

OPINIONS
OF THE
ATTORNEY GENERAL

OF THE
STATE OF WISCONSIN

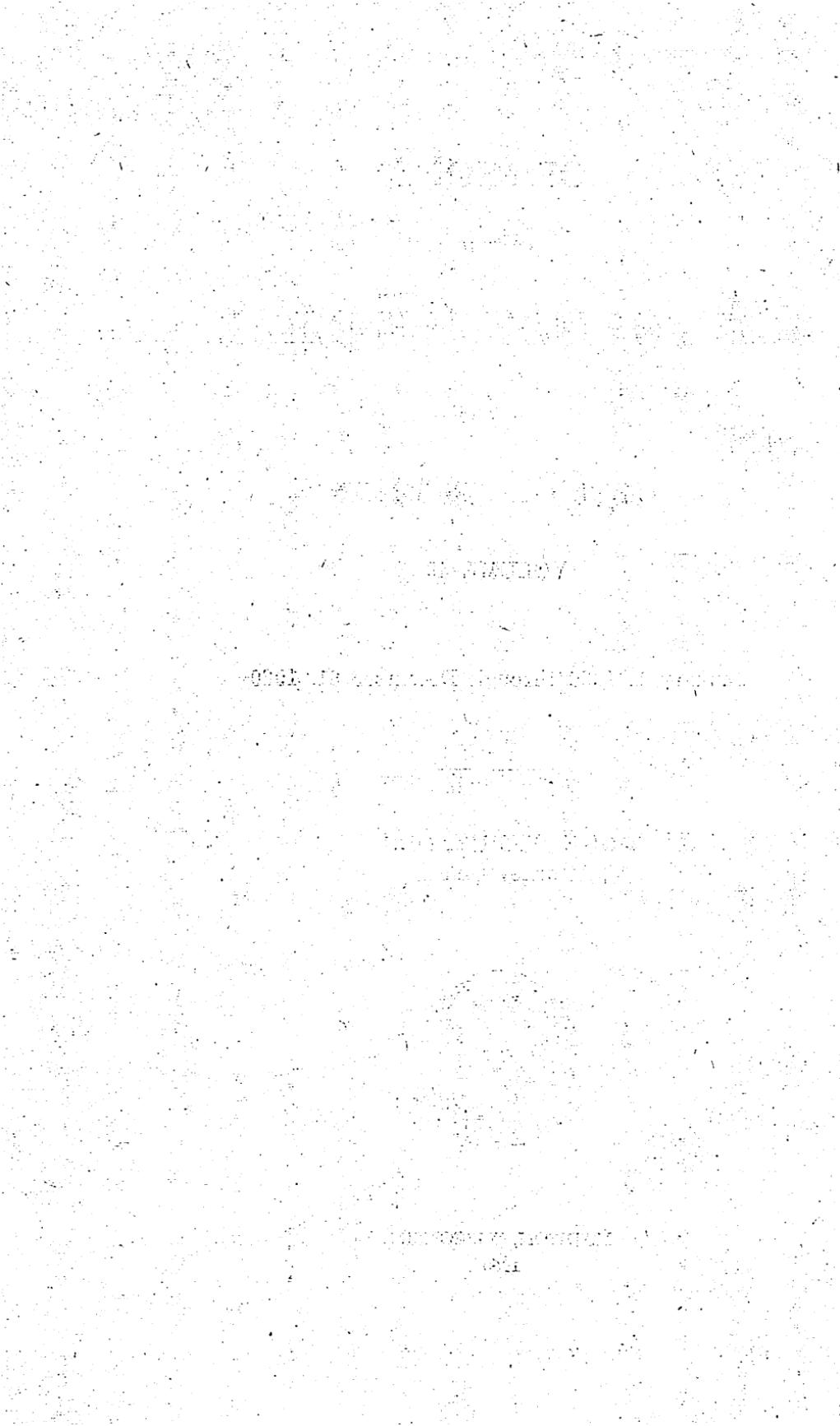
VOLUME 49

January 1, 1960 through December 31, 1960

JOHN W. REYNOLDS
Attorney General



MADISON, WISCONSIN
1960



ATTORNEYS GENERAL OF WISCONSIN

FROM THE ORGANIZATION OF THE STATE

JAMES S. BROWN, Milwaukee	from June 7, 1848,	to Jan. 7, 1850
S. PARK COON, Milwaukee	from Jan. 7, 1850,	to Jan. 5, 1852
EXPERIENCE ESTABROOK,		
Geneva	from Jan. 5, 1852,	to Jan. 2, 1854
GEORGE B. SMITH, Madison	from Jan. 2, 1854,	to Jan. 7, 1856
WILLIAM R. SMITH, Mineral Point	from Jan. 7, 1856,	to Jan. 4, 1858
GABRIEL BOUCK, Oshkosh	from Jan. 4, 1858,	to Jan. 2, 1860
JAMES E. HOWE, Green Bay	from Jan. 2, 1860,	to Oct. 7, 1862
WINFIELD SMITH, Milwaukee	from Oct. 7, 1862,	to Jan. 1, 1866
CHARLES R. GILL, Watertown	from Jan. 1, 1866,	to Jan. 3, 1870
STEPHEN S. BARLOW, Dellona	from Jan. 3, 1870,	to Jan. 5, 1874
A. SCOTT SLOAN, Beaver Dam	from Jan. 5, 1874,	to Jan. 7, 1878
ALEXANDER WILSON, Mineral Point	from Jan. 7, 1878,	to Jan. 2, 1882
LEANDER F. FRISBY, West Bend	from Jan. 2, 1882,	to Jan. 3, 1887
CHARLES E. ESTABROOK, Manitowoc	from Jan. 3, 1887,	to Jan. 5, 1891
JAMES L. O'CONNOR, Madison	from Jan. 5, 1891,	to Jan. 7, 1895
WILLIAM H. MYLEA, 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. FINNEGAR, 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, Richland Center	from Jan. 1, 1951,	to Jan. 7, 1957
STEWART G. HONECK, Madison	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 O. HARRIMAN	Assistant Attorney General
ROY G. MITA	Assistant Attorney General
WILLIAM WILKER*	Assistant Attorney General
GEORGE SCHWAHN**	Assistant Attorney General
JAY SCHWARTZ	Law Examiner
PATRICK PUTZI	Law Examiner
MILO W. OTTOW	Chief Investigator

* Appointed January 1, 1960.

** Appointed August 1, 1960.

INTRODUCTION

Anti-Secrecy—Meetings—Under sec. 14.90 all meetings of all public agencies must be conducted in public, except where the subject matter falls squarely and clearly within one of the statutory exceptions.

SYNOPSIS OF OPINIONS INVOLVING ANTI-SECRECY LAW

For some time now this office has been receiving requests for interpretation of Wisconsin's anti-secrecy law. Many of such requests have come from private persons. While this office does not ordinarily advise such persons, I have answered many of these requests and explained my views in regard to the proper interpretation of this law because I believe so strongly that there should be no unnecessary secrecy in government. This problem is of such great importance that I have decided to summarize the views which I have expressed on this subject and issue a formal opinion which will be published with our other formal opinions so that it will be available to district attorneys, city attorneys, and attorneys for school boards and other public agencies, who may be called upon to advise public bodies regarding the necessity of conducting public business in open meetings which interested members of the public can freely attend.

The Wisconsin anti-secrecy law is found in sec. 14.90. That statute reads as follows:

“14.90 Open meetings of governmental bodies. (1) In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of the state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental affairs and the transaction of governmental business.

"(2) To implement and insure the public policy herein expressed, all meetings of all state and local governing and administrative bodies, boards, commissions, committees and agencies, including municipal and quasi-municipal corporations, unless otherwise expressly provided by law, shall be publicly held and open to all citizens at all times, except as hereinafter provided. No formal action of any kind shall be introduced, deliberated upon or adopted at any closed executive session or closed meeting of any such body.

"(3) Nothing herein contained shall prevent executive or closed sessions for purposes of:

"(a) Deliberating after judicial or quasi-judicial trial or hearing:

"(b) Considering employment, dismissal, promotion, demotion, compensation, licensing or discipline of any public employe or person licensed by a state board or commission or the investigation of charges against such person, unless an open meeting is requested by the employe or person charged, investigated or otherwise under discussion;

"(c) Probation, parole, crime detection and prevention;

"(d) Deliberating or negotiating on the purchasing of public property, the investing of public funds, or conducting other public business which for competitive or bargaining reasons required closed sessions;

"(e) Financial, medical, social or personal histories and disciplinary data which may unduly damage reputations;

"(f) Conferences between any local government or committee thereof, or administrative body, and its attorney concerning the legal rights and duties of such agency with regard to matters within its jurisdiction."

By this statute the legislature has declared that it is the public policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental affairs and the transaction of governmental business. The statute requires that all meetings of all state and local governing and administrative bodies, boards, commissions, committees and agencies, including municipal and quasi-municipal corporations, unless otherwise expressly provided by law, shall be publicly held and open to all citizens at all times, except as hereinafter provided. No formal action of any kind may be introduced, deliberated upon, or adopted at any closed executive session or closed meeting of any such body. There are certain specific exceptions. Public agencies may hold closed meetings in the following situations.

- 1) The deliberation after hearing or trial by a judge, jury, or administrative agency;
- 2) Where personnel problems are discussed, unless a public hearing is requested by the employe concerned;
- 3) Certain areas of crime detection and prevention, and probation and parole matters;
- 4) Sessions where business matters which for competitive or bargaining purposes require closed session;
- 5) Deliberations or negotiations on purchasing of public property or investing public funds; and
- 6) Conferences or information passed between a public agency and its legal counsel.

All meetings of all public agencies must be conducted in public, except where the subject matter falls squarely and clearly within one of the above exceptions. Any doubt whether a matter falls within one of these exceptions should be resolved in favor of open, public meetings. Any public agency, finding it necessary to conduct any business in private, should first make a finding of fact, resolution or statement that matters to be discussed will fall within one or more of these exceptions, before going into executive session. Matters not falling within the exceptions should not be discussed or acted upon until the meeting has been opened to the public.

There is no statutory penalty for violation of the anti-secrecy law. It is merely an admonition to public agencies that they shall conduct their meetings in public so that the public and the press may attend and be informed. In all probability now even a person improperly denied access to a meeting which should be open to the public could apply to a court for a writ of mandamus to require the public agency to open its meetings to the public.

**REGENTS AND FACULTY OF THE UNIVERSITY
OF WISCONSIN**

In applying the anti-secrecy law we have given the opinion that the meetings of the Regents of the University of Wisconsin must be open to the public. We have also concluded that the debates of the university faculty on the subject of compulsory ROTC must be open to all and, since the statutes clearly constitute the faculties of the several col-

leges of the university as the governing bodies of these colleges, it is our opinion that all faculty meetings must be open.

In a recent opinion to the University Board of Regents we said that the exception relating to considering employment, dismissal, compensation of public employees, etc., applies only where a specific employe is being discussed or considered, relevant to one of the items set forth in sec. 14.90 (3) (b). This exception does not apply where personnel or management policies are discussed generally. The purpose of the exception is to protect a particular employe who is being considered or discussed and not to protect the public agency involved. We advised that if the Dean of the Medical School had resigned and the only question to be discussed was whether to retain him in employment, then the meeting could be closed to the public, after the board had made the necessary finding or declaration on the record to show that the subject matter would come within the exception. If, on the other hand, the resignation or continued employment of the Dean was merely incidental to the policy problems of the Medical School administration and recruiting, then the meeting should be open to the public. The mere fact that items of public policy or future personnel relations are to be discussed is not a sufficient reason for a secret meeting. It is, in fact, a reason for holding an open meeting.

CITY COUNCIL

Likewise the anti-secrecy law requires the meetings of a city council to be open to the public. This requirement is also specifically made by sec. 62.11 (3) (c). It is also our opinion that so-called "informal" meetings of a city council must be open to the public, unless the subject matter thereof falls squarely within the language of one of the exceptions of the anti-secrecy law. Likewise special meetings of a city council must be open to the public. Section 62.11 (2) requires that six hours' notice of special meetings be given. Any device to give this notice in such a way that the public and the press are not able to attend would be contrary to the public policy declared by the legislature in the anti-secrecy law. The city council of the City of Sheboygan has solved this problem by

adopting a rule that notices of special meetings shall be served upon representatives of the press in the same manner as they are served upon council members. I believe this is a good practice in keeping with the purpose and intent of the anti-secrecy law.

JOINT SEWERAGE DISTRICT

We have expressed the opinion that a joint sewerage district cannot hold secret meetings. Section 144.07 (4) (d) provides that the commissioners of a joint sewerage district shall proceed as a common council. As pointed out above, the meetings of a common council are required by sec. 62.11 (3) (c) to be open to the public. It follows that meetings of a joint sewerage district are likewise required to be open to the public. Also, the minutes of these meetings are open to public inspection as provided by sec. 18.01 (2).

COUNTY BUREAU OF PERSONNEL

We have also considered the following problem: A county bureau of personnel had prepared a survey report on salaries and job qualifications. This report was to be discussed at a meeting of the personnel committee. Questions were asked whether such a meeting must be open to the public under sec. 14.90, and whether the report itself is a public record under sec. 18.01.

As to the first question, it is clear that there is no exception in the law which applies to compensation of public employes. The exception which is most closely related to compensation is the one that appears at sec. 14.90 (3) (b) :

“(b) Considering employment, dismissal, promotion, demotion, compensation, licensing or discipline of any public employe or person licensed by a state board or commission or the investigation of charges against such person, unless an open meeting is requested by the employe or person charged, investigated or otherwise under discussion;”

It is the opinion of this office that the purpose of this section is to protect *individual* public employes so that reports as to conduct, compensation of an individual, charges against him, etc., can be discussed privately in order that

there may be no damage to reputation which could result if unsupported assertions were made in a public meeting.

Our belief that this is the intent of the exception is further fortified by the additional proviso that an open meeting may be requested by the employe or person charged, investigated, or otherwise under discussion. In short, it is our opinion that this exception is a shield, not a sword, and that its purpose is to protect an individual employe and is not to be used for the concealment of information or to prevent employes as a group from knowing what personnel or compensation policies are being considered by the county board of supervisors or its committees.

Under certain circumstances I believe that a municipal board could close the meeting if it were to make a finding of fact that its actions in a closed meeting come squarely within the exception. For example, subsec. (3) (d) of sec. 14.90 provides that a closed meeting may be held when "conducting other public business which for competitive or bargaining reasons require closed sessions;". In the event the board of supervisors was conducting labor regulations negotiations and a report had been submitted to it regarding wage adjustments or inequities and the board wishes to give its private consideration to the report prior to a public discussion or bargaining session, it is my opinion that the exception would apply. In any event, we have advised other state and municipal boards that prior to going into a closed session they should in a public meeting make a finding of fact that the matter to be discussed is one that comes within the exception and state the facts that would qualify a closed meeting.

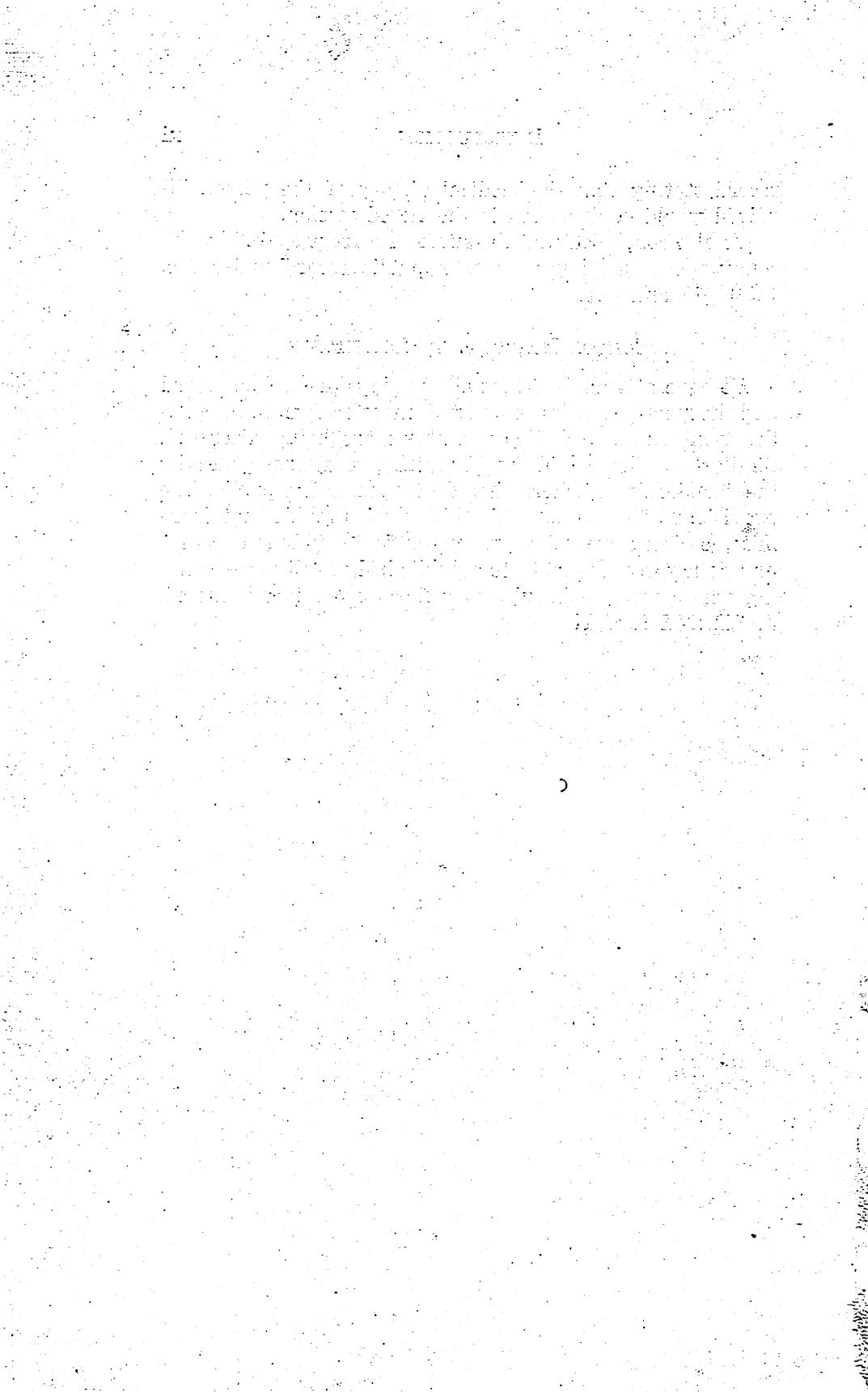
For example, we have given an opinion to the faculty committee of the University of Wisconsin that the meeting held to consider whether intercollegiate boxing was to be abolished must be an open meeting. The faculty committee members informed us that part of the matter to be discussed was the medical history and records of the university boxer who died following an intercollegiate boxing match. The committee was advised that a closed session could be held for the purpose of this discussion but that prior to closing that portion of the meeting it should go on

record stating that the medical history of the person involved would be discussed in the closed session.

We also concluded that the survey report prepared by the county personnel bureau was a public record under sec. 18.01 (1) and (2).

SCHOOL BOARDS AND COMMITTEES

We have also advised that all meetings of a school board and the meetings of its committees must be open to the public, even where preliminary matters are being discussed. Similarly we have said that a meeting to discuss generally the salaries for teachers should be open to the public. The provisions of sec. 14.90 (3) (b), which provide that there may be closed executive sessions, refer to individual cases and do not give the right to a public body to close the meeting where salary schedules in general are being discussed.
J.W.R.:N.S.H.:A.H.



OPINIONS
OF THE
ATTORNEY GENERAL
OF
WISCONSIN

VOLUME 49

Counties—County Board—Under secs. 39.06 (6) and 59.15 (1) (a), county superintendent of schools is not entitled to compensation for serving as member of county committee on agriculture because of the amendment of sec. 59.87 by ch. 431, Laws 1957, unless county board specifically thereafter increases the previously fixed compensation for such officer.

January 6, 1960.

RONALD D. KEBERLE,
District Attorney,
Marathon County.

The county board of your county in accordance with sec. 39.06 (6), Stats., prior to the election of April, 1957 fixed the salary of the county superintendent of schools at a specified sum per month plus an additional \$50 per month for his work as secretary of the county school committee. Sec. 59.87, Stats. 1955, under which the county superintendent of schools is a member of the special county committee on agriculture, specifically provided that the members of that committee, "except the county superintendent of schools, shall receive as compensation and expenses the amounts and allowances determined under s. 59.15." By ch. 431, Laws 1957, the provisions of sec. 59.87 were revised and thereafter provided that the members of the committee "shall

receive such compensation and expenses as the board may determine under the authority of s. 59.15 (2) (c) and (3)." You request a formal opinion whether the county superintendent is entitled to a per diem when serving as a member of the county committee on agriculture subsequent to July 31, 1957, the effective date of said ch. 431, where the county board has taken no action to change the compensation of the office from that established prior to the 1957 election.

Sec. 39.06 (6), so far as here material, provides:

"(6) SALARY. The county board, at its annual meeting next preceding the election of the county superintendent, shall fix his salary and when so fixed, it shall continue to be his salary until changed by the board or by operation of law. * * * Additional compensation may be provided the county superintendent by the county board both for the performance of his regular duties and for his work as secretary of the county school committee. Compensation for additional duties may be authorized by the county board at any time during his term of office. * * *"

Under this statute the county board is given the power to provide for payment of additional compensation to the county superintendent for the performance of additional duties. But, it is limited to providing extra compensation only where the county superintendent is eligible therefor. It does, however, require action by the board which provides that the compensation of the superintendent is increased and specify the amount thereof.

Accordingly, even though the revision of sec. 59.87 by ch. 431, Laws 1957, was deemed a removal of the prior ineligibility of the county superintendent for receipt of additional compensation for acting on the special county committee on agriculture, such officer would not be entitled to receive any per diem that may have been provided generally for members of the committee. Before he would be entitled to any such per diem this statute would require action by the county board specifically providing for payment of compensation in addition to that previously fixed by the board for the office and setting forth the amount of such additional compensation.

In addition there are applicable the provisions in sec. 59.15 (1) (a) providing 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."

The prohibition against increase of the compensation in the last sentence of the above quoted statute is not operative presently by virtue of sec. 66.195. However, the other provisions thereof are by their terms applicable to all officers elected in the county except supervisors and circuit judges and thus would cover the county superintendent of schools. As stated in 43 O.A.G. 237 these provisions mean exactly what they say. The annual compensation of an elective county officer may be established on a straight salary basis, or a strictly fee basis or upon a part salary and part fee basis. Where it is fixed at a salary then it is in lieu of all fees. If it is fixed at part salary and part fee then such officers receive in addition to the salary specified only those fees, per diem and other compensation for services that are specifically enumerated as reserved to him. The result is that until a particular fee, per diem or other payment of compensation is included in the fees, per diem and other compensation *specifically enumerated* in the ordinance or resolution, an officer is not entitled to receive the same.

Therefore, as the county board took no action subsequent to the amendment of sec. 59.87 by ch. 431, Laws 1957, that the county superintendent of schools shall receive the per diem or other compensation it has provided as the compensation payable to members of the county school committee

created under sec. 59.87, he is not entitled to the per diem or other compensation fixed by the county board for such committee. His duties on that committee are a part of his duties as county superintendent of schools. Until the county board changes the compensation which has been established for that office pursuant to secs. 39.06 (6) and 59.15 (1) (a), he is not entitled to any per diem or other compensation for acting as a member thereof.

HHP:

Real Estate Brokers—License—Sale of corporate business, consisting of real estate, inventory, goodwill, etc., by means of a stock transaction discussed. Respective rights of real estate brokers and licensed securities dealers analyzed.

January 7, 1960.

ROY E. HAYS, *Secretary-Counsel,
Wisconsin Real Estate Brokers' Board.*

You have requested my opinion as to the following questions:

1. Is a licensed securities dealer required to be licensed as a real estate broker in order to negotiate for the sale of or sell a business by means of a stock transaction where the business is composed of real estate, inventory, good will, etc.?
2. Is a licensed real estate broker required to be licensed as a securities dealer in order to negotiate for the sale of or sell real estate and a business by means of a stock transaction where the business is composed of real estate, inventory, good will, etc.?
3. Is a licensed business opportunity broker required to be licensed as a securities dealer in order to negotiate for the sale of or sell a business by means of a stock transaction where the business is composed of inventory, fixtures, good will, etc.?

Sec. 136.02 requires real estate brokers and business opportunity brokers to be licensed.

Sec. 136.01 (2), (4) and (6) 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; or

"(c) Negotiates or offers or attempts to negotiate a loan, secured or to be secured by mortgage or other transfer of or encumbrance on real estate.

"(d) Engages in any activities of a business opportunity broker set forth in sub. (4).

"(4) 'Business opportunity broker' means any person not excluded by sub. (6) or who does not hold a real estate broker's license issued by the board, 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 any business, its good will, inventory, fixtures or an interest therein; or

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

"(6) 'Real estate broker' or 'business opportunity broker' does not include:

"(a) Receivers, trustees, administrators, executors, guardians or other persons appointed by or acting under the judgment or order of any court;

"(b) Public officers while performing their official duties;

"(c) Any bank, trust company, savings and loan association, or any land mortgage or farm loan association organized under the laws of this state or of the United States, when engaged in the transaction of business within the scope of its corporate powers as provided by law; or

"(d) Employes of persons enumerated in pars. (a), (b) and (c) when engaged in the specific performance of their duties as such employes."

Sec. 189.03 requires securities dealers to be licensed.

Sec. 189.02 includes the following material definitions:

"(1) 'Security' includes any stock, treasury stock, bond, note, debenture or evidence of indebtedness; any interest, share or participation in any profits, earnings, profit-sharing agreement, property, leasehold, royalty, patent right, copyright, trade-mark, process, formula or oil, gas or other mineral right; any collateral trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting trust certificate, certificate of deposit for a security, or any membership in a corporation without capital stock; any certificate of interest or of participation in, temporary or interim certificate for, receipt for, guaranty of, or warrant or right to subscribe to or purchase any of the foregoing; and without limitation by reason of the foregoing any instrument commonly known as a security. The term 'stock' includes shares of beneficial interest in a business trust, as well as all other securities commonly known as stock.

"(2) 'Person' includes an individual, a corporation, a partnership, an association, a joint stock company, a trust, an unincorporated organization, a government, a political subdivision or instrumentality of a government, and any other entity.

"(3) (a) 'Sale' or 'sell' includes every disposition, offer, negotiation, agreement, or attempt to dispose of a security or any interest therein, for value; every solicitation of any subscription or order for the purchase of a specific security, for value; and every exchange of a security for another security or for other property; but does not include: * * *

"* * *

"(5) 'Dealer' includes every person, not an agent, who in this state engages in the business of purchasing or selling securities or executing orders for the purchase or sale of securities issued by others, except a security exempted by section 189.05, but does not include:

"(a) An executor, administrator, guardian or other officer of the court making any sale under subsection (7) of section 189.07;

"(b) A pledgee making any sale under subsection (8) of section 189.07;

"(c) A person whose dealings in securities are limited to sales exempted by subsections (3) or (4) of section 189.07; or

"(d) A person having no place of business in this state, whose dealings in securities in this state are limited to sales to or purchases from licensed dealers.

"* * *

Securities dealers are not within the exempt classifications listed in sec. 136.01 (6) and conversely real estate and

business opportunity brokers are not within the exempt classifications listed in sec. 189.02 (5).

A securities dealer is authorized to deal in securities and is not authorized by statute to negotiate for the purchase or sale of a business as such. This does not mean, however, that a securities dealer cannot negotiate for the purchase or sale of or buy or sell securities which evidence ownership of a business which term is for the purpose of this opinion limited to a corporate business.

In general, real estate, is not a security within the contemplation of the securities act. *Kadane v. Clark*. (Tex. Civil App. 1939) 134 S. W. 2d 448, 453. The definition of a security in sec. 189.02 (1), however, is very broad and some transfers of an interest in real estate or other property would result in a securities transaction. A security is in most cases an instrument evidencing a right to participation in profits or earnings or ownership in certain forms of property. In *First National Savings Foundation, Inc. v. Samp*, (1956) 274 Wis. 118, 128-132, 80 N.W. 2d 249, our court held sec. 189.01 is to be construed liberally, to carry out its purpose of protecting investors and restraining the sale of improvident securities. Such law, to be construed liberally to carry out its purpose, should not be narrowly limited to the familiar and customary types of arrangement mentioned in the definition of "security" in sec. 189.02 (1), but should rather be considered flexible enough to reach unconventional and ingenious devices.

A corporation owns title to its corporate real estate and other property.

Except in cases where the instrument evidencing ownership of property to be transferred qualifies as a security within sec. 189.02 (1), a securities dealer cannot, without being duly licensed as a real estate broker, negotiate for the purchase or sale of or buy or sell, for another and for a commission or other thing of value, real estate, good will, or furniture or fixtures of a corporate business where transfer of title to the property would pass to a third party, individual, partnership or corporation. This does not mean, however, that a licensed securities dealer cannot advertise that he engages in the negotiation of the purchase or sale of corporate businesses by arranging for the purchase or

sale of the shares of stock which evidence ownership of a corporation. It makes no difference what the corporate property consists of, whether it be real estate alone or good will, fixtures, furniture, accounts, etc., as title to the property remains in the corporation or is merged into the surviving corporation. The dealer in such case is doing exactly what he is authorized to do by statute. He is dealing in securities.

The answer to your first question is a qualified "no."

A real estate broker cannot for another and for a commission or other thing of value negotiate for the purchase or sale of corporate securities as such. A real estate broker may, however, negotiate for the purchase or sale of a business and real estate owned by a corporation. In the simple situation, the transfer of title to the property would be consummated by the passing of money to the corporation and the delivery of a deed, bill of sale and bulk sales affidavit to the buyer. In the situation with which you are concerned, it is evidently contemplated that money would pass to the persons owning the corporate stock and that those individuals would then assign said stock to the purchasers. This latter transaction is essentially a securities transaction and is not a transaction involving a security which a real estate broker is permitted to engage in under ch. 136. The word "business" is not fully defined in sec. 136.01, but it is not a synonym for the word "corporation" or for the word "security." A corporation may conduct a business and own real estate and personal property. Strictly speaking, a share of stock does not represent an interest or estate in real estate.

It may be argued that the use of the stock transaction is merely an incident to the negotiation for the purchase or sale of the real estate, business, good will, inventory, furniture and fixtures owned or carried on by a corporation and that the transfer of the shares is merely a convenient method of transferring ownership to the assets of the corporation and that the substance should prevail over the form. There are great similarities as to the rights, powers, and duties of real estate brokers and securities dealers, who are also brokers, and there are certain gray areas into which neither may move without caution.

It is my opinion, however, in answer to your second question, that a real estate broker, generally, must be licensed as a securities dealer in order to negotiate for the sale of a corporate business by means of a stock transaction where the business is conducted by a corporation and is composed of real estate, inventory, good will, etc.

On the basis of the same reasoning, the answer to your third question is also in the affirmative.

If more definitive answers are required on any of these questions, I shall be glad to furnish the answers to the same on receipt of more definite facts.

RJV

Banks—Insurance—Automobile purchase financing through “bank plan” discussed relative to state and federal laws as well as to the practice of law.

January 18, 1960.

WILLIAM J. McCUALEY,
District Attorney,
Milwaukee County.

You ask whether the following described activities of an insurance company, or an insurance agent, engaged in by prior arrangement with a state bank are violative of the banking laws of Wisconsin, and particularly of those provisions of the statutes which prohibit branch banking. You also inquire as to whether any law is violated where the bank concerned is a national bank.

The insurance company and insurance agent are engaged in writing casualty insurance on automobiles.

As an aid, both to obtaining and retaining business, they hold out in promotional material to customers or potential customers the representation that they can aid such customers in arranging financing in connection with the purchase of a new or used car. Pursuant to a prior arrangement between the insurance company or insurance agent and the bank, the “bank plan” operates as follows:

1. The insurance agent has the applicant, who presumably is a customer of the insurance agent, fill out a loan application and credit information form or fills out the application form for the applicant and has the applicant sign the same. The agent is either furnished with forms by the bank or uses forms approved by the bank which carry the printed name of the bank thereon.
2. The insurance agent calls the bank and gives the bank the credit data and informs the bank that he has a signed loan application and requests approval for the loan.
3. After the insurance agent has received notice that the loan has been approved, the agent in accordance with bank instructions, and on forms furnished by the bank:
 - a. Fills out a chattel mortgage wherein the bank is mortgagee and has the mortgagor sign the same.
 - b. Fills out a promissory note in favor of the bank and has the borrower sign.
 - c. Fills out checks furnished by the bank:
 - (1) One check payable to the automobile dealer.
 - (2) One check payable to the insurance company for the insurance premiums financed.
 - d. Has the customer sign these checks.
 - e. Gives the customer the check payable to the dealer.
 - f. Gives a self-addressed envelope to the customer to send the bill of sale to the bank.
 - g. Advises the customer that his application for title should show a lien in favor of the bank.
 - h. Sends the signed application, promissory note, original and copy of chattel mortgage, duplicate of each check and a copy of the insurance order form to the bank.

The insurance company and insurance agent do not receive any consideration paid directly by the bank for their services. Such consideration as they receive arises from the added inducement to the customer to purchase their insurance, and prompt payment for such insurance, inasmuch as the bank will finance the amount of the insurance premiums along with the time price contract on the car.

The documents described above are usually prepared and processed at the office of the insurance agent, even though in some cases the documents may be taken around to the customer's home for signature.

You state that the bank contends that the insurance agent is acting solely on behalf of the customer and not as an agent of the bank.

It is probable that the insurance agent is acting as agent for both the bank and the customer in the loan transaction.

In Restatement of the Law, Agency 2d § 14 L (1), it is stated:

"§ 14 L. (1) A person who conducts a transaction between two others may be an agent of both of them in the transaction, or the agent of one of them only, although the agent of the other for other transactions, or the agent of one of them for part of the transaction and the agent of the other for the remainder."

It is my opinion that if the insurance agent is not in fact an agent of the bank in the transaction, he is, in the preparation of the promissory note and chattel mortgage, both of which run to the bank and not to the insurance company, engaging in the unauthorized practice of law in violation of sec. 256.30, (1) and (2), unless he is licensed to practice law in this state.

Sec. 256.30, (1) and (2) provide in material part:

"(1) Every person, who without having first obtained a license to practice law as an attorney of a court of record of Wisconsin, as provided by law, shall practice law within the meaning of sub. (2) of this section, or hold himself out as licensed to practice law as an attorney within the meaning of sub. (3) of this section, shall be guilty of a misdemeanor, * * *

"(2) Every person who shall appear as agent, representative or attorney, for or on behalf of any other person, * * * or who shall otherwise, in or out of court for compensation or pecuniary reward give professional legal advice not incidental to his usual or ordinary business, or render any legal service for any other person, or any firm, copartnership, association or corporation, shall be deemed to be practicing law within the meaning of this section."

See *State ex rel. Junior Asso. of Milwaukee Bar v. Rice*, (1940) 236 Wis. 38, 294 N.W. 550.

It is my opinion that under the facts stated, the insurance agent is in fact acting as an agent for the bank.

"An agency may be defined as a contract either express or implied upon a consideration, or a gratuitous undertaking, by which one of the parties confides to the other the management of some business to be transacted in his name or on his account, and by which that other assumes to do

the business and render an account of it." 2 Am. Jur. 13, Agency § 2. (Emphasis added).

In *Meyers v. Matthews*, (1955) 270 Wis. 453, 467, 71 N. W. 2d 368, appeal dismissed 350 U.S. 927, 100 L. Ed. 811, 76 S. Ct. 303, it is stated:

"Agency may be of a general or special character, and soliciting agents are agents of a special nature. An agent having authority only to solicit applications and forward them to the home office is a 'soliciting agent.' 39 Words and Phrases (perm.ed.), p. 621; *Rozgis v. Missouri State Life Ins. Co.* (1933), 271 Ill. App. 155, 157. An agency is created by contract, express or implied. 'The relation arises when one is authorized to represent another in bringing or to aid in bringing the latter in contractual relation with a third party, however such authority may be conferred.' 2 Words and Phrases (perm.ed.), p. 725; *Keyser v. Hinkle* (1907), 127 Mo. App. 62, 72, 106 S.W. 98, 100."

It is true that the insurance company and insurance agent do not disclose the name of the bank in their advertisements. They are, however, representing that they can arrange financing with a bank and in nearly all cases such financing is arranged with the bank with whom they have the definite prior arrangement. It would not be unlikely for the insurance agent to disclose the name of the bank to the prospective borrower before the credit information is obtained and in any event the applicant is furnished with a loan application form which carries the imprinted name of the bank thereon and such form is furnished to the insurance agent by the bank, not for the specific customer, but for any customer of the insurance agent who may wish to finance the purchase of a new or used car and insurance under the "bank plan." In cases where the forms are furnished by the insurance company or agent, the imprinted name of the bank appears thereon with the consent of the bank. Such activity amounts to solicitation by the insurance agent on behalf of the bank.

Sec. 221.01 (2) (a), specifies that an application for charter for a bank shall include "the location of the proposed corporation."

Under sec. 221.01 (5), the commissioner of banks in making his investigation prior to the issuance of a bank charter

must determine if the proposed banking corporation will promote public convenience and advantage, must consider the prospects for development of the municipality in which the bank is to be located and the surrounding territory, and the character of the service which the bank would render the community.

Under sec. 221.12, a bank may not move its location as stated in its articles without the approval of the commissioner of banks.

Sec. 221.04 (1) (f), provides in part:

"(1) GENERAL. Upon the execution and filing of the articles of incorporation with the commissioner of banks and the approval by the commissioner, and upon the filing of an approved copy of such articles with the register of deeds of the county in which the bank is to be located, the bank shall become a body corporate, and in addition to the powers conferred by the general corporations law, subject to the restrictions and limitations contained in this section, having the following powers:

*** *

"(f) To exercise by its board of directors, or duly authorized officers *or agents*, subject to law, all such incidental powers as shall be usual and necessary to carry on the business of banking; by buying, discounting, and negotiating promissory notes, bonds, drafts, bills of exchange, foreign and domestic, and other evidences of debt; by buying and selling coin and bullion; by receiving commercial and savings deposits under such regulations as it may establish; by buying and selling exchange, and by loans on personal and real security as hereafter provided; *but no bank shall establish more than one office of deposit and discount or, except as provided under par. (i), establish branch offices, branch banks or bank stations*, but this prohibition shall not apply to any branch office or branch bank established and maintained prior to May 14, 1909, or any bank station established and maintained prior to May 17, 1947, and any bank may exercise the powers granted by this subsection to carry on the business of banking in any such branch office, branch bank or banking station so established ***"

The foregoing statutes clearly establish the policy of the state that a banking corporation is not free to select multiple places of doing business as other business corporations are, that its proposed location is a matter of vital concern to the commissioner of banks in deciding whether or not

to grant a charter, and that the business must be carried on at the location named and not through the agency of branch offices, bank banks, or bank stations.

This policy and the statutes on which it is based are clearly violated if a bank by prior arrangement can authorize persons to act on its behalf who would be available for the acceptance of loan applications at other places than the office of the bank.

The fact that only a loan application and supporting papers are made out at the office of the insurance agent is immaterial. In practically every bank, any loan of substantial size has to be approved by some authorized officer, or a loan committee, and is not necessarily approved by the person who sits down and writes the application. Nevertheless the act of conferring with a possible customer and securing all the information necessary to a decision upon approval of a loan is a banking function which is traditionally carried on at the office of the bank.

If the bank should pay the insurance company or pay any other agent at an office away from the bank to accept loan applications on behalf of the bank, it would be violating the branch banking statute.

It is my opinion that the bank and the insurance company or insurance agent in conjunction cannot avoid the force of the branch banking statute by virtue of the fact that no consideration flows directly from the bank to the insurance company or insurance agent.

The insurance company and insurance agent are not rendering the service to the bank as an act of charity. They are rendering its service because they obtain consideration in a two-fold manner: one as an aid to their own business; and two, in the fact that they obtain prompt payment for the insurance that they have sold. The bank has a direct and material interest in the plan also.

It is pointed out that this is not an isolated case where a bank might send a messenger or even an officer over to some customer with the papers to fill out to complete a loan application. Such service rendered in isolated cases as a matter of courtesy could not properly be charged to be a violation of the branch banking law or of the statutory policy that banking must be conducted at the bank office.

However, when by prior arrangement such conduct is carried on as a continual course of business, a violation of the policy against doing business away from the office of the bank may result. When such activity is carried on at a stated place, such as the office of the insurance agent or insurance company, it clearly is a violation of the branch banking law.

12 USCA § 36, sets forth the conditions upon which a national banking association may retain or establish and operate a branch or branches and § 36 (c) provides in material part:

“(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. * * *”
(Emphasis added).

Except as authorized by express provisions of this section, a national bank does not have power to establish a branch bank. *Rushton ex rel. Commissioner of Banking Department v. Michigan Nat. Bank*, (1941) 299 N.W. 129, 298 Mich. 417, 136 A.L.R. 458.

In determining whether a branch of a national bank could be opened in a city after a state bank had established a branch there, the state statute with reference to establishment of banks was controlling. *National Bank of Detroit v. Wayne Oakland Bank*, (1958, C.A. 6th.) 252 F. 2d 537.

Even in states permitting branch banking, approval of the comptroller of currency should probably be evidenced by a formal certificate; a letter from the deputy comptroller of currency to the vice president of national bank in Michigan approving its application to establish a branch was held to be insufficient. *National Bank of Detroit v. Wayne Oakland Bank, supra*.

In the Wisconsin situation, the bank in question does not claim that it has authority to establish branches and has not sought authority to establish branch operations.

I am of the opinion that the establishment and operation of a bank plan involving a national bank and an insurance company or agent, as outlined above, would be in violation of both federal and Wisconsin statutes which prohibit branch banking.

RJV

Industrial Commission—Liquefied Gas—Sec. 101.105 relative to regulations to storage of liquefied petroleum gas for fuel purposes applies to all installations of such equipment so as to make it safe. Industrial commission authority to regulate storage of flammable liquids reaffirmed.

January 25, 1960.

MATHIAS F. SCHIMENZ, *Chairman,*
Industrial Commission.

You have requested my opinion with respect to specific questions which arise in connection with administering sec. 101.105, Stats., entitled "liquefied petroleum gas." Your first question asks whether regulations adopted by the commission under authority of this section would apply to installations in mobile homes, stationary trailers, and private homes, including farm homes where liquefied petroleum is used for fuel purposes.

The section of that statute to be interpreted in order to answer both of your questions is subsec. (2) which reads as follows:

"(2) The industrial commission shall ascertain, fix and order such reasonable standards, rules or regulations for the design, construction, location, installation, operation, repair and maintenance of equipment for storage, handling, use, and transportation by tank truck or tank trailer, liquefied petroleum gases for fuel purposes, and for the odorization of said gases used therewith, as shall render such equipment safe. The promulgation, effect and review of

standards, rules and regulations adopted under this section shall be controlled by the provisions of this chapter. The industrial commission shall appoint an advisory committee to assist in the promulgation of such standards."

Sec. 101.105 became law with the passage of ch. 235, Laws 1941. It is a criminal statute which provides a penalty of from twenty-five to one hundred dollars (\$25.00 to \$100.00) fine or imprisonment in jail not less than thirty (30) days nor more than six (6) months for violation of its provisions or any regulations promulgated thereunder. It is to be noted that this is the only section which provides a criminal penalty for violation of industrial commission safety orders, all other orders being subject to prosecution under sec. 101.28 in a forfeiture action.

The statute represents the exercise of the police power concerning the handling and use of a dangerous commodity and is a delegation to the industrial commission of the function of ascertaining the proper standards and regulations concerning this particular type of dangerous commodity which is used for fuel purposes.

It is to be noted that this section does not use the terms "place of employment" or "public building" which limits the application of most industrial commission safety regulations. The commission is directed to adopt such orders and standards as "shall render such equipment safe" regardless of where it is used. Subsec. (4) of the statute requires that anyone performing the work of installing equipment which utilizes liquefied petroleum gas for fuel must certify that the design, construction, location, and installation of the equipment conforms with the rules and regulations adopted by the industrial commission relative to this particular type of equipment.

There are no exceptions provided by the legislature which would allow a construction omitting mobile trailers or private homes from the requirements set out. Those construing and administering statutes cannot add language or add exceptions which are not found within the plain meaning of the statute as written. *State ex rel. U. S. Fidelity and Guaranty Co. vs. Smith*, (1924) 184 Wis. 309, 199 NW 954.

Accordingly, the industrial commission in adopting regulations applying to the design, construction, location, in-

stallation, operation, repair and maintenance of equipment using liquefied petroleum gases for fuel purposes may not except from the operation of the law installations made in mobile trailers, stationary trailers, or private residences.

Your second question is whether the opinion of the Attorney General, dated August 7, 1945, in 34 O.A.G. 220, recognizing jurisdiction in the industrial commission under sec. 101.10 (5a) to regulate the storage of flammable liquids on farms is still applicable.

There has been no change in the statutory wording since the opinion was issued and we see no reason to change the ruling made at that time.

LLD

Department of Public Welfare—Dependent Children—
Children committed to the department of public welfare as dependent or neglected under sec. 48.35 and placed by the department in a home of a relative of the children are eligible for aid under sec. 49.19 provided all other conditions are met.

January 26, 1960.

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

You ask whether a child is eligible for aid under sec. 49.19, Stats., if he has been committed to your department as dependent or neglected (or both) under sec. 48.35, and placed by the department in the home of a relative enumerated in sec. 49.19 (1) (a).

Aid may be granted under sec. 49.19 only for children who come within the definition of subsec. (1) (a) which reads:

"A 'dependent child' as used in this section means a child under the age of 18, who has been deprived of parental support or care by reason of the death, continued absence from the home, or incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousins, nephews or nieces in a residence main-

tained by one or more such relatives as his or their own home, or living in a residence maintained by one or more of such relatives as his or their own home because the parents of said child have been found unfit to have its care and custody, or who is living in a foster home having a license under s. 48.62, when a license is required under such section and placed in such home by a county agency pursuant to ch. 48."

The fact that a child has been found "neglected" or "dependent" under ch. 48 does not necessarily establish its dependency under the foregoing definition, because the conditions of dependency in sec. 49.19 do not in all respects coincide with the definitions in sec. 48.18, relating to jurisdiction of the juvenile court over dependent and neglected children.

It was pointed out in 43 O.A.G. 71 that a child is not dependent within the meaning of sec. 49.19 (1) (a) merely because its parents are unable to support it outside the parental home, and that the statutory conditions for aid are not met unless the child is deprived of parental support in a manner specified by statute. If a child is living with one of the relatives enumerated in sec. 49.19 (1) (a), it is dependent only if it has been "deprived of parental support or care" by one of the exigencies enumerated in the section.

The legislature has left to the personnel charged with administering aid to dependent children the initial determination whether the foregoing statutory conditions are met in a particular case. The leeway for fact-finding functions in administration of public assistance is discussed in *Dane County vs. Barron County*, (1947) 249 Wis. 618, 26 N.W. 2d 249. The case-by-case determinations, however, must be within the scope of statutory standards. This office is without authority to make a determination in a specific case; but can, perhaps, help to formulate some of the broad principles which mark the limits of administrative authority.

It has been suggested that a child committed to your department is not in a practical sense dependent, because there are available for his support the resources of the department. The fact that public assistance in one form or another is available to supply a child's needs does not pre-

vent him from being a public dependent. The receipt of relief does not remove a person from the category of a dependent under sec. 49.01. On the contrary, mere receipt of public assistance in the form of relief or social security aids has been considered in a number of cases as a basis for establishing the status of dependency. See, for example, *Milwaukee County v. Stratford*, (1944) 245 Wis. 505, 15 N.W. 2d. 812. Different statutes were involved in that case than the one which governs aid to dependent children; but the definition in the latter statute implies even more strongly that the availability of other forms of public aid does not preclude the status of dependency under sec. 49.19. The definition under sec. 49.19 (1) (a) includes all children who have been deprived of "parental support," if other conditions are met, irrespective of whether they may be receiving support from other sources.

Other provisions of sec. 49.19, such as the condition in sec. 49.19 (4) (a) that there must be a child dependent "upon the public" for proper support, indicate that the legislature did not intend the availability of other means of public support to preclude aid to dependent children. Sec. 49.19 (4) (f) also implies that the availability of other means of support for a child, whether public or private, does not preclude aid under sec. 49.19, unless such other provision is found to be "better." In the event aid is granted under sec. 49.19, it is contemplated that it be sufficient for all needs, and that no other public assistance be given (sec. 49.19 (5)); but the fact that a child could receive public support from other sources instead of under sec. 49.19 does not preclude aid under sec. 49.19.

The fact that the 1959 legislature indefinitely postponed Bill 416, S does not militate against the foregoing interpretation. The bill would have added the following provision to the statute:

"Whenever a child whose custody has been transferred to the department under s. 48.34, 48.35 or 48.43 is placed with a relative specified in par. (a), other than its father or mother, this section shall apply."

Even if the introduction of the bill indicated a belief that sec. 49.19 does not authorize aid of children in the custody

of your department, the legislative action in 1959 could not affect the interpretation of a pre-existing law, under such decisions as *Green Bay Drop Forge Co. v. Industrial Comm.*, (1953) 265 Wis. 38, 61 N.W. 2d 847 and *Maus v. Bloss*, (1954) 265 Wis. 627, 62 N.W. 2d 708.

Neither the introduction nor the postponement of the bill however, manifested of itself a legislative understanding that aid under the present sec. 49.19 precludes payment of aid for children in the custody of the department. The note appended to the bill says that the proposal "clarifies" the law, which indicates that no substantive change was intended.

In addition to the conditions implicit in the definition in sec. 49.19 (1) (a), sec. 49.19 (4) contains other express conditions to the granting of aid. Sec. 49.19 (4) (a) reads:

"(4) The aid shall be granted only upon the following conditions:

"(a) There must be a dependent child who is living with the person charged with its care and custody and dependent upon the public for proper support and who is under the age of 18 years. * * *"

In the use of the phrase "charged with its care and custody", the legislature did not intend to limit application of the section to persons legally liable for care under sec. 52.01 or common law rules; because such a restrictive construction would exclude foster homes and many of the relatives specifically enumerated in sec. 49.19 (1) (a). The term "charged with" refers to the person exercising the responsibility for care in a factual sense.

BL

Small Claims Court—Counties—Small claims court established pursuant to sec. 254.01 has jurisdiction over collection of forfeiture for violation of county ordinance.

January 28, 1960.

DAVID H. BENNETT,
District Attorney,
Columbia County.

You requested an opinion as to whether a small claims court established pursuant to sec. 254.01, Stats., has jurisdiction over actions for violation of a county ordinance and collection of forfeiture and penalties imposed thereby.

Sec. 254.04, provides:

“Powers, duties, jurisdiction. The small claims court and the judge thereof are vested with all powers and charged with all duties of a court of record and all laws of a general nature shall apply to the small claims court so far as applicable. The actions in respect to which such powers shall be exercised and such duties shall be performed are as herein-after set forth. The following actions may be brought in the small claims court and said court and the judge thereof are conferred jurisdiction over such actions:

“(1) Actions arising out of contract wherein the amount does not exceed \$500;

“* * *

Sec. 288.10, provides:

“Municipal forfeitures, how recovered. All forfeitures imposed by any ordinance or regulation of any county, town, city or village, or of any other domestic corporation may be sued for and recovered, pursuant to this chapter, in the name of such county, town, city, village or corporation. It shall be sufficient to allege in the complaint that the defendant is indebted to the plaintiff in the amount of the forfeiture claimed, specifying the ordinance or regulation which imposes it. And when such ordinance or regulation imposes a penalty or forfeiture for several offenses or delinquencies the complaint shall specify the particular offenses or delinquency for which the action is brought, with a demand for judgment for the amount of such forfeiture. All moneys collected on such judgment shall be paid to the treasurer of such county, town, city, village or corporation.”

The small claims court established under sec. 254.01 has civil jurisdiction over causes of action on a contract up to the extent of \$500.00.

The question is whether collection of forfeitures for violation of county ordinances is upon a cause of action on contract. Long line of authority dating from Blackstone shows that actions for collection of forfeitures and penalties are civil action of debt, or *indebitatus assumpsit*, which includes a sum of money due upon a contract implied in law.

To start an action to enforce a forfeiture, it is sufficient to allege in the complaint that the defendant is *indebted* to plaintiff in the amount of the forfeiture claimed. The cause is an action of debt or *indebitatus assumpsit* wherein a definite sum of money is due upon a contract implied by law. It is stated in 26 C.J.S., Debt, Action of, page 18:

"Debt is a form of action which lies at law to recover a certain specific sum of money, or a sum that can readily be reduced to a certainty."

The Wisconsin supreme court in *Trempealeau County vs. State*, (1951) 260 Wis. 602, at 605 said:

"* * * In its strict, technical, and legal sense a 'debt' is that for which an action of debt or *indebitatus assumpsit* will lie; and includes a sum of money due upon a contract, implied in law, * * *"

Actions for collection of forfeitures and penalties are civil actions of debt in Wisconsin. In *State vs. Peterson*, (1930) 201 Wis. 20, it was held that the state is vested with title by forfeiture. Therefore, an action for money had and received or an action of debt at law constitutes the act culminating the forfeiture.

The encyclopedia sources and text-book authorities are also in accord that proceedings to enforce forfeitures are founded on implied contract which every person enters into with the state to obey the laws.

23 Am. Jur., Forfeitures and Penalties, sec. 54, p. 644:

"* * * According to Blackstone, actions for penalties are civil actions, both in form and substance. The action is founded on that implied contract which every person enters into with the state to obey the law. * * *"

23 Am. Jur., Forfeitures and Penalties, sec. 55, p. 645:

"* * * For example, it has been held that the suit for statutory penalty is an action on a contract within the meaning of a constitutional provision giving justices of the peace jurisdiction in certain civil suits on contract."

9 Words and Phrases, Contract, 255; makes reference to *The Fire Department of the City of Oshkosh v. Tuttle*, (1880) 50 Wis. 552, which says at page 554:

"* * * But whether the action would have been *assumpsit* or debt, at the common law, it would still sound in contract, and none the less so since the forms of action have been abolished. We suppose the legislature employed the term 'on contract,' * * * with reference to the well understood general classification of the civil actions as *ex contractu* and *ex delicto*. * * *"

The small claims courts established pursuant to ch. 254, are designated "courts of records", and have all the attributes of a court of record. All laws of general nature shall also apply. It would therefore seem that the legislature intended to give such courts jurisdiction to try all civil cases of general nature where the amount does not exceed \$500.00.

In *Malinowski vs. Moss*, (1928) 196 Wis. 292, at 296, the court said:

"The act in question, as amended, provides, among other things: that the court as created is a court of record; that the court shall have attributes and exercise functions independent of the person of the magistrate; * * *."

And at 297:

"Generally in courts of record the court is presumed to have the incidents pertaining thereto except as expressly denied by the act creating the court. * * *"

In *Katzenstein v. R & G R. R. Co.*, (1881), 84 N. C. 688, 696, the North Carolina supreme court affirming its prior decision, said:

"In the case of *Wilmington vs. Davis*, 63 N.C. 582, Judge Roman held that a justice of the peace had jurisdiction of a penalty under two hundred dollars; but it is objected that

it was dictum; be it so yet it was an authority from a very respectable source, which was afterwards cited and approved in the case of the *Town of Edenton vs. Wood*, 65 N.C. 379, where this court held that an action for a penalty for a breach of a town ordinance was technically a civil action arising out of contract. There is no error. Judgment must be affirmed."

Cooley's Blackstone, Vol. II, p. 972 (4th ed.) is quoted by the court in the case of *Miami Copper Co. vs. State*, (1915) 17 Ariz. 179, 149. Pac. 758, 761, to support its conclusion that an action for forfeiture is a civil action founded on contract:

"From these express contracts the transition is easy to those that are implied by law. Which are such as reason and justice dictate, and which therefore the law presumes that every man has contracted to perform; and upon this presumption makes him answerable to such persons as suffer by his non-performance.

"Debt for penalties—the same reason may with equal justice be applied to all penal statutes, that is, such acts of parliament whereby a forfeiture is inflicted for transgressing the provisions therein enacted. The party offending is here bound by the fundamental contract of Society to obey the direction of the legislature, and pay the forfeiture incurred to such persons as the law require. * * *"

Thus it is clear that an action to recover a forfeiture for violation of county ordinances is founded upon contract implied by law and the small claims court has jurisdiction over the subject matter.

RGM

County Board—Sheriffs—County board has power to decrease salary of an undersheriff without limit and without regard to the tenure of the appointing sheriff and may abolish the position if action is not based on fraud, and is not arbitrary.

January 29, 1960.

JOHN J. HAKA,
District Attorney,
Portage County.

You advise that the sheriff of Portage county has appointed his wife undersheriff and that many members of the county board are of the opinion that such position should be filled by a man instead of a woman.

You inquire whether, and to what extent, the county board can reduce the salary of an undersheriff during the term of office of the sheriff by whom the undersheriff was appointed. You also inquire whether the county board may abolish the position of undersheriff.

At the outset we wish to point out that the practice of a sheriff appointing his wife as undersheriff has long been followed in this state, is permissible under present statutes, and women have served in the position as well as in the position of sheriff with efficiency and with valor.

The county board does not have direct power to hire and fire individual clerks, typists, stenographers or deputies in county departments of government. This does not mean, however, that the county board cannot abolish positions under sec. 59.15 (2) (b) or transfer duties. See 44 O.A.G. 262.

The office of undersheriff is not referred to in the Constitution of the State of Wisconsin. It is of historical origin, but is statutory in Wisconsin.

Paragraph 6 of an Act Concerning Sheriffs, Statutes of the Territory of Wisconsin, 1839, page 88, provides in part:

"§ 6. The sheriff of each county in this territory shall, as soon as may be after he has taken upon himself the office, by writing under his hand and seal, make some proper person undersheriff of the same county, who shall also be his deputy during the pleasure of the said sheriff; * * *"

A similar provision appears in ch. 10, Sec. 79, Revised Statutes of Wisconsin, 1849.

Sec. 722, Revised Statutes of 1878 provides in part:

"Every sheriff shall, within ten days after entering upon the duties of his office, appoint some proper person undersheriff of the same county, who shall also be a general deputy, to hold during the pleasure of the sheriff; * * *"

Sec. 59.21, Stats., 1957, pertains to sheriff, undersheriff and deputies and provides in part:

"(1) Within 10 days after entering upon the duties of his office the sheriff shall appoint some proper person, resident of his county, undersheriff, provided that in selecting such undersheriff, in counties where the sheriff's department is under civil service the sheriff, in conformity with county ordinance, may grant a leave of absence to a deputy sheriff, and appoint him undersheriff, * * * *provided that in counties with a population of 500,000 or more the appointment of an undersheriff shall be optional;* and within such time the sheriff shall appoint deputy sheriffs for his county as follows:

"* * *

"(2) He may appoint as many other deputies as he may deem proper.

"(3) He may fill vacancies in the office of any such appointee, and may appoint a person to take the place of any undersheriff or deputy who becomes incapable of executing the duties of his office.

"(4) A person appointed undersheriff or deputy for a regular term or to fill a vacancy or otherwise shall hold office during the pleasure of the sheriff.

"(5) The sheriff or his undersheriff may also depute in writing other persons to do particular acts.

"(6) Every appointment of an undersheriff or deputy, except deputations to do a particular act, and every revocation of such appointment shall be in writing and be filed and recorded in the office of the clerk of the circuit court.

"(7) In case of a vacancy in the office of sheriff the undersheriff shall in all things and with like liabilities and penalties execute the duties of such office until the vacancy is filled as provided by law.

"(8) * * *"

It will be noted that the appointment of an undersheriff is mandatory in counties of less than 500,000 population, but there is no reference to compensation to be paid. Under earlier statutes, sheriffs of all counties were required to

appoint undersheriffs, but the statute now makes the appointment of an undersheriff in counties of over 500,000 population discretionary with the sheriff.

Sec. 59.15 (1) (e), Stats., 1943, provided in part.

"(e) The county board, *at its annual meeting* shall fix the salary or compensation for any office or position (other than the county officers designated by section 59.12, *judicial officers* and the county superintendent of schools) created by any special or general provision of the statutes and the salary or compensation of which is paid in whole or in part by the county * * *."

Sec. 59.15 (3), Stats., 1943, provided:

"The county board may at any time fix or change the number of deputies, clerks and assistants that may be appointed by any county officer and fix or change the annual salary of each such appointee, *except that the salaries of the undersheriff and of the register in probate may be changed only at the annual meeting.*"

Ch. 559, Laws of Wisconsin, 1945, repealed sec. 59.15 and recreated it in to its approximate present form. The undersheriff was no longer specifically referred to, the exception as to judicial officers was removed, circuit judges being specifically referred to, and subsection (4), was added to control any possible questions of conflict with other statutes. This law was an outgrowth of Bill No. 540,A., 1945, which was drafted at the request of the legislative chairman of the district attorneys' association. In a memorandum which is included in the files of the legislative reference library, the legislative chairman stated that the bill proposed to resolve conflict between statutes and that sec. 59.15 (2) was designed to take the place of the former home rule statute relating to authority of the county board.

"The language of this section has been somewhat changed to make it definitely clear that the county board does have the right to establish or change the salary for any county employee or appointive official regardless of the provisions of any other sections of the statutes."

Sec. 59.15, Stats., 1957, provides in part:

"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.

*** *

"(2) APPOINTIVE OFFICIALS, DEPUTY OFFICERS AND EMPLOYES. (a) The board has the powers set forth in this subsection and sub. (3) as to *any office, board, commission, committee, position or employe in county service (other than elective offices included under sub. (1), supervisors and circuit judges) created under any statute, the salary or compensation for which is paid in whole or in part by the county, and the jurisdiction and duties of which lie within the county or any portion thereof* and the powers conferred by this section shall be in addition to all other grants of power and shall be limited only by express language.

"(b) The board *may abolish, create or re-establish any such office, board, commission, committee, position or employment, and may transfer the functions, duties, responsibilities and privileges to any other agency* including a committee of the board except as to boards of trustees of county institutions.

"(c) *The board may provide, fix or change the salary or compensation of any such office, board, commission, committee, position, employe or deputies to elective officers without regard to the tenure of the incumbent* (except as provided in par. (d)) and also establish the number of employes in any department or office including deputies to elective officers, and may establish regulations of employment for any person paid from the county treasury, but no action of the board shall be contrary to or in derogation of the rules and regulations of the state department of public welfare pursuant to s. 49.50 (2) to (5) relating to employes administering old-age assistance, aid to dependent children, aid to the blind and aid to totally and permanently disabled persons or ss. 16.31 to 16.44.

"* * *

"(3) REIMBURSEMENT FOR EXPENSE. The board may provide for reimbursement to any elective officer, appointive officer or employe of any expense out-of-pocket incurred in the discharge of his duty in addition to his salary or compensation, * * *

"(4) INTERPRETATION. *In the event of conflict between this section and any other statute, this section to the extent of such conflict shall prevail.*"

The position of undersheriff is not an elective office and does not fall within the restriction of sec. 59.15 (1) as to increasing or decreasing compensation during the officer's term. The restriction formerly included, providing that the salary of undersheriff may be changed only at the annual meeting of the board, was deleted in 1945.

In answer to your first question, it is my opinion that under the terms of sec. 59.15 (2) (a) (b) and (c) the county board may, when properly convened, decrease without limit, the salary of an undersheriff without regard to the tenure of the appointing sheriff.

In *Kewaunee County v. Door County*, (1933) 212 Wis. 518, 523, 250 N.W. 438, it is stated:

"* * * Courts will not interfere with the actions of county boards within the powers conferred upon them by statute 'on the ground that they are characterized by lack of wisdom or sound discretion'; they will interfere only in cases of fraud or arbitrary action; and county boards 'have a wide or at least a reasonable discretion' when so acting."

In *Schultz v. Milwaukee County*, (1947) 250 Wis. 18, 26 N. W. 2d 260, the court held that although the county board had the right to establish the salary for the office of coroner, an unreasonable exercise of that power, resulting in a reduction of the salary way below a fair minimum, would amount to an abolition of the office, which the county would not have the right to do, and the test of reasonableness must be gauged by the duties prescribed by law and not weighted with a possible but uncertain change by legislative action. In *Schmidt v. Milwaukee County*, (1947) 250 Wis. 23, 26 N.W. 2d 263, the court held that the portion of the ordinance which attempted to abolish the office

of deputy coroner was also invalid as an indirect attempt to accomplish the abolishment of the office of coroner and the county would have been without necessary services. The decision is based on the rule of law which provides that a statute or ordinance which is invalid as to its main purpose, is invalid in its entirety.

These cases are distinguishable on the ground that the county board has the power to abolish the office of undersheriff and to provide for the transfer of his duties to some other person.

It is therefore my opinion that the county board has power to abolish the position of undersheriff, if the action is not based on fraud and is not arbitrary, and the board may, within limits, provide for the transfer of certain functions, duties, and responsibilities of the undersheriff to some other agency or person.

The limitation on the transfer of such functions, duties and responsibilities is partially defined in *State ex rel. Kennedy v. Brunst*, (1870) 26 Wis. 412, which held that the legislature cannot transfer to other officers, elected by the county board, important powers and functions which from time immemorial have belonged to the office of sheriff.

The same restriction would be applicable to the county board.

Whether the action of a county board, in reducing the compensation of undersheriff to a bare minimum in hope that the incumbent would resign, or abolishing the office of undersheriff, would be arbitrary, if based merely upon the opinion of the board that such position should be filled by a man instead of a woman, is in part at least a question of fact to be determined by judicial tribunal in a proper action in the light of all of the circumstances.

RJV

Town Board—Annexation—Town board of canvassers has authority to determine legality of voting on referendum and to recertify results of the election.

February 15, 1960.

JOSEPH W. BLOODGOOD,
District Attorney,
Dane County.

You have requested an opinion with reference to the following fact situation:

On December 1, 1959 a referendum was held in the town of Madison to determine whether a certain portion of the town would be annexed to the city of Madison. The initial count showed 79 ballots cast of which 2 were blank, 39 for, and 38 against annexation. On December 4, 1959 a qualified voter of the disputed area filed a petition for a recount pursuant to sec. 6.66, Stats., alleging that 2 residents of the disputed area voted in the election but were not qualified to do so. You state that subsequent investigation proved conclusively that the 2 people in question were not qualified electors and should not have voted. On the day following the filing of the recount petition, the board of canvassers met. An affidavit signed by the 2 unqualified voters was received by the board, in which they stated that they were not qualified and that they had voted "yes" in favor of annexation. The board of canvassers then struck 2 "yes" votes and determined the result of the election as follows: total ballots cast 79; blank ballots 2; void ballots 2; 37 for annexation and 38 against annexation.

The results of the recount were tabulated and filed on December 10, 1959 and on the same day the city council of the city of Madison passed a resolution annexing the disputed area to the city.

It appears that neither of the 2 unqualified voters was challenged at the time of the election and their ballots went into the box unmarked and unidentifiable.

You inquire whether the board of canvassers of the town of Madison acted illegally or exceeded its authority in determining that the 2 ballots were void, that they were "yes" ballots, and that the result of the election was that annexation was defeated by a vote of 38 to 37.

So far as material to this opinion, sec. 6.66, provides as follows:

"(1) Whenever * * * any elector who voted upon * * * any proposition, voted for at any election * * * within 3 days after the last meeting of the * * * town * * * board of canvassers, * * * shall file with the * * * town * * * clerk, * * * a verified petition setting forth that * * * a mistake or fraud has been committed in specified precincts in the counting and return of the votes cast * * * upon the matter voted upon, or specifying any other defect, irregularity or illegality in the conduct of said election, said * * * town * * * board of canvassers * * * shall reconvene on the day following the filing of such petition and *proceed to ascertain and determine the facts* alleged in said petition and make correction accordingly and recount the ballots in every precinct specified in accordance therewith. * * *

* * *

"(2) Each member of said board of canvassers, for the purposes mentioned in this section, shall have power to administer oaths, certify to official acts and issue subpoenas. The fees of witnesses shall be paid by the county.

"(3) Within five days after the determination of said board, any candidate, or any elector who voted upon such constitutional amendment or proposition, as the case may be, aggrieved thereby may appeal therefrom to the circuit court of said county, by serving a notice in writing to that effect upon such other candidates or persons who filed written notices of appearance with said board. Such notice shall be filed with the clerk of the circuit court, together with an undertaking by the appellant, with surety and in an amount to be approved by the clerk of said court or the judge thereof, conditioned for the payment of all costs taxed against said appellant. The circuit judge shall forthwith issue an order directing the clerk of said county, or of said city, town or village, to transmit to the clerk of said court forthwith all ballots, papers and records affecting such appeal and fixing a time and place for hearing thereon, in open court or at chambers, or before a referee, not later than five days from the making of such order. Such order shall be served upon the county clerk, or the city, town or village clerk, as the case may be, and all such other candidates or persons who have appeared before said board. A reference may be ordered upon any or all questions. At the time and place so fixed the matter shall be summarily heard and determined and the costs taxed as in other civil actions.

"(4) Nothing in this section shall be construed to abrogate any right or remedy that any *candidate* may now have affecting the trying of *title to office*."

It is apparent from sec. 6.66 (2) above quoted that the board of canvassers has quasi-judicial powers to take testimony in support of its duty "to ascertain and determine the facts" as provided in subsec. (1). In my opinion the board acted properly on the basis of the evidence before it for the following reasons:

It has been held that the board of canvassers is obliged to invalidate illegally cast ballots and not include them in the total count, whether they are challenged at the election or not. *Olson v. Lindberg*, (1957) 2 Wis. 2d 229, 238, 85 N. W. 2d 775. It is true that the ballots involved in that case were absentee ballots, but the principle is the same and there is precedent for excluding ballots cast in person in a referendum, when the same was contested in court, even though it did not appear that the voters had been challenged at the polls. *State ex rel. Hopkins v. Olin*. (1868) 23 Wis. 309.

It was not error for the board of canvassers to receive in evidence the affidavit of the two voters instead of subpoenaing them to appear and testify orally. An *ex parte* statement of a voter regarding how he voted, and bearing on his competency to vote, is admissible in evidence under an exception to the hearsay rule, on the theory that he is a party to the controversy and his statement is an admission. *State ex rel. Alford v. Thorson*, (1930) 202 Wis. 31, 36-37, 231 N. W. 155; *State ex rel. Hopkins v. Olin*, *supra*.

It is also held in the two cases just cited that whether or not the illegally cast ballot can be identified, it will be deducted from the total.

Moreover, it appears to me that no appeal having been taken from the determination of the board of canvassers, as provided in sec. 6.66 (3), its determination is very probably final and not subject to review or collateral attack in any other action. It will be observed that subsec. (4) above quoted provides that nothing in sec. 6.66 shall be construed to abrogate any right or remedy that any *candidate* may now have affecting the trying of title to office. This was no doubt intended to preserve the right of a candidate to a

remedy by proceedings in the nature of *quo warranto*. See *State ex rel. Graves v. Wiegand*, (1933) 212 Wis. 286, 24^a N. W. 537.

It is also true that formerly *quo warranto* or mandamus proceedings were available to test the outcome of a referendum. *State ex rel. Hopkins v. Olin*, *supra*. But it will be observed that in the *Hopkins* case the statute authorizing the referendum, ch. 148, Laws 1866, contained no provision for a recount or for an appeal from the canvass of the votes. Now the legislature has provided a remedy by recount and appeal and has expressly said that it does not interfere with other remedies of *candidates*, but has deliberately omitted any similar statement with reference to *referenda*. Therefore, the general rule appears to be applicable that "where a specified method of review is prescribed by an act * * * conferring a new power, the method so prescribed is exclusive and if review is sought that method must be pursued." *Superior v. Committee on Water Pollution*, (1953) 263 Wis. 23, 26-27, 56 N. W. 2d 501, and cases cited. Since the time for appeal has expired, the finding of the board of canvassers upon the recount proceeding is probably final and binding.

I express no opinion regarding the possible application or effect on this controversy of sec. 66.021 (10) (a).

WAP

Schools—Transportation—Sec. 40.53 (8) prohibits extension of public high school bus route to pick up non-resident students not residing on such route. State superintendent of public instruction must withhold state aid where route involves such deviations.

March 8, 1960.

G. E. WATSON,

Superintendent Public Instruction.

You ask my opinion on four related questions, the first of which is: may a person who is under contract with a municipality to transport non-resident high school pupils over routes approved pursuant to the provisions of sec. 40.53 (8)

legally extend transportation services, on the basis of parent contracts, to non-resident high school pupils who do not reside on said approved routes?

By way of background for the above-stated question, you have advised me as follows:

"There are cases in Wisconsin in which parents of high school students who reside within a given area and in comparatively close proximity to operating high schools and on bus routes servicing said high schools, enroll their children in more remote high schools and demand that free public school transportation be provided for said children to said remote high schools.

"The County School Committees in cooperation with the Department of Public Instruction have refused to approve bus routes to provide such service. Thereupon bus operators, under contract with municipalities under the provisions of Sec. 40.53 of the Wisconsin Statutes, have taken it upon themselves to extend services beyond the limits of approved routes on the basis of parent transportation contracts. The attempts of the County School Committees and the State Superintendent of Public Instruction to bring reasonable order and direction to school transportation service are thereby made ineffectual."

When you state that the bus operators above-mentioned "extend" services beyond the limits of approved routes, it is my understanding that you mean that such operators deviate from those routes a number of times in order to provide transportation from their homes for children residing beyond the limits of such routes. Those deviations, as you indicate, are undertaken pursuant to contracts between the parents of such children and the bus operator in question, and it is these contracts which are referred to in your question as "parent contracts". They are not to be confused, be it noted, with those contracts to which parents are parties described in sec. 40.53 (5) (b). No such contracts are involved in this matter.

That part of sec. 40.53 (8) pertinent herein reads:

"(8) SCHOOL BUS ROUTES. The location and extent of all public school bus routes for the transportation of pupils shall be determined by the school board of the district or the municipal board operating such routes but no public high school bus route on which nonresident pupils are transported, shall be put into operation until a certificate of ap-

proval has been obtained from both the county school committee and the state superintendent and no state aids, shall be granted any district or municipality which operates public high school bus routes not so approved."

It is my opinion that this statute plainly requires that your question be answered in the negative, i.e., it prohibits any extension of public high school bus routes, approved under such statute, by deviations undertaken pursuant to "parent contracts" of the type to which your question pertains. It is unsound argument to contend that such deviations are not in contravention of sec. 40.53 (8) on the grounds that the regular approved bus route is covered in timely, efficient fashion despite the deviations, and that the deviations are at the expense only of the parents of the children served. The fact cannot be ignored that such deviations in effect unlawfully extend the school bus routes in question, for the pupils picked up along the lawful route are regularly carried along all or a part of the roads covered in the deviations, which thus clearly become an unapproved portion of the school bus route for those pupils. Any conclusion to the contrary would have a vitiating effect on the above-quoted provision of sec. 40.53 (8). That provision is clearly intended to vest the determination of public school bus routes in the school board of the district or the municipal board operating such routes, with a certificate of approval to be obtained from both the county school committee and the state superintendent of public instruction in the case of public high school bus routes on which non-resident pupils are transported. If, however, deviations of the sort here in question were to be countenanced, the intent of such provision would be thwarted, for the operators of public school busses, engaging in deviations from approved routes, would then in effect have a share in the determination of the location and extent of public school bus routes—a share they cannot lawfully have under the plain provisions of sec. 40.53 (8).

Your second and third questions were to be answered only if the above-stated question was answered in the affirmative. Since the answer thereto is negative, no answers to such questions are necessary.

For your fourth question, you ask: does the state superintendent have authority, pursuant to the provisions of sec.

40.53 (8) to order the discontinuance of the type of excess services that are described in question number one? Stated otherwise, can you order school bus operators to cease deviations of the kind described in my answer to your first question? I do not believe so. As a public officer, the state superintendent, in addition to powers expressly conferred upon him by statute has by implication (a) such additional powers as are necessary for the due and efficient exercise of the powers expressly granted, or, (b) such as may be fairly implied from the statute granting express powers. *Kasik v. Janssen*, (1914) 158 Wis. 606. I find no statute conferring upon you an express power to order the cessation of such deviations as those above-mentioned; no statute granting you any other express power, which, for its due and efficient exercise, requires the implication of an additional power to suppress the "excess services" in question; and no statute granting you any other express power from which such additional power may be fairly implied. True, under sub. (8), sec. 40.53, the state superintendent may, and indeed, must, withhold state aids in instances such as those described hereinabove, where a public high school bus route on which non-resident pupils are transported involves major deviations not approved by the county school committee and the state superintendent as part of such route. This power to withhold state aids, however, manifestly does not require, for its due and efficient exercise, the implication of an additional power to order such deviations to cease, and such additional power may not be fairly implied from the express power to withhold state aids above-mentioned. The latter power was clearly regarded by the legislature as sufficient, in and of itself, to assure adherence to approved public high school routes on which non-resident pupils are transported. The legislature therefore provided no powers in aid of such power, expressly or by implication.

JHM

County—Forests—Under sec. 28.11 (2) county forestry fund may not be spent to construct a county building designed to be used by the forest caretaker as a combined residence and foster home.

March 9, 1960.

WAYNE W. TRIMBERGER,
District Attorney,
Clark County.

You have requested my opinion concerning the legality of the proposed expenditure of certain county forestry funds for the construction of a building which would be used by the county forest caretaker as a residence for himself and his family and as a home for about eight delinquent boys. Your letter contains the following statement of facts:

"Clark county has an extensive county forest program and maintains certain tools, supplies, etc., at a location approximately five miles west of the county seat of Neillsville. Because of the remote location, the area has frequently been illegally entered and county property stolen or damaged.

"It long has been felt desirable to have a permanent custodian and supervisor present to safeguard the county's interest at the county forest and nursing (sic) station. Accordingly the county forestry and zoning committee contacted the state department of public welfare—division of corrections—with a proposal that the county build a forestry home at said location to house the needed supervisor and also eight juveniles who could earn their board and room working on the forest plantations.

"The state department of public welfare was very interested in the project and especially so in the hope of establishing a worthwhile program to assist in correcting juvenile delinquents.

"A plan thus was developed whereby Clark County would build a structure to house a caretaker-supervisor and his wife plus eight boys. It was understood that the construction funds needed would come from an accumulation of some \$50,000 presently on hand in the County Forestry Fund derived from the sale of forest products. The county would maintain the building, insurance, etc., and receive benefit from having a supervisor present to safeguard equipment, from the work performed on the county forest plantations and from making useful citizens out of juvenile delinquents.

"The state department of public welfare would transfer to the structure not to exceed eight youths presently on probation who would be supervised and guided by the caretaker couple and either attend regular school or work on the county forest plantations or both. The state department of public welfare would pay to the caretaker couple an amount sufficient to give coverage for the expenses of furnishing food, bedding, etc. Naturally this would reduce by eight the number of youths having to be kept at a boys' reform school."

The request stemmed from a resolution which was adopted by the county board in August of 1959 and which read as follows:

**"RESOLUTION ON CONSTRUCTION OF
FORESTRY CAMP"**

"WHEREAS, the State Department of Public Welfare, Correction Division, desires to create Forestry Camps, or group homes for delinquent boys in need of a work program, and different home situations, and,

"WHEREAS, Clark County has about 131,000 acres of Forest Crop lands and 10 county parks, on which there is a need for workers of this kind, and,

"WHEREAS, The Clark County Forestry Department has about \$50,000.00 of unexpended funds of which a portion could be set aside for the construction of a home to be used for the purpose of housing eight boys who could be used in the Forestry and Park programs,

"NOW, THEREFORE, Be It Resolved, that the Clark County Forestry and Park Committee be authorized to construct a home at the Clark County Nursery location not to exceed \$21,000.00."

You have informed me that the aforesaid resolution has been rescinded and that it is now proposed that the following resolution be adopted in lieu thereof:

"RESOLUTION ON FORESTRY BUILDING"

"WHEREAS, Clark County has approximately 131,000 acres of forest crop lands and ten county parks and

"WHEREAS, the care, management and supervision of such lands and parks is a full time responsibility involving a great deal in time, effort and expense and

"WHEREAS, the proper use of said land and parks can result in substantial benefit to Clark County and its residents and

"WHEREAS, the Clark County Forestry Department has approximately \$25,000.00 of unexpended funds available, not received from state aid funds, of which a portion could be used for the construction of a residence for a county forest caretaker and other personnel needed in the performance of the work involved in the forestry and park program,

"NOW, THEREFORE, BE IT RESOLVED, that the Clark County Forestry and Park Committee be and it is hereby authorized to construct a county forest residence at the Clark County Nursery location and there is hereby appropriated for such purpose not to exceed \$21,000.00 from funds of the Clark County Forestry Department."

However, you have advised by telephone that, in fact, it is the intention to carry out the original plan.

Secs. 28.10 and 28.11 (2) provide:

"28.10 County forest law. The county board of any county may by resolution acquire land by tax deed or otherwise for the purpose of establishing county forests."

"28.11 Administration of county forests. The county board of any such county shall have power:

"* * *

"(2) To appropriate funds for the purchase, development, protection and maintenance of such forests * * *."

The question presented therefore is whether the proposed expenditure is one "* * * for the purchase, development, protection and maintenance * * *" of a county forest.

In the case of *Dodge County v. Kaiser* (1943), 243 Wis. 551, 557, 11 N. W. 2d 348, it was said:

"The county board has only such powers as are expressly conferred upon it or necessarily implied from those expressly given. 14 Am. Jur. p. 200, sec. 28; 15 C. J. p. 457, sec. 103; 1 Dillon, Mun. Corp. (5th ed.) p. 67, sec. 37; *Spaulding v. Wood County*, 218 Wis. 224, 228, 260 N. W. 473. In *Spaulding v. Wood County, supra*, page 229, the court said:

"It has been held that if there be a fair and reasonable doubt as to an implied power [of a county board] it is fatal to its being."

"Then, quoting from *Blades v. Hawkins*, 240 Mo. 187, 195, 112 S. W. 979, 981, 141 S. W. 1198, the court said:

"The courts are conservative in implying powers not expressly given."

It appears from your statement of facts that a major, and perhaps the primary, purpose of the county is the establishment of an institution which could be used by the caretaker-supervisor of the county forest for the maintenance of a foster home for about eight juvenile delinquents. The proposed structure would be a county building. Undoubtedly it would cost more to construct such a building which would house eight additional juvenile delinquents than it would cost to construct a building which would be ample for a caretaker and his family. The larger building would also require additional maintenance, insurance costs, fuel, etc., all of which would be primarily for the benefit of the caretaker and his wife who might contract in their individual capacity with the department of public welfare for the operation of the building as a foster home from which the county might or might not derive benefit. Conceivably the department of public welfare might find that the caretaker and his wife were unacceptable as the operators of a foster home.

No statute authorizes the county to operate or aid in operating a foster home. Sec. 48.31 authorizes the county board to establish a detention home whose policies shall be determined by the judge of the juvenile court and which shall be in charge of a superintendent and conducted as a family home.

Sec. 56.07 authorizes a county to designate any county forest project under 28.11 to be a county reforestation camp and to provide facilities therein for keeping and maintaining prisoners and inebriates. Such a county reforestation camp must be in charge of a superintendent who shall have the powers and duties of a jailer. From your statement of facts it does not appear that the county has taken action or proposes to take any action to establish a detention home under sec. 48.31 or a county reforestation camp under sec. 56.07.

Under the proposed plan the county through the expenditure of money from the county forestry fund would be aiding one or more individuals to operate a foster home. Assuming, without deciding, that a county could appropriate

money from the county forestry fund to construct a building which was strictly a residence for a county forest caretaker, it is my opinion that the proposed expenditure would be illegal.

JRW

Architects and Engineers Board—Board has duty to see that proper investigation is made and to institute criminal proceedings in proper cases. No personal liability would occur if proper action was taken.

March 18, 1960.

W. A. PIPER, *Secretary,*
Wisconsin Registration Board of Architects,
and Professional Engineers.

You have made inquiry as to procedures to be followed relative to the enforcement of secs. 101.31 (1) and (14), and 101.315 (1) and (9) of the Wisconsin Statutes.

You specifically inquire as follows:

1. Is it proper for a member of the board to sign the necessary complaint before the proper district attorney or magistrate when done at the request of the board?
2. Is it proper for the secretary of the board to sign the necessary complaint before the proper district attorney or magistrate when done at the request of the board?
3. What liability is assumed by each of the signers of Questions 1 and 2?
4. What liability is assumed by the board when charges are signed as stated in each of Questions 1 and 2?
5. What further advice can you furnish the board regarding procedure to be followed in filing charges for violation of sec. 101.31 (1), (14) and 101.315 (1), (9) of the Wisconsin Statutes?

The members of the board are public officers and the board in addition to its duties of administering licensing requirements under the statute is also empowered by sec. 101.31 (15) to investigate persons required to be licensed as architects or professional engineers and who are neither registered nor exempt.

While sec. 101.315 (10) does not specifically state that the engineering division of the board has power to investigate, such power may be implied in view of the wording "If it appears upon complaint or is known to the division * * * the division * * * may, in addition to other remedies, bring action * * * to enjoin * * *."

Ch. 581, Laws 1959, increased the annual registration fees of architects, professional engineers and land surveyors and the fiscal note attached to Bill No. 861,A., which became ch. 581 states that the increase in renewal fees "will provide sufficient funds to carry out the Board's functions in the administration of Sections 101.31 and 101.315 and enable the Board to employ an *investigator* to better protect the public."

The board and the engineering division are charged with law enforcement duties, including the duty to institute prosecutions for violations of secs. 101.31 (1) and (14), and 101.315 (1) and (9). 44 O.A.G. 126.

In order to enforce a criminal statute, it is necessary for some person to accuse some other person of having violated the statute in question. A complaint may be signed before a district attorney or magistrate of the county in which the violation is alleged to have occurred.

Sec. 954.01 provides that process for the arrest of persons accused of crime may be issued by magistrates and district attorneys.

Sec. 954.02 (1) and (2) provide:

"(1) A complaint is a written statement of the essential facts constituting the offense charged and may be upon information and belief. It shall be made upon oath before a magistrate or other person empowered to issue warrants of arrest.

"(2) If it appears from the complaint that there is probable cause to believe that a crime has been committed and that the accused committed it, the magistrate shall issue a warrant or summons."

The statute expressly provides that a complaint may be made on information and belief. I do not find any provision in the statutes which would appear to justify a complaint by the Wisconsin registration board of architects and pro-

fessional engineers as a board. The statute contemplates that criminal complaints should be signed by an individual, although it is permissible to have a complaint signed by a number of individuals. The individual signing the complaint may identify himself as a member of the board or as secretary of the board.

In answer to questions one and two, it is my opinion that it is proper for your board, after having made an investigation of any case, to request a member of the board or secretary who is familiar with the matter to sign the necessary complaint. The member or secretary signing the complaint, however, should believe in good faith that a violation of the law has been committed and that the person accused is the proper defendant.

In answer to questions three and four, I am of the opinion that if the complaint is signed in good faith and without malice, the individual believing that there is probable cause to believe that a crime has been committed and that the accused is the person involved, no liability would attach to the individual or to the members of the board.

In discussing the question of liability, it is important to consider both a possible civil suit for malicious prosecution and the power of a magistrate to enter a judgment for costs against a complainant.

Sec. 960.22 (1) provides :

"(1) If the defendant is acquitted, he shall be discharged; and if the justice certifies in his docket that the complaint was malicious and without probable cause, he shall enter judgment against the complainant to pay all the taxable costs that have accrued, including the fees of witnesses."

Subsecs. (2) and (3) of the same section provide for a stay of the judgment pending appeal and for an appeal from the judgment as in civil actions. See also, sec. 954.12.

Sec. 270.58 (1) provides that where a state officer is proceeded against in his official capacity, except in case of false arrest with which we are not here concerned, and the court or jury finds that he acted in good faith, any judgment as to damages against the officer shall be paid by the state. The members of the board are public officers within the meaning of this statute. However, in spite of the broad in-

terpretation given the words "public officers" by the supreme court in *Larson v. Lester*, (1951) 259 Wis. 440, 444-445, 49 N.W. 2d 414 and *Matczak v. Mathews*, (1953) 265 Wis. 1, 60 N.W. 2d 352, it is questionable as to whether the secretary of the board would be a public officer within the meaning of the statute as he is a civil service employe and is not required to file an oath of office with the secretary of state. The secretary would nevertheless be in a position to defend any suit brought against him for malicious prosecution, if he had proceeded, in good faith and without malice, in the manner outlined in this opinion. If an action were brought against the secretary for malicious prosecution and the secretary prevailed, it is probable that the costs which he could tax against the person instituting such action would not cover his actual costs of defense. He could make a claim to the legislature in such an instance for reimbursement. Such additional expense is not the result of a liability arising out of the signing of the criminal complaint, but arises from the agreement between the attorney and client as to the defense of the action.

The necessary elements to the successful maintenance of a civil suit for malicious prosecution are well stated in 34 Am. Jur. 706:

"* * * In general, to authorize the maintenance of an action for malicious prosecution, the following elements must be shown: (1) the institution or continuation of original judicial proceedings, either civil or criminal; (2) by, or at the instance of, the defendant; (3) the termination of such proceedings in plaintiff's favor; (4) malice in instituting the proceedings; (5) want of probable cause for the proceeding; and (6) the suffering of injury or damage as a result of the action or prosecution complained of."

The Wisconsin supreme court sets forth these six essential elements in almost identical language in the case of *Elmer v. Chicago & N.W.R. Co.*, (1950) 257 Wis. 228, 231, 43 N.W. 2d 244, and at page 232 defines "probable cause" as follows:

"'Probable cause' has been defined to be such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe or entertain an honest and strong suspicion that the person arrested is guilty. * * *"

In *Gladfelter v. Doemel*, (1958) 2 Wis. 2d 635, 640-641, 87 N.W. 2d 490, the court stated:

"The burden of proof is upon the plaintiff to establish all six elements; and, if he fails with respect to any one of them, the defendant prevails. There is a strong reason of public policy for thus making it rather onerous for a person to successfully maintain an action for malicious prosecution. This is well stated by the Colorado Supreme Court in *Montgomery Ward & Co. v. Pherson* (1954), 129 Colo. 502, 508, 272 Pac. (2d) 643, 646, as follows:

"It is for the best interests of society that those who offend against the laws of the state shall be promptly punished, and that any citizen who has reasonable grounds to believe that the law has been violated shall have the right to cause the arrest of the person whom he honestly and in good faith believes to be the offender. For the purpose of protecting him in so doing, it is the generally established rule that if he has reasonable grounds for his belief, and acts thereon in good faith in causing the arrest, he shall not be subjected to damages merely because the accused is not convicted. The rule is founded on the grounds of public policy in order to encourage the exposure of crime."

"In further keeping with this public policy, if the defendant in a malicious-prosecution action has instituted a criminal proceeding against the plaintiff upon the advice of counsel after making a full and fair statement of the facts within the defendant's knowledge, honestly believing the plaintiff to be guilty, this affords the defendant a complete defense as a matter of law. [cases cited omitted] The advice of prosecuting attorneys affords the same cloak of protection as does advice of private practitioners * * *"

At page 642, the court defines malice:

" * * * A person instituting a criminal prosecution is actuated by malice if he is found to have acted chiefly from motives of ill will, or if his primary purpose was something other than the social one of bringing the offender to justice. * * *"

In certain cases a person who procures a third person to institute a malicious prosecution becomes liable in damages to the party injured to the same extent as if he had himself instituted the proceedings, but in such case it must appear

that he was the proximate and efficient cause of putting the law in motion. 34 Am. Jur. 718.

The board members who vote to request a member or the secretary to sign a criminal complaint should have no cause to worry about possible liability for having indirectly instituted a criminal proceeding if the board has fulfilled its duty of investigating the matter in question or has caused a proper investigation to be carried out and has fully evaluated the results of that investigation.

Sec. 101.31 (14) (b) provides that the attorney general or his assistant shall act as legal advisor of the board. In any case where your board becomes convinced that a violation of the law has occurred, you can and properly should, after investigating the matter, submit the entire facts, including documentary evidence and names of witnesses and their statements, if available, to your legal advisor and obtain his approval of the proposed action. You would then have this additional defense to any action for malicious prosecution that might be instituted. Full disclosure of all material facts should also be made to the district attorney of the county wherein the violation is alleged to have occurred if he is requested to institute proceedings.

A district attorney is justified, when application is made to sign a complaint before him and before issuance of a warrant by him, in requiring that the individual signing the complaint or those instrumental in seeking institution of a criminal action, make full disclosure of all material facts known to them and that they give their full cooperation to the end that the prosecution sought will be successful. In the event that there is a trial, the success or failure of the prosecution will depend upon the availability, weight and competency of oral and documentary evidence.

The district attorney himself has no statutory duty of investigation until a person accused is held for trial, at which time his duty is prescribed in sec. 955.17. See 44 O.A.G. 159. At that time, as the supreme court stated in *State v. Peterson* (1928) 195 Wis. 351, 359, 218 N.W. 367, the district attorney must interview all who he has reason to believe may know any fact material to any criminal prosecution. This does not absolve any citizen from the duty of informing him of any known facts with reference

to any violation of the law. In all such cases, the district attorney acts in a *quasi-judicial* capacity and determines what course should be pursued in view of the facts disclosed by his investigation.

Secs. 101.31 (15) and 101.315 (10) provide that a district attorney *may*, after being notified by the board, investigate persons required to be licensed and who are neither registered nor exempt. The board or division and the attorney general have the same authority.

District attorneys frequently take an active part in the investigation and suppression of crime over and above their statutory duties and will generally advise a prospective complainant or others interested in instituting a criminal prosecution as to the type of evidence which must be assembled in order to insure a successful prosecution.

RJV

Vital Statistics—Marriage Forms—State registrar of vital statistics has authority to prescribe format for various marriage forms enumerated in sec. 245.20 and local registrars and registers of deeds must use forms prescribed and supplied by state registrar.

March 21, 1960.

CARL N. NEUPERT,
State Health Officer.

You have requested my opinion as to the following questions:

1. Does the state registrar of vital statistics have authority to prescribe the format for the various marriage forms enumerated in sec. 245.20, Wis. Stats.?
2. Must the local registrar use the forms prescribed by the state registrar?

You have furnished me with copies of the marriage certificate, marriage license and marriage application forms, which have been prescribed by the state registrar and indicate that you are primarily interested in these forms. You state that the bureau of vital statistics is a member of

the national marriage registration area and that in cooperation with the national office of vital statistics of the U. S. public health service, certain informational data are required to be furnished on a uniform basis to permit its use in national studies and that in order to serve that purpose, the forms used in Wisconsin must contain certain information needed to provide comparable data for local, state and national statistics.

Sec. 245.20, Stats. 1957, was not changed by ch. 595, Laws 1959, commonly known as The Family Code, and provides as follows:

"245.20 Records and Blanks. The state registrar of vital statistics shall prescribe model forms for blank applications, statement, consent of parents, affidavits, licenses, and marriage certificates and other such forms as shall be necessary to comply with the provisions of this chapter. The county clerk shall keep in his office among his records, a suitable book to be called the marriage license docket and enter therein a complete record of the applications for, and the issuing of all marriage licenses, and of all other matters which he is required by this chapter to ascertain relative to the rights of any person to obtain a license. Said marriage license docket shall be open for public inspection or examination at all times during office hours."

Sec. 245.20 was given its present form by ch. 393, Laws 1943, being an outgrowth of a bill requested by the Wisconsin county boards association. The *former statute* was created by ch. 218, sec. 3, Laws 1917, and provided:

"Section 2339n-9. The state registrar of vital statistics shall prescribe model forms for blank applications, statement, consent of parents, affidavits, licenses, and marriage certificates and other such forms as shall be necessary to comply with the provisions of this act and shall furnish to the county clerk of each county, at the expense of the county, all of the aforesaid blanks, together with a suitable book to be called a marriage license docket, which said county clerk shall keep in his office among his records, and enter therein a complete record of the applications for, and the issuing of all marriage licenses, and of all other matters which he is required by this act to ascertain relative to the rights of any person to obtain a license. Said marriage license docket shall be open for public inspection or examination at all times during office hours. All funds received by the state registrar of vital statistics under the

provisions of section 2339n-9 of the statutes shall be paid into the state treasury within one week of their receipt and all such moneys are appropriated to the state board of health to carry into effect the provisions of section 2339n-9 of the statutes."

The legislature has provided that the marriage license and marriage certificate forms shall be substantially as set forth in the statutes. See sec. 245.22, renumbered 245.13; sec. 245.23, renumbered 245.14 and amended; sec. 245.24, renumbered 245.18 and amended, all as provided in sections 27 through 29 of ch. 595, Laws 1959.

Sec. 14 of ch. 595, Laws 1959, creates sec. 245.09 and specifies the information which must be contained in the statement of qualifications and application form. Sec. 21 of the act renames and amends sec. 245.13 to sec. 245.05 and provides that the county clerk shall procure marital information cards at the expense of the county for distribution.

The word "model" was left in sec. 245.20 at the time it was substantially amended in 1943. It is not defined therein, and must be given its common and ordinary meaning by reason of sec. 990.01 (1). As used in the statute, it means an example for imitation.

In answer to your first question, it is my opinion that the state registrar has authority by reason of sec. 245.20 and statutes hereinafter discussed to prescribe the format for the various marriage forms enumerated in sec. 245.20. In prescribing the format of the forms, the state registrar must take into account the requirements established by the legislature as to the statement of qualifications and application form, and the marital information, license and certificate forms.

Sec. 245.20 contemplates that such forms as are prescribed by the state registrar shall be employed or substantially followed by local officials in every county in the state. Local officials primarily concerned are the county clerk, register of deeds, local registrar, judges of courts of record having divorce jurisdiction, probate judges and persons entitled to perform marriage ceremonies.

The state bureau of vital statistics was established by ch. 469, Laws 1907, and ch. 69 of the statutes relating to

vital statistics has not been substantially amended as far as the state registrar's supervisory powers over local registrars and his duties of preparing and supplying blank forms are concerned.

If a form is necessary to secure uniform observance and the maintenance of a perfect system of registration, the local official is not only required to follow the format set forth by the state registrar, but in such case no blanks shall be used other than those supplied by the state registrar.

Sec. 69.06 (1), provides:

"(1) The state registrar shall prepare and issue detailed instructions required to secure the uniform observance and the maintenance of a perfect system of registration, and no blanks shall be used other than those supplied by him."

The marriage certificate is the primary form relied upon by the state registrar and it is his duty to provide the county clerk with the forms of certificate. Local registrars and registers of deeds are subject to the supervision of the state registrar. Secs. 69.02 (2) (b), 69.07 (1). The division of public health statistics has the duty of preparing the required forms and sec. 69.05 provides:

"69.05 Forms prepared by registrar. The state registrar shall prepare forms of certificate of birth, fetal deaths, deaths, marriages, divorces and of burial permits, and such other forms necessary to meet the requirements of this chapter, which forms shall be printed and supplied in the same manner as are blanks and stationery for the use of other offices of the state government."

Marriage certificates shall be on forms *supplied* by the state registrar. Secs. 69.10, 69.15, 69.18. Sec. 69.49 provides that the form, contents, execution, returns, delivery, transmission and recording of marriage certificates shall be as provided in ch. 245 except as specifically otherwise provided in ch. 69.

Since sec. 245.18, renumbered from 245.24, Stats. 1957, requires that the marriage license have appended to it three blank certificates of marriage, it would appear that in the interests of uniformity the state registrar could furnish the license blank to the county clerk at state ex-

pense; however, it is possible for the county clerk to append the license to the blank certificates if the state registrar deems it unnecessary to furnish the license form.

In answer to your second question, you are advised that local registrars and registers of deeds must use the marriage certificate forms prepared and supplied by the state registrar and must use such other forms as are prescribed, prepared, and supplied by the state registrar.

RJV

State Aids—Teachers' Salaries—Sec. 40.71 (7), as amended, does not prohibit paying of state aids for 1959-1960 to a school district paying salaries meeting previous standards and which were prescribed by contracts made prior to amendment.

March 22, 1960.

G. E. WATSON,
Superintendent, Public Instruction.

You have asked two questions concerning the application of ch. 522, Laws 1959, which became effective October 11, 1959. That chapter amended sec. 40.71 (7), Stats. 1957, establishing minimum standards for teachers' salaries, which must be met in order for school districts to qualify for state aids under secs. 40.70 and 40.71 by raising the minima substantially. So far as here material, sec. 40.71 (7) (a) provided:

"No aid * * * shall be paid to any school district * * * for any year during which such district has not maintained a common school for at least 9 months taught by a qualified teacher under a contract providing * * * a salary of not less than \$1,800 per school year, if the certificate of such teacher is based on 2 years of professional training and not less than \$2,000 per school year if such teaching certificate is based on not less than 3 years of professional training and not less than \$2,600 if based on 4 years of professional training with a degree; unless the state superintendent shall be satisfied that such school was maintained

and so taught for at least 3 months, and the failure to maintain and so teach it for 9 months was occasioned by some extraordinary cause not arising from intention or neglect on the part of the responsible officers."

Ch. 522, Laws 1959, increased the above dollar amounts to \$2,400, \$3,000 and \$4,000, respectively. Paragraph (b) of the same section makes similar changes with respect to aids for schools in cities of the first class.

You ask whether the amendment prohibits granting state aids in the 1959-1960 fiscal year to a district which is paying one or more teachers during the 1959-1960 school year at rates below the new minima when:

- (1) The contract with the teacher was made prior to October 11, 1959, or
- (2) The teacher acquired, subsequent to October 11, 1959, and to the date of the contract, a certificate based on 4 years of professional training and a degree.

The statute prohibits payment of aid to a district "for any year during which" the district fails to meet the specified minimum standards. The literal meaning of the statute would preclude aids to districts which do not meet the statutory standards during the 1959-1960 school year, regardless of when the contracts with the teachers were executed. This construction would lead to an obviously absurd result, however, for the amendment did not become effective until several weeks after schools opened for the 1959-1960 school year and several months after the teachers' contracts were executed. Those contracts, under sec. 40.41, must be tendered by April 1 for the ensuing school year.

The legislature scarcely could have intended the literal meaning of sec. 40.71 (7), as amended. Advance payments of state aid to school districts for the 1959-1960 school year had begun well before the effective date of the amendment. Sec. 40.71 (2a), permits advance payments to be made after July 15, although the regular payment of aids does not begin until approximately eight months later. The records of your department show that over \$9,000,000 in state aids for the 1959-1960 school year were paid between July 15 and October 1, 1959. These payments were made accord-

ing to the statutes then in force but some of such payments may have been made to school districts which are, during the current school year, paying salaries below the new minima specified in ch. 522, Laws 1959.

To give the amendment a retroactive effect would conflict with the policy expressed in secs. 40.66 and 40.69 of providing some relief from local general property tax as a source of school revenues. Indeed, giving retroactive effect to the amendment would mean withholding from some districts state aids upon which their budgets had been predicated and their tax revenues determined long before passage of the amendment.

In construing statutes, there are several principles which apply here.

A statute should be construed so as to give effect to its leading idea and the whole statute brought into harmony therewith if reasonably practicable. *McCarthy v. Stein-kellner*, (1937) 223 Wis. 605, 270 N.W. 551. A statute should be construed in light of the general system of laws of which it forms a part and must be interpreted in the light of other statutes on the same subject. *State ex rel. Time Ins. Co. v. Superior Court*, (1922) 176 Wis. 269, 186 N.W. 748. The legislative intent must be sought, even though a statute be unambiguous, if the literal application of the statute would lead to an absurd result. *State ex rel. Morgan v. Dornbrook*, (1925) 188 Wis. 426, 206 N.W. 55; *Laridaen v. Ry. Express Agency, Inc.*, (1951) 259 Wis. 178, 47 N.W. 2d 727. And, finally, in construing statutes retroactive effect is to be avoided unless it is clearly intended. *Northern Supply Co. v. Milwaukee*, (1949) 255 Wis. 509, 39 N.W. 2d 379.

It is my conclusion that the amendment does not prohibit granting state aids in this fiscal year to a district which is paying teachers in accordance with the old, but below the new, minimum salary standards, pursuant to contracts made prior to the effective date of the amendment.

Your second question also is answered in the negative. If a teacher holding a certificate based on three years of professional training prior to October 11, 1959, entered into a contract specifying a salary of \$2,000 or more and subsequent to that date acquired a new certificate based on four

years of professional training and a degree, the teacher's salary could be continued for the current school year without the district being disqualified for state aids. This is the only practicable interpretation of sec. 40.71 (7), and the reasoning followed in answering your first question is applicable.

EWW

County—Hospital—Words and Phrases—Various types of hospitals discussed. Power of board of health relates to sanitary conditions in hospitals and not to determination of types. Enforcement of standards limited.

March 23, 1960.

CARL N. NEUPERT,
State Health Officer.

You ask my opinion on several questions arising out of the fact that five counties of this state have in recent years converted their tuberculosis sanatoria to joint institutions, housing a tuberculosis sanatorium and a county hospital. The latest of such five counties to effect that conversion is Douglas county, which did so on October 9, 1958, by resolution of its county board. Such resolution provides that "the institution herein established shall be known as the Douglas County General Hospital." As recently amended, it further provides that "the [Douglas] County Hospital was and is created and established for the treatment of dependent persons pursuant to Section 49.16 of the Wisconsin Statutes of 1957, and pursuant to Section 46.17 of the Wisconsin Statutes of 1957."

You state that, "the dangers of cross infection are substantial where tuberculosis and chronically ill patients are not carefully segregated. One group faces the danger of infections with diarrheas, dysenteries, etc., and the other of infection with tuberculosis." You also indicate that your purpose in asking such questions is to clarify the jurisdiction of the state board of health over joint institutions such as that created by the resolution referred to above.

The questions you ask shall be answered seriatim. They are:

1. What are the definitions of a county hospital, a general hospital, and an infirmary as they relate to joint institutions such as referred to in the (Douglas County) resolution?

The general rule on the construction of statutes is that all words and phrases are to be construed according to common and approved usage but that technical words and phrases and others that have a peculiar meaning in the law are to be construed according to such meaning. Sec. 990.01. This is also subject to the qualification that such rule is to be followed unless it would produce a result inconsistent with the manifest intent of the legislature.

The term "county hospital" has no clear-cut statutory definition, either standing alone as an institution or as part of a joint institution such as that of Douglas county. Sec. 49.16 (1) provides that a county hospital is one established by a county for the care of dependent persons, and sec. 49.17 (1) makes it clear that it is not only dependent persons who are cared for in a county hospital.

The term "general hospital" has no statutory definition. The word "general" is normally used in contradistinction to "particular" or "partial", and as not restricted to one class or field such as a tuberculosis hospital, an eye, ear, nose and throat hospital, a maternity hospital, a mental hospital, etc.

The term "infirmary" refers to the "county infirmary" which may be established under sec. 49.171. The purpose of such an infirmary is to provide for "the treatment, care and maintenance of the aged infirm." Sec. 49.171 (1). Sec. 49.171 (3) (a) defines an aged infirm person as "a person over the age of 65 years so incapacitated mentally by the degenerative processes of old age, or so incapacitated physically, as to require continuing infirmary care." And sec. 49.171 (3) (b) defines a county infirmary as "as county institution created pursuant to subsection (1) or (2) under the general supervision and inspection of the state department of public welfare pursuant to sections 46.16 and 46.17 as to adequacy of equipment and staff to treat, care for and maintain the physical and mental needs of aged infirm

persons." The Douglas county resolution does not deal with a county infirmary.

(2) What authority has the State Board of Health in determining whether a portion of a joint institution designated by the county board as a county hospital or an infirmary is in fact such an institution?

No specific statutory authority is granted to the state board of health to make any binding determination of whether or not a portion of a joint institution designated by the county board as a county hospital or an infirmary is in fact such an institution.

Administrative agencies have only such powers as are expressly granted to them or are necessarily implied, and any power sought to be exercised by such an agency must be found within the four corners of the statute under which the agency proceeds. *American Brass Co. v. State Board of Health*, (1944) 245 Wis. 440, 15 N.W. 2d 27.

Sec. 140.055 (1) does provide:

"(1) The state board of health shall investigate and supervise the sanitary conditions of all the charitable, curative, reformatory and penal institutions of every county and other municipality, all detention homes for children and all industrial schools, hospitals, asylums and institutions, organized for the purposes set forth in section 58.01."

If in the course of exercising the above supervisory power the board finds *insanitary* conditions as distinguished from *illegal* procedures, it has very broad powers to act, and attention is directed to sec. 140.05 (1) which reads in part:

"140.05 Powers and duties. (1) The state board of health shall have general supervision throughout the state of the health and life of citizens, * * *. It shall make sanitary investigations into the causes of disease, especially epidemics, the causes of mortality, and the effect on health of localities, employments, conditions, habits and circumstances, and make sanitary inspections and surveys in all parts of the state. It may, upon due notice, enter upon and inspect private property. It shall have power to execute what is reasonable and necessary for the prevention and suppression of disease. It shall voluntarily or when required, advise public boards or officers in regard to heating and ventilation of any public building or institution. It may send its

secretary or a committee to any part of the state to investigate the cause and circumstances of any special or unusual disease or mortality, or to inspect any public building; and such officers shall have full authority to do any act necessary therefor. The board may establish bureaus and shall possess all powers necessary to fulfill the duties prescribed in the statutes and to bring action in the courts for the enforcement of health laws and health rules. It may empower the state health officer to act for the board upon such matters as it may determine in issuing and enforcing orders in compliance with law and rules and regulations adopted by the board. Whenever anyone feels aggrieved by any order of a state health officer, he may appeal to the board."

This is not to say that the state board of health is compelled to remain silent if in fact it does discover illegal procedures in the course of investigating sanitary conditions. It could, and should, call the attention of the proper authorities to such situation. This office will advise you as to what legal steps may be taken to correct such an illegal condition when you are faced with specific facts to which we can apply the law.

(3) If the State Board of Health has the authority to make such a determination, what measures is it authorized to take to obtain compliance?

This question relating to the measures which the state board of health is authorized to take if it has authority to make the determination referred to in the second question has already been covered in the answer to that question.

(4) What authority does the board have to adopt and enforce rules and regulations pertaining to general hospitals, county hospitals, infirmaries, tuberculosis sanatoria and joint institutions?

As already noted in this opinion, the state board of health has the power, under sec. 140.055 (1), to "investigate and supervise the sanitary conditions of all the charitable, curative, reformatory and penal institutions of every county * * *." This statute gives the board a substantial power over county hospitals and infirmaries, either standing alone as separate units or as components of joint county institutions of the kinds hereinabove mentioned—namely, the power to investigate and supervise sanitary conditions therein.

The term "sanitary conditions" is no narrow one, for the word "sanitary" has been defined as, "Of or pertaining to health; for or relating to the preservation of health," Webster's New International Dictionary, 2nd Ed.; and also as, "Relating to the preservation of health, especially to hygiene and public health." New Standard Dictionary. "Hygiene" is defined as, "The branch of medical science that relates to the preservation and improvement of health, both in individuals and in communities; sanitary science." Idem. With these definitions of "sanitary" and "hygiene" in mind, it is clear that the term "sanitary conditions" as it relates to a county hospital or infirmary, covers much ground, and that the power to investigate and supervise such conditions therein is an important governmental power and duty in relation to such institutions. Having such power, the board is authorized by statute to issue rules and regulations to implement its exercise. Secs. 140.05 (1) and 227.014 (2). So if the board were to promulgate a rule relative to sanitary conditions in county hospitals, and a given county hospital was found to be violating such rules, the board could, under the authorization conferred by sec. 140.05 (1), seek to obtain a mandatory injunction requiring compliance with the violated rule.

There is an apparent conflict between the supervisory power over sanitary conditions in county institutions given the state board of health by sec. 140.055 (1), and the general supervisory power over such institutions conferred on the state department of public welfare by sec. 46.16 (1) and sec. 46.17 (1) and (3).

It is my belief that in case of conflict between the administration of the provisions of secs. 46.16 (1), 46.17 (1) and (3), and 140.055 (1), the latter statute, covering a specific aspect of the supervision of the institutions named therein, would control, since the former statutes are general ones covering the entire matter of management and supervision. See *Maier v. Racine County*, (1956) 1 Wis. 2d 384, 388.

One further matter requires comment in this answer. In 1951 the legislature added subsection (10) to sec. 49.50. (L. 1951, c. 725, s. 19 m). The pertinent parts thereof, insofar as this opinion is concerned, read as follows:

"A joint committee on institution standards consisting of 6 members shall develop minimum uniform standards for the care, treatment, health, safety, welfare and comfort of patients in county institutions * * * in accordance with the provisions of ss. 49.18 (1) (b), 49.20 (2) and 49.61 (1m). * * * A uniform standards plan shall be submitted to the state *board* of public welfare on or before June 1, 1952. The *board* shall have power to establish and enforce the standards submitted by the joint committee * * *."

Pursuant to this statute, the state board of public welfare adopted minimum standards for county homes, infirmaries, general hospitals and public medical institutions, effective January 1, 1953. These standards are to be found in Chapter PW 1, Vol. 5, Wisconsin Administrative Code. They plainly deal, in large part, with some aspects of sanitary conditions in county institutions, and to the extent that they do so, constitute a lawful exercise of power authorized by sec. 49.50 (10), but subject to the control of the state board of health, as noted above, by the enactment of sec. 140.055 (1) in 1939. The rules contained in Chapter PW 1 set up *minimum* standards in certain fields. The board of health may promulgate rules, relating to sanitary conditions in county institutions, raising or supplementing standards already established by other agencies.

As indicated above, your letter posing the questions herein answered states, with respect to joint county institutions such as those under consideration, that, "The dangers of cross infection are substantial where tuberculosis and chronically ill patients are not carefully segregated." Rules aimed at preventing such cross infection, or minimizing its dangers, could clearly be promulgated by the state board of health under its power to supervise sanitary conditions in county institutions.

No aspect of the operation of the tuberculosis sanatorium portion of a joint institution will ever present a question as to whether it should be supervised by the state board of health or the state department of public welfare, since that portion of a joint institution is plainly under the exclusive control of the state board of health not only as to "sanitary conditions" involved in its operation, but as to all aspects thereof. See sec. 50.07.

(5) Sec. 140.27 (1) (c), provides that the board shall not have authority under secs. 140.23 to 140.29 to establish standards relating to "administration of hospitals except insofar as necessary for the adequate care of individuals who are hospitalized." Does the board have the authority under this section or otherwise to promulgate and enforce standards to insure the care of individuals hospitalized in general hospitals, county hospitals, infirmaries, tuberculosis sanatoria and joint institutions, and, if so, does authority to enforce such standards include that of enjoining their operation should that appear to be necessary?

The standard-establishing power conferred on the state board of health by sec. 140.27 (1) does not give such board the authority to promulgate and enforce standards to insure the care of individuals hospitalized in county hospitals, infirmaries, tuberculosis sanatoria, and joint institutions. Sec. 140.27 is part of the "Hospital Regulation and Approval Act," comprised of secs. 140.23 to 140.29. Sec. 140.24 (1) reads in part:

"* * * Institutions now governed by ss. 49.16 and 49.17, and institutions now governed by ss. 46.16, 46.17 and 46.18 and primarily designed only for mental and tuberculosis cases or the aged and infirm, are specifically exempt from all the provisions of ss. 140.23 to 140.29."

These exemptions cover all the county institutions described in your question except those in Milwaukee county, and make the standard-establishing power conferred on the board by sec. 140.27 (1) inapplicable to them.

However, it seems to me that sec. 140.055 (1) covers a portion of the same ground by giving the state board of health the supervisory power over sanitary conditions in such institutions which I have dealt with above. It is my opinion that the board is authorized to bring actions seeking mandatory injunctions, in instances where standards set up by the board, pursuant to such power, are not complied with by county institutions. The authority to seek such a remedy for the enforcement of such standards is found in the power granted the board "to bring action in the courts for the enforcement of health laws and health rules." Sec. 140.05 (1).

In the case of Milwaukee county it would appear that the state board of health would have the standard-establishing

power conferred by sec. 140.27 insofar as the county hospital of such county is concerned. This is so because the exemptions above mentioned do not apply to such institution.

Nothing I have said in answering the above-stated question is to be construed as an opinion that the state department of public welfare has no supervisory power whatsoever over the county hospital and county infirmary of Milwaukee county. Mention has been made hereinabove of the minimum standards pursuant to sec. 49.50 (10) for county homes, infirmaries, general hospitals and public medical institutions established by the state board of public welfare. I am informed that the state department of public welfare has had the responsibility of enforcing such standards as an administrative or executive function not undertaken by the board establishing them. In my judgment, those standards are applicable to the county hospital and county infirmary of Milwaukee county and their enforcement by the state department of public welfare is an exercise of supervisory power by the department over such facilities not denied to the department by the provisions of sec. 46.21.

CONCLUSION

The state board of health does have very broad powers in the areas concerning which you inquire and there is some overlapping of jurisdiction between this board and the state department of public welfare. However, it would be futile here to anticipate conflicts which might conceivably arise. You do not state that the two agencies are presently in conflict. Your attention is directed to sec. 20.904 (1) which requires the several state officers, commissions and boards to cooperate in the performance and execution of state work. If there are areas in which conflicts appear to be imminent, it might be well for the agencies to hold a joint conference for the purpose of exploring the possibilities of reconciling the same. If reconciliation is impossible then the agencies should seek remedial legislation. In the meantime it would be impossible for me to anticipate what rules either agency may be contemplating or the possible conflicts which may arise.

Generally speaking, the statutes provide that business management and regulation fall within the province of the state department of public welfare which has general supervision of welfare institutions of curative character and that sanitation and health fall peculiarly within the know how and expertise of the state board of health.

If a bona fide effort were made by these agencies to study the over-all problem jointly it ought not to be too difficult for them to reach an understanding, within the framework of the statutes here discussed, as to what rules each agency should adopt. If irreconcilable conflicts arise they can then be considered at the appropriate time.

JWR/WHR/JHM

Words and Phrases—Criminal Law—Person convicted of sex crime and found to be sex deviate must be committed to the department of public welfare as provided in sec. 959.15 and not sentenced pursuant to the provisions of the criminal law.

March 23, 1960.

WILLIAM J. McCUALEY,
District Attorney,
Milwaukee County.

You have requested an opinion on a question arising out of the following situation:

A defendant pleaded guilty to a charge of disorderly conduct, a misdemeanor, and admitted three prior misdemeanor convictions bringing him within the terms of the repeater statutes sec. 939.62. The offense was committed by exposing the defendant's privates on the street in the presence of an 11-year-old girl, and the court found that the defendant was probably directly motivated by a desire for sexual excitement in the commission of the crime charged. Accordingly, after securing the necessary certificate from the department of public welfare, the court committed him to the department for a presentence examination pursuant to sec. 959.15 (2) (the "sex deviate law"). Within 60 days

the department reported its finding that defendant was "in need of specialized treatment for his mental aberrations," as provided in sec. 959.15 (6). Thereupon, the court sentenced him to not more than 3 years imprisonment in the state prison (as provided in sec. 939.62 (1) (a), the repeater statute), stayed execution, and placed the defendant on probation for a period of 2 years on the usual terms plus a requirement that he receive outpatient treatment as might be directed by the probation department of the court.

The question was then raised whether in case of violation of probation the defendant should be committed to the prison pursuant to the sentence of not more than 3 years, or should be committed to the department for treatment pursuant to the sex deviate law, sec. 959.15, and the court requested your office to seek the opinion of the attorney general on this point.

It is my opinion that in case his probation is revoked, the court should commit the defendant to the state department of public welfare for treatment under the sex deviate law, not commit him to the prison pursuant to the sentence which the court had imposed.

The applicable provisions of the sex deviate law are the following:

Sec. 959.15 (1) provides that if a person is convicted of rape, sexual intercourse without consent, or indecent behavior with a child, or for attempted rape or sexual intercourse without consent "the court *shall* commit him to the state department of public welfare for a presentence social, physical and mental examination."

Sec. 959.15 (2), (4), (5), (6) and (18) provide as follows:

"(2) If a person is convicted of any sex crime other than those specified in sub. (1), the court *may* commit him to the department for such a presentence examination, if the department certifies that it has adequate facilities for making such examination and is willing to accept such commitment. The court and all public officials shall make available to the department upon its request all pertinent data in their possession in respect to the case. 'Sex Crime' as used in this subsection includes any crime except homicide or attempted homicide if the court finds that the defendant was probably directly motivated by a desire for

sexual excitement in the commission of the crime; and for that purpose the court may in its discretion take testimony after conviction if necessary to determine that issue.

" * * *

"(4) Upon completion of the examination, but not later than 60 days after the date of the commitment order, a report of the results of the examination and the recommendations of the department shall be sent to the court.

"(5) If it appears from such report that the department does *not* recommend specialized treatment for his mental and physical aberrations, the court shall order the proper county authorities to bring him before the court at county expense and shall *sentence him* in the manner provided by law.

"(6) If it appears from said report that the department recommends specialized treatment for his mental or physical aberrations, the court shall order the proper county authorities to bring him before the court at county expense and shall *either place him on probation under the provisions of ch. 57* with the requirement as a condition of such probation, that he receive outpatient treatment in such manner as the court shall prescribe, *or commit him to the department* under this section. If he is committed to the department the court shall order him conveyed by the proper county authorities, at the expense of the county to the sex deviate facility, established by the department.

" * * *

"(18) All statutes conflicting with this section are superseded to the extent of the conflict and the provisions of this section shall prevail over conflicting provisions heretofore enacted."

The provisions relating to probation in ch. 57 (referred to in 959.15 (6) above quoted) so far as material, are as follows:

Sec. 57.025 (9) (relating to the municipal and district courts of Milwaukee county) provides as follows:

"When a person is convicted of a misdemeanor or violation of a county or city ordinance the district court or the municipal court may place him on probation as prescribed by section 57.04 (1) for not to exceed 2 years and upon such conditions as the court determines, including the payment of a fine. He may be returned to the court *for sentence* at any time within the probation period. Upon the expiration of such period or before, he may be *sentenced* or discharged or continued under probation subject to like *sentence* or discharge or probation."

Sec. 57.04 (1) and (2) provide in part as follows:

"(1) When a person is convicted of a misdemeanor or of a violation of s. 52.05 the court having jurisdiction (whether a court of record or otherwise) may, by order, withhold sentence or impose sentence and stay its execution and in either case place him on probation for a period not less than one year nor more than 2 years (except that in counties having a population of over 500,000 a shorter minimum period of probation may be ordered) * * *.

"(2) The order shall place the probationer in charge of the department or shall designate some person as probation officer, who shall be entitled to necessary expenses in the performance of his duties, to be paid by the county. * * * The department or officer may, at any time, take the probationer into physical custody to prevent his escape, to enforce discipline for violation of probation and may take the probationer into court and in the latter case, if the court has reason to believe that he has violated the conditions of his probation or is engaging in criminal practices or has formed improper associations or is leading a vicious life, it may revoke his probation and *pronounce sentence, or if sentence has been pronounced, order its execution*, without deduction of the period of probation."

It should be pointed out that the same problem may arise in felony cases, concerning which sec. 57.03 (1) provides as follows:

"(1) If a probationer in its charge violates the conditions of his probation, the department may order him brought before the court *for sentence* which shall then be imposed without further stay or if already *sentenced* may order him to prison; and the term of *sentence* shall begin on the date he enters the prison. A copy of the order of the department shall be sufficient authority for the officer executing it to take the probationer to court or to prison."

What is said here will apply as well in felony cases.

The problem boils down to this: Do the words "under the provisions of ch. 57" in sec. 959.15 (6), together with the references to "sentencing" in the applicable sections of ch. 57, require that a person, who has been found to be a sex deviate following examination by the state department of public welfare and placed on probation by the court, must be sentenced to imprisonment if his probation is revoked, although had he not been placed on probation he would

have had to be committed to the state department of public welfare for treatment pursuant to sec. 959.15?

A subsidiary question is whether the court acted properly in imposing a sentence of imprisonment and staying execution when the defendant was placed on probation. Under ch. 57 there are two ways of granting probation: (1) Imposing sentence and staying execution; and (2) withholding sentence, which will be imposed only if the defendant violates the terms of his probation. In my opinion the court should not have sentenced the defendant to prison before placing him on probation.

When the sex deviate law was originally enacted by ch. 542, Laws 1951, the words "under the provisions of ch. 57" did not appear in subsec. (6). The question then arose, what was meant by the words "place him on probation" as used in that subsection? It was considered by the department, and, so far as I can ascertain, by most of the courts, that the legislature must have meant to provide for probation as heretofore known to the law, including provisions for supervision, discipline and revocation as contained in ch. 57. It was to clarify this that the words "under the provisions of ch. 57" were subsequently inserted in the statute. It is unreasonable to suppose that the legislature intended by those words to substitute an ordinary criminal sentence for the commitment for treatment provided for in the sex deviate law.

The intent and purpose of the sex deviate law has been expressed as follows by the supreme court in *State ex rel. Volden v. Haas*, (1953) 264 Wis. 127, 131, 58 N. W. 2d 577:

"In enacting sec. 340.485 [now 959.15], Stats., the Wisconsin legislature has recognized that sex crimes are frequently committed by persons afflicted with mental aberrations, and has established this means of accomplishing the rehabilitation and adjustment of the offender to society for the protection of the public. There can be no question but that this method of rehabilitation is more desirable, from the standpoint of both the individual and society, than the punishment by imprisonment prescribed in sec. 340.47."

The purpose of the law would not be fully achieved if a person found to be afflicted with mental aberrations were to be subject to ordinary imprisonment merely because he

was first given an opportunity to take outpatient treatment while on probation. The intent and purpose is achieved by committing the probation violator to the department for treatment, as he might have been in the first place if the court had not determined to try him out on probation.

If there is a conflict between the sex deviate law and the probation law, then sec. 959.15 (18) requires that the sex deviate law shall prevail. But in my opinion there is no conflict and the two statutes can be harmonized without resorting to subsec. (18).

It is a mistake to suppose that the word "sentence" must always mean a sentence to pay a fine or to imprisonment for a term of years. The word simply denotes the action of the court declaring to the convict the consequences of his guilt ascertained by his plea or by verdict, usually in a criminal case. Many judicial definitions to this general effect are collected in 38 Words and Phrases 597 *et seq.* It has been held that the term is broad enough to include a juvenile court "commitment" of a delinquent child to the state training school. *State ex rel. Stensby v. McClelland*, (1929) 58 N. D. 365, 226 N. W. 540, 543-544.

It follows that the purpose of the sex deviate law to provide treatment instead of punishment can be achieved by construing the word "sentence" used in ch. 57 to include a commitment to the department pursuant to sec. 959.15. This does no violence to the ordinary meaning of the word "sentence."

WAP

Words and Phrases—Surveying—Engineering surveying services are, but land surveying services are not, engineering service within the meaning of sec. 15.79, renumbered 16.87 by ch. 228, Laws 1959.

March 24, 1960.

JOE E. NUSBAUM, *Commissioner,*
Department of Administration.

You inquire whether surveying services are engineering services within the meaning of sec. 16.87 of the statutes, as renumbered from sec. 15.79 by Ch. 228, Laws 1959.

Sec. 16.87, as renumbered, provides:

"Approval of contracts by engineer and governor; audit. Every contract for engineering or architectural service and every contract involving an expenditure of \$1,000 or more for construction work to be done for, or furnished to the state, or any department, board, commission or officer thereof, shall, before it becomes valid or effectual for any purpose, have indorsed thereon in writing the approval thereof of the state chief engineer or his designated assistant, and the approval of the governor; and no payment or compensation for work done under any contract involving \$1,000 or more, except highway contracts, shall be made unless the written claim therefor is audited and approved by the state chief engineer."

You state that the bureau of engineering of the department of administration has for many years interpreted the phrase "engineering and architectural service" to include surveying services. The state chief engineer states that it has not been his practice to require approval in writing of every contract for surveying services to be furnished the conservation commission, but that in most instances a verbal clearance was required. The governor has not specifically approved such contracts.

The conservation commission utilizes surveying services with reference to lands presently owned and lands to be acquired for various purposes. In some instances surveying services are necessary to determine the boundaries of land to be acquired and for their correct determination and description and for conveyancing. The conservation commission contends that these land surveying services are not

engineering services within the meaning of sec. 16.87. In other instances, surveying is necessary as an aid to construction of buildings, dams, park areas, drainage areas, etc., and the commission in such cases does seek the approval of the bureau of engineering.

83 C.J.S. 920 defines "surveying" as:

"While the word 'surveying' in a general sense means the act or occupation of making surveys, the term is more specifically employed to denote that branch of applied mathematics which teaches the art of determining the area of any portion of the earth's surface, the lengths and directions of the boundary lines, the contour of the surface, etc., and in this sense is defined as meaning the operation of finding and delineating the contour, dimensions, positions, topography, etc., as of any part of the earth's surface, whether land or water, by the preparation of a measured plan or description of any area or other portion of the country, or of a road or line through it. It has been said that carrying a chain or holding a pole or a rod, while necessary to surveying, is not surveying."

The Encyclopedia Americana (Vol. 26, 1959 ed.) designates various types of surveying as geodetic control surveying, topographic surveying, hydrographic surveying, land surveying, mine surveying and engineering surveying. At page 98a, land surveying is defined as:

"Land surveying has to do with the delineation and subdivision of parcels of land and the determination of their areas. A land survey may range from the survey of a small rectangular city lot to the survey and subdivision of large tracts of public land."

At page 98b, engineering surveys are defined as:

"Engineering surveys are surveys of the sites where construction of an engineering nature is to be undertaken; they include the laying out of lines, grades, and detailed dimensions, which serve as guides for construction work. In no other type of surveying is a knowledge of the details of procedure more necessary than in surveying for construction.

"Construction surveys for railroads, highways, canals, transmission lines, etc., differ from other forms of surveying in that there is usually no closed survey and the survey thus fails to be self-checking. * * *"

Engineering is defined in 30 C.J.S. 252 as "The planning and constructing of roads, bridges, railroads, canals, aqueducts, machinery, and other similar works. The art and science by which the mechanical properties of matter are made useful to man in structures and machines."

In *Gray v. Blau*, (1949 Tex. Civ. App.) 223 S.W. 2d 53, 59, the development of the term was expressed as follows:

"* * * From an examination of text books and encyclopedias we learn that engineering as a profession was first so recognized strictly as a military calling. An engineer was a person skilled in making and using engines of war, building fortifications, forts, canals, bridges, dams and other structures needed in warfare. When such skill became useful and was used in non-military life for building dams, waterways, docks, harbors and other large building projects the profession was termed civil engineering to distinguish it from the military. With the advancement of learning and science, civil engineering has been subdivided into many different branches such as mechanical, electrical, mining, hydraulic, petroleum, chemical and many other branches of engineering."

Civil engineers were first required to be licensed in Wisconsin in 1931.

Professional engineers have been licensed by the state of Wisconsin since 1935 and land surveyors were first required to be licensed on January 31, 1956. The question is not whether land surveyors are required to be licensed as professional engineers. They are not so required in Wisconsin as of this date. Sec. 101.315 provides that land surveyors must be licensed and subsection (1) (b) defines land surveying as:

"(b) The practice of land surveying within the meaning and intent of this section includes surveying of areas for their correct determination and description and for conveyancing, or for the establishment or re-establishment of land boundaries and the platting of lands and subdivisions thereof."

Land surveying is surveying for area.

Professional engineers are authorized to do engineering surveying if licensed pursuant to sec. 101.31. They are not exempted from the requirements of sec. 101.315, however, and the Wisconsin registration board of architects and pro-

fessional engineers has taken the position that they must be licensed as land surveyors before they can engage in land surveying. Civil engineers have long been recognized as skilled in high grade surveying involving elevations, locations of structures on areas, and alignment involving location of highways, etc., both as to the horizontal position and vertical position.

The ultimate question to be determined is whether land surveying services are to be included in the phrase "engineering * * * service" as that term is used in sec. 16.87.

Former sec. 15.79 was created by ch. 468, Laws 1929, a time prior to the date either civil engineers, professional engineers or land surveyors were required to be licensed. Ch. 468 was enacted to establish a state purchasing agent, to establish purchasing procedures and to centralize these functions. The act also centralized a great deal of power in the bureau of engineering and state chief engineer.

Sec. 16.85 (1), (2), (3), and (6) (formerly sec. 15.77 (1), (2), (3), and (6)) provide:

"The department of administration [formerly state chief engineer] shall exercise the powers and duties prescribed by ss. 16.85 to 16.92:

"(1) To take charge of and supervise all engineering or architectural services or construction work performed by, or for, the state, or any department, board, institution, commission or officer thereof, including non-profit-sharing corporations organized for the purpose of assisting the state in the the construction and acquisition of new buildings or improvements and additions to existing buildings as contemplated under ss. 14.89, 36.06, and 37.02, except the engineering, architectural and construction work of the state highway commission and the engineering service performed by the industrial commission, department of taxation, public service commission, board of health and other departments, boards and commissions when such service is not related to the maintenance, construction and planning of the physical properties of the state;

"(2) To furnish engineering and architectural services whenever requisitions therefor are presented to him by any department, board, commission or officer;

"(3) To act and assist any department, board, commission or officer requesting such co-operation and assistance, in letting contracts for engineering or architectural work authorized by law and in supervising the work done thereunder;

"* * *

"(6) To approve the appointment, subject to the classified service, of a principal engineer or architect for departments, boards and commissions and when such continuous service is needed. No such engineer or architect shall be employed without the written approval of the director.

Sec. 16.86 (formerly sec. 15.78) provides:

"The engineer or architect employed pursuant to s. 16.85(6) shall have charge and supervision of the work of the department, board, commission or officer by whom employed, subject, however, to the general direction of the department of administration and the immediate direction of the department, board, commission or officer."

Sec. 16.88 (formerly sec. 15.80) provides:

"The cost of services furnished pursuant to s. 16.85 (2) to (4), (6) and (7) shall be charged to and paid out of available funds for the respective projects, whenever in the judgment of the director the charges are warranted and the cost of the services can be ascertained with reasonable accuracy."

Sec. 16.89 (formerly sec. 15.81) provides:

"Construction controlled by chapter 16. No department, board, commission, officer or agent of the state shall employ engineering or architectural services or expend money for construction purposes on behalf of the state, except as provided in this chapter. No major repair or major improvement shall be authorized or undertaken by the board, commission or officer in charge of any institution prior to the completion of a report of the state chief engineer, except in cases of emergency, which shall be first reported to the state chief engineer before any work thereon is commenced."

The conservation commission is not within the excepted state agencies listed in sec. 16.85 (1) and any engineering services which the commission might undertake would probably be "related to the maintenance, construction and planning of the physical properties of the state." Civil engineers employed by the commission formerly did varying amounts of land surveying, but since land acquisitions have increased, such engineers have devoted their time to other

duties and the commission has contracted such jobs out to registered land surveyors.

Sec. 16.87, as renumbered, provides in part:

"* * * Every contract for engineering or architectural service and every contract involving an expenditure of \$1,000 or more for construction work to be done for, or furnished to the state, or any department, board, commission or officer thereof, shall, before it becomes valid or effectual for any purpose, have indorsed thereon in writing the approval thereof of the state chief engineer or his designated assistant, and the approval of the governor;
* * *"

Our supreme court has stated:

"It is fundamental that in construing a statute the words therein are to be given the meaning they commonly were understood to have at the time the statute was passed. * * *"

International Union v. Wisconsin E. R. Board, (1947)
250 Wis. 550, 558, 27 N.W. 2d 875, 28 N.W. 2d
254.

State v. Decker, (1950) 258 Wis. 177, 180, 45 N.W.
2d 98.

A search of dictionaries and encyclopedias fails to disclose that land surveying was considered a part of engineering at the time the statute was passed. Dictionaries and encyclopedias of current date fail to indicate that land surveying is presently considered a part of engineering.

The question whether land surveying is a part of engineering has long been argued even within the engineering profession itself. The interim report, 1956, of the task committee on status of surveying and mapping, American society of civil engineers, stated that land surveying was separate and distinct from engineering; however, the final report of the task committee, dated October 14, 1958, stated that land surveying is engineering and on February 10, 1959, the board of direction of the American society of professional engineers adopted the following policy statement:

"The American Society of Civil Engineers, on the basis of thorough studies carried out by a Task Committee on the Status of Surveying and Mapping, declares that the following four major categories in the field of activity com-

monly designated as surveying and mapping are a part of the Civil Engineering profession:

- I. Land Surveying
- II. Engineering Surveying
- III. Geodetic Surveying
- IV. Cartographic Surveying

"* * *"

Surveying, in connection with construction or engineering surveying services, would certainly be included within the phrase "engineering * * * service" as that term is used in sec. 16.87. However, I am of the opinion that land surveying services are not included within the phrase "engineering * * * service" as that term is used in sec. 16.87.

This conclusion is based on the following reasons:

1. The words engineering service were not commonly understood to include land surveying services at the time former sec. 15.79 was enacted in 1929 and at the time it was renumbered as sec. 16.87 by ch. 228, Laws 1959.
2. The state chief engineer, who from 1929 to the date ch. 228 was enacted in 1959, had the duty of administering the statute, failed to require the written approval of land surveying contracts and did not even require verbal approval in all cases, nor was the approval of the governor secured.

Administrative construction, as evidenced by actual practices followed, is an important consideration in construing a statute. *State ex rel. Lathers v. Smith*, (1941) 238 Wis. 291, 299 N.W. 43. *Universal Underwriters v. Rogan*, (1959) 6 Wis. 2d 623, 95 N.W. 2d 921.

3. The Wisconsin registration board of architects and professional engineers requires professional engineers who wish to engage in land surveying to be also registered as land surveyors.

RJV

Deeds—Mineral Rights—Under secs. 75.14 (1) and (4) a tax deed cuts off a reservation of mineral rights reserved by a former owner of the tax deeded lands.

April 1, 1960.

WALTER DALLAGRANA,
District Attorney,
Florence County.

You state that your county owns considerable land which was acquired by tax deed and that in many cases former owners had reserved mineral rights in such lands. The county now wishes to sell these lands free and clear of any reservation of mineral rights, and you ask whether the ores and minerals reserved to former owners passed to the county under the tax deeds. The answer is, "Yes".

Sec. 75.14 (1) provides, so far as here material, that a tax deed "shall vest in the grantee an absolute estate in fee simple in such land subject, however, to all unpaid taxes and charges which are a lien thereon and to recorded restrictions and redemption as provided in this chapter * * *."

Sec. 75.14 (4) provides that "valid and enforceable restrictions and covenants running with the land, as herein-after defined and limited, * * * shall survive * * * after the issuance of a tax deed * * *. This subsection shall apply to the usual restrictions and covenants limiting the use of property, the type, character and location of building, covenants against nuisances and what the former parties deemed to be undesirable conditions, in, upon and about the property, covenants to contribute to the cost of maintaining private roads, and other similar restrictions and covenants * * *."

In *Union Falls Power Co. v. Marinette County*, (1941) 238 Wis. 134, 298 N.W. 598, the court held that the plaintiff's flowage right over certain adjacent lands was not cut off by a tax deed to those lands on the ground that the flowage right was an easement which was appurtenant to the plaintiff's land and incapable of existence separate and apart from the plaintiff's land. Since the easement is assessed with the land to which it appertains—the dominant estate—the easement operates to diminish the value of the flowed land—the servient estate.

In *Doherty v. Rice*, (1942) 240 Wis. 389, 3 N.W. 2d 734, it was held that a tax deed passes title subject to existing easements and that if an easement were cut off by a tax sale of the servient estate the owner of the dominant estate would be deprived of his property without due process. In short, the tax deed cuts off those interests in land that were, or should have been, taxed against that land.

Sec. 70.32 provides that the value of mineral deposits be considered in assessing real property, but there is no provision in the statutes for assessing mineral rights separately. The last sentence of sec. 70.32 (1), was added by ch. 255, Laws 1957. That sentence provides that when a person other than a Wisconsin governmental unit owns real property in which a Wisconsin governmental unit has retained mineral rights, the value of such rights shall not be considered in assessing the property. In all other cases, the value of mineral rights is assessed to the owner of the fee. Under the principle that a tax deed cuts off those interests in the property which were taxable to the owner of the fee, a reservation of mineral rights, which is not taxed to the holder of the rights, would be cut off by a tax deed. Such a reservation of mineral rights is not an easement which appertains to the owner of adjoining lands and is assessable as part of the dominant estate in those lands.

A reservation by a former owner of the right to enter and explore for, mine and remove minerals can scarcely be said to be an easement appurtenant to some other dominant estate and assessable to such estate. Rather, a reservation of mineral rights is like a reservation of timber rights.

Schmidt v. Almon, (1923) 181 Wis. 244, 194 N.W. 168, held that standing timber must be assessed to the owner of the land and not to the person holding the timber rights, and that the land owner's only relief from the assessment is by his contract with the purchaser of the timber rights. This being so, the principle stated in *Aberg v. Moe*, (1929) 198 Wis. 349, 359, 224 N.W. 132, 226 N.W. 30, is applicable. The court there said:

"* * * the right of every person claiming any interest in the property subordinate to the fee, whether under lease, contract, or otherwise, is extinguished if the property be sold in the exercise of the taxing power. * * *"

EWW

Wisconsin Real Estate Brokers Board—Licensees—REB 5.04 of administrative code probably exceeds the bounds of correct interpretation within the meaning of sec. 227.014 (2) (a) in allowing licensees to draft documents other than the listing contract and offer to purchase in real estate transactions.

April 11, 1960.

Roy E. HAYS, *Secretary-Counsel,
Wisconsin Real Estate Brokers' Board.*

You state that the Wisconsin real estate brokers' board is in the process of revising its administrative rules. One of these rules is REB 5.04, Ch. 5, Wisconsin Administrative Code. It reads as follows:

"REB 5.04 Legal advice or services. The broker or salesman shall not dispense legal advice, directly or indirectly, or act as a public conveyancer, or give advice as to the legal effect of legal instruments, or give opinions concerning the validity of title to real estate or undertake to draw or prepare documents fixing and defining the legal rights of parties to a transaction. The above prohibition however, does not prevent a broker from preparing instruments of conveyance in connection with property in which he has acted as broker, such as deed, mortgage, et cetera. No separate fee can be charged for this service."

In this connection you direct attention to the fact that there has been considerable litigation during recent years in a number of states on the question of whether conveyancing by a licensed broker constitutes the practice of law. You have asked us to examine the above rule with this problem in mind and advise you whether a licensed real estate broker is engaging in the unauthorized practice of law when in transactions where he is engaged as a broker he drafts, without separate fee, the following documents:

1. Listing contract
2. Offer to purchase or earnest money receipt
3. Notices of termination of tenancy
4. Deeds
5. Mortgages
6. Land Contracts
7. Option Agreements
8. Leases

Perhaps some comment as to the permissible scope of administrative rules by licensing agencies is first in order. This subject was pretty well canvassed by the Wisconsin supreme court in the case of *State v. Grayson* (1958) 5 Wis. 2d 203, 92 N.W. 2d 272. There the court was faced with the necessity of passing upon a rule of the state board of chiropractic examiners defining the scope of chiropractic practice. The statute contained no definition of the practice of chiropractic, and the board had no express rule-making power. Nevertheless, the court stated that it would be difficult to conceive of any rule more necessary for the board to adopt, in effectuating the purpose of the chiropractic licensing statute, than one which defines the term "chiropractic", and that the board had such power by virtue of sec. 227.014 (2) (a), which reads:

"(2) * * *

"(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."

The court then went on to hold that the definition adopted by the board's rule was valid since it did not exceed the bounds of correct interpretation.

By the same token here there is a necessity for your board to chart the permissible scope of a real estate broker's activities if the board is to effectuate the purposes of the real estate broker's licensing law, and again the question which must be answered in revising REB 5.04 is whether it exceeds the bounds of correct interpretation, since the board can no more properly carve out a portion of what is the practice of law and blanket it into the real estate broker's charter of authority under his license than could the board of chiropractic examiners by rule capture a portion of the practice of medicine for its licensees.

This brings us to the basic question of what is and what is not the practice of law. Much has been written on this subject in the opinions of the appellate courts as well as in law review and law journal articles. References to the case law may be found in the Decennial Digest "Attorney and Client," Key No. 11, 7 C.J.S. "Attorney and Client" sub-

heading "Practice of Law" at p. 703 and following, 5 Am. Jur. "Attorneys at Law" §3 "What Constitutes Law Practice", 33 Words and Phrases "Practice of Law", and "Unauthorized Practice Source Book" published by the American Bar Foundation in 1958. See also the annotations in 111 A.L.R. 19, 125 A.L.R. 1173, and 151 A.L.R. 781, to the effect that the practice of law is not confined to litigation in the courts but includes the giving of legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are defined or secured.

In Wisconsin the supreme court has long taken the view that it has the inherent or implied power to control the practice of law.

- In re Cannon* (1932) 206 Wis. 374, 240 N.W. 441;
Integration of Bar Case (1943) 244 Wis. 8, 11 N.W.
2d 604;
In re Integration of Bar (1946) 249 Wis. 523, 25 N.W.
2d 500;
In re Integration of Bar (1955) 273 Wis. 231, 77 N.W.
2d 602;
In re Integration of Bar (1958) 5 Wis. 2d 613, 93 N.W.
2d 601.

The concept that the courts have inherent power to control and prevent unauthorized practice of law and are the sole arbiters of what constitutes the practice of law as a corollary of their right to discipline attorneys is generally accepted. Just a few of the cases so holding are:

- People ex rel. Ill. State Bar Ass'n v. Peoples Stock
Yards State Bank* (1931) 344 Ill. 462, 176 N.E.
901;
Opinion of the Justices (1932) 279 Mass 607, 180 N.E.
725;
Rhode Island Bar Ass'n v. Automobile Service Ass'n.
(1935) 55 R.I. 122, 179 Atl. 139;
Bump v. Dist. Court (1942) 232 Iowa 623, 5 N.W. 2d
914;
Gardner v. Conway (1951) 234 Minn. 468, 48 N.W. 2d
788;
In re Baker (1951) 8 N.J. 321, 85 Atl. 2d 505;

Conway-Bogue Realty Investment Co. v. Denver Bar Ass'n (1957) 135 Colo. 398, 312 P. 2d 998;
State Bar Ass'n v. Conn. Bank & Trust Co. (1958) 145 Conn. 222, 140 Atl. 2d 863.

As to the drafting of the specific instruments about which you have inquired there is considerable diversity of opinion with the more recent cases taking a stricter view as to the broker's limitations in preparing documents relating to real estate transactions. The cases are collected in an annotation in 53 A.L.R. 2d 788 and following entitled "Drafting, or filling in blanks in printed forms, of instruments relating to land by real-estate agents, brokers, or managers as constituting practice of law." The cases there discussed are supplemented by additional and later decisions cited in the A.L.R. Blue Book and Advance Sheets of Supplemental Decisions.

As just indicated there appears to be a growing sensitivity to and awareness of the need of protecting the public from the harm that can result from the rendering of legal services by persons unskilled and untrained in the law, who are subject to no restraints as to solicitation and who are unguided by any professional canons of ethics. In a frontier society such as we have had in this country there was very little in the way of a legal profession initially. Here and there could be found some person of clever penmanship and easy volubility who drafted the deeds and wills of the community. As Frederick Jackson Turner, one of America's most significant historians, so ably puts it in "The Frontier in American History":

"Behind institutions, behind constitutional forms and modifications, lie the vital forces that call these organs into life and shape them to meet changing conditions. The peculiarity of American institutions is, the fact that they have been compelled to adapt themselves to the changes of an expanding people * * *."

Reprinted in Vol. 1 of American Issues, p. 662, by Thorp, Curti and Baker (Lippincott 1955).

See also: Vom Baur—"An Historical Sketch of the Unauthorized Practice of Law" Vol. XXIV, No. 3 Unauthorized Practice News as reprinted from Student Lawyer Journal, June 1958;

Resh—"Safeguarding the Administration of Justice from Illegal Practice" 42 Marquette Law Review, No. 4, Spring 1959, pp. 484 and following.

The fact that we started out with minimal requirements to practice law in Wisconsin is illustrated by ch. 152, Laws 1849, which decreed that every court of record should admit to practice any resident of the state of good moral character. See 4 Wis. L. Res. 65. This was typical and the late A. B. Hall of the University of Wisconsin Law School faculty used to tell his students that when he was admitted to the bar in Indiana the only requisites were that the applicant be 21 years of age and of good moral character but that they frequently waived the latter requirement.

Naturally under such conditions no one was likely to become too excited over the drafting of conveyances by laymen. The concept that the law in any particular place and era is likely to be more or less a crystallization of the felt needs of the time can be demonstrated by a very recent case on conveyancing by brokers. The case is that of *Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n* (1957) 135 Colo. 398, 312 P. 2d 998. That was a suit by the Denver Bar Association and the Colorado Bar Association to enjoin licensed real estate brokers from preparing certain instruments relating to real estate such as receipts and options for purchase, contracts of sale and agreements, deeds, promissory notes, deeds of trust, real estate mortgages, releases of deeds of trust and mortgages and giving advice to the parties to such instruments as to the legal effect thereof.

The court had no difficulty in arriving at the conclusion that the drafting of such documents constitutes the practice of law, but concluded that licensed brokers should not be enjoined from drafting the same when done at the request of their customers in connection with transactions being handled by them with no separate charge being made for such service. In reaching its decision the court apparently relied upon what might be termed the frontier doctrine of convenience and necessity discussed above, saying at p. 1007:

"The testimony shows, and there is no effort to refute the same, that there are three counties in Colorado that have no

lawyers, ten in each of which there are only two lawyers; that many persons in various areas of the state reside at great distances from any lawyer's office. The testimony shows without contradiction that the practices sought to be enjoined are of at least 50 years uninterrupted duration, that a vast majority of the people of the state who buy, sell, encumber and lease real estate have chosen real estate brokers rather than lawyers to perform the acts complained of. * * *

"We feel that to grant the injunctive relief requested, thereby denying to the public the right to conduct real estate transactions in the manner in which they have been transacted for over half a century, with apparent satisfaction, and requiring all such transactions to be conducted through lawyers, would not be in the public interest; that the advantages, if any, to be derived by such limitation are outweighed by the conveniences now enjoyed by the public in being permitted to choose whether their broker or their lawyer shall do the acts or render the service which plaintiffs seek to enjoin."

This brings us to the latest appellate decision on the subject, that of *Ark. Bar Assoc. et al. v. Block, et al.*, decided by the supreme court of Arkansas on April 27, 1959, rehearing denied June 1, 1959, 323 S.W. 2d 912.

Here the Bar Association of Arkansas by its officers brought a class action on behalf of themselves and all of the members of the Arkansas Bar against the defendants as members of a class of real estate brokers and salesmen. The facts were stipulated. It was charged that the defendants while acting as brokers used standardized and approved forms of the following instruments and completed them by filling in the blank spaces:

- “1. Warranty Deeds;
2. Disclaimer Deeds;
3. Quitclaim Deeds;
4. Joint Tenancy Deeds;
5. Options;
6. Easements;
7. Loan Applications;
8. Promissory Notes;
9. Real Estate Mortgages;
10. Deeds of Trust;
11. Assignments of leases or rentals;

12. Contracts of Sale of Real Estate;
13. Releases and Satisfactions of Real Estate Mortgages;
14. Offers and Acceptances;
15. Agreements for the sale of real estate;
16. Bills of Sale;
17. Contracts of Sale;
18. Mortgages;
19. Pledges of personal property;
20. Notices and Declarations of Forfeiture;
21. Notices requiring strict compliance;
22. Releases and discharges of mechanics's and materialmen's liens;
23. Printed forms approved by attorneys, including the various forms furnished by title insurance companies to defendants for use by defendants as agents of title insurance companies; and
24. Acting as closing agent for mortgage loans and completing by filling in the blanks therein with factual data such instruments as are furnished to them and are necessary and incidental and ancillary to the closing of the transaction between the mortgagor for whom they act as agent and the mortgagor.
25. Leases."

No separate charge was made by the brokers although they received commissions on the real estate transactions involved.

The court at p. 915 quoted at length from the recent case of *State Bar Assoc. of Conn. v. Conn. Bank and Trust Co.* (Apr. 15, 1958) 145 Conn. 222, 140 A. 2d 863, 870, as follows:

"* * * The practice of law consists in no small part of work performed outside of any court and having no immediate relation to proceedings in court. It embraces the giving of legal advice on a large variety of subjects and the preparation of legal instruments covering an extensive field. Although such transactions may have no direct connection with court proceedings, they are always subject to subsequent involvement in litigation. They require in many aspects a high degree of legal skill and great capacity for adaptation to difficult and complex situations. No valid dis-

tinction can be drawn between the part of the work of the lawyer which involves appearance in court and the part which involves advice and the drafting of instruments. The work of the office lawyer has profound effect on the whole scheme of the administration of justice. It is performed with the possibility of litigation in mind, and otherwise would hardly be needed. * * *

At p. 916 the Arkansas court further stated:

"The Supreme Court of Washington in the case of Washington State Bar Association v. Washington Association of Realtors, 1953, 41 Wash. 2d 697, 251 P. 2d 619, 621, used this language: '* * * Any legal form must be adapted skillfully to the transaction for which it is used, so that it expresses the agreement of the parties and defines their rights and obligations. Doing this is work of a legal nature, and, when it is done by one unqualified, we not only cannot condone its continuance but we must act to prevent it, whether or not it is done for compensation', and in the case of People ex rel. Illinois State Bar Ass'n v. Schafer, 1949, 404 Ill. 45, 87 N.E. 2d 773, 777, the Supreme Court of Illinois said: 'With reference to preparing deeds, notes, mortgages and contracts in real estate transactions, respondent seems to consider those acts as being more or less mechanical and routine requiring no legal knowledge or skill. Many titles are complex and complicated. They have grown more so from time to time and will not likely become less complex in the future. Those who prepare instruments which affect titles to real estate have many points to consider. A transaction which at first seems simple may upon investigation be found to be quite involved. One who merely fills in certain blanks when other pertinent information should be elicited and considered is rendering little service but is acting in a manner calculated to produce trouble. When filling in blanks as directed he may not by that simple act be practicing law, but if he elicits the proper information and considers it and advises and acts thereon, he would in all probability be practicing law. In other words, if his service does not amount to the practice of law it is without material value; but if it is of material value it would likely amount to the practice of law. The public should be protected from falling into the hands of one not skilled in the laws of conveyancing when seeking advice or service having to do with real-estate titles.' "

With reference to the 25 forms listed above the Arkansas court concluded:

"As indicated, we hold that the preparation of any of the instruments here involved, or any other instruments involving real property rights for others, either with or without pay, save and except instrument No. 14 above, constitutes the practice of law in this state. Obviously instruments of 'Offers and Acceptances' contemplate the subsequent preparation of a deed to the property involved, and possible related instruments such as mortgages, leases, easements, etc., to complete the transaction which, we hold, only a licensed lawyer equipped with requisite legal training, knowledge and skill could prepare."

The Arkansas decision is the latest one on the subject and was made with the court having the benefit of all of the prior decisions on the subject both pro and con.

No attempt will be made in this opinion to distinguish those cases which hold that a real estate broker may draw deeds other than to point out that the courts in the more recent cases such as those in Missouri and Michigan have yielded to statutory language in the real estate broker licensing laws which seemed to give brokers such a right. In this connection it should be observed that ch. 136, Wisconsin statutes, relating to the licensing of real estate brokers in Wisconsin purports to confer no such rights on licensees. Even if the statute were otherwise it would very likely be doomed to judicial disapproval because of the fact that the Wisconsin supreme court at all times has very carefully safeguarded its inherent control over the practice of law against attempted legislative encroachments thereon, as pointed out in the *Cannon Case* and *Integration of Bar Cases, supra*.

The Arkansas decision is of considerable significance here because it was deemed controlling by the circuit court for Kenosha County in a decision under date of February 10, 1960, in the case of *State ex rel. State Bar of Wisconsin and Kenosha County Bar Assoc. v. Cunningham-Nield Realty, Inc.* This was a quo warranto action in which the defendant real estate firm was charged with being engaged in the practice of law by holding itself out to the public by its advertising as being competent, qualified and authorized to practice law by rendering legal services encompassed by language to the effect that it took "care of all of the details

like abstracting, opinion of title, mortgage papers, deed and recording."

If the real estate brokerage firm could lawfully perform the services which it advertised there would, of course, be nothing unlawful about the advertising. Hence judgment was granted to the plaintiffs even though it was conceded that the defendant did not actually perform the services which it advertised.

For purposes of this opinion I am accordingly following the Arkansas decision with the result that an administrative rule adopted by the real estate brokers' board which sanctions the drafting of any of the instruments you have mentioned other than (1) the listing contract, and (2) the offer to purchase or earnest money receipt, is improper. The reasons for this view in addition to those already mentioned will be more fully discussed later in the opinion.

The listing contract is a contract between the broker and the seller. Either party to a contract may draw the same without practicing law, since anyone can be his own attorney. Art. VII, sec. 20, Wis. Const.

I have found no cases specifically holding that a broker may not draw an "Offer and Acceptance" or as it is sometimes called "Earnest Money Contract" or "Binder and Deposit Agreement." This document, of course, is to be distinguished from the more formal recordable document known as the "land contract" and which is used on the closing of a time purchase wherein the owner usually agrees to deliver a warranty deed only after a substantial portion of the purchase price is paid over a period of time with interest and with provision for taking back a mortgage from the buyer for the balance of the purchase price.

Reference has been made to the Offer and Acceptance form in several cases. In *Keyes Co. v. Dade County Bar Assoc.* (Fla. 1950) 46 S. 2d 605-606, it was pointed out that if a broker is employed to find a purchaser, he performs his service when he produces a prospective purchaser ready, willing, and able to buy or procures from the purchaser a binding contract.

"* * * So it seems logical and fair that the realtor be restricted in the drafting of papers to those, such as a memorandum, deposit receipt, or the contract, as the case may

be, recording his handiwork—that is, the bringing together of buyer and seller. Thus his activities would coincide with the service he was employed to perform and which, performed would entitle him to his compensation. Once this point is reached, the field is the lawyer's, and he then should do those things necessary to the consummation of the contract.

"While the preliminary arrangement between the buyer and seller is from its nature relatively informal, despite the possibility that any contract drawn by the realtor may become the basis of a suit for specific performance, the services to be performed thereafter are usually highly technical and ones which could not likely be expertly discharged except by a trained attorney * * * the preparation and execution of the instruments effectuating the transfer should be under the lawyer's supervision, if the parties decide that they need expert advice and service."

Similarly in *Commonwealth v. Jones & Robins* (1947) 186 Va. 30, 41 S.E. 2d 720, 727, it was said:

"* * * However, the ordinary and customary business of a real estate broker is to negotiate the sale or purchase of real property. His duty is completed and he is entitled to his commission when he has found a purchaser 'ready, willing and able to take the property at the price and upon the terms fixed by the owner.' [Citing cases] * * * Usually the instruments whereby title passes from the seller to the purchaser are not prepared, executed or delivered until after the title has been examined and approved by the attorney for the purchaser. As a practical solution of the question, it was deemed advisable to permit a real estate broker to prepare simple contracts of sale, options, leases, etc., and to prohibit him from preparing legal instruments whereby the legal title passes from the seller to the purchaser."

There are other cases containing somewhat similar language. The difficulty from the standpoint of protecting the public is that the original sales memorandum or offer and acceptance is very often the most important document in the entire transaction. Lawyers complain bitterly and with justification that by the time the client sees his lawyer it is oftentimes too late to save him from the effect of restrictions, zoning ordinances, etc., because the offer and acceptance usually recites that the conveyance is to be "subject to any and all zoning ordinances, building and other restric-

tions of record affecting the property" to borrow the language from one of the standard forms approved by a local real estate board. The purchaser cannot possibly know what is involved by the use of this language until his lawyer has examined the abstract of title or made other appropriate search, and the buyer is bound nevertheless to what may be a highly improvident contract because of the burdens to which the property is subject under the "booby trap" language quoted above.

I am told that this problem is one which the National Conference of Lawyers and Realtors has been considering for a long time and that various proposals have been suggested whereby the "Offer and Acceptance" could be so drafted as to contain some sort of an escape clause whereby this document could be made subject to the approval of counsel for the parties within some short reasonable period of time.

Until something is worked out along this line in the course of negotiations which are now pending both on the state level in Wisconsin and nationally, I am unable to advise you that there is legal precedent for concluding that a broker may not draft an "Offer and Acceptance," even though technically it would appear that such activity constitutes the practice of law in that the broker who selects and uses such a form is impliedly advising the parties that the instrument which he has selected and filled in is legally sufficient to protect their rights. The instrument he prepares defines, sets forth, limits, terminates, and grants legal rights of one or the other or both parties to the transaction.

Before closing some mention should be made of sec. 256.30 (2) which provides:

"(2) Every person who shall appear as agent, representative or attorney, for or on behalf of any other person, or any firm, copartnership, association or corporation in any action or proceeding in or before any court of record, court commissioner, or judicial tribunal of the United States, or of any state, or who shall otherwise, in or out of court for compensation or pecuniary reward give professional legal advice not incidental to his usual or ordinary business, or render any legal service for any other person, or any firm, copartnership, association or corporation, shall be deemed to be practicing law within the meaning of this section."

One of the reasons for mentioning this statute is that in 1945 the Wisconsin Bar Association, predecessor to the State Bar of Wisconsin, entered into an agreement with the Wisconsin Association of Real Estate Boards, which provided among other things:

"The Realtor shall not undertake to draw or prepare documents fixing and defining the legal rights of parties to a transaction. However when acting as broker, a Realtor may (draw) (use) the purchase contract and such instruments of conveyance as may be required in connection with property in which he has acted as broker, to-wit: such instruments as are contemplated and permitted by Section 256.30 (2) of the Wisconsin Statutes."

This does but little more than to beg the question since it leaves open the query of what "instruments are contemplated and permitted by Section 256.30 (2)." Moreover, having in mind the proposition that only the supreme court can declare what is the practice of law, it is as incompetent for the legislature to define the practice as it is for any group of laymen and lawyers to agree what it shall consist of. While sec. 256.30 is a penal statute the penalties of fine and imprisonment set forth in subsec. (1) are supplemented with the words "in addition to his liability to be punished as for a contempt." Thus the legislature paid its respects to the inherent power of the courts while spelling out how far it was willing to go in assisting the judiciary in curbing the illegal practice of law by penal sanctions. This is in line with the theory that the penal statute represents a proper exercise of the police power and is in aid of the judicial power vested in the courts. See *State ex rel. Junior Ass'n. of Milwaukee Bar v. Rice* (1940) 236 Wis. 38, 53, 294 N.W. 550.

It might be stated here that the state bar has recognized that the 1945 agreement with the realtors is no longer expressive of present day concepts relating to what documents a broker should be permitted to prepare and that at the present moment negotiations are pending between the inter-professional relations committee of the state bar and representatives of the brokers looking towards the redrafting of the 1945 agreement and a drafting committee has been appointed for that purpose.

Another point with respect to sec. 256.30 (2) which calls for attention is the use of the language "for compensation or pecuniary reward." Whether this was meant to modify only the language preceding or the language following as well, reading "or render any legal service" is not exactly clear. In any event "The weight of authority, where such issue has been presented, is that the character of the service and its relation to the public interest, determines its classification,—not whether compensation be charged therefor." *Grievance Committee v. Dean* (1945 Tex. Civ. App.) 190 S.W. 2d 126, 129. Many other cases could be cited both pro and con.

Finally, sec. 256.30 (2) also contains another qualification,—"not incidental to his usual or ordinary business." While this may be important so far as a criminal proceeding under this section is concerned, the language again is not in line with the better reasoned decisions including that of *State ex rel. Junior Ass'n of Milwaukee Bar v. Rice* (1940) 236 Wis. 38, 52, 294 N.W. 550, where the court said that "* * * a lay person may not engage in a business which involves the rendering of 'legal service' and then claim immunity because the giving of professional legal advice was incidental to his usual or ordinary business. Giving legal advice under such circumstances violates the express provision of sec. 256.30 (2), which provides: 'Or render any legal service for any other person, or any firm, copartnership, association or corporation, * * * .'"

CONCLUSION

You are accordingly advised that in revising Rule REB 5.04 it would be well to delete the following language:

"The above prohibition however, does not prevent a broker from preparing instruments of conveyance in connection with property in which he has acted as broker, such as deed, mortgage, et cetera. No separate fee can be charged for this service."

If other language is substituted therefor it is suggested that the broker's drafting services should be limited to the listing contract, and the offer to purchase. While I have some serious misgivings about the latter, as above indicated,

I cannot at this time state that there is adequate precedent for a rule which would preclude its use by a licensed real estate broker or salesman. By way of constructive suggestion it would appear to be in the public interest that the rules should either require or at least suggest that the broker recommend to the purchaser that an attorney be retained to pass upon the marketability of the title and to ascertain that all appropriate steps are taken to properly close the transaction. This has been done elsewhere.

WHR

Assessment—Time—Assessment of property as of “the close of May 1” in sec. 70.10 is not changed by occurrence of May 1 on Sunday.

April 15, 1960.

JOHN A. GRONOUSKI,
Commissioner of Taxation.

In view of the fact that May 1 this year is a Sunday you ask whether property is to be assessed this year as of the close of May 2 instead of as of the close of May 1 which otherwise would be applicable.

Sec. 70.10 provides that all real and personal property is to be assessed “as of the close of May 1 each year.”

Sec. 990.001 (4) (b) provides:

“(4) TIME, HOW COMPUTED.

“* * *

“(b) If the last day within which an act is to be done or proceeding had or taken falls on a Sunday or legal holiday the act may be done or the proceeding had or taken on the next secular day.”

The assessment of property is done by the assessor of the district in which it is subject to taxation placing a valuation thereon for tax purposes. Such action of the assessor is not done on May 1 or at the close of May 1 each year. It is done whenever the assessor reaches his conclusion as to the valuation to be ascribed to the particular property and inserted as the assessed valuation thereof on the assessment

roll. Sec. 70.10 also provides, "Except in cities of the first class, such assessment shall be finally completed before the first Monday in July."

Thus, the assessment of specified property is not an act which is "to be done" on May 1, or at "the close of May 1" to use the language of sec. 70.10. It is an act that the assessor performs when he places the assessed value on that particular property. However, such assessed valuation which the assessor does give to that property is to be the value thereof in point of time "at the close of May 1."

"The close of May 1" in sec. 70.10 is not a limitation upon or statement of the time when the assessor shall perform his act of assessing property. It is only a designation that in fixing the assessed value of the property, the value thereof at that time is to be used and not its value at some other or different time. Therefore, as May 1 is not the last day upon which the act of assessing property is to be done, the provisions in sec. 990.001 (4) (b) are inapplicable and the occurrence of May 1 on Sunday this year does not operate to change the time of assessment of property from "the close of May 1" this year.

HHP

Delegates—Elections—Under sec. 5.38 (3) (e), as amended, two-thirds majority pledged to one candidate may release themselves by vote, regardless of the action of those pledged to another candidate.

April 27, 1960.

HONORABLE GAYLORD A. NELSON,
Governor of Wisconsin.

You have requested an opinion on the operation of the new law governing release of convention delegates via the two-thirds vote.

Sec. 5.38 (3) (e), as amended by ch. 635, Laws 1959, provides as follows:

"(3) Each candidate for delegate, whether he be certified or file nomination papers, shall file with the secretary of

state a declaration of acceptance signed by himself, on or before 5 p.m. on the last day for filing nomination papers. Such acceptance shall be in the form of an affidavit, prescribed by the secretary of state, which shall contain the following information:

*** *

"(e) A pledge, which shall be binding unless after the first ballot at the convention a two-thirds majority of the delegates vote to withdraw and be released from same, in the following form:

"I pledge myself that if I am selected at the delegate election as a delegate to the _____ national party convention, as a delegate pledged to the candidacy of _____ (insert here the name of the candidate for whose candidacy the delegate has been filed) as a candidate for the nomination of the said party for president, that I will, until released by said candidate, vote for his candidacy on the first ballot of the said party convention and vote for his candidacy on all ensuing ballots, provided, however, that if on any ballot said candidate shall receive less than 10 per cent of the total vote cast on such ballot, I am released from this pledge and shall thereafter have the right to cast my ballot according to my own judgment.'"

The question is whether the words "a two-thirds majority of the delegates" means two-thirds of all the delegates or two-thirds of the delegates pledged to a particular candidate.

The legislative history of the 1959 amendment, including the author's instructions to the bill-drafting division of the legislative reference library, casts no light on the problem. There is no specific provision for the contingency of a split delegation; hence there is a latent ambiguity which must be resolved by application of rules of construction.

A statute must be construed sensibly, to avoid an absurd result if possible. *Laridaen v. Railway Express Agency, Inc.*, (1951) 259 Wis. 178, 182, 47 N. W. 2d 727; *State ex rel. Morgan v. Dornbrook*, (1925) 188 Wis. 426, 429, 206 N. W. 55. A statute should be construed to give effect to its leading idea, considering the object sought to be reached by the legislature, and the dominant rule is to discover and give effect to the legislative purpose. *McCarthy v. Steinkellner*, (1937) 223 Wis. 605, 615, 270 N. W. 551, and cases cited.

The evident purpose of ch. 635, Laws 1959, is to give greater independence to the delegates. Formerly delegates could be released only by the candidate himself or by his receiving less than 10 per cent of the total vote cast on any ballot. In case of a split delegation, each group would be independent of the other so far as release from the pledge is concerned. One group might be released by its candidate while the other remained bound. One candidate might receive less than 10 per cent, resulting in release of his delegates, while the other remained in contention and his delegates remained obligated to continue to vote for him.

The amendment must be construed in the light of these facts. When it is considered that each group of delegates is independent of the other so far as concerns release by the terms of the pledge itself, it is unreasonable to suppose the legislature intended them to be considered together in the matter of voting to release themselves.

It would be a practical absurdity to say that delegates bound to candidate A should have a voice in deciding whether to release those pledged to candidate B, and vice versa. If candidate A released his delegates and they constituted two-thirds of the whole Wisconsin delegation, they could vote to release the delegates pledged to candidate B even though a majority of the latter were opposed to being released. Or if two-thirds of the delegates pledged to A wished to release themselves pursuant to the statute, the delegates pledged to B could prevent it. Surely the legislature did not intend such a result.

It is my conclusion that only delegates pledged to a particular candidate have a right to vote on whether to be released from their pledge. A "two-thirds majority of the delegates" means two-thirds of those entitled to vote on the proposition, so that each unit of a split delegation can, by a two-thirds vote, release its own members regardless of the action of the other unit.

WAP

Counties—Corporation Counsel—Under 59.07 (44) county corporation counsel must be charged with duty of acting as legal adviser to the county board, its committees, and county officers. He may not be limited to serving the county welfare department.

May 8, 1960.

C. M. MEISNER,

District Attorney,

Dunn County.

You have requested an opinion on the question whether the county board has authority to employ a corporation counsel and restrict his duties so that he may act only as legal counsel to the county welfare department.

Sec. 59.07 (44) provides as follows:

“59.07 General powers of board. The board of each county may exercise the following powers, which shall be broadly and liberally construed and limited only by express language:

“* * *

“(44) CORPORATION COUNSEL. In counties not containing a city of the first class, employ a corporation counsel, and fix his salary. His employment may be terminated at any time by a majority vote of all the members of the board. The duties of the corporation counsel shall be limited to civil matters and *shall include giving legal opinions to the board and its committees and interpreting the powers and duties of the board and county officers.* Whenever any of the powers and duties conferred upon the corporation counsel are concurrent with similar powers or duties conferred by law upon the district attorney, the district attorney's powers or duties shall cease to the extent that they are so conferred upon the corporation counsel and the district attorney shall be relieved of the responsibility for performing such powers or duties. Opinions of the corporation counsel on all such matters shall have the same force and effect as opinions of the district attorney. The corporation counsel may request the attorney general to consult and advise with him in the same manner as district attorneys as provided by s. 14.53 (3).”

You state that in your opinion the duties of the corporation counsel may not be restricted to serving the county welfare department because the statute requires that he be

the adviser of the board and its committees and interpret the powers and duties of the county board and officers. I agree with your conclusion. The statute is not ambiguous and requires no construction. If a corporation counsel is employed the board may limit his duties in some respects, but he must be charged with the duty of advising the board, its committees and all county officers—not merely the welfare department.

WAP

Board of Regents—Military Science—Board of regents may approve or disapprove determinations of the faculty, but cannot modify its action. Action taken regarding optional military science instruction is ineffective.

May 3, 1960.

CLARKE SMITH, *Secretary,*
The Regents of the University of Wisconsin.

You have inquired whether action recently taken by the faculty of the university of Wisconsin and the board of regents of the university of Wisconsin with respect to optional instruction in military science and tactics is in accordance with sec. 36.15, Wis. Stats., as amended by ch. 328, Laws 1959.

This provision reads:

“All schools and colleges of the university shall, in their respective departments and class exercises, be open without distinction to students of both sexes; and every able-bodied male student therein, except those granted exemption under rules * * * prescribed by the board of regents, shall during his freshman and sophomore years of attendance receive instruction in military science and tactics *and that such instruction in military science and tactics shall be optional to such male students when the faculty so determines and the board of regents approves.*”

So far as is material for present discussion, the faculty action provides:

"That the ROTC programs of any of the armed services should not be compulsory at Madison, Milwaukee or any of the extension centers after September, 1960 except that an ROTC orientation program of no more than six class hours may be required by the faculty of all male freshman students found eligible by the University * * *."

The regent action reads:

"That, subject to the opinion of the Attorney General, the Regents limit their approval, for a trial period of two years, of the Faculty resolutions relating to ROTC (EXHIBIT—attached). Since we strongly believe that the University of Wisconsin must continue to make its traditional contribution to the Armed Services and the national defense, it is understood that the University will revert automatically to compulsory basic ROTC if the number of students entering the third year Army ROTC programs in Madison and Milwaukee in the fall of 1962 falls below 75% of the numbers entering these programs in the fall of 1959."

By the terms of the statute the regents were limited to approving or disapproving the determination of the faculty. What the board did was to *modify* the determination made by the faculty and then approve the determination as so modified by the regents. There was nothing in the faculty action about reverting to a compulsory basis if the enrollment in the third year programs should fall below 75% of the numbers entering these programs in 1959.

Thus the regent action does not comply with the requirements of the statute, and it will accordingly be necessary for the regents to rescind its present action. It would then be incumbent upon the regents either to approve or disapprove the determination made by the faculty. The faculty could recanvass its position also and submit a new determination to the regents for consideration. It is my understanding that the faculty may want to do this now that it has had the benefit of the regents' thought on the subject.

By way of further explanation of the faculty's study of the problem it appears from information which you have furnished with your request that, as is true in so many university programs as well as national defense programs, there have been changes over the years. In the past, the ROTC served primarily as a source of reserve officers, while today it is also the largest source of new officers, exceeding

the combined output of West Point, Annapolis, and the Air Force Academy. Present military policy does not include plans for any substantial expansion of the three service academies. This places a major emphasis upon the training of active duty officers by the colleges and universities.

The former idea of compulsory military drill for freshmen and sophomores at the university as a source of candidates for advanced ROTC training should in the judgment of the faculty be replaced with an ROTC orientation program or guidance course which will be taught not as military science and tactics per se but in accordance with the same standards that characterize regular university courses. The hope is that such a 5 or 6 hour course which would be made compulsory for freshmen men would open up and demonstrate the possibilities of a military career on a professional or reserve basis.

The faculty, subject to regent approval, has always played the leading role in setting up basic requirements for students, e.g., freshman English, physical education, and required credits in foreign language, mathematics, natural science, etc., for particular degrees. The proposal with reference to a guidance or orientation course in national defense is no different in principle. Such a requirement could, no doubt, be made even in the absence of a statute such as sec. 36.15, particularly when it is kept in mind that the proposed instruction will be expository in nature.

Thus there would appear to be no doubt as to the authority of the university to require the proposed course. Whether this be viewed as compulsory "instruction in military science and tactics," which it probably is not, or as a standard academic requirement is not too important.

However, as previously indicated the present regent action is ineffective under sec. 36.15, and it will be necessary to proceed further by rescinding such action. The regents can then approve or disapprove the faculty determination as submitted or the faculty can withdraw its prior determination and submit a new one which the regents may approve or disapprove, but not modify, under sec. 36.15.

WHR

Retirement Fund—Conservation Commission—Inclusion of conservation department employes on pay roll at higher than normal contributions rate under Wisconsin retirement fund does not constitute a designation of such employes as subject to special duty under 66.903 (2) (a) 1.

May 3, 1960.

FREDERICK N. MACMILLIN,

Executive Director, Wisconsin Retirement Fund.

Sec. 66.903 (2) (a) 1. as repealed and recreated by ch. 251, sec. 5, Laws 1959, relating to the Wisconsin retirement fund, provides in part:

“(a) Each participating employe shall make contributions to the fund as follows:

“1. Normal contributions of the following percentage of each payment of earnings paid to any such employe by any participating municipality:

“a. For any employe not otherwise specified, 3 per cent.

“b. For such employes who are * * * conservation wardens, conservation patrol boat captains, conservation patrol boat engineers, conservation airplane pilots, state forest rangers, employe of the conservation commission who are designated by the conservation director as being subject to call for forest fire control or warden duty, * * * 5 per cent, except as provided in c and d of this subdivision.”

The portion of the aforesaid statute which provides that employes who have been designated by the director of the conservation commission as being subject to call for forest fire or warden duty shall have a normal contribution rate under the Wisconsin retirement fund which is higher than that of most employes was added by ch. 478, Laws 1955. This act took effect July 31, 1955. The higher contribution which is made by these employes is matched by the state and results in a proportionately larger accumulation to their credit in the Wisconsin retirement fund for the same period of service.

The director of the conservation commission did not take any action pursuant to ch. 478 until September 19, 1957 at which time he certified to you eight pages of names of departmental employes who qualified for the higher contribution rate under the aforesaid sec. 66.903 (2) (a) 1. It was

unofficially determined at that time that said certification could not be effective retroactively, so the increased contribution rate for the employes named therein became effective on the September, 1957, payrolls.

Between September 19, 1957 and May 26, 1958, the director of the conservation commission made seven additional certifications covering varying numbers of employes. Since May 26, 1958 said director has made 23 more of such certifications. In each of said certifications the conservation director designated the individuals named therein as being subject to call for forest fire control or warden duty.

On May 26, 1958, the director of the conservation commission certified two pages of names and added:

"This certification is in part a duplicate of a certification forwarded to you by letter dated September 19, 1957. It is duplicated at this time inasmuch as it is brought to our attention that your office is unable to locate that page among attachments that lists the seasonal Forest Protection personnel who qualify for the 5% normal contribution rate on earnings."

On October 15, 1958 you inspected the records of the conservation commission in the presence of its director and personnel officer. The carbon copy of the certification of September 19, 1957, which was in the files of the conservation commission was identical with the certification received by the Wisconsin retirement fund. Neither one included the names of any employes classified "Forest Protection—Seasonal."

The director and personnel officer of the conservation commission conceded that there was no evidence that the individuals listed on the two pages submitted on May 26, 1958 had ever been certified to the Wisconsin retirement fund before that date. They also stated that the files of the department contained no other indication that the director had ever designated those employes as being subject to call for forest fire control or warden duty.

The director of the conservation commission then contended that the mere inclusion of those employes on the payroll at the higher contribution rate was sufficient to meet the requirement of sec. 66.903 (2) (a) 1.

It was unofficially determined that said action did not constitute a designation of said employes "as being subject to call for forest fire control or warden duty" and the director of the conservation commission was so advised. However, despite the several conferences about the matter, he declined to make the payroll corrections which would have been necessary to adjust the contribution rate for these employes who had been included on the payrolls at the higher contribution rate for several months prior to May 26, 1958.

When the Wisconsin retirement fund was audited for the calendar year 1958 it was decided that some action should be taken which would make it unnecessary to carry the adjustments for said employes over into 1960. Accordingly, after conferring with your legal advisor in this office, you had checks constituting refunds of the overpayment of normal contributions drawn to the respective employes and transmitted to the director of the conservation commission as the most expeditious way of making the adjustments for the employes and for your records. Said director has declined to distribute said checks to the respective payees thereof until an official opinion has been issued interpreting the provisions of sec. 66.903 (2) (a) 1.

The word "designated", in its well-settled legal sense means "to call by a distinctive title; to point out by distinguishing from others; to express or declare; to indicate by description, or something known and determinate; to point out or mark by some particular token; to show; to point out; to specify." *People v. Dunning*, 98 N.Y.S. 1067, 1070.

The term "designated" may mean marked, made known or pointed out, or it may be the equivalent of "appointed", though it may under some circumstances import less stability of tenure than the word "appointed"; the term "designated" also has the connotation of indicated or set apart for a purpose or duty, such as designation of an officer for a command. *Terminal Const. Corp. v. Bergen County Hackensack River Sanitary Sewer Dist. Authority*, 113 A. 2d 787, 796, 18 N. J. 294.

An employe of the conservation commission who is not in one of the other classifications particularly named in sec.

66.903 (2) (a) 1., is subject to the higher normal contribution rate only if he has been "designated", that is "appointed", "set apart" or "specified" "as being subject to call for forest fire control or warden duty"; and unless it can be shown that he has been so designated in some manner he would not have the right to make a normal contribution at the higher rate for which he would receive a matching contribution from the state. The fact that an employe of the conservation commission has been included on the payroll at the higher contribution rate might be simply the result of an error. If such inclusion was through error, you would not be authorized to accept the higher contribution rate or credit the employe's account with a matching municipality contribution and the employe would not be subject to sec. 66.906 (1) (c) which might require such an employe to retire at age 60 instead of 65.

After the passage of ch. 478, Laws 1955, the conservation director requested his legal advisor in this office to interpret the portion of said act which is the subject of this opinion. On January 6, 1956 said legal advisor issued a law memorandum which read in part:

"The suggestion has been made that since all able-bodied personnel of the department are subject to call in the event of an emergency under sec. 216.14 (1) that all personnel of the department should be so designated.

"This does not appear to be a proper interpretation of the statutes and would in effect read out of the statutes the requirement that only those employes who are 'designated by the conservation director' are to receive a contribution at the rate of 7%. [Since reduced to 5%.]

"The only obvious meaning which can be placed upon this proviso would be an interpretation that it is not intended to apply to those employes who may only be incidentally subject to call, but only to such classes or groups of employes who are commonly subject to call and in fact have been called upon in the past.

"In making your decision under this proviso it would be proper for you to review the experience rating both in the field of emergency conservation warden and in the field of emergency fire warden, and on that basis to establish such criteria as would conform to the experience of your department.

"You could properly establish rules on that basis directed to your division heads for their use in making recommenda-

tions to you as to the particular personnel who would be called upon on the foregoing basis."

The mere inclusion of employes on the payroll at the higher than normal contribution rate would not constitute a compliance with the provisions of sec. 66.903 (2) (a) 1., as construed in said law memorandum.

As indicated above, in all of the other certifications made by the director of conservation, of which there have been at least 30, he has specifically designated the employes named therein as being subject to call for forest fire control or warden duty. The practical construction given to a statute by an administrative agency is entitled to great weight in determining its meaning. *Wisconsin Axe Division v. Industrial Comm.* (1953), 263 Wis. 529, 60 N.W. 2d 383.

While I cannot say that sec. 66.903 (2) (a) 1., requires the director of conservation to certify to you that the employes in question are subject to call for forest fire control or warden duty, I am of the opinion that he must so designate them in a manner which will be clearly reflected on the records of said commission and that their inclusion on the payroll at the higher contribution rate is not a sufficient designation. As a practical matter, it appears to me that the procedure which has been used would be a convenient and desirable one to follow.

JRW

Wisconsin General Hospital—Pro Rating Charges—
Amendment of the statutes by ch. 620, Laws 1959, regarding pro rating of charges discussed. Particular attention given to public welfare cases.

May 9, 1960.

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

You ask several questions which arise in connection with statutory amendments effected by ch. 620, Laws 1959, "relating to administration of Wisconsin General Hospital and its fee system."

I

Your first question is whether all charges for care and maintenance prior to the effective date of ch. 620, Laws 1959 (i.e. before January 1, 1960) shall be collected and pro-rated under the statutes in existence prior to such date. The answer is yes.

The rule was stated in *Dallmann v. Dallmann*, (1915) 159 Wis. 480, 486, 149 N. W. 137:

"In Black on Interpretation of Laws (2d ed.) sec. 168, p. 584, the rule is stated as follows:

"'An amendatory statute, like other legislative acts, takes effect only from its passage, and will not be construed as retroactive or as applying to prior facts or transactions, or to pending proceedings, unless a contrary intention is expressly stated or necessarily implied.'

"These rules are sustained by *Glentz v. State*, 38 Wis. 549, 554; *State v. Gumber*, 37 Wis. 298, 303; *Hurley v. Town of Texas*, 20 Wis. 634; *State ex rel. Ohlenforst v. Beck*, 139 Wis. 37, 40, 119 N.W. 300; *Scheftels v. Tabert*, 46 Wis. 439, 446, 1 N.W. 156; *Laude v. C. & N. W. R. Co.* 33 Wis. 640, 643; *Fullerton v. Spring*, 3 Wis. 667."

See, also, *Ryan v. Chicago & Northwestern R. Co.*, (1899) 101 Wis. 506, 77 N. W. 894.

Where an amendment has the effect of repealing a certain provision, the repealed provision may still be applied with respect to "the accrued results" of its operative tenure. See *Waddell v. Mamat*, (1955) 271 Wis. 176, 181-182, 72 N.W. 2d 763, where it was said:

"The general rule applicable here is stated in 82 C.J.S., Statutes, p. 1010, sec. 435:

"'The repeal of a statute does not operate to impair or otherwise affect rights which have been vested or accrued while the statute was in force. . . .

"'Even where no question of vested rights is involved, the presumption is that repeal of a statute does not invalidate the accrued results of its operative tenure, and it will not be thus retroactively construed as undoing accrued results if not clearly required by the language of the repealing act.'"

See, also, sec. 990.04, Stats.

II

Your second question is:

"Will our department under sec. 46.10, Stats., now become involved in collections for orthopedic care for children, as described in new sec. 36.31 (1) created by Section 2, Chap. 620, Laws 1959."

The answer is no, because the amended law still contains the specific provisions which were recognized in 29 O.A.G. 98 as superseding sec. 46.10.

Except for crippled children admitted to the hospital under the special provisions of secs. 142.03 (1) and 142.08 (1m), your department is charged with collections for children to the same extent as for adults, whether admitted as public or private patients.

With respect to crippled children, ch. 620 contains the following specific provisions which are substantially the same as those contained in the law when the opinion in 29 O. A. G. 98 was issued:

Sec. 142.03 (1) :

"* * * Whenever an application is submitted to a county judge for hospitalization of a crippled child under s. 142.02, the judge shall submit a request for approval on blanks, supplied for the purpose, to the bureau for handicapped children of the state department of public instruction. The bureau for handicapped children shall report its approval of the request to the county judge and to the Wisconsin general hospital. * * *"

Sec. 142.08 (1m) :

"* * * At the time that the application for admittance of a patient to the hospital is submitted to the bureau for handicapped children, the county judge shall include a statement regarding the financial status of the parents or guardian and an agreement signed by the parents or guardian as to the amount of money which the parents or guardian will contribute toward the child's care in the hospital. All money so collected by the county judge or the hospital from parents or guardians shall be transmitted to the bureau for handicapped children of the state department of public instruction other than a state dependent, to be deposited in the general fund. * * * Financial arrangements for hospital care of children admitted by the county judge shall be made

with parents or guardians of such children only by the county judge, or by an agent designated by him, or by the bureau for handicapped children of the state department of public instruction, with the knowledge of the county judge."

Sec. 142.08 (4) :

"The department of administration shall certify to each county one-half the amount paid by the state for each such dependent child patient from that county except state dependents certified to the hospital, less half the amount which has previously been deposited in the general fund by the bureau for handicapped children of the state department of public instruction, from amounts received for the care of such children other than state dependents in such hospital; * * *."

Since the legislature has continued in effect the substantive provisions upon which the above opinion was based, it was presumably satisfied to continue the rule there stated that the "state department of public welfare is not authorized to make collection", at least unless designated as an agent by the county judge.

The fact that the legislature has made the Wisconsin orthopedic hospital for children a part of the Wisconsin general hospital (sec. 36.31 (6), Stats. 1959, created by sec. 2, ch. 620, Laws 1959) does not affect the specific legislative directions for handling collections.

III

Your third question is whether the limitation in sec. 46.10 (2), that the patient's liability shall not exceed "the actual per capita cost" of his maintenance, means only the per capita cost of the "room rate" or the per capita cost of "room rate" and "ancillary services" combined.

When sec. 46.10 (2) is read with the new sec. 142.07 (1), it seems clear that the charge collectible from public patients should be based on the total of charges for room rent and ancillary services.

Sec. 142.07 (1), as created by ch. 620, Laws 1959, reads:

"HOSPITAL CHARGES. (1) Rates. The Wisconsin general hospital shall treat patients so admitted at rates computed in the following manner:

"(a) Room rate; private patients. The superintendent shall establish with the approval of the board of regents a schedule of room rates for private patients which may be adjusted by the superintendent with the approval of the board of regents to meet changes in the cost of operation. As used in this section 'room rates' includes the charges for meals and for ordinary nursing care.

"(b) Room rates; public patients. The board of regents shall establish, with the approval of the board on government operations, a schedule of room rates for public patients.

"(c) Ancillary services. All services provided except those covered by the room rate shall be charged for in accordance with a schedule established and maintained for public inspection by the Wisconsin general hospital.

"(d) Public patients, ceiling. The amount charged back to counties for public patients under pars. (b) and (c) shall not exceed one-half the average daily cost of care for the prior fiscal year. The adjustment of the charges shall be made September 1."

Since the last quoted provision relating to public patients refers to the amount charged to counties "under pars. (b) and (c)", the legislature must have intended both room rates under (b) and ancillary services under (c) to be considered as a part of the charge against a public, as well as a private, patient.

Sec. 142.08, which relates only to "certified or public patients," provides in subsec. (2) that the report to be filed with the department of administration must contain an "itemized" statement of the account against each "such" patient. The requirement of itemization implies the inclusion of all charges covered by sec. 142.07 (1) (b) and (c).

The liability of patients under sec. 46.10 (2) for "maintenance not exceeding the actual per capita cost thereof" was considered in *State ex rel. Racine County v. Schmidt*, (1959) 7 Wis. 2d 528, 545-547, where it was held that a "separate per capita cost is to be computed for each institution covered" for the purpose of "reimbursement of the county or other public treasury for what has been spent for maintenance of a patient." Since the public treasuries are required under sec. 142.08 to spend public funds for ancillary services as well as for room rates, the above purpose would not be served without inclusion of the former in the

"actual per capita cost" of the maintenance of patients in the Wisconsin general hospital.

IV

Your last question is how moneys collected under sec. 46.10, for maintenance of patients in the Wisconsin general hospital, should be allocated between state and county.

The limitation in sec. 142.07 (1) (d) upon the amount which may be charged back to counties will sometimes result in the state's paying a greater portion of the cost of a patient's care than is paid by the county.

If a collection from such a patient is allocated one-half to the county and one-half to the state, the county will be reimbursed in greater proportion than it contributed.

You point out that sec. 46.10 (8) (f) authorizes the department to make "adjustment and settlement with the several counties for their proper share of all moneys collected." If there were no other provision governing allocation of collections for care in the Wisconsin general hospital, a "proper" share would be a share in proportion to the amount contributed.

Sec. 142.08 (1m) contains the following express provision:

"* * * One-half of the amount received for each patient admitted through certification of the county judge for care at the hospital, shall be credited to the county on the account of each such patient * * *."

Such provision may have been included through oversight of the fact that such division would not always represent the correct proportion of the respective contributions. The words of the statute are explicit, however, and if the result does not meet the legislative purpose they can be changed only by amendment.

Under the quoted provisions, your collections from patients admitted through certification, which includes all patients cared for at public charge, must be divided evenly between the state and the county.

BL:RGM

Legislature—Salvage Dealer—Licenses—Discussion of sec. 342.37 (3) as amended. Prior to January 1, 1961 salvage dealer and auto dealer may be licensed at same location. On or after that date, the two operations must be separated.

May 13, 1960.

THE HONORABLE, THE ASSEMBLY.

You have requested that I render my opinion as to the effect of ch. 625, Laws 1959, on ch. 485, Laws 1959, with particular attention to spelling out the rights and duties of motor vehicle dealers and salvage dealers, especially when both such licenses are held by a single party, both now and after January 1, 1961.

Insofar as it is applicable to this question, ch. 485 created sec. 342.37 (4) to read as follows:

"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."

On November 18, 1959, I issued an opinion to the commissioner of the motor vehicle department which construed sec. 342.37 (4), as to require a separation of the business of a salvage dealer and auto dealer where one person holds licenses to carry on both businesses. That opinion said in part:

"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), Stats., 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."

Under that interpretation the salvage dealer could not deal with the public from the same office where he dealt with the

public as an auto dealer since the statute was construed to require two business locations in fact.

Ch. 625 was passed by the senate on December 8, 1959, and was approved by the assembly on December 22, 1959. It reads as follows:

"342.37 (4) of the statutes, as created by chapter 485, laws of 1959, is amended to read:

"342.37 (4) (a) 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, provided that nothing herein shall prohibit licensing and transacting of both businesses at the same location where the salvage operations are physically separated.

"(b) In order that such dealers have sufficient time to make the necessary business arrangements so as to comply therewith, par. (a) is suspended in operation until January 1, 1961, when it shall again take effect."

There is a fundamental rule that in construing statutes, it is necessary to ascertain and give effect to the intention of the legislature, and this rule is even more applicable in dealing with an amendment of a statute such as we are dealing with in the instant case. If possible, the object the legislature had in mind in the amendment should be ascertained as well as the occasion and necessity for the amendment, the defects and the evils in the former law and the remedy provided by the new one. Those construing the statute must adopt a construction which is best calculated to secure the benefits intended. See *State ex rel. Time Insurance Co., v. Superior Court*, (1922) 176 Wis. 269.

Bearing in mind that the amendment was passed subsequent to the opinion which was issued to the commissioner of the motor vehicle department, some reasonable purpose may be assumed for the amendment in relation to that opinion. It seems clear that the legislature intended that the commissioner of the motor vehicle department be permitted to license salvage dealers at the same location where the dealer is licensed as an auto dealer under sec. 218.01 (2), providing the area where the "salvage operations" (wrecking or dismantling of vehicles) are carried on is physically separated from the area where the auto dealer operations are carried on. No other plausible reason can be assigned for the amendment.

Subsec. (b) of sec. 342.37 (4) extends the time for compliance with the requirements that the salvage operations be physically separated from the auto dealer operations until the next licensing year beginning January 1, 1961. This permits the commissioner of the motor vehicle department to grant licenses to combined salvage and auto dealer operations without requiring any physical separation during the 1960 licensing year.

What will constitute physical separation of the two businesses will be a fact question for the commissioner of the motor vehicle department to determine in each instance.

LLD

Register of Deeds—Plats—Subdivision maps meeting requirements of sec. 236.25, and certified survey maps meeting requirements of sec. 236.34 must be accepted for recording by the register of deeds. Discussion of ch. 236 regarding items to be registered.

May 16, 1960.

HENRY FORD,
Director, Regional Planning.

You have asked whether a replat of an existing land subdivision plat or a part thereof is entitled to be recorded without having the first plat or part thereof vacated in accordance with secs. 236.40, 236.41 and 236.42, Stats. You further ask whether it is proper to use a certified survey map in the same manner as the replat.

When submitting your question, you also submitted your definition of a replat. You defined a replat as follows:

"The process of changing, or the map or plat which changes, the boundaries of a recorded subdivision plat or part thereof. The legal dividing of a large block, lot or outlot within a recorded subdivision plat without changing exterior boundaries of said block, lot, or outlot is not a replat."

This opinion is limited to answering the question using your definition of a replat.

Ch. 236 does not provide a procedure for replatting. However, secs. 236.40, 236.41 and 236.42, provide a procedure for applying to the circuit court for the vacation or alteration of all or part of a recorded plat of a subdivision. In view of the fact that a procedure is prescribed for altering plats, it is my opinion that plats cannot be altered by means of a replat. It is a well-settled principle of statutory construction that where a statute designates a method by which a certain fact is to be determined or ascertained, such method is exclusive. This is the maxim of *expressio unius est exclusio alterius*. See *State ex rel. Owen v. McIntosh*, (1917) 165 Wis. 596, 162 N.W. 670 and 15 Marquette Law Review 191, 196. There is nothing in ch. 236 to indicate that the legislature intended a plat could be altered without following a procedure as prescribed in the chapter.

I can find nothing in the chapter that would indicate a certified survey map could be used to accomplish replatting according to your definition. The maxim *expressio unius est exclusio alterius* applies to the recording of a certified survey map just as it does to a replat.

You also ask whether sec. 236.295, which provides for correction instruments, could be used to change boundaries of lots. It is my opinion that correction instruments may not be used to rearrange the boundaries of lots in a subdivision but are to be used for correcting errors in distances, angles, etc., when the recorded plat does not conform to the plat as it exists on the ground.

You indicated that certain registers of deeds were concerned with what duty they had to discover whether or not the proper procedure was followed before a replat or a certified survey map, which had the effect of a replat, could be accepted for recording. There was further indication in your submittal that some registers of deeds were concerned with whether or not they could refuse to record a replat or a certified survey map that had the effect of a replat.

It is my opinion that if a map of a subdivision meets all the requirements of recording a plat as set forth in sec. 236.25, the register of deeds must record it. The same is true for a certified survey map. If the map meets all of the requirements in sec. 236.34, the register of deeds must ac-

cept it for recording. There is nothing in the duties of the register of deeds under sec. 59.51 or in ch. 236 of the statutes which would require or permit a register of deeds to question a map beyond the requirements of secs. 236.25 and 236.34.

AJF

Liens—Public Welfare—Old Age Assistance—When realty subject to old-age assistance lien under sec. 49.26 (5) is sold in administration proceedings, proceeds may not be used for payment of administration and funeral expenses until all personality of decedent has been exhausted. Funeral expenses may not be allowed in excess of \$300 where any debts of the estate are paid from such proceeds.

May 20, 1960.

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

Your questions relate to the extent to which claims for administration expenses, funeral expenses and the like may be satisfied in administration proceedings out of the proceeds of the sale of realty which is subject to an old-age assistance lien under sec. 49.26 (4) to (10), when the decedent also leaves personal property which is not subject to lien.

I

Your first question presents a hypothetical situation in which a recipient of old-age assistance leaves an estate consisting of \$500 in personal property and a homestead subject to an old-age assistance lien. The costs of administration including sale of realty are \$400, and burial expense is \$500.

As a starting point in answer to your question, all personal property must be exhausted toward payment of expense of administration (except cost of sale of realty) and funeral expense before any proceeds of the realty may be applied for such purposes.

As pointed out in 41 O.A.G. 300, the real property of a decedent whose estate is insolvent may be sold by an administrator under Wisconsin statutes, even though the realty is subject to lien. In such a case sec. 49.26 (5) (a) provides that, if a county court orders sale of the realty free of the lien, "the lien shall attach to the proceeds." Only the portion of the proceeds of the sale in excess of the indebtedness secured by lien are available for payment of unsecured debts or costs of administration, except as contrary provision is made by statute.

The personality left by a decedent is primarily liable for costs of administration and payment of unsecured claims. (See 21 Am. Jur. 604.) The rule is reflected in sec. 49.26 (5) (b), as amended by ch. 500, Laws 1959, and provides in part:

*"Such lien shall take priority over any lien or conveyance subsequently acquired * * * except that the amounts allowed by court in the estate of any deceased beneficiary and remaining unpaid after all funds and personal property in the estate have been applied according to law, for administration * * * and for hospitalization, nursing and professional care furnished such decedent during last sickness, not to exceed \$400 in the aggregate, shall be charges against all real property of such decedent upon which an old-age assistance lien has attached, and which in such order shall be paid and satisfied prior to such lien out of the proceeds derived from such real property upon liquidation of such old-age assistance lien."*

The underlined provision requires exhaustion of *all* personal property in the estate before any of the proceeds of the realty may be used for unsecured debts.

Prior to enactment of ch. 425, Laws 1957, the quoted provisions of sec. 49.26 (5) (b) covered funeral expenses as well as expenses of administration and last illness. That enactment removed funeral expenses from the purview of sec. 49.26 (5) (b) and created sec. 49.26 (5) (c), which reads:

"The amount allowed by the court in any such estate for funeral expenses not to exceed \$300 shall be a charge against all real property of such deceased upon which an old-age assistance lien has attached and shall be paid and satisfied before such lien out of the proceeds derived from such real property upon liquidation of such lien."

The above subsection does not expressly provide for exhaustion of the decedent's personality before funeral expenses may take priority over the old-age assistance lien. However, at the same time that ch. 425, Laws 1957, made separate provision for funeral expenses in subsection (c) of sec. 49.26 (5), it created subsec. (d), providing for proportionate deductions of the expenses covered in subsecs. (b) and (c) if proceeds of sale of realty were not sufficient for both, thus indicating the expenses itemized in the two subsections were to be placed on a comparable basis:

"49.26 (5) (d). When the proceeds from such property are insufficient to pay the amounts allowed under par. (b) and the amount of the funeral expenses allowed under par. (c), such amounts shall be reduced proportionately. For the purposes of such reductions the amounts allowed under par. (b) shall be considered in the aggregate."

Since there is no statute to the contrary, all personality would have to be exhausted before either administration or funeral expense might become a prior charge on realty subject to lien. Sec. 49.26 (5) (c) and (d) indicate a legislative intent to place funeral expenses on a basis comparable with those enumerated in sec. 49.26 (5) (b), which is expressly applicable only with respect to amounts remaining unpaid "after all funds and personal property in the estate have been applied according to law."

The expense of sale of the realty, as distinguished from expense of administration, stands in a different category, because of the provision in sec. 49.26 (5) that the county court may "order sale of realty free and clear of the lien and the lien shall attach to the *net proceeds* of such sale after * * * *the costs of sale have been deducted.*"

The opinion was given in 27 O.A.G. 751 that unsecured claims are payable out of personality of an old-age assistance beneficiary in accordance with sec. 313.16 (1).

In specific application of the hypothetical facts which you submit:

1. Actual costs of sale of the realty would be deducted from proceeds of sale.

2. Remaining expenses of administration (not to exceed \$400) are to be paid out of the \$500 personality pursuant to secs. 313.16 (1) and 49.26 (5) (b).

3. The balance of the personality must be applied on the funeral bill pursuant to sec. 313.16 (1).

4. If \$100 is paid on the funeral bill from the personality, the proceeds of the realty are liable for \$200, that is, the difference between \$300 and the amount paid out of the personality.

Where the estate is insolvent and the funeral bill is to be a charge on the realty subject to lien, the statute limits the "amount allowed by the court" to \$300.

II

Your scond question has been partially answered by the first. You ask:

"Assume that the recipient owned real estate and had \$500 in cash. Does this entitle him to an \$800 funeral, or does the \$300 limitation contained in the above provision require that no funds be used from the proceeds of the sale of real estate if the funeral exceeds \$300?"

Funeral expense in excess of \$300 may not be allowed if assets other than the realty are not sufficient to pay them. The limitation in sec. 49.26 (5) (c) is on the "amount allowed by the court", which shall not exceed \$300, not merely on the amount which may take priority over the lien. The limitations are set because of the fact that the court is dealing with insolvent estates. If it were not, there would be no occasion for altering the ordinary rules of preference by giving any portion of an unsecured claim priority over a secured one.

BL

Highways—Public Utilities—Sec. 59.965 (5) (h) which authorizes partial reimbursement of utility lines because of expressway construction does not authorize payment for value of unused life of utility lines abandoned, but not required to be moved because of expressway construction.

June 2, 1960.

C. STANLEY PERRY,
Corporation Counsel,
Milwaukee County.

You have requested an opinion concerning the extent to which the county of Milwaukee is required to reimburse public utilities for removing their facilities in existing public owned lands because of expressway construction.

In this state, utility facilities occupy existing street and highway and other public property at sufferance so that when public need requires, the utility must move its facilities at its own expense. See sec. 182.017. *Milwaukee E. R. & L. Co. v. Milwaukee*, (1932) 209 Wis. 656, 245 N.W. 856. In 1955, however, the legislature allowed concessions to utilities in counties of over 500,000 population having county expressway commissions, where relocation of their lines was made necessary by "expressway construction". Pertinent parts of the law read as follows:

Sec. 59.965 (5) (h) 1, 2 and 3:

"(h) *Private occupancy of streets; relocation.* 1. All persons other than those mentioned in par. (g) lawfully having buildings, structures, works, conduits, mains, pipes, wires, poles, tracks or any other physical facilities in, over or under the public lands, streets, highways, alleys, parks or parkways of the county, or of any town, village or city therein, which in the opinion of the commission in any manner interfere with the construction of any expressway project or the relocation or maintenance thereof, shall upon order by the commission promptly so accommodate, relocate or remove the same as may be ordered by the commission so as to remove such interference.

"2. Whenever the commission proposes to submit an expressway project to the county board for its approval it shall give notice thereof to each privately owned public utility or other person affected by such project indicating in such notice the action which it desires such utility or person to take, and such utility or person shall within 90 days after

receipt of such notice furnish to the commission its plan to comply with such request.

"3. When the utility pursuant to the commission's order proceeds with the work in a manner satisfactory to the commission, the county by the commission shall pay the utility from expressways funds upon monthly estimates of work performed and submitted for payment by the utility, two-thirds of the net cost incurred by the utility in performing such work, after deducting reasonable and fair credits for items salvaged, for any betterments made at the option of the company and for the value as carried on the utility's books, of the used life of a facility retired from use if the service life of the new facility will extend beyond the expectancy of the one removed. The county shall not be liable to pay any value whatever for utility facilities where use of the same has been abandoned for reasons other than the construction or proposed construction of an expressway project even though the installation is intact."

[Note:

I note here that the federal highway act allows reimbursement for the cost of "relocation" of utility facilities necessitated by the construction of a project on federal-aid primary or secondary system and on the interstate system. Cost of relocation is defined in the federal act to include "the entire amount paid by such utility properly attributable to such relocation after deducting therefrom any increase in the value of the new facility and any salvage value derived from the old facility." See Title 23, U.S. Code, §123. The act has been interpreted by the federal government to include political subdivisions of the state as being eligible for reimbursement. No reimbursement, however, is made except as follows:

"When the state submits a project for approval, which proposes federal participation in the cost of relocation of utility facilities located on an existing public highway right-of-way, it shall certify that payment to the utility does not violate state or local law or a legal contract between the utility and the state or its subdivisions." See Regulations of Federal Aid for Highways—Feb. 21, 1957, U.S.C. Title 23 "Highways".

Undoubtedly, one of the objects of passing the state act allowing payment to utilities was to take advantage of federal reimbursement. On advice of members of my staff, I understand that the highway commission has refused to cer-

tify to the federal government costs of reimbursements of utilities for the value of the unused life of a utility line abandoned because of expressway construction, but not relocated. Expressway construction has necessitated the removal of a large number of buildings in Milwaukee county and as a result, the utility lines serving these buildings were no longer needed, although the expressway construction itself, did not necessitate the removal or relocation of the utility line.

You have written an opinion to the expressway commission of Milwaukee county wherein you take issue with the advice of the members of my staff. You seek to have the highway commission certify the value of unused life of such utility lines as reimbursable through federal funds.

The only authorization for reimbursement of utilities is found in the county expressway law. Here, actual payment to utilities is made only by your county. State funds never have been authorized for this purpose.]

Authorization of payment is in derogation of the common law of this state. Therefore, the law must be strictly construed in favor of the public corporation and not to the claimant for damages. See *Sullivan v. School District No. 1, City of Tomah*, (1923) 179 Wis. 502, 191 N.W. 1020; *Necedah Mfg. Corp. v. Juneau County*, (1932) 206 Wis. 316, 237 N.W. 277, 240 N.W. 405, 96 A.L.R. 4; *Young v. Juneau County, Id.; Pearson v. School District No. 8. Town of Greenfield*, (1911) 144 Wis. 620, 129 N.W. 940.

Referring to the Wisconsin statute above quoted, the utilities are required to "accommodate, relocate or remove" the facility as ordered by the expressway commission "so as to remove such interference". (Emphasis supplied).

The utility is then paid two-thirds of the net costs incurred "in performing such work." (Emphasis supplied). The statute then allows for deductions for salvage and betterment.

Up to this point, no mention has been made for payment of an abandoned line. I note that the statute refers to estimates submitted "of work performed" and payment to the utility for costs incurred in performing such work. There is certainly no indication of any intent to pay for abandoned lines in the statute as so far discussed, although necessary

work performed to abandon the line such as disconnection and capping would be a proper subject for payment. You point out however, that by amendment to the laws in 1957, the following sentence was added to sec. 59.965 (5) (h) 3.: "The County shall not be liable to pay any value whatever for utility facilities where use of the same has been abandoned for reasons other than the construction or proposed construction of an expressway project even though the installation is intact." Ch. 329, Laws 1957, Bill 392, A.

It is your position that "if the expressway law, as it stood prior to such 1957 session law, had not intended payment or abandonment, there would have been no need for the passage of the limitations in Chap. 329, Laws of 1957."

I do not agree with your position. There is no presumption of a change in the common law rule upon the subject, except as such intent appears by clear and unambiguous language. It is rather to be presumed that no change in the common law was intended, unless the language employed clearly indicates such an intention. *Kappers v. Cast Stone Construction Co.*, (1924) 184 Wis. 627, 200 N.W. 376; *Sullivan v. School District No. 1, supra*.

The amendment states that money cannot be paid to reimburse utilities when their lines have been abandoned for reasons other than expressway construction, but neither in the amendment nor the original act is there a positive statement that the abandoned lines can be paid for. The negative statement from which you seek to derive legislative intent is in my opinion insufficient because "Legislatures by a later act cannot establish or effect construction of a former act." *Moorman F.F.G. Co. v. Industrial Comm.*, (1942) 241 Wis. 200, 208, 5 N.W. 2d 743; *Northern Trust Co. v. Snyder*, (1902) 113 Wis. 516, 530, 89 N. W. 460; *Maus v. Bloss*, (1954) 265 Wis. 627, 62 N.W. 2d 708.

It is my opinion that the act, as originally passed in 1955, makes no provision of payment for an abandoned line, nor can I find any implication that such was the intent of the legislature. It is my further opinion that the 1957 amendment cannot be used to determine the intent of the previous legislature and is insufficient to indicate any change of legislative intent.

REB

Register of Deeds—Fees—Words and Phrases—Register of deeds is not a "local registrar" entitled to fees provided by sec. 69.24 (4).

June 6, 1960.

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

You state that pursuant to sec. 69.24 (4) (b) the state registrar of vital statistics has certified to the county clerk the amounts due local registrars, and has included therein certain amounts allegedly due the register of deeds. Referring to the opinion in 31 O.A.G. 334 you inquire whether the inclusion of fees to the register of deeds in this certificate is proper. My answer to your question is "no." For the following reasons it is my opinion that the register of deeds is not a local registrar entitled to fees under sec. 69.24 (4), which provides as follows:

"(4) (a) For each complete certificate of birth, fetal death, death and marriage forwarded to the register of deeds or the state registrar as the case may be, in accordance with the provisions of this chapter, including any copies retained in cities the local registrar shall be paid the sum of 25 cents. For each fetal death or death certificate collected by the village clerk and forwarded by him to the city health officer or register of deeds, as the case may be, and for which he has issued a burial or removal permit, the village clerk shall be paid the sum of 25 cents by the county.

"(b) The state registrar shall annually certify to the county clerk of the several counties the number of births, fetal deaths, deaths and marriages registered, with the names of the local registrars and the amounts due each at the rates fixed herein for payment by the county treasurer."

The opinion in 31 O.A.G. 334, dated October 7, 1942, construed sec. 69.53 (6), Stats. 1941, to the effect that the state registrar was not required to certify fees of registers of deeds to the county treasurer. However, this opinion must be read in the light of the law as it existed at the time it was written. Sec. 69.05, Stats. 1941, provided as follows:

"For the purposes of this chapter, the state shall be divided into registration districts as follows: Each city, incorporated village and town shall constitute a primary

registration district. The health officer of the board of health in cities and the clerk of each town and incorporated village shall be the local registrar of vital statistics."

Sec. 69.53 (1), (5) and (6), Stats. 1941, provided as follows:

"(1) For each complete certificate of each birth, death, marriage or accident forwarded to the state registrar, together with the copy thereof transmitted to the register of deeds in accordance with the provisions of sections 69.01 to 69.54, inclusive, including the copy retained in cities and villages, the local registrar shall be paid the sum of twenty cents.

"* * *

"(5) All amounts payable to registrars under provisions of this section shall be paid by the treasurer of the county in which the registration districts are located upon certification by the state registrar.

"(6) The state registrar shall annually certify to the treasurers of the several counties the number of births, deaths, marriages and accidents registered, with the names of the local registrars and the amounts due each at the rates fixed herein."

Clearly under the foregoing statutes the register of deeds was not a local registrar entitled to have his fees certified pursuant to sec. 69.53 (6), Stats. 1941.

However, an important change in the method of collecting vital statistics was brought about by ch. 503, Laws 1943, and some additional modifications were made by ch. 173, Laws 1945, so that at the present time there are no municipal registrars outside of cities, and the register of deeds' office is the primary filing office for vital statistics reports covering events occurring in towns and incorporated villages. Sec. 69.09, Stats. 1957, provides as follows:

"For the purposes of this chapter each county shall be a primary registration district for villages and towns and the registers of deeds' office shall be the place for filing. The primary registration district for any city shall be the city and the office of the local health officer the place for filing. The local registrar shall be the health officer or commissioner of health in cities."

It is therefore arguable that under the present statutes the register of deeds is the "local registrar" for the towns

and villages in the county, while the city health officer is the local registrar for his city. However, reference to other sections of the statutes shows that the term "local registrar" is not used in a way which include the register of deeds. Thus, sec. 69.06 (2) requires the state registrar to "carefully examine the certificates received from the local registrars and registers of deeds." Sec. 69.07 (2) requires "all local registrars and registers of deeds" to aid the state registrar in investigating irregularities and violations of the law. Sec. 69.08 provides for the collection of statistics by the state board of health, "if it is impossible to obtain through the local registrars and registers of deeds complete reports." Sec. 69.13 provides that "the registers of deeds and local registrars shall enforce this chapter, in their respective districts * * *." Sec. 69.23 (1) and (3) provide for the furnishing of certified copies by "the state registrar, register of deeds or the local registrar of any city."

Thus, it is apparent that the term "local registrar" as used in sec. 69.24 (4) does not include the register of deeds even though, like the city health officer, he is required to perform the same service (forwarding copies to the state registrar, secs. 69.10 and 69.18 (1)) for which sec. 69.24 (4) provides a fee of 25 cents to be paid to the "local registrar" by the county treasurer.

It is probable that the reason for omitting the register of deeds from the provision for the payment of fees is that a great majority of them are on a straight salary basis. But be that as it may, the rule is that an officer is entitled to no fees except those specifically provided for by statute. 31 O.A.G. 334, 336.

WAP

Public Service Commission—Hartor Lines—Public service commission may not approve bulkhead lines or pierhead lines established under secs 30.11 and 30.13 where effect would violate trust wherein state holds such lands for the public use.

June 9, 1960.

EDWARD T. KAVENY, *Secretary,*
Public Service Commission.

You state that a port authority desires to extend harbor lines in the vicinity of Green Bay and particularly upstream in the Fox river. The words "harbor lines" appear in the federal statutes relating to harbors (33 U.S.C.A. ss 403, 404) but do not appear in state laws such as ch. 441, Laws 1959, which creates Ch. 30, Stats. You note that establishment of a harbor line under federal statutes does not obviate the need for compliance with state law. The proposal, which you call to our attention, is to establish a harbor line in the Fox river. The line is to be about 3,500 feet long and is to be some 500 feet out from the present shoreline. The riparian owners would then fill in this area of river bed out to the new harbor line and use the area thus created for industrial and harbor purposes. Assuming that this would be permitted by federal authorities, the question arises whether the state law would permit this to be done. That is, could such a line, authorized as a harbor line under federal statutes, be authorized as a bulkhead line under state law?

Referring to ch. 441, Laws 1959, which creates Ch. 30, Stats., you ask:

"(1) Do the provisions in the subsection referred to (Section 30.11) (2) which state that bulkhead lines shall conform as nearly as practicable to existing shore line require that the bulkhead line conform as nearly as practicable to the existing shore line in light of the configuration of the shore, or does it mean that it should conform as nearly as practicable to what would seem reasonable under all the circumstances involved, including the desires of the riparian owners or others desiring bulkhead line?

"(2) Is it legally possible to approve the establishment of a 'bulkhead line' under Section 30.11 (2) where the result is to 'make land,' including any land made by filling to smooth out the existing shore line, bearing in mind that the State

holds title to the beds of underlying navigable waters in trust for all of its citizens subject only to the qualification that a riparian owner on banks of a navigable stream has qualified title in the streambed to the center thereof? *Muench v. Public Service Comm.*, supra. Could a 'pierhead line' be established under Section 30.13 (2) where the result is to 'make land?' "

Ch. 441, Laws 1959, repealed and recreated Ch. 30, Stats. Old Ch. 30 referred to shore lines and dock lines. New Ch. 30 eliminates the use of those terms. Under the new statute bulkhead line seems to be the equivalent of shore line under the old statute, and pierhead line is the equivalent of dock line. We are here chiefly concerned with what is meant by bulkhead line.

The term bulkhead line is not specifically defined in new Ch. 30. A satisfactory definition of that term is not found in the federal harbor law previously referred to, nor in Words and Phrases and legal dictionaries. However, several sections of this new law contain provisions from which a workable definition can be devised. The following references are to ch. 441, sec. 2, Laws 1959, which creates Ch. 30, Stats. Sec. 30.04 reads:

"SHORE AND DOCK LINES NOT INVALIDATED. A shore line lawfully established prior to [the effective date of this revision] is deemed to be a lawfully established bulkhead line subsequent to such date. A dock line lawfully established prior to [the effective date of this revision] is deemed to be a lawfully established pierhead line subsequent to such date."

Sec. 30.11 reads:

"ESTABLISHMENT OF BULKHEAD LINES. (1) WHO MAY ESTABLISH. Any municipality may, subject to the approval of the public service commission, by ordinance establish a bulkhead line and from time to time re-establish the same along any section of the shore of any navigable waters within its boundaries.

"(2) STANDARDS FOR ESTABLISHING. Bulkhead lines shall be established in the public interest and shall conform as nearly as practicable to the existing shores.

"(3) * * *

"(4) RIPARIAN RIGHTS PRESERVED. Establishment of a bulkhead line shall not abridge the riparian rights of ri-

parian proprietors. Riparian proprietors may place solid structures or fill up to such line."

Sec. 30.13 (3) reads:

"ESTABLISHMENT OF PIERHEAD LINES. Any municipality authorized by s. 30.11 to establish a bulkhead line may also establish a pierhead line in the same manner as it is authorized to establish a bulkhead line, except that if such municipality has created a board of harbor commissioners, the municipality must obtain the approval of such board to the establishment of the pierhead line in addition to the approval of the public service commission. Any pierhead line established by a municipality shall be established in the interest of the preservation and protection of its harbor or of public rights in navigable waters."

From the above statutes it is apparent that bulkhead line means shore line or property line in the sense of highwater mark, the line dividing the private property of the riparian owner from the public's property in the bed under the water. Of course, it is fundamental that the state has unqualified title to lake beds and a qualified title to river beds. In the view we take of this matter it would make no difference whether we were dealing with a lake or river. If a new bulkhead line is established, as in your example, 500 feet out into the water, this has the effect of granting title to this part of the bed under the water to the riparian, who then can fill out to the bulkhead line and make use of the filled area for private purposes. His riparian rights to access to the water are preserved to him. This gives him exclusive ownership and use of what was formerly lake bed or river bed, to the possible future injury of public interests, and in violation of the public trust in which the state holds title to lake beds and a qualified title to river beds for the public use. It will be noted that sec. 30.11 (2), Stats., 1959, requires that bulkhead lines be established in the public interest, but this does not authorize the public service commission, in effect, to give away to private individuals substantial portions of the lands held in trust for the public, on the theory that the public interest will not suffer. This trust doctrine was thoroughly discussed in a prior opinion of this office in 39 O.A.G. 230.

For many years it has been the position of this office that the state can go no further in this direction than to transfer

such lands to a municipality for public purposes such as a harbor facility, a public building, or a public park. This seems to be the view of the supreme court, *Milwaukee v. State*, (1927) 193 Wis. 423, 214 N. W. 820; *State v. P.S.C.*, (1957) 275 Wis. 112, 81 N. W. 2d 71; *Madison v. State*, (1957) 1 Wis. 2d 252, 83 N. W. 2d 674; *Muench v. Public Serv. Comm.*, (1952) 261 Wis. 492, 53 N. W. 2d 514. It has also been the position of this office that, where a shore line was to be established pursuant to sec. 30.02, Stats., 1957, the new shore line should not create any substantial new land areas out of what was formerly the bed under the water. Under this statute, a shore line could be straightened or changed slightly, both inward toward the land or outward toward the water, for such purposes as protecting the banks from the action of water or ice, to provide better docking facilities, or better recreational facilities for swimming, fishing, hunting or boating and the like, or to eliminate snags or small inlets which produce stagnant water, unwholesome odors or unhealthy conditions, and to promote conservation values and provide a more attractive appearance. However, there is no authority to use this device to create any substantial parcels of usable land which become the property of the riparian owners. All that is permitted is to modify the shore line itself to provide a more usable shore with a more satisfactory appearance. Since bulkhead line under the new law is the equivalent of shore line under the old law, the same principles would apply in determining where and how a bulkhead line may be established.

To answer your specific questions, the provisions of sec. 30.11 (2), Stats., 1959, which state that bulkhead lines shall conform as nearly as practicable to existing shore lines, require that the bulkhead line conform as nearly as practicable to the existing shore line in light of the configuration of the shore. This statute does not mean that a bulkhead line may conform as nearly as practicable to what would seem reasonable under all the circumstances involved, including the desires of the riparian owners or others desiring a bulkhead line, since this latter statement does not give sufficient recognition to the principle that the state cannot transfer, to private interests, property which it holds in trust for the public.

A bulkhead line should not be approved where the result is to make any appreciable amount of new, usable, saleable upland where the lake bed was before. That is, the total amount of the area of the upland adjacent to the water is not to be increased to any substantial extent at the expense of a decrease in the area of the lake bed. The reason for this is that any other answer can result in the appropriation, to private riparian owners, of land which is held by the state in trust for the people, and such land can only be transferred by the state to a public body, such as a municipality, for public purposes. If the result of a bulkhead line, so established, is to make it possible to utilize submarginal upland and convert such upland into usable, saleable land, that is a desirable result. The thing that may not be done is to make land by converting lake or river bed into upland.

Likewise, a pierhead line cannot be established under sec. 30.13 (2), Stats., 1959, where the result is to make land, for the same reasons as given above.

The difficulty involved in trying to give a workable answer to your questions arises because the location of bulkhead lines involves what is essentially a question of fact. This problem is one to be determined by the public service commission in each case upon the particular facts and circumstances which are met therein.

AH

Counties—Mineral Rights—Under secs. 75.14 and 75.521 a tax deed and a judgment in a foreclosure in rem proceeding, respectively, cut off the reservation of mineral rights by a former owner of the lands involved.

June 22, 1960.

WARREN WINTON,
District Attorney,
Washburn County.

You have requested my opinion as to how mineral rights in county-owned lands acquired by tax deed or by foreclosure in rem may be secured to the county.

In an opinion to the district attorney of Florence county, dated April 1, 1960, it was stated that when a county acquires title to lands by a tax deed issued pursuant to sec. 75.14, the tax deed cuts off any mineral rights reserved to former owners of the property. I am enclosing a copy of that opinion herewith.

Similarly, where the county obtains title to land through the foreclosure in rem proceeding provided by sec. 75.521, any prior reservation of mineral rights is cut off.

Sec. 75.521(8) provides for the entry of a judgment in default cases under the foreclosure in rem proceeding and expressly provides that such judgment shall order and adjudge

"* * * that the county is vested with an estate in fee simple absolute in such lands, subject, however, to all unpaid taxes and charges which are subsequent to the latest dated valid tax lien appearing on the list specified in subsection (3) (b) of this section and to recorded restrictions as provided by section 75.14 (4) and all persons, both natural and artificial, including the state of Wisconsin, infants, incompetents, absentees and nonresidents who may have had any right, title, interest, claim, lien or equity or redemption in such lands, are forever barred and foreclosed of such right, title, interest, claim, lien or equity of redemption. * * *"

Sec. 75.521(13) (b) contains a virtually identical provision applying to the judgment entered in any contested foreclosure in rem proceeding.

The recorded restrictions to which the title of the county is subject are those specified in sec. 75.14(4), and do not include a reservation of mineral rights, as pointed out in the enclosed copy of the opinion dated April 1, 1960.

It is therefore my conclusion that when the county acquires title to lands either by a tax deed issued pursuant to sec. 75.14 or by a judgment in a foreclosure in rem proceeding, under sec. 75.521, the title of the county is not subject to reservations of mineral rights by former owners.

EWW

Industrial Commission—Truck Rentals—Discussion of sec. 103.50 as amended by ch. 526, Laws 1959, relative to certification of actual cost rate or prevailing rental rate when either is greater than the other.

July 19, 1960.

MATHIAS F. SCHIMENZ,
Chairman, Industrial Commission.

You have requested my opinion on the proper interpretation of sec. 103.50, Stats. as amended by ch. 526, Laws 1959, with respect to the certification by the industrial commission to the highway commission as to the prevailing truck rental rate in connection with contracts let by the highway commission. You point out that in one part of this section the industrial commission is required to certify the *prevailing* truck rental rate and that in another part the intent of this provision is declared to be "to prevent a truck driver who owns the equipment he operates from being required to accept less than the *actual* cost of operating his equipment."

The pertinent portions of sec. 103.50, as amended by ch. 526, Laws 1959, as they relate to your question, read: (The language added by Ch. 526 is italicized.)

"103.50 (2) 'Prevailing hours of labor' means the hours of labor per day and per week worked within the area by a larger number of workmen of the same class than are employed within the area for any other number of hours per day and per week. In no event shall the prevailing hours of labor be deemed to be more than 8 hours per day nor more than 40 hours per week. 'Prevailing wage rate' means the rate of pay per hour paid to the largest number of workmen engaged in the same class of labor within such area, *including rental rates for truck hire paid to those who own and operate the truck*. In no event shall the prevailing wage rate for any class of labor be deemed to be less than a reasonable and living wage, *nor shall truck rental rates established pursuant to this provision be subject to the provisions of sub. (1) relating to hours worked in excess of the prevailing hours when operated in excess of 8 hours in any one day or 40 hours in any one week*. 'Area' means the locality from which labor for any project within such area would normally be secured.

"(3) (b) *The commission shall inform itself of the nature of the equipment furnished by truck drivers who own and*

operate trucks on such contract work, with a view to ascertaining and determining minimum rates for the drivers and equipment. In order to protect the minimum wage rates established by the commission from evasion through unrealistic rates paid truck drivers for equipment owned and operated by them, the commission shall establish minimum rates for the drivers and equipment owned and operated by them. It is the intent of this provision to prevent a truck driver who owns the equipment he operates from being required to accept less than the actual cost of operating his equipment, thereby reducing the scale of wages established by the commission.

“(4) The industrial commission shall prior to May 1 of the current calendar year certify to the highway commission the prevailing hours of labor and the prevailing wage rate for all such classes of laborers and mechanics in each area. * * *

Your specific question is whether the industrial commission, “* * * must in all cases certify the *prevailing* truck rental rate, the *cost* of operating the truck, or the higher of the two?”

As a matter of clarification, the reason for the changes made by the 1959 legislature is that it was previously possible for an owner-operator of a truck to “rent” his truck and himself at a low hourly rate. He could state what portion of this rate would be his wage. This, of course, would be at the prevailing hourly rate. The balance of the hourly rate, after deducting his wage, would be the rental rate for the cost of operating his truck. This balance could be lower than the actual cost of operating his truck. Since actual operating costs are constant, or at least in the final analysis inescapable, the net effect of the owner-operator’s low rate is that he receives less than the prevailing hourly wage rate for his own labor.

Sec. 103.50 (3) (a) and (4) require the industrial commission to determine and certify to the highway commission the prevailing wage rate for classes of labor. Sec. 103.50 (2) and (3) (b) are explanatory material. In order to carry out the legislative directive contained in sec. 103.50 (3) (a) and (4), the language of sec. 103.50 (2) and (3) (b) must be considered.

With respect to your question, the term “prevailing wage rate,” insofar as truck rental rates are concerned, is ex-

plained by the legislature in sec. 103.50 (2) and (3) (b). Considering this, we must conclude that the prevailing hourly rate for truck rental cannot be lower than the actual cost rate of operating the truck plus the wage rate for the operator of the truck.

The conclusion is supported by two rules of statutory construction: (1) Great weight must be accorded to the legislative intent, as stated by the legislature itself. *Board of Supervisors of Milwaukee County v. Ehlers*, (1878) 45 Wis. 281. (2) A construction should be given that will give effect to the legislative intent or the beneficial purpose for which the enactment was intended. *Good v. Starker*, (1934) 216 Wis. 253, 257 N.W. 299; *Good v. Blaschka*, (1934) 216 Wis. 260, 257 N.W. 302; *Huck v. Chicago, St. P., M. & O.R. Co.* and companion cases, (1958) 4 Wis. 2d 132, 90 N.W. 2d 154.

In the present case, the legislative intent, insofar as it relates to your question, is clear. It is spelled out by the legislature in the last two sentences of sec. 103.50 (3) (b).

"In order to protect the minimum wage rates established by the commission from evasion through unrealistic rates paid truck drivers for equipment owned and operated by them, the commission shall establish minimum rates for the drivers and equipment owned and operated by them. It is the intent of this provision to prevent a truck driver who owns the equipment he operates from being required to accept less than the actual cost of operating his equipment, thereby reducing the scale of wages established by the commission."

Furthermore, if a construction were given that the industrial commission is to determine and certify the prevailing rate for truck rentals, when such rate is below the actual cost rate plus the wage rate of its driver, such construction would defeat the legislative intent or the stated beneficial purpose.

In effect, the industrial commission is required to determine and certify two distinct rates: (1) the prevailing hourly cost rate for operating the truck, and (2) the prevailing hourly wage rate for the operator of that truck.

These two rates must be determined separately because it is evident that the legislature, when it added the language:

"* * * nor shall truck rental rates established pursuant to this provision be subject to the provision in sub. (1) relating to hours worked in excess of the prevailing hours when operated in excess of 8 hours in any one day or 40 hours in any one week."

intended that the cost rate for operating the truck be treated separately from the wage rate for its operator. Note the clause immediately preceding the last quoted clause:

"In no event shall the prevailing wage rate for any class of labor be deemed to be less than a reasonable and living wage * * *,"

In other words, the overtime pay provisions in sec. 103.50 (1) obviously would not apply to the cost of operating a truck, but would apply to the prevailing wage rate for its operator.

However, should the prevailing rate on truck rentals be higher than the actual cost rate, the industrial commission should certify the prevailing rate rather than the actual cost rate.

This is because of the language of sec. 103.50 (2), "‘Prevailing wage rate’ [includes] rental rates for truck hire * * *." In this case, the legislative intent is clear. The explanatory sections previously referred to state the legislative intent that the prevailing truck rental rate shall not be lower than the actual cost rate, but no construction indicates an intent that the prevailing rate is the actual cost rate if the prevailing rate is higher than the actual cost rate. This is in line with the two rules of statutory construction discussed.

WHW

Inheritance Tax—Fees—Division of inheritance tax revenues from estates of nonresident decedents between state, county, county judge, and public administrator under secs. 72.12 (3) and 72.17 (3) discussed. Statute of limitations for claims explained.

July 25, 1960.

DUANE K. RUTH, *District Attorney,*
Bayfield County.

You have requested answers to four questions involving the amounts to be retained by the county, or paid to the county judge, from inheritance taxes in the estates of nonresident decedents, under sec. 72.12 (3), Stats. Your questions are discussed separately below, but certain general comments should be made first.

Sec. 72.12 (3) provides, so far as here material, that out of the inheritance taxes in the estates of nonresident decedents:

“* * * The county treasurer shall retain for the use of the county out of all such taxes paid and accounted for, only one per cent, and the balance, less the statutory expenses of collection and adjustment as fixed by the court, shall be paid into the state treasury; provided, however, that the minimum fee to which the county shall be entitled shall be \$3 in each case and that in no case shall the maximum fee exceed \$100; and the judge shall be paid \$2 for each such case.”

Sec. 72.20 provides:

“72.20 Tax retained by county. The county treasurer shall retain for the use of the county, out of all taxes paid and accounted for by him each year under sections 72.01 to 72.24, inclusive, seven and one-half per cent on all sums so collected by or paid to said treasurer.”

Sec. 72.74 (3) expressly provides that the entire amount of the emergency tax shall be paid to the state.

The public administrator is “* * * entitled to 5 per centum of the gross inheritance tax as determined in each such estate, to be paid by the county treasurer out of the inheritance tax funds upon an order of the county judge, provided that the minimum fee for each such estate shall not

be less than \$3, except that it shall not exceed the amount of such tax * * *." Sec. 72.17 (3).

Secs. 59.15 (1) and 253.15 require the county board to establish the compensation to be paid to the county judge on a basis of straight salary, fees, or part salary and part fees. If the compensation established is a salary, or part salary and part fees, it shall be in lieu of all fees except those specifically reserved to the county judge in the resolution or ordinance.

The \$2 fee provided by sec. 72.12 (3) is payable by the judge to the county, unless the fees provided for the county judge under that subsection have been established by the county board as part of his compensation.

Also, the fees of the county judge and the portion retained by the county from inheritance taxes in the estates of nonresident decedents cannot be taken out of the emergency tax. Sec. 72.74 (3), Stats.

I.

Your first question is whether the amount to be retained by the county is contingent upon the collection of a sufficient tax in each estate or whether the county is entitled to the \$3 minimum for each estate of a nonresident decedent and may retain that amount from inheritance taxes due to the state from other estates.

The pertinent part of sec. 72.12 (3) is quoted above. That section, rather than sec. 72.20, applies to inheritance taxes in the estates of nonresident decedents. Sec. 72.12 (3) is a specific statute applicable only to estates of nonresident decedents and therefore controls the general provision in sec. 72.20. *Frank Lloyd Wright Foundation v. Wyoming* (1954), 267 Wis. 599, at 608, 66 N.W. 2d 642. Also, sec. 72.12 (3) was enacted by ch. 530, Laws 1911, and thus was subsequent to sec. 72.20, which was part of the original inheritance tax law enacted by ch. 44, Laws 1903.

Sec. 72.12 (3) provides that one per cent of the taxes paid in the estates of nonresident decedents shall be retained for the use of the county but that the minimum to be retained shall be \$3 in each case, and the maximum shall not exceed \$100. While the one per cent is stated as one per cent "of

all such taxes paid and accounted for," the only reasonable construction is that the county's fee is to be determined separately in each estate; and the \$3 minimum applies only where the normal tax paid in a given estate is \$3 or more. Where the normal tax is less than \$3, the county fee to be retained is the amount of the normal tax. Were it otherwise, it would be necessary to have a specified accounting period in order to determine the one per cent. Furthermore, the \$100 maximum would be meaningless if the county were to retain one per cent of all such taxes paid in a given period.

II.

Your second question is whether the county judge is entitled to a \$2 fee in each case regardless of the amount of tax collected.

Sec. 72.12 (3) provides that "the judge shall be paid \$2 for each such case." The statute does not expressly provide that in each case this fee is to be paid from the taxes collected in that case, and there is no language in sec. 72.12, or elsewhere in the statutes, from which it may be inferred that such was the intent of the legislature. Were the statute to be so construed, it would require a proration or priority as between the county and the judge in each case where the tax collected is insufficient to pay the \$2 fee to the judge and leave the minimum \$3 amount for the county.

There being no statutory provisions for such a priority or proration, and no language indicating that the judge's fee is contingent upon each estate producing a sufficient tax, it is my conclusion that the county judge is entitled to \$2 in each case, and the fee for any such case is not contingent upon the taxes paid in the particular case.

III.

In your third question you assume a case where the normal tax in the estate of a nonresident decedent is \$6 and the emergency tax is \$1.80, making a total tax collected of \$7.80. You state that the statutory deductions are:

1% of normal tax	\$0.06
Public Administrator's fee	3.00
County fee	3.00
Judge's fee	2.00
	\$8.06

and ask whether the 26 cents excess of the deductions over the total taxes collected may be deducted from other inheritance tax funds due to the state from the county.

The answer is no.

The county is not entitled to both a minimum fee of \$3 and 1% of the normal tax in any case. The minimum fee of \$3 does not apply where 1% of the normal tax exceeds \$3; and when the \$3 minimum is applicable, the 1% figure does not apply.

As previously noted herein, the entire emergency tax is to be paid into the state treasury, so that only the \$6 normal tax is available from the particular estate to meet the various statutory deductions. In other words, in your hypothetical situation, after striking out the 1% of normal tax, the deductions total \$8 and the tax available from this estate to meet those deductions is only \$6.

The fee of the public administrator is, like that of the county judge, not contingent upon the taxes collected in a particular estate, except that it may not exceed the normal tax, but is to be paid out of the "inheritance tax funds" upon an appropriate order made following the public administrator's quarterly report. Sec. 72.17(3), Stats.

In your hypothetical case, the county would retain the minimum fee of \$3 from the normal tax of \$6. The \$3 balance remaining from the normal tax would be added to other normal tax receipts for the quarter, and this fund would be available for payment of the fees of the judge and the public administrator. The entire \$1.80 emergency tax collected would be paid into the state treasury.

IV.

Your fourth question concerns the correction of errors in accounting over the past ten years. You state that your county treasurer never has taken any of the "statutory ex-

penses of collection and adjustment," which may be deducted prior to payment of the balance to the state treasury, under sec. 72.12(3), and you indicate that you are referring to the county fees and the judge's fees. You ask whether the county treasurer may claim from the state a minimum of \$5 for each of the 62 nonresident decedents' estates in which inheritance taxes have been paid in your county during the last ten years. Also, you ask whether this \$310 claim could be used as a counterclaim to a claim by the state against your county based upon errors made in accounting for inheritance tax collections from estates of nonresident decedents.

As previously stated, the \$3 minimum fee to be retained by the county applies only when the normal tax is \$3 or more. If the normal tax is less than \$3, the county may retain only the amount of the normal tax. Thus, it cannot be said that the county is entitled to a full \$3 fee for each estate of a nonresident decedent. The \$2 fee of the county judge is not contingent upon the amount of tax collected in each such estate.

The proper procedure for settling a controversy of this nature would be for the county to pay to the state the amount of the deficiencies in remittances to the state and at the same time make a refund claim for the full amount of the overpayments, to be processed under the provisions of sec. 20.555(42), Stats. However, under Art. VIII, sec. 2, Wis. Const., any repayment to a county would have to be limited to overpayments made to the state within six years, even though the state, under sec. 330.18(6), Stats., may go back ten years in its claim against a county.

EW^W

State Aid—Land Acquisition—Under sec. 23.09 (15) state aid is available only to counties and towns for the acquisition and improvement of land for new accesses to navigable waters.

July 26, 1960.

GEORGE THOMPSON, JR.,
District Attorney, La Crosse Co.

You have asked my opinion as to the proper construction of sec. 23.09 (15), Stats., 1959, created by ch. 547, sec. 6, Laws 1959. You have informed us that the city of La Crosse owns and maintains a public park on the shore of the Mississippi river near Isle La Plume. Since the city is not eligible for state aid under the above-cited statute, the city is working with La Crosse county on this project. The county has applied to the conservation commission for state aid for this project, and that commission has given preliminary approval. The project proposed is to improve the existing, city-owned access to the river at this location by constructing four boat launching ramps and a parking area to accommodate approximately eighty-five boat, trailer, or car units. You ask whether these two facilities qualify as improvements under this statute, so that the apportionment of funds for state aid may be lawfully made by the conservation commission.

Sec. 23.09 (15), Stats., 1959, reads:

“PUBLIC ACCESS TO WATERS. (a) The county board of any county or the town board of any town which, by resolution, indicates its desire to *acquire and improve lands* for the purpose of providing public access to any navigable lake or stream in the county or town may make application to the conservation commission for the apportionment of funds for state aid to counties or towns for the purpose. Such application shall state the name of the lake or stream and the location thereof and shall include an estimate of the total cost of the project. The commission shall thereupon investigate the proposed project and it shall consider the distance the lake or stream lies from the nearest public highway, the existing access thereto, the terrain of the proposed project and whether it is of a practical nature from the standpoint of labor, development and cost, and whether it will best serve the public interest and need. If the commission finds that the proposed public access project

will best serve the public interest and need of the state as a whole, it may give preliminary approval to such project. Thereupon the county or town shall prepare and submit plans and specifications and cost analysis of the project to the commission for final approval. Upon final approval, the commission shall encumber a sum equal to one-half of the approved cost estimate of such project. When the project is completed, the commission shall pay to the county or town such encumbered sum or an amount not greater than one-half of the actual cost of such project, whichever is the lesser. The actual cost of such project shall be determined by the commission by audit of the county or town cost records before such payment is made to the county or town."

This law permits the conservation commission to make certain state aid available to counties and towns, but not to cities. A county board or town board must pass a resolution indicating the desire to acquire and improve lands for a public access to a navigable lake or stream in the county or town. The board then applies to the commission for state aid. If the commission finds the project will best serve the public interest and need of the state as a whole, it may give preliminary approval.

Under the express language of this statute, state aid may be furnished only to counties or towns which propose to acquire and improve land for a public access to navigable water in such county or town. The words "acquire and improve" must be considered together. This cannot be read acquire "or" improve. The purpose must be both to acquire and improve the land. The use of the word "acquire" implies that the county or town will acquire land, which they do not already own, and improve it. Thus existing accesses, where the county or town already owns the land, are not eligible for improvement with this state aid. Analysis of the governor's message to the legislature regarding the state's furnishing financial assistance for access projects, leads to the conclusion that he was primarily concerned with opening up new accesses for use by the public rather than furnishing state aid for improving existing accesses. To acquire land means to acquire a fee simple title. An easement, being only a liberty, privilege or advantage in land, distinct from ownership, would not be enough. *Colson v. Balzman*, (1956) 272 Wis. 397, 401. If a proposed project

otherwise met the statutory requirements above discussed, a parking lot and boat launching ramps could constitute proper improvements which the conservation commission could approve as a part of the project.

The Isle La Plume access project does not qualify for state aid because it is an existing, city-owned access, not a new access which is to be acquired by the county, and the city, itself, is not authorized to apply for aid under this statute.

AH

Expenses—Condemnation Commissioners—Condemnation law does not give state authority to pay any expenses of condemnation commissioners except per diem duly established by law.

August 15, 1960.

HARVEY GRASSE, *Chairman,*

State Highway Commission.

Sec. 32.08 of the new condemnation law provides in part, that "Commissioners shall receive no salary but shall be compensated on a per diem basis for actual service of not less than 6 hours for each full day and 3 hours for each half day at a per diem rate which shall be fixed by ordinance of the county board of such county. The circuit judge shall fix the rate of per diem compensation until the county board enacts such ordinance. Such compensation shall be paid by the condemnor on order approved by the circuit judge." See sec. 32.08(3).

Sec. 32.08(6) (b), further states that "* * * The commission shall file with the clerk of the court a sworn voucher for the compensation due each member, which sum, upon approval by the circuit judge, shall be paid by the condemnor."

You state that in at least one instance, compensation for the commissioners was established at a certain per diem rate plus mileage allowance for travel, and that in addition,

disbursements have been certified for expenses paid by the chairman of the condemnation commissioners for telephone, toll charges, postage, registry fees, office supplies, and other miscellaneous expenses. You ask whether these items of expense, which are in addition to the per diem, may be paid by the highway commission under the existing law.

The office of "commissioner of condemnation" is created by sec. 32.08 of the statutes. The commissioners are county officers. They are appointed on a county basis. They function only in their county and their per diem is fixed by the county board. It would appear proper for the county to appropriate a sum sufficient to pay for their travel and other incidental expenses under the broad general provisions of sec. 59.07(5) and sec. 59.15(3) of the statutes. The law, however, does not contain any authority for the payment of any monies by the condemnor other than the per diem fixed by the circuit judge, or later fixed by the county board. There must be an appropriation and statutory authority for a legal state expenditure. Since the law does not provide for such payment, none can be made. See Art. VIII, sec. 2, Wis. Const.; *State ex rel. Bell v. Harshaw, et al.*, (1890) 76 Wis. 230.

REB

Employment Relations Board—Cooperative Mediation—
Under sec. 20.904 the employment relations board may mediate a work stoppage situation at the request of the industrial commission.

August 15, 1960.

ARVID ANDERSON, *Executive Secretary,*
Employment Relations Board.

You have addressed this office stating that you have been advised by Commissioner R. G. Knutson of the industrial commission that a work stoppage is threatened in the municipally-owned utility at Richland Center. Mr. Knutson's letter which you enclose with yours states that "the situation prevailing at Richland Center appears to be of such a nature as to warrant the matter having immediate attention

in the hope of avoiding a work stoppage. Because of this sort of situation confronting the people within Richland Center and its surrounding area, it is hoped that your Board can be instrumental in preventing an actual work stoppage and the resulting hardships which will follow such action."

Pursuant to my telephone conversation with you Thursday, August 11, we construe the letter of Mr. Knutson as being a request by the industrial commission for the Wisconsin employment relations board to use its personnel for the mediation of this dispute. In view of the previous correspondence between the office of the WERB and this office and the letter of Commissioner John Rouse, dated March 9, 1960, we further construe this request as being a request for mediation services as set forth in sec. 101.10 (8), which places the responsibility upon the industrial commission for promoting voluntary arbitration, mediation, and conciliation of disputes between employers and employees.

Our previous discussions have concluded that sec. 20.904 provides that state boards and commissions shall "co-operate in the performance and execution of state work and shall interchange such data, reports and other information, and, by proper arrangements between the officers, commissions and boards directly interested, shall interchange such services of employes * * * as the best interests of the public service require."

The letter of Commissioner Knutson and the March 9 letter of Commissioner Rouse state that the industrial commission no longer has the personnel trained to carry out mediation services. It is our understanding that the request of Mr. Knutson, dated August 11, 1960, is predicated on sec. 20.904, which authorizes the exchange of services and functions between departments as the best interests of the public may require.

It is our opinion that such a request is completely proper, and under the statutory authorization you may properly use your personnel for the purposes of carrying out the industrial commission's responsibility as set forth in sec. 101.10 (8). In so doing it is my opinion that you will be exercising the powers of the industrial commission, or stated in another way, the industrial commission will be exercising its

statutory power through the personnel which the WERB has loaned to it pursuant to the provisions of the statutes.

Although I am of the opinion that the industrial commission may properly exercise and use the "know-how" of the WERB in a mediation situation of this type, I believe that I must express my opinion that a procedure of this type is extremely awkward. The legislature by its enactment of Ch. 101 has clearly indicated that all disputes between employee and employer should be mediated. Yet this function is vested in a branch of our state government which has had little opportunity to exercise its function and at the present time does not have adequate personnel. On the other hand, the WERB which has the expertise is not specifically authorized by the statutes to carry out this function. It would appear that the industrial commission and the WERB, as well as other interested parties, should invite the attention of the legislature to this matter so that the responsibility and function can be combined in one department.

Although the situation at Richland Center is unusually acute, this type of problem is not unique. During the past year your board had discussed a number of municipal labor relations problems with us. Recurrence of the demand for mediation in the municipal labor relations field indicates that this problem should be given consideration by the legislature at its next session.

However, in response to your specific question, it is my opinion that pursuant to the request of the industrial commission you may mediate the labor dispute at Richland Center.

NSH

Motor Vehicle Department—Licenses—Sec. 343.30 (1) grants discretionary power to courts to revoke operating privileges, which includes every license such as an operator's license and a chauffeur's license granted to a person or the right to obtain such licenses upon a person's conviction of violating any traffic law. Revocation and suspension discussed.

August 17, 1960.

JAMES L. KARNS, *Commissioner,*
Motor Vehicle Department.

You ask for my interpretation of sec. 343.30 and in connection therewith you have presented two specific questions. First, you ask whether courts have authority under that section to revoke only the driver's license of an operator, while at the same time permitting the chauffeur license to remain unrevoked.

Sec. 343.30 reads as follows:

“343.30 Suspension and revocation by the courts. (1) A court may revoke a person's operating privilege for any period not exceeding one year upon such person's conviction in such court of violating any of the state traffic laws or any local ordinance which is in conformity therewith.

“(2) A court shall revoke or suspend the operating privilege of a person under 18 years of age under the circumstances stated in s. 48.36.

“(2m) A court may suspend a person's operating privilege upon such person's first conviction for violating s. 346.93 and may revoke a person's operating privilege upon such person's second or subsequent conviction for violating s. 346.93. Such suspension or revocation shall be for a period of not less than 30 days nor more than one year.

“(3) The judge who ordered the issuance of an occupational license may revoke such license whenever the judge, upon the facts, does not see fit to permit the licensee to retain his occupational license. Such revocation shall be for a period of one year.

“(4) Whenever a court or judge suspends or revokes an operating privilege, the court or judge shall immediately take possession of any suspended or revoked license and shall forward it to the department together with the record of conviction and notice of suspension or revocation.

“(5) No court shall suspend or revoke an operating privilege except as authorized by this section.”

The answer to your question depends upon the interpretation placed upon the term "operating privilege" used in sec. 343.30 (1). This term was first defined under ch. 260, Laws 1957, as follows:

"'Operating privilege' means, in the case of a person who is licensed under ch. 343, the license so granted; in the case of a resident of this state who is not so licensed, it means the privilege to secure a license under ch. 343; in the case of a nonresident, it means the operating privilege granted by s. 343.05 (2) (c)."

This definition was modified by sec. 6 of ch. 684, Laws 1957, to provide as follows:

"340.01 (40) 'Operating privilege' means, in the case of a person who is licensed under ch. 343, * * * *every* license so granted *to such person*; in the case of a resident of this state who is not so licensed, it means the privilege to secure a license under ch. 343; in the case of a nonresident, it means the operating privilege granted by s. 343.05 (2) (c)."

Prior to ch. 260, Laws 1957, the driver's license laws contained no definition of the term "operating privilege" nor was this term used in the statutes as a reference to any driver's license or privilege to drive.

Ch. 551, Laws 1957, created sec. 343.47 relating to chauffeur's licenses. This act was to take effect on January 1, 1958. However, on November 20, 1957, ch. 684 was passed which repealed sec. 343.47, and integrated the chauffeur's licensing law into the vehicle code, as created by ch. 260, Laws 1957. As previously pointed out, sec. 6 of ch. 684 clarified the definition of "operating privilege" so that it included *every* license granted to a person or his privilege to secure such a license under ch. 343. In other words, the legislature defined "operating privilege" as being the total privilege to secure any kind of a license issued under ch. 343.

Accordingly, when the statute reads that an "operating privilege" may be revoked or suspended whether it be under sec. 343.30, which permits courts to suspend and revoke, sec. 343.31, which deals with the mandatory revocation of "operating privileges" by the commissioner or whether it be under sec. 343.32 (2), which provides for the discretionary revocation of "operating privileges" by the commissioner,

each authority whether it be the court or the commissioner may revoke or suspend, as is appropriate, only the "operating privilege" and not an individual license, such as an operator's license or a chauffeur's license unless other specific statutory provision is made.

The legislative intent is further clarified by secs. 17, 18, 19 and 20 of ch. 684, Laws 1957. Secs. 17 and 18 amended s. 343.28 (2) and s. 343.29 (2) so that the term "licenses" replaced the term "license" in reference to the surrender of evidence of the "operating privilege." Sec. 19 amended sec. 343.31 (1), to provide that when a person has been convicted of operating a motor vehicle while under the influence of intoxicating liquor, the commissioner shall suspend his chauffeur's license, if he was licensed as a chauffeur, for a period of only 15 days if he was *not* operating as a chauffeur at the time of the offense, while his regular license shall be revoked for one year. Thus, the legislature recognized that when the revocation of the "operating privilege" was referred to, it meant all licenses granted under the chapter, and this special exception was provided under these limited circumstances to allow return of the chauffeur's license after a suspension of 15 days.

Sec. 20 amended sec. 343.32 (2) to provide that the commissioner of the motor vehicle department, in assessing "points" under the administrative rule which is commonly called the "point system," should not count against the chauffeur's license points which are accumulated while operating as a private operator, but that points assessed while operating as a chauffeur shall be counted against the regular license.

A "license" is defined in sec. 343.01 (2) (b), as " * * * any authority to operate a motor vehicle * * * including * * * chauffeur's licenses * * *."

My conclusion is that since the legislature has provided an adequate definition of the term "operating privilege" as well as the term "license" and has made specific exceptions where it did not want the complete operating privilege either revoked or suspended, the only reasonable interpretation of the statute under consideration is that the legislature delegated to the courts under sec. 343.30 (1), the authority

to revoke an "operating privilege" but not an individual license.

Your second question is whether courts have authority to order a suspension of a license and to direct the department to return the license at the end of the period of suspension under sec. 343.30 (1).

In enacting ch. 260, laws 1957, the legislature created a distinction between a "revocation" and a "suspension" of operating privileges. This distinction may be found in sec. 343.38, relating to reinstatement of the operating privilege after revocation or suspension. In the case of a suspension, the operating privilege is automatically reinstated when the period of suspension is terminated. However, when the privilege has been revoked, it cannot be reinstated until the person files a proper application, passes an examination if required to take one by the commissioner and has on file with the department proof of financial responsibility for the future.

In view of this obvious distinction between a "revocation" and a "suspension" of the operating privilege and because sec. 343.30 (5) specifically provides that "no court shall suspend or revoke an operating privilege except as provided by this section," it is apparent that the legislature has not delegated to the courts the power to "suspend" operating privileges or an individual license under sec. 343.30 (1). However, the courts do have the power to suspend an operating privilege under the conditions set out in sec. 343.30 (2) and (2m). These are the only two instances where a court is empowered to "suspend" an operating privilege.

JWR:LLD

Voters—Registration—Municipal clerks, except in cities of more than 200,000 population, may employ such temporary employes as authorized by municipal legislative body for house to house canvass to register voters pursuant to secs. 6.15, 6.17 and 6.185.

August 26, 1960.

ROBERT C. ZIMMERMAN,
Secretary of State.

You have requested advice regarding the authority of municipal clerks, in municipalities other than the city of Milwaukee, under secs. 6.15 and 6.17 to employ persons to go about the municipality registering voters in their homes.

Sec. 6.15 provides as follows:

"The clerk of each municipality in which registration is applicable under section 6.14 shall have full charge and control of the registration of voters within the municipality for which he is elected or appointed. The clerk and *all employes in his office* are authorized to execute such affidavits as may be required by sections 6.16, 6.17 and 6.18."

Sec. 6.17 provides in part as follows:

"(1) The clerk of the municipality shall receive applications for registration at his office during regular office hours throughout the year, *and at such other places and at such times as he may deem advisable*, except that registration for any election or primary shall be closed at 5 p.m. central time on the second Wednesday next preceding the election or primary. * * *

"(2) Personal application. (a) Except as otherwise provided herein, applications for registration shall be made in person by the elector who shall be required to sign the original and duplicate affidavits.

"(b) Affidavits of registration of any qualified elector confined to his home or in any institution because of physical illness or infirmity may be filled in and sworn to at the home of such elector or in the institution where he is confined, before the municipal clerk or other authorized employe of his office."

Sec. 6.185 (4) (c), referring to municipalities in Milwaukee county, other than the city of Milwaukee contains provisions similar to 6.17 (1).

Prior to the enactment of sec. 6.17 (2) (b) above quoted, a former attorney general advised the then secretary of state that under what is now sec. 6.17 (1) (a) (above quoted) the clerk might register sick or disabled voters at their homes, stating in part as follows:

"Under the provisions of the above quoted section, the clerk is not limited to registering electors at his office but may also register electors at their homes, and when he so directs, his deputies may also register electors in their home, since sec. 6.15 clearly authorizes all the employes of his office to administer the affidavits required in such registration." 16 O.A.G. 790, 794.

There was no reason to limit the opinion to sick or disabled voters except that the question submitted related to such voters. The language from the opinion above quoted is broad enough to cover any voter registered at his home, if the clerk is willing to go there or send an employe for that purpose.

Under sec. 6.17 (2) (b), sick or infirm persons now have a right to be registered at their homes, but it does not follow that others may not be so registered if the clerk makes provision to do so.

The foregoing opinion refers to the clerk's "deputies." This is inaccurate, since under secs. 60.44, 61.19, and 62.09 (11) (i), each clerk is entitled to appoint only one deputy. But sec. 6.15 refers to "employes in his office" indicating that the clerk may have other employes in addition to his deputy.

I find no statutory provision relating to the hiring of such employes, but it is stated as follows in *McQuillin, Mun. Corps.* (3rd ed. 1949) § 12.35:

"A person who is engaged in the performance of the proper duties of an office is an 'employee in the office,' whether his particular duties are carried on within or without the walls of the building in which the chief officer generally transacts his business.

* * * Usually the authority to employ all such must be expressly conferred by ordinance, and their compensation must be fixed in like manner by the governing legislative body. * * *"

See also, *McQuillin, Mun. Corps.* (3rd ed. 1949) § 12.127.

It follows that if the clerk requires additional help for the purpose of a house to house canvass to register voters, he should apply to the municipal legislative body for the *authority* to employ them. In this connection, attention should be given to the applicable municipal civil service ordinance if there is one. This additional help may be employed without remuneration.

I should emphasize that if this is done the clerk must give express and detailed instructions to such temporary employees regarding the laws applicable to the method of registration, to determine who are qualified electors entitled to be registered, to how to re-register suspended electors, and the like; of the location of ward and precinct lines; and other information necessary to insure that the job is done properly. In order to avoid duplications the persons making the canvass should be supplied with current poll lists so that they do not re-register persons already registered. These temporary employees should be advised that no partisan test for registration is permitted and that this registration must be conducted with scrupulous fairness and impartiality.

The statutes referred to in this opinion apply to municipalities outside Milwaukee county. For the city of Milwaukee, sec. 10.15 (1) provides for the registration of voters by the secretary of the board of election commissioners. This opinion therefore does not apply to the city of Milwaukee. Other municipalities in Milwaukee county are governed by sec. 6.185 (4) (c), which is substantially equivalent to sec. 6.17 (1) so far as concerns the problem involved in this opinion. This opinion therefore does apply to the municipalities in Milwaukee county other than the city of Milwaukee.

WAP

Civil Action—Procedures—Discussion of procedures to be followed in making service in civil actions in order to conform with provisions of chapters 226 and 690, Laws 1959.

September 19, 1960.

C. STANLEY PERRY,
Corporation Counsel, Milwaukee County.

You have made inquiry relative to procedures to be followed in making service in civil actions in order to conform with the provisions of chs. 226 and 690, Laws 1959.

Question 1: In an action for divorce or legal separation where the cause of action arose before July 1, 1960, and where the summons form specified in sec. 247.066 (1) as created by ch. 690 is delivered to the sheriff for service but the sheriff is unable to serve the same on the defendant within the state, do the provisions of sec. 247.066 (2) as created by ch. 690 then become applicable so that the form of summons to be served upon the defendant either outside the state or by publication must be in accord with secs. 262.10 and 262.11 as created by ch. 226?

Your first question must be answered in the negative.

Sec. 10 of ch. 690, Laws 1959 created sec. 247.066 as follows:

“(1) ACTIONS FOR DIVORCE OR LEGAL SEPARATION, SUMMONS SERVED WITHIN STATE. When in an action for divorce or legal separation the summons is served within the state either personally upon the defendant or at his usual place of abode therein, the summons shall specify whether the action is for divorce or legal separation, shall be approved in writing by the plaintiff and shall be substantially in the following form:

----- Court, ----- County.

“A. B., Plaintiff,
P. O. Address -----

v.

C. D., Defendant,
P. O. Address -----

The State of Wisconsin, to said defendant:

You are hereby summoned and required to serve upon -----, Plaintiff's attorney, whose address is -----, an answer or other pleading to the complaint for

[divorce] [legal separation] within 20 days after such complaint is served upon you. In the absence of a court order to the contrary, service of such complaint upon you shall be delayed for 60 days after service of this summons. If no copy of the complaint is served upon you after such 60 days have passed, you may in the next 20 days thereafter demand in writing of the plaintiff's attorney a copy of the complaint. If you fail to answer or defend the above entitled action in the court aforesaid, judgment will be rendered against you according to the demand of the complaint.

E. F.
Plaintiff's Attorney
P. O. Address _____
----- County, Wisconsin

Approved:

A. B., Plaintiff

"(2) OTHER ACTIONS AFFECTING MARRIAGE. In all other actions affecting marriage the general provisions in ch. 262, respecting the content and form of summons in regular civil actions, shall apply."

An action for divorce or legal separation is an action affecting marriage. See sec. 247.03 (1), as amended by sec. 4, ch. 690, Laws 1959. The provisions of sec. 247.066 (1) are applicable to actions for divorce or legal separation when the summons is served within the state. The provisions of sec. 247.066 (2) apply to other actions affecting marriage and to actions for divorce and legal separation where service is to be made outside the state or by publication. The wording of sec. 247.066 (2) is clear and concise and there are no qualifications or exceptions.

Procedures for commencing civil actions as set forth in Ch. 262 of the statutes were substantially revised by ch. 226, Laws 1959, however, sections 23 and 24 of the act expressly provide:

"SECTION 23. This act shall not apply to any cause of action arising prior to its effective date.

"SECTION 24. This act shall take effect upon July 1, 1960."

Ch. 226, Laws 1959, was published on July 30, 1959, and by its express wording, became effective on July 1, 1960. The clear legislative intent indicates that the procedures set

forth in the act should only apply to causes of action accruing on or after July 1, 1960. There is no exception as to actions affecting marriage. It is true that it is difficult to ascertain when a cause of action for divorce accrues, but the ascertainment of the accrual date of many causes of action is equally difficult.

In general, a cause of action may logically be said to "arise" when the facts necessary to demonstrate the defendant's breach of duty and liability to some persons or group of persons or interests have all come into existence. *State ex rel. N. W. Mut. Life v. Circuit Court* (1917) 165 Wis. 387, 162 N. W. 436; *In re Estate of Lathers* (1934) 215 Wis. 151, 251 N. W. 466, 254 N. W. 550.

Sec. 247.066 (2), as created by ch. 690, Laws 1959, refers to "Ch. 262". Since passage of ch. 690, we have two chapters 262, one which appeared in the 1957 statute book, which applies to civil actions in general in which the cause of action arose before July 1, 1960, and one created by ch. 226, Laws 1959, which is applicable to causes of action arising on or after July 1, 1960. There is nothing in ch. 690, Laws 1959, which creates an over-all exception as to actions relating to marriage except that in actions for legal separation or divorce where the summons is served within the state, and in such cases the summons prescribed by sec. 247.066 (1) as created by ch. 690 must be used regardless of the date the cause of action for divorce, or legal separation, arose.

Statutes dispensing with personal service are to be strictly construed and the statutory provisions for acquiring jurisdiction of the person of a defendant by publication of the summons, instead of personal service, must be strictly pursued and where the statute is not substantially complied with, the court obtains no jurisdiction over the defendant. *Pollard v. Wegener* (1861) 13 Wis. 636; *Likens v. McCormick* (1876) 39 Wis. 313; *Hafern v. Davis* (1860) 10 Wis. 443; *State ex rel. Stevens v. Grimm* (1927) 192 Wis. 601, 213 N.W. 475.

Under the facts stated in your question #1, the form of the summons to be served outside the state or by publication, should be in accord with the provisions of secs. 262.02, 262.03, Wis. Stats., 1957, and the procedures set forth in

secs. 262.12, 262.13, 262.16, Wis. Stats., 1957, should be followed.

Question 2: Is sec. 247.066 (2) applicable to an action for divorce or legal separation where the cause of action arose *on or after* July 1, 1960, and where the sheriff is unable to serve the summons specified in sec. 247.066 (1) upon the defendant within the state?

For reasons hereinbefore stated, sec. 247.066 (2) would be applicable to an action for divorce or legal separation where the cause of action arose *on or after* July 1, 1960, and where the sheriff is unable to serve the summons specified in sec. 247.066 (1) upon the defendant within the state. The form of summons and procedures to be followed would be governed by secs. 262.10, 262.11, 262.12, 262.15 as created by ch. 226, Laws 1959.

It will be noted that sec. 262.10, as created by ch. 226, Laws 1959, provides in part:

“SUMMONS, CONTENTS OF. The summons shall contain:

“* * *

“(2) * * * The summons shall further direct the defendant to serve the answer or demand for a copy of the complaint:

“(a) Within 20 days, exclusive of the day of service, after the summons has been served personally upon the defendant or served by substitution personally upon another authorized to accept service of the summons for him; or

“(b) Within 40 days after a date stated in the summons, exclusive of such date, if no such personal or substituted personal service has been made, and service is made by publication. The date so stated in the summons shall be the date of the first required publication.

“* * *

Sec. 262.15, as created by ch. 226, Laws 1959, provides:

“SUMMONS, WHEN DEEMED SERVED. A summons is deemed served as follows:

“(1) PERSONAL OR SUBSTITUTED PERSONAL SERVICE. A summons served personally upon the defendant or by substituted personal service upon another authorized to accept service of the summons for the defendant is deemed served on the day of service.

“(2) SERVICE BY PUBLICATION. A summons served by publication is deemed served on the first day of required publication.”

The revision note to sec. 262.15, prepared by Professor G. W. Foster, Jr., appearing in the bill drafting records on file in the legislative reference library and reported at 30 Wis. Stats. Anno. 1960 Pocket part, page 37, states:

"This section codifies several matters of general law which have not previously been codified.

"Sub. (1) restates earlier law.

"Sub. (2) changes in theory but not substantially the practice under old law. Under old law it was assumed that service by publication did not commence the action until three weeks have passed since the date of first publication. The defendant had 20 days after the action was commenced in order to appear and defend. This meant that a total of 41 days had to elapse following the date of first publication before a default could be taken against a defendant served by publication. Under sub. (2) of this section, the action is commenced as of the day of first publication, and the court has control over the case from that point on. The defendant who has been served by publication has 40 days after the date of first publication in which to appear and defend under s. 262.10 (2) (b). This matter is discussed further in the notes following s. 262.10."

Question 3: In an action commenced by service of summons on the defendant outside the state pursuant to the provisions of secs. 262.10 and 262.11, as created by ch. 226, Laws 1959, must the summons direct the defendant to serve the answer or demand for a copy of the complaint within 40 days after a date stated in the summons rather than within 20 days after service of summons?

This question must also be answered in the negative.

You indicate that it is your feeling that the words appearing in sec. 262.10 (2) (b), as created by ch. 226, Laws 1959 "if no such personal or substituted personal service" really mean if no such personal or substituted service has been made *within the state*, and that therefore the 40-day period should apply. These underlined words do not appear in sec. 262.10 (2) (b) and there is no reason to read them into the section. The 20-day period set forth in sec. 262.10 (2) (a) applies to a summons which is to be served outside the state. Also, see the provisions of sec. 262.15. The legislature did not intend to extend a 40-day period to defendants served outside the state and a 20-day period to defend-

ants served within the state. The time element was placed at 40 days in case of service by publication and service is now deemed made on the first required day of publication. The increase in stated time was to substantially conform with former practice. Sec. 262.10 (2) (b) requires that the 40-day summons shall contain a stated date and that the date so stated shall be the date of the first required publication which is also, by reason of sec. 262.15 (2), the date of when the summons is deemed served.

Service on the person of the defendant outside the state is personal service within the meaning of that term as it is used in sec. 262.10 (2) (b), as created by ch. 226, Laws 1959. See sec. 262.06 (1) (a), 262.12 (1), 262.17 (1) (b), all as created by ch. 226, Laws 1959.

Question 4: In an action not affecting marriage (i.e., for mortgage foreclosure or for personal injuries) against several defendants where the cause of action arose after July 1, 1960, and the sheriff is not able to serve all of the defendants within the state so that some defendants must be served by publication, can the same form of summons as was served personally on some defendants within the state be used for service by publication on the other defendants?

This question is also answered in the negative.

Where the cause of action arises after July 1, 1960, and where publication is proper and is resorted to, the 40-day summons prescribed in sec. 262.10 (2) (b) and 262.11 must be used. The 20-day summons would apply in cases of personal service, made within or without the state.

Question 5: In an action not affecting marriage where the cause of action arose prior to July 1, 1960 does the plaintiff's attorney have the option of using either the form of summons prescribed by Ch. 262 of the 1957 Wisconsin statutes or the form specified in sec. 262.11, as created by ch. 226, Laws 1959?

Sections 23 and 24 of ch. 226, Laws 1959, are explicit. There is no option. However, whether the form of summons used and served in any action does give the court jurisdiction must be decided in each individual case. It should be noted that sec. 262.03, Wis. Stats., 1957, and sec. 262.11, as created by ch. 226, Laws 1959, provide that the "summons shall be substantially in the following form." Some defects

in form are mere irregularities and are not jurisdictional. *Harvey v. Chicago N.W. Ry. Co.* (1912) 148 Wis. 391, 134 N.W. 839; *Hammond-Chandler L. Co. v. Ind. Comm.*, (1916) 163 Wis. 596, 158 N.W. 292. Also, see sec. 262.16, as created by ch. 226, Laws 1959, and sec. 262.17, Wis. Stats., 1959, as to manner of raising objections to personal jurisdiction, trial of issue, and waiver.

RJV

Judges—Retirement Fund—Since January 1, 1960, a judge who was formerly under the Wisconsin retirement fund in some other capacity need not serve another qualifying period as judge.

October 17, 1960.

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

Chapter 475, Laws 1951, brought circuit judges and supreme court justices under the provisions of the Wisconsin retirement fund found in secs. 66.90 to 66.918.

In 1953 you requested the opinion of this office upon the correctness of an administrative interpretation of said act which was made by you and which was explained in the following language taken from your request for such opinion:

"In several instances these individuals became participating employees under the Wisconsin Retirement Fund during such prior employment, in other cases they did not become participating employees because of the nature of the service.

"Ordinarily a person who has once been a participating employee under the Wisconsin Retirement Fund is not required to again serve the qualifying period specified in section 66.901 (4) (d) because of the language of such requirement, but instead immediately resumes his status as a participating employee under the Wisconsin Retirement Fund upon reemployment by the same or some other participating municipality (if the service otherwise qualifies).

"On the other hand normally a person who has been in public service for the same or some other participating municipality, the nature of which does not qualify him to become a participating employee under the Wisconsin Retirement Fund, is treated like a new employee when he does enter service which is such as to make him eligible to become a participating employee, and he must serve the qualifying period.

"In the computation of prior service credits under section 66.904 (1) (a) 1, normally there is deducted the first 6 months of eligible continuous service.

"In the case of these supreme court justices and circuit judges whose previous service did not qualify them to become participating employees under the Wisconsin Retirement Fund, it appears that in computing their prior service credits there must be deducted their first six months of service as a judge.

"The statutes are not quite so clear with respect to these supreme court justices and circuit judges who previously became participating employes during their previous public service. However section 66.902 (3) (n) seems to indicate a legislative intent that as part of the special treatment accorded to supreme court justices and circuit judges all service other than as supreme court justices or circuit judges should be disregarded in computing prior service credits.

"This would seem to indicate that all supreme court justices and circuit judges should be treated alike, and that in each case the qualifying period stipulated in section 66.901 (4) (d) should be deducted from their service as supreme court justice or circuit judge in computing prior service credits under Chapter 475 of the Laws of 1951."

The opinion which was issued in response to your request did not attempt to decide the basic legal question as to the correctness of your position as a matter of law but it approved the continuance of your interpretation as being the conservative course of action which might prevent the unlawful payment of public funds. 42 O.A.G. 197.

The fundamental question was left open for judicial interpretation with the admonition that the longer such interpretation remained unchanged by the courts or the legislature the more stature it would attain.

Sec. 66.902 (3), stats. 1951, provided in part:

"* * * Each employe of the state of Wisconsin who becomes a participating employe effective January 1, 1948 pursuant to section 66.903 (1) (a) 4 shall be given prior service credit for state service prior to January 1, 1948 in accordance with section 66.904 (1) (a) 1 * * *."

This statute did not limit the type of state service for which prior service credit should be given.

In contrast to this, sec. 66.902 (3) (n), stats. 1951, as created by ch. 475, Laws 1951, provided:

"Each supreme court justice and circuit judge who makes the election pursuant to section 66.901 (5) (i) shall be given prior service credit as of January 1, 1952, in accordance with section 66.904 (1) (a) 1. for state service prior thereto as supreme court justice or circuit judge * * *."

The language of this latter statute of course was the basis for your conclusion that "all service other than as supreme

court justices or circuit judges should be disregarded in computing prior service credits."

By ch. 461, Laws 1953, county judges were brought under the Wisconsin retirement fund. Sec. 66.902 (3) (o) which was created by said act provided that a county judge " * * * shall be granted prior service credit as of January 1, 1954 in accordance with s. 66.904 (1) (a) 1 for service rendered as county judge prior to said date * * *."

By ch. 486, Laws 1955, full time judges of courts of record, municipal or inferior (other than county courts) were brought under the Wisconsin retirement fund. Sec. 66.902 (3) (p) which was created by said act also limited the service for which they would be entitled to prior service credit to "service rendered as judge of a court of record, municipal or inferior" prior to January 1, 1956.

The "special treatment" which was accorded judges under ch. 475, Laws 1951, and to which you referred consisted principally of the following: (a) their normal contribution rate (which was matched by the state) was 7% instead of 5%. (b) The \$350 limitation on earnings upon which contributions could be made did not apply to them. (c) The nominal compulsory retirement age for them was fixed at 70 instead of 65. (d) One of the limitations upon the amount of the annuity which could be granted was made inapplicable to them. (e) They were given the right at retirement to select a 10 year guaranteed life annuity as well as a 15 year life annuity in lieu of a straight life annuity.

The governor's retirement study commission considered the desirability of providing more uniformity in the operation of the Wisconsin retirement fund. As the result it sponsored the bill which became ch. 251, Laws 1959. This act related to "making uniform the operations of the Wisconsin retirement fund" and became effective January 1, 1960.

You have now inquired whether this act and ch. 619, Laws 1959, which also became effective January 1, 1960, would make it unnecessary, after said date, for judges who were formerly under the Wisconsin retirement fund in some other capacity to serve a new qualifying period.

Ch. 251, Laws 1959, made the provisions of the Wisconsin retirement fund, as they applied to judges and state and

municipal employes, more uniform by removing for all members of the fund the limitation upon the earnings upon which contributions are made. To this extent at least the "special treatment" accorded to judges was modified.

Ch. 619, Laws 1959, amended sec. 66.901 (4) (d) by providing that persons who were formerly under the state teachers retirement system for at least six months need not serve the qualifying period if and when they occupy a position which comes under the Wisconsin retirement fund.

You feel that since January 1, 1960 it would be incongruous if a person who formerly was under the state teachers retirement system need not serve said qualifying period but that a person who actually was under the Wisconsin retirement fund in some other capacity must serve another qualifying period when he occupies an office of judge which is under said fund.

As indicated in 42 O.A.G. 197, this office stated that the original conclusion to the effect that judges should serve a second qualifying period was debatable. Although the legal effect of chs. 251 and 619, Laws 1959, upon the conclusion reached in the aforesaid opinion are not clear and decisive, I have concluded that said acts could reasonably be construed to have the result which you have suggested. Accordingly I am of the opinion that since January 1, 1960 judges who have previously been under the Wisconsin retirement fund in some other capacity need not serve another qualifying period.

JRW

Register of Deeds—Documents—Register of deeds in Milwaukee county cannot discontinue present statutory numbering system for documents and substitute another system, but can, with county board approval, assign a second number. Index numbers of microfilmed documents must refer searcher to exact location of document.

December 12, 1960.

C. STANLEY PERRY,
Corporation Counsel, Milwaukee County.

You state that Milwaukee county proposes to adopt a new system to utilize microfilm processes for recording documents received for record in the office of the register of deeds. You state that Milwaukee county now receives in excess of 80,000 documents per year for recording and that the current consecutive numbering system is in the millions. It is proposed that, after January 1, 1961, documents received for recording would be numbered consecutively, with a prefix indicating the year of recordation. Thus, the first document received for record in 1961 would be given the number 61-1, the second 61-2, etc., until the end of 1961. In 1962 the number 62-1 would be assigned to the first document received for record. The system contemplates that after the document has been assigned a number, and after it has been entered in the general index, it would be microfilmed pursuant to the provisions of ch. 228, and that reels of microfilm would replace the present system of volumes of books where copies of deeds and mortgages and other recorded instruments are now kept. If present law does not permit the use of a new numbering system, in which the document number such as 61-1 could be used for both the document number and as an indexing number, in lieu of volume and page numbers now required, the county proposes to use the present system of consecutive document numbers plus assigned index numbers such as 61-1, 61-2, etc. Documents received for recording would be filmed consecutively according to their given number and in case of film or exposure failure necessitating a second microfilm of the given document, the replacement microfilm would be spliced into its correct position in the reel with appropriate "target title"

and certificate as required by sec. 228.03 (1) (c). The proposed system does not contemplate separate reels for deeds, mortgages, land contracts or miscellaneous documents.

You inquire as follows:

1. May the Milwaukee county register of deeds, with approval of the county board, discontinue the present consecutive document numbering system now in effect and substitute the yearly prefix numbering system described above?
2. May the Milwaukee county register of deeds, with county board approval, assign a second number to each document as described above, for indexing purposes?
3. Where documents are microfilmed, may different classes of instruments be recorded on the same reel?
4. Where the microfilm process is employed in recording documents, may indexing by volume and page be replaced by indexing by document number only?

Ch. 228 is concerned with recording and copying of public records in populous counties by photostatic, photographic, microphotographic, microfilm or other suitable mechanical process. The chapter was created by ch. 399, Laws 1959.

Sec. 228.01 provides:

"228.01 Recording of documents and public records by mechanical process authorized. Whenever any officer of any county having a population of 500,000 or more is required or authorized by law to file, record, copy, recopy or replace any document, court order, plat, paper, written instrument, writings, record or book of record, on file or of record in his office, notwithstanding any other provisions in the statutes, he may do so by photostatic, photographic, microphotographic, microfilm, or other mechanical process which produces a clear, accurate and permanent copy or reproduction of the original document, court order, plat, paper, written instrument, writings, record or book of record in accordance with standards not less than those approved for permanent records by the national archives and records service of the general services administration. Any such officer may also reproduce by such processes any document, court order, plat, paper, written instrument, writings, record or book of record which has previously been filed, recorded, copied or recopied."

The basic difficulty with ch. 228, insofar as it is applicable to the microfilming system proposed by Milwaukee county, is that ch. 228 is primarily concerned with the problem of

making and preserving a permanent copy of the document, on film in this instance, and does not adequately provide for a system of indexing which is a necessary part of the recording process.

In 32 O.A.G. 173, at 175, it is stated:

"Until an instrument has been indexed in the general index referred to in sec. 59.52 it has not been recorded. *Shoves v. Larsen*, 22 Wis. 142; *Lombard v. Culbertson*, et al., 59 Wis. 433, 18 N.W. 399."

Also see *The Oconto Company v. Jerrard*, (1879) 46 Wis. 317 at 322.

Sec. 59.51 provides in part:

"59.51 Register of deeds; duties. The register of deeds 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.

(2) State upon the record of any instrument the number and denomination of all United States internal revenue stamps, if any, affixed thereto.

(3) Keep the *several books and indexes hereinafter mentioned in the manner required*.

(4) Indorse upon each instrument or writing received by him for record his certificate of the time when it was received, specifying the day, hour and minute of reception and the volume and page where the same is recorded, which shall be evidence of such facts.

(5) Indorse plainly on each instrument received for record, or file as soon as received a number consecutive to the number affixed to the instrument next previously received according to the numbering now established, and to enter the same in the indexes.

"* * *"

The answer to your first question is in the negative. Sec. 59.51 (5) would preclude a change from the official document numbering system now established. The numbering system now established in Milwaukee county contemplates assigning consecutive numbers *ad infinitum* without respect to the year of recording and while some other system may

now appear to be more advantageous, such change is precluded by statute.

The answer to your second question is in the affirmative. The register of deeds with county board approval may assign a second number to each document for indexing purposes for insertion in volume and page columns if such number directs the searcher to the exact location of the document of record.

Sec. 59.52 provides that each register of deeds shall keep a general index, each page of which shall be divided into nine columns and that:

“* * * He shall make correct entries in said index of every instrument or writing received by him for record, under the respective and appropriate heads, entering the names of the grantors in alphabetical order; and he shall immediately upon the receipt of any such instrument or writing for record enter in the appropriate column, and in the order of time in which it was received, the day, hour and minute of reception; and the same shall be considered as recorded at the time so noted. Wherever any register has made in any index required by law to be kept in his office, in the index column provided for describing the land affected by the instrument indexed, the words ‘see record,’ ‘see deed,’ ‘see mortgage,’ or other instrument, as the case may be, such entry shall be a sufficient reference to the record of such instrument if it be in fact recorded at large in the place so referred to.”

One of the columns in the general index is headed “Volume and Page Where Recorded”.

Sec. 59.53 provides in part:

“**Index of records.** He shall keep an index of all records or files kept in his office showing the number of the instrument or writing consecutively, the kind of instrument and where the same is recorded or filed, thus: * * * and shall keep another index showing the number of the instrument and the names of the grantees in each instrument or writing in alphabetical order, and the names of the grantors, and the volume and page where the same is recorded, and the name of the instrument or writing.”

Sec. 59.55 provides in part:

“(1) The register shall also keep a tract index in suitable books, so ruled and arranged that opposite to the de-

scription of each quarter section, sectional lot, town, city or village lot or other subdivision of land in the county, which a convenient arrangement may require to be noted, there shall be a blank space of at least forty square inches *in which he shall enter in ink the letter or numeral indicating each volume, and the class of records of such volume designating mortgages by the letter M, deeds by the letter D, and miscellaneous by the abbreviation Mis., and the register of attachments, sales and notices by the letter R, together with the page of said volume upon which any deed, mortgage or other instrument affecting the title to or mentioning such tract or any part thereof shall heretofore have been or may hereafter be recorded or entered;* provided, that no such index shall be kept in any county where none now exists until ordered by the county board to be made; but no such index, when once made in any county, shall ever thereafter be discontinued, unless such county has or shall adopt, keep and maintain a complete abstract of title to the real estate therein as a part of the records of the office of the register of deeds thereof.

"(2) *In any county which has a city of the first class, the county board of supervisors may, by resolution, adopt a more complete system of tract indices than that above specified, or a system of chain of title indices, provided such system be clearly specified in such resolution; and may thereafter at any time before the completion of such system alter or change such system or add to the same by resolution clearly specifying such alterations, changes or additions.*

* * *,

It is clear that where the microfilm system is adopted there would not be volume and page references as the index systems now in use employ. Ch. 228 uses the term "reel" and a reel is made up of a large number of individual "images" or "frames". The reference given in the volume and page column should enable any searcher to ascertain the location of the copy of the document referred to. It is conceivable that the reference could be to a certain reel and frame. The numbering system proposed would utilize a number only which would indicate the assigned number of the document for index purposes, and would thus aid the individual in locating the appropriate reel and image or frame. It would not indicate, however, whether the document was a deed, mortgage or other instrument. We recognize that sec. 59.55 (2) permits the county board of supervisors in Milwaukee county to adopt a *more complete system of tract in-*

dices, but are of the opinion that the alternate numbering system proposed is insufficient in that it would fail to indicate the general nature of the document involved and would not comply with the required entries to be made in the tract index.

In reply to your third question you are advised that under present statutes all documents received for recording cannot be microfilmed by consecutive number only on the same reel without regard to class of instrument. While we recognize the mechanical difficulty in filming and maintaining separate reels for classes of instruments and while filming in the same reel might well, with a proper system of indexing, be more feasible, the provisions of secs. 59.51, 59.52, 59.53, 59.54, 59.55 (1), 236.25 indicate that separate sets of volumes should be kept for the following: (1) mortgages, (2) deeds, (3) miscellaneous instruments, (4) attachments, sales and notices, (5) certificates of organization of corporations and (6) plats. This listing is not intended to be all inclusive. We should point out that there are advantages to a system which requires separate sets of volumes or reels for various classes of instruments.

While you have indicated that all instruments received for *recording* would be microfilmed consecutively in accordance with their official document number, it should be pointed out that sec. 59.51 (5) applies the consecutive numbering system to both instruments received for recording and to those received for filing. Therefore, if the *numbering system now established*, does not provide for a separate series of numbers for instruments received for filing, there would be number gaps in the reels of microfilmed instruments unless it is proposed that instruments for filing be included on the same reel as recorded instruments.

In answer to your fourth question you are advised that where the microfilm process is employed in recording documents, indexing by document number only would not be permissible for reasons given above.

RJV

Justice of Peace—Fees—Justices of peace may charge fees only as set forth in ch. 307. In cases dismissed county becomes liable for fees and costs in state cases as provided in sec. 959.055 (1). Commissioner of motor vehicle department has power and duty to direct state traffic patrol officers not to take cases to courts where illegal fees are being charged.

December 13, 1960.

JAMES L. KARNS, *Commissioner,*
Motor Vehicle Department.

You inquire as to the proper fees to be charged by a justice court in a state traffic case where there is no contest. You point out that the records of the state traffic patrol disclose that there is a great variance in fees assessed by the various justice courts for identical matters.

Fees which may be charged by justices of the peace are set out in ch. 307 of the statutes. The amount of fees which a justice may charge in each case will depend upon the services which are performed which are necessary to the disposition of the matter before the court. However, this amount should be uniform in each court where the same offense is charged against a violator in a non-contested case. For a justice to intentionally charge more, or less, than is prescribed by law would be a violation of sec. 946.12 (5), which provides a \$500.00 fine or imprisonment of not more than one year for intentionally soliciting or accepting "anything of value which he knows is greater or less than is fixed by law."

Taking the most simple case, where the traffic violator is apprehended by your patrol officer for violation of a *state traffic* statute and a uniform traffic citation is issued directing the violator's appearance before a justice court, or other court with justice court jurisdiction, at a time set in such citation, and where the violator appears before the court at the time set and pleads guilty, the following schedule of fees would be proper in such case as provided in sec. 307.01:

1. Docketing case -----	\$1.00
2. Entering action without process -----	.15
3. Filing papers (Citation, Report to M.V.D., and Certificate of Conviction) -----	.30
4. Oath to citation -----	.25
5. Judgment -----	.75
6. One folio writing (100 words) -----	.15
7. Drawing Report to M.V.D. -----	.25
8. Drawing Certificate of Conviction, (State cases only, s. 960.27) postage and registry -----	.79
9. Taxing costs -----	.25
10. Entering satisfaction of judgment -----	.25
	<hr/>
	\$4.14

It should be noted that no fee is being allowed for drawing of the complaint because, in fact, the uniform citation sworn to by the court officer is an adequate complaint; and since it is drawn by the officer in connection with his duties, the justice may not charge for that paper. Nor should a charge be made for issuing a warrant since the general appearance of the defendant before the court has made the issuance of a warrant superfluous. The issuing of a warrant and filing it in the court file without placing it in the hands of an officer for service would be unnecessary to the completion of the action before the court, since the defendant stands voluntarily before the court. It would be highly improper for the court to attempt to make a charge for a warrant in such a circumstance.

Where a deposit is made for a speeding violation under state statute, sec. 345.13 provides for an ex parte hearing and a summary disposition. The same fees would apply as previously set out for the violator who appears personally and does not contest the charge.

Where the accused has posted a cash bail to be relieved from custody on a charge other than speeding and the amount posted is forfeited for failure to appear, the fee set out previously would be reduced by \$1.54 because no judgment would be entered, only an order forfeiting the deposit, and report of conviction to circuit court would not be made. The 25 cents allowed for entering the order would be offset by the loss of the fee for entering satisfaction of judgment.

It should be pointed out, however, that except under a speeding charge the forfeiture of cash bail would not neces-

sarily dispose of the charge against the accused, since the penalty of forfeiture is for failure to appear at the time set by the court. The charge is still pending against the offender, and, where the court is of the opinion that the offense is of such a nature as to require the accused to appear personally before the court before disposition of the case, a warrant could properly issue to bring the accused before the court, and naturally under such circumstances the fees would increase in proportion to the services necessarily rendered.

Records in the enforcement division indicate that many courts handling traffic offenses throughout the state, including justice courts and other courts with justice court branches, are charging a flat fee in each and every case brought before the court. In most cases, these fees run from \$6.00 to \$7.00, regardless of the services performed in each individual case. It is my opinion that the charges being made in most of these cases are excessive and illegal and that such conduct is probably a violation of sec. 946.12 (5) previously cited.

Sec. 66.113 requires that every officer upon receiving fees for an official duty must, upon request, provide a particular receipted account of such fees, specifying for what they respectively accrued. It naturally follows that only a service necessary to the disposition of a cause before the court can be listed and charged for. To attempt to make a charge for a service which was not performed, or which the judge or justice knows was not a necessary service to the fulfillment of his duty, would be in violation of sec. 946.12 (4).

Your records also indicate that some courts have adopted a practice of charging court fees against the accused even though the court dismisses the charge on the merits. This is an improper practice. When there is a charge of violation of a state law, and when the accused is found not guilty and the case dismissed, the county becomes liable for any fees and costs in connection with the prosecution as provided in sec. 959.055 (1). If a municipal ordinance is involved, of course, the municipality becomes liable for any fees and costs.

You have the power and the duty to direct your enforcement officers not to take cases to courts where illegal fees

are being charged. I would suggest also that you notify this office as well as the district attorney of the county involved whenever you suspect that illegal charges are being made by any court in handling your traffic cases.

LLD

Jurisdiction—County Teachers Colleges—Coordinating committee for higher education has no jurisdiction under sec. 39.024 over county teachers colleges operating under secs. 41.36 to 41.46 inclusive.

December 14, 1960.

ARTHUR E. WEGNER, *Secretary,*
The Coordinating Committee for Higher Education.

The coordinating committee for higher education has requested an opinion as to the jurisdiction of the coordinating committee over the county teachers colleges.

The purpose of the coordinating committee is set forth in sec. 39.024 (1) as follows:

“39.024 Co-ordinating Committee. (1) Purpose. The purpose of this section is to provide for the co-ordination of the activities of the university of Wisconsin and the state colleges and institutes by providing a permanent joint committee to make a continuing study of the state-supported institutions of higher education under their jurisdiction, the relation thereto of the needs of the people of Wisconsin, to recommend necessary changes in programs and facilities, to provide for a single, consolidated, biennial budget request for all of such institutions, and to report the results of its studies and recommendations to the governor and the legislature.”

No specific mention of the county teachers colleges is made in this provision, nor is there any such reference in sec. 39.024 (2) (a) relating to the composition of the committee. The committee consists of 15 members, 4 from the university regents, 4 from the state colleges regents, 4 citizens, the president of the university regents, the president of the state colleges regents, and the state superintendent of public instruction. The citizen members are appointed by the gov-

ernor with the advice and consent of the senate. While the governor could select among the citizen members representatives of the county teachers colleges, there is no requirement that he do so, and as a matter of fact, the implication would seem to be that these appointees should be citizens at large rather than representatives of any particular segment of the state's educational system other than those mentioned such as the university and state colleges regents whose membership is specifically provided for in the statute.

Another significant provision is that contained in sec. 39.024 (3) (a) on educational planning which provides in part:

"* * * The committee shall determine what over-all educational programs shall be offered in the several units of *the university and the state colleges* to avoid unnecessary duplication and to utilize to the best advantage the facilities and personnel available for instruction in fields of higher education. * * *"

Again no reference is made to county teachers colleges, and under familiar rules of statutory construction the expression as to specific units results in the implied exclusion of others,—*expressio unius est exclusio alterius*.

At this point it might be well to turn to the statutory provisions relating to county teachers colleges for any additional information they might furnish.

Sec. 41.36 authorizes any county which has no state college operating an elementary department to appropriate money for the organization, equipment and maintenance of a County Teachers College. Sec. 41.37 provides for a 3 member board consisting of the county superintendent of schools and 2 members elected by the county board. Under sec. 41.375 the board may contract with the university extension division for extension courses. Sec. 41.39 gives the state superintendent of public instruction general supervision of such colleges and authorizes him to prescribe the course of study. Sec. 41.40 (2) entitles graduates of county teachers colleges after one year of teaching to receive credit of one year toward the completion of an elementary teacher's course at a state college. Under sec. 41.42 the county boards of 2 or more adjoining counties may unite in setting up a county teachers college. Sec. 41.44 (1) and particularly

(1m) provides for state aid to county teachers colleges.
Sub. (1m) provides:

"(1m) If it appears from an actual inspection by direction of the state superintendent that the work of such county teachers college has been efficient, and that the college has been devoted exclusively to the training of teachers, the state superintendent shall certify, in favor of the county operating such teachers college, the amount of the salary paid to each teacher and president but not to exceed an amount to which such teacher or president is entitled under a salary schedule for teachers and presidents of county teachers colleges to be adopted and promulgated by him. The salary schedule shall provide for a salary range of from \$4,500 to \$6,950 per year, varying with length of service and professional training."

It is apparent from all of the foregoing that although county teachers colleges receive state aid and supervision they are not a part of the system established by the state for higher education. They are county institutions set up by action of the counties. If the legislature had intended to include them within the jurisdiction of the coordinating committee set up by sec. 39.024, it would have been easy to say so.

This is not to say that the county teachers colleges have no relevance to the educational needs of the people of the state on the college level. Indeed these institutions have performed a most valiant service in meeting the state's pressing need for elementary teachers, but the question of whether they should be subject to the jurisdiction of the coordinating committee or have representation on that committee is a legislative one. If any changes in the statutes discussed above are desirable, they should be called to the legislature's attention.

WHR

Constitutional Amendment—Validity—Joint resolution No. 37 of the 1959 legislature was not adopted by a yea and nay vote as required by Art. XII, sec. 1, Wis. Const., and would probably be held invalid.

December 15, 1960.

EMILY P. DODGE, *Executive Secretary,*
Judicial Council.

You have called our attention to Joint Resolution No. 37 of the 1959 legislature, Vol. I, Laws of Wisconsin 1958–1959, page 930, relating to a proposed amendment of Art. VII, sec. 24, Wis. Const., concerning the eligibility for office and service after retirement of supreme court justices and judges of other courts of record. This was the first approval by the legislature.

The resolution was introduced as Joint Resolution No. 25, A., by the committee on judiciary at the request of the judicial council. According to the Journal of the Assembly for April 22, 1959, the resolution was read a third time and passed on that date, the journal at pp. 607–608, reading:

“Jt. Res. No. 25, A.,

“Relating to the eligibility for office and service after retirement of supreme court judges [justices] and judges of other courts of record.

“The question was: This joint resolution having been read three several times, shall the joint resolution pass?

“The motion was carried and the joint resolution was passed.”

In the senate the resolution was read a third time and concurred in on June 4, 1959, by a vote of 26 ayes and 5 noes.

In this connection you refer to Art. XII, sec. 1, Wis. Const., which provides in part:

“Any amendment or amendments to this constitution may be proposed in either house of the legislature, and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon, and referred to the legislature to be chosen at the next general election, * * *.”

This raises the question of whether the first approval of the resolution in the 1959 legislature is effective by reason of the failure of the assembly to take a yea and nay vote.

The Wisconsin supreme court has held that the provisions of the constitution regarding amendments are mandatory and not merely directory. *State v. Zimmerman* (1925) 187 Wis. 180, 204 N.W. 803. Also in *State ex rel. Owen v. Donald* (1915) 160 Wis. 21, 151 N.W. 331, it was determined that in amending the constitution the prescribed procedure must be strictly followed. Likewise in *State ex rel. Postel v. Marcus* (1915) 160 Wis. 354, 152 N.W. 219, it was concluded that the court should declare invalid an amendment to the constitution, where it appears that the constitutional requirements relating to such amendments have not been met.

In *Donald, supra*, the court said at p. 57:

"If all else could be successfully passed by in this case, the fact that the proposal was not passed upon, at all, in the Assembly at the session of 1909 would be insurmountable. Such an effort, as in the case heretofore decided, to be efficient must be characterized, among other things, by these circumstances:

"* * *

"If agreed to at the first session, it must be entered, substantially, upon the journals of each of the two houses, as indicated in the final decision in the *Marcus Case*. At the next session of the legislature each of the two houses must agree to the precise proposal agreed to at the previous session, and that must be evidenced by a recorded yea and nay vote in each house." (Emphasis supplied.)

In referring to the procedure for amending the constitution the court said in *Marcus, supra*, at p. 360:

"* * * It was, doubtless, supposed that the safeguards thus thrown around the matter would enable the people, upon their coming to the point of voting directly in respect to such a proposition, to have the benefit of that individual considerate judgment of the members of the legislature which they had provided should occur. * * *" (Emphasis supplied.)

Justice Marshall in writing the court's opinion in the *Donald* case was mindful of the fact that the construction of the constitution there followed might be subjected to unfair

criticism as having been based on "technicalities", and he therefore stated at pp. 58-59:

"We think proper to remark as of public interest, that it is a mistake to suppose the judicial disapproval of a legislative effort to propose a constitutional amendment to the people, is based on what is commonly termed in legal matters 'technicalities.' It is very far therefrom. Those who assume to teach on this subject should be very careful not to inculcate false notions in respect to such an important matter. To characterize the point that there has been a failure to do a thing which the people made a condition precedent to efficiency of the particular activity of amending the constitution, a technicality, shows want of appreciation of the very basic features of a constitutional system and, unwittingly, breeds disrespect for such a system, if not for law in general. The court does not accord any dignity to mere technical accuracy in respect to nonessentials, and none in any situation unless required by mandate of written law. But the court is in duty bound to decide upon what is technical or directory, and what is substantial and mandatory. What the people in creating our form of government made material, no one has a right to say is not, or is technical, in the common acceptance of that term as being mere matter of form. The court cannot so invade the sovereign command unless its trusted instrumentalities violate the solemn obligations to which they are pledged by their oaths of office."

While the question of whether a purported amendment to the constitution is valid is a judicial question to be determined by the court when material in any case as was held in *Donald*, it nevertheless appears here that a court in the light of the express language of the constitution itself and the decisions mentioned above would be likely to hold invalid Joint Resolution No. 37 of the 1959 legislature.

WHR

Bounties—Counties—County which has authorized payment of bounty must follow procedures set forth in secs. 29.61, 59.15 (2) (c), 59.16, and may follow same procedure in regard to applications for state bounty under sec. 29.60.

December 15, 1960.

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

You ask several questions regarding the payment of bounties for killing certain wild animals. Each question will be stated and followed by the answer.

1. Can the county authorize and pay a bounty directly to the claimant, rather than going through the procedure of reimbursing the town, city, or village for paying such bounty?

The answer is "no". Subsecs. 29.60 (1), (2), (3) and (4), Stats., 1955, provided a state bounty and subsec. 29.60 (6), Stats., 1955 made provision for an additional county bounty. This latter subsection read:

"The county board may authorize the payment of an additional bounty for the killing of any animal and may authorize the payment of a bounty by the county or its designated agents for the destruction of any fox, skunk, weasel and other animal or animals when, after careful investigation by competent authorities, they are found to be destructive in any manner. Such action by the county board shall not conflict in any manner with other sections of the statutes or with conservation commission orders and regulations. Any action heretofore taken by any county board authorizing the payment of bounties for the killing of animals hereinbefore mentioned in this subsection, is validated with like effect as if specific authority therefor was provided by law. When any county board indicates by the proper legal procedure that it is their intention to cause a bounty to be paid on any animal hereinbefore mentioned in this subsection, they or their designated agents shall promptly notify the state conservation commission at Madison of that fact by supplying them with a full copy of the procedure dealing with their action in the matter."

This statute authorized counties to pay a bounty in addition to the state bounty. Pursuant to this section counties paid such county bounty directly to the bounty claimant.

Chapter 259, sec. 1, Laws 1957, repealed subsecs. 29.60 (1), (2), (3), (4) and (6) Stats., 1955, thus eliminating both the state bounty and this county bounty, leaving only the provisions for local bounties found in sec. 29.61. Ch. 612, Laws 1959, re-enacted a state bounty, but did not reinstate the provision for an additional county bounty previously contained in sec. 29.60 (6) Stats. of 1955. Thus at the present time counties have authority to pay a bounty, in addition to the state bounty, only as provided in sec. 29.61. This section reads in part:

"Bounties, local; false certificates. (1) The governing body of any county, town, city or village may direct that every person who shall kill any crow, or any sharp-shinned or Cooper's hawk, or any pocket gopher, or any streaked gopher, or any black, brown, gray or Norway rat, commonly known as the house rat or barn rat, or any rattlesnake, or any ground hog or any woodchuck, or any mole, or any red or grey fox, or any wolf, or any coyote, or any wildcat, or any lynx, or any weasel shall be entitled to a reward as determined by the governing board of any county, town, city or village.

"(2) Any person claiming such reward shall exhibit the bill of the crow or hawk, or the ears of the gopher or woodchuck, at least half of the body including the rattles of the rattlesnake, or head of any other animal on which a bounty is payable to an officer designated by such governing body in its ordinance or resolution providing for such reward, and present an affidavit to such officer stating that said bill, ears, body or head are of the animal killed by him, and that he has not spared the life of any such animal or bird within his power to kill. Such officer shall then issue a certificate in the following form:

State of Wisconsin, } ss.
County of _____ }

I, _____ (designation of officer), do certify that _____ has this day exhibited to me the head (or bill, or body, or ears) of _____, which he claims to have killed in said (town, city, village), and that the head (or bill, or body, or ears) of said _____ was (were) destroyed in my presence, and that the said _____ is on presentation of this certificate to the (town, city, village) clerk within twenty days from the date hereof, entitled to an order on the (town, city, village) treasurer for the sum of _____ dollars, to be drawn from the general fund of said (town, city, village).

Dated this _____ day of _____, 19_____.

(Designation of Officer)

"(3) The town, city or village clerk, respectively, shall on the production of the certificate of such officer, issue to the holder thereof an order on the town, city or village treasurer, respectively, for the amount stated in said certificate.

"(4) Whenever any county has authorized the reward provided for in this section, the treasurers of the various towns, cities and villages shall, at the close of their accounts on the thirtieth day of October in each year certify to the county clerk the amount of money expended by their respective towns, cities and villages under the provisions of this section. Such treasurer shall attach to the certificate an affidavit stating that the account is just and that his town, city or village has actually expended the amount therein stated. The certificate and affidavit shall be placed on file in the office of the county clerk and the account shall be audited by the county board and the amount thereof paid to the treasurers of the respective towns, cities and villages from any money in the general fund of the county not otherwise appropriated."

This statute provides that the governing body of any county, town, city, or village may direct that certain bounties be paid. The person claiming the bounty must present specified parts of the animal body and an affidavit to an officer designated by such governing body. Such officer then makes a certificate which the claimant presents to the town, city or village clerk, who issues an order upon the town, city, or village treasurer. Whenever the county has authorized the bounty provided by this section, the county reimburses the towns, cities, and villages for bounties they have so paid out. There is no provision for a county to pay a bounty directly to the bounty claimant.

2. Can the county board, under sec. 29.61 (2) designate a town, city, or village officer as the officer to whom the bounty claimant must exhibit the parts of the animal body and the affidavit?

The answer is "no". The county board has no power to specify the duties of town, city, or village officers.

3. Where the county board designates the county clerk as the officer to whom applications for the county bounty are to be made, may such clerk deputize town, city, or village clerks for this duty and can such deputies be compensated for their services in this respect?

The answer is "yes". Under sec. 59.15 (2) (c) the county board has authority to establish the number of deputies to elective officers and provide the compensation for such deputies. Under sec. 59.16 the county clerk is authorized to appoint deputies and direct what their duties shall be. The county clerk may appoint town, city, and village clerks as his deputies for the limited purpose of receiving bounty applications and making the necessary certificates as required by sec. 29.61 (2). This act would of course be performed by such town, city, and village clerks as deputy county clerks. This procedure was discussed and approved as to the issuance of hunting and fishing licenses in 39 O.A.G. 579.

4. May the county clerk deputize town, city, and village clerks to perform similar duties in respect to applications for state bounties under sec. 29.60, Stats., 1959?

The answer is "yes". Ch. 612, Laws 1959, creates sec. 29.60, which provides that a claimant for a state bounty shall exhibit the entire carcass of the animal to the nearest conservation warden or county clerk and make the prescribed affidavit. Such warden or clerk is required to punch the ears and slit full length the inside of the right hind leg of the animal, and make a certificate. The county clerk may deputize town, city, and village clerks for the performance of this duty for the same reasons discussed in the answer to question number 3 above.

AH

Motor Vehicle Department—Operator's License—Suspension, revocation, and forfeiture of operating privileges of juveniles under sec. 48.36 discussed. Felony committed while using motor vehicle may also result in revocation under sec. 343.31.

December 19, 1960.

JAMES L. KARNS, *Commissioner,*
Motor Vehicle Department.

You ask two questions concerning revocation or suspension of the operating privileges of persons under eighteen years of age.

Your first question concerns a minor under eighteen who was found guilty of a moving violation and his operating privilege was suspended by the court under sec. 48.36 for a period of 60 days. Thirty days later he was apprehended operating a motor vehicle. You state that upon his appearance in court he was assessed a forfeiture of \$50 and costs under sec. 48.36 (2) (c), and the period of suspension was increased by 90 days unless the forfeiture was paid. The forfeiture was paid within three days. You question whether the payment of the forfeiture terminates the extension of the period of suspension and whether it is the duty of your department or the court to revoke the operating privilege. Sec. 48.36 (1) (a) and (2) (a) and (c), as amended, read as follows:

"48.36 (1) JUVENILE COURT. If a juvenile court finds that a child has violated any provision of s. 218.01 (7b) or chs. 341 to 349 or any county or municipal ordinance enacted under s. 349.06, it shall dispose of the case in the following manner:

"(a) In cases of moving vehicle violations, it shall either suspend or revoke the child's operating privilege upon the first violation and shall revoke such operating privilege upon a second or subsequent violation. * * *

"*(*)

"(2) CIVIL COURT. If a civil court finds that a child has violated a county or municipal ordinance enacted under s. 349.06, it shall dispose of the case in the following manner:

"(a) In cases of moving vehicle violations, it shall not impose a forfeiture but shall either suspend or revoke the child's operating privilege upon the first violation and shall revoke such operating privilege upon a second or subsequent violation. * * *

"*(*)

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

First, assuming that the second violation was of a county or municipal ordinance and the juvenile was tried in a civil court, the court has the duty under sec. 48.36 (2) (a) to revoke the child's operating privilege, since this was at least his second *moving* vehicle violation. I do not find it necessary

to elaborate further on the point that driving during a period of suspension is a moving violation.

Sec. 48.36 (2) (c), *in addition to requiring the revocation of the operating privilege for the second moving violation*, allows the court to impose a forfeiture in accordance with the terms of the ordinance violated, and provides for enforcement of payment of the forfeiture by extension of the period of "suspension" or "revocation". In other words, §§ (a) and (c) are complementary and are not alternatives as to how the court may dispose of moving violations by juveniles. The statute clearly provides that the court must either suspend or revoke for the first moving violation and must revoke for the second violation.

You have a limited function in the suspension or revocation of the operating privilege of juveniles. Secs. 343.30 (2), 48.17 and 48.36 expressly delegate the authority to suspend and revoke the operating privilege of persons under 18 years of age to the courts. In other words, the authority placed with the commissioner to suspend or revoke operators' licenses is limited by sec. 343.30 (2), insofar as it applies to an operating privilege of a person under eighteen years of age and you do not have authority to revoke the privilege if the court fails to do so. This does not change the ministerial function of issuing revocation orders delegated to the commissioner under sec. 343.31, which provides for the mandatory revocation of licenses after such offenses as operating while privileges are suspended or revoked when the minor is tried as an adult in criminal court.

Your second question concerns a person under eighteen years of age who was found guilty of operating a motor vehicle without the owner's consent in violation of sec. 943.23. You question whether such a violation must be reported by the convicting court, and whether it is the duty of the court under sec. 48.36 to revoke the operating privilege or whether it is the duty of the department to revoke the operating privilege under sec. 343.31 (1) (c).

A violation of sec. 943.23 by a minor under 18 for intentionally taking and driving any vehicle without the owner's consent would not be disposed of under sec. 48.36. The offender might be tried as an adult or, of course, he might

be tried in juvenile court, but the disposition would not come under sec. 48.36 because that section is limited to violations under chs. 341 to 349 and local ordinances enacted under authority of sec. 349.06.

If the minor is convicted in criminal court, the clerk of the court is required to report such conviction to the motor vehicle department under sec. 343.28 (2), since the crime is a felony and since the conviction of any felony in which a motor vehicle is used requires the mandatory revocation of the operator's privilege under 343.31. Such court must require the surrender to it of any license then held by such convicted person, but the privilege is revoked by formal order of the commissioner in accordance with sec. 343.31.

If the minor is tried in juvenile court because of operating a vehicle without the owner's consent, he may be adjudged delinquent, and the court probably has the authority under sec. 48.34 (1) (b), which provides that the court can prescribe "reasonable rules for his conduct", to order the minor to surrender his operating privilege for a given period of time.

LLD

Motor Vehicle Department—Weights—Sec. 348.21 (2) (b) applies where vehicle is overweight on an axle or wheel because of shifting of load. If excess is not more than 1,000 pounds over allowed tolerances and can be reloaded on same vehicle to bring weight within tolerated limits, a special fine of \$10 applies.

December 20, 1960.

JAMES L. KARNS, *Commissioner,*
Motor Vehicle Department.

You have asked for my interpretation of Chapter 611, Laws 1959, which renames sec. 348.21 (2) and creates sec. 348.21 (2) (b). The Act, including the title thereof, reads as follows:

"AN ACT to renumber 348.21 (2); and to create 348.21 (2) (b) of the statutes, relating to fines for shifting loads of motor vehicles on Class 'A' and 'B' highways.

"The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

"Section 1. 348.21 (2) of the statutes is renumbered 348.21 (2) (a).

"Section 2. 348.21 (2) (b) of the statutes is created to read:

"348.21 (2) (b) If the load on any wheel axle or group of axles does not exceed the weight prescribed in s. 348.15 (3) (a), (b) or (c) or 348.16 by more than 1,000 pounds and provided such excess *can be reloaded within the normal load carrying areas*, on any other wheel axle or axles, so that all wheels and axles are then within the tolerated limits, the official shall direct the operator to reload. *If such reloading is accomplished* and all axles or group of axles are within the legal limits, a fine of \$10, shall be imposed. This fine shall be paid upon the basis of the citation issued by the official to the court named in the citation. Failure to pay shall subject the operator to the penalty in par. (a) or sub. (3) (a). Violations under this section shall not be considered as violations or prior convictions under par. (a), sub. (3) (a) or (3) (b)."

You point out that you are encountering difficulty in enforcement because of the ambiguity in the wording of sec. 348.21 (2) (b), and particularly because of a difference of opinion as to whether the "reloading" must take place within the same vehicle on which the cargo was loaded or whether the excess cargo can be placed in another vehicle.

Your question is whether the statute makes it mandatory that the driver be able to reload the excess cargo, or whether it means that the space for such reloading merely be available in the truck without requiring the physical reloading of the vehicle. You point out that lading problems may make it difficult to reload the vehicle but that in some cases the excess could be removed, and you ask whether removing the excess would entitle the violator to the special provisions of this statute. We deem it necessary to go beyond the limitations of your question in providing our answer.

Ch. 348 of the statutes regulates the size, weight and load which vehicles may carry upon the highways of the state. Weight limitations are set out under secs. 348.15 and 348.16. The penalties for violating these weight limitations are set

out in sec. 348.21. Sec. 348.15 (3) provides for certain tolerances for enforcement purposes. For instance, under sec. 348.15 (3) (b) no enforcement action would be taken to prosecute for an overweight axle unless the axle was at least 1,500 pounds over the 18,000 pounds permitted by sec. 348.15 (2) (b). A situation where the axle of a truck is imposing on the highway a weight of 20,500 pounds would cause enforcement action to be taken since the weight exceeds the tolerances permitted under sec. 348.15 (3) (b). In fact, under such circumstances the truck axle is 2,500 pounds over the weight permitted for any one axle. However, since the violator is not more than 1,000 pounds over the tolerances permitted under sec. 348.15 (3) (b), he may now claim the benefit of a reduced penalty under sec. 348.21 (2) (b), provided "such excess can be reloaded within the normal load carrying areas * * *" and providing "such reloading is accomplished * * *."

The statute under consideration is not a penal statute. Rather, it is an exception to a penalty provision in a penal statute, and under proper rules of construction the statute must be strictly construed, and those claiming benefits of its provisions must show that they come clearly within the intent of the statute. 50 Am. Jur. 451.

When ambiguity exists in a statute, construction is called for. As our court said in *State ex. rel. West Allis v. Dieringer*, (1956) 275 Wis. 208 at 218:

"A statute, or any sentence, clause, or word thereof, is 'ambiguous' when it is capable of being understood by reasonably well-informed persons in either of two or more senses. * * *"

The fundamental rule in construing statutes is to ascertain and give effect to the intent of the legislature. In a proper case resort may be had to the title of the Act to determine such intent. See *State v. Hohle*, (1931) 203 Wis. 626 at 631 and cases cited. See also *Smith v. Brookfield*, (1955) 272 Wis. 1 at 5, 6 and 7.

Reference to the title of ch. 611 as set forth in the session laws of 1959 discloses that the subject of the enactment is "* * * fines for shifting loads of motor vehicles * * *." Considering that the Act is to become a part of the penalty

section dealing with overweight vehicles, it seems apparent that the title discloses legislative intent that the Act is to deal with fines for overweight vehicles which have become in violation because of a load shifting in transit. Any other interpretation would invite violations of the weight laws by intentional or negligent loading of the vehicle at the originating terminal, and would be an imputation that the legislature has placed a premium on inefficient loading or intentional violations of the law.

Our supreme court has said that if a statute is reasonably open to any other construction, it will not be given a construction that results in absurdity or unreasonableness. Thus, even though no ambiguity exists, where an unreasonable result is evident “* * * the court may look to the history of the statute, to all the circumstances intended to be dealt with, the evils to be remedied, to its reason and spirit, to every part of the enactment, and may reject words, or read words in place which seem to be there by necessary or reasonable inference, and substitute the right word for one clearly wrong, and so find the real legislative intent, though it be out of harmony with, or even contradict, the letter of the enactment. A thing which is within the intention of the lawmakers and by rules for construction can be read out of it, ‘is as much within the statute as if it were within the letter.’” See *Pfingsten v. Pfingsten*, (1916) 164 Wis. 308 at 313.

Since the statutes already provide a tolerance of 1,000 pounds for each wheel or 1,500 pounds for each axle to cover such items as ice, mud, snow, dirt and tire chains, there would be only two practical causes for weights in excess of the tolerances—one being the intentional or negligent illegal loading of the vehicle and, second, the shifting of the load within the truck during transit. To construe the section to permit the violator to escape with a \$10 fine where the overload can be re-arranged within the truck so that all the axles are within the legal limits regardless of the cause of the violation in the first place would be to assign to the legislature an absurd intent. I cannot conceive that the legislature intended to make it profitable for unscrupulous truckers to financially benefit from their intentional violation of the law. As we advised you in 48 O.A.G. 152, even a *negli-*

gent overloading of a vehicle is an intentional violation of the weight laws.

In accordance with the foregoing discussion, it is my opinion that an offender may claim the benefit of the special penalty provided in sec. 348.21 (2) (b) only where the violation of the wheel or axle weight resulted from a shifting of the load and such excess of not more than 1,000 pounds can be reloaded within the normal load carrying area within that same vehicle. The burden is on the violator to show that his load shifted.

The function of your officers in administering this statute will be to advise the court where the citation is filed as to whether or not there was a shift in the load and whether or not the excess was reloaded within the normal load carrying area.

Once the state proves beyond a reasonable doubt that there was a violation in regard to a wheel or axle, the burden of going forward with the affirmative defense that the load shifted falls upon the defendant.

Naturally, your officer should make careful note of the makeup of the load in any case where he is convinced that the overweight violations *did not* result from a shifting of the load. If the officer is reasonably satisfied that the violation resulted from a shift of the load in transit and in any case where it appears that the excess can be reloaded within the load carrying area, he should direct the operator to reload.

JWR:LLD

Sanitoria—Aid—Under sec. 50.09 (3) county boards must take affirmative action before 14 per cent may be added to charges for care in county sanatoria. Such addition may not be charged by private sanatoria. Additional percentage is not included in per capita cost nor is state aid increased.

December 21, 1960.

J. JAY KELIHER, *State Auditor.*

You ask several questions in connection with statutory amendments affected by Ch. 555, Laws 1959, relating to additional charge for cost of care in county and private tuberculosis sanatoria.

I

Your first question is:

"Must the county board, or managing board of a private sanatorium, affirmatively assert its intention to add such additional charges (14%) to its claims, or is it sufficient if the sanatorium trustees or superintendent make such additions on their own authority?"

The above question has two parts, one relating to county sanatoria, and the other to private sanatoria. Since it is my conclusion that private sanatoria are not entitled to add the 14% charge at all, consideration of what action should be taken by their managing boards is unnecessary.

As to county sanatoria, it is my opinion that affirmative action by the county board is necessary to support claim for the additional 14% authorized by Ch. 555, Laws 1959.

Prior to amendment by Ch. 555, Laws 1959, sec. 50.09 (3) reads as follows:

"(3) On each July 1, the superintendent or other officer in charge of each county sanatorium shall prepare a statement of the amount due from the state to the county in which such institution is located, pursuant to law, for the maintenance, care and treatment therein of patients at public charge, on forms supplied by the state board of health. Such statement shall cover the preceding fiscal year and shall specify the name of each patient whose support is partly chargeable to the state, or wholly chargeable in the first instance to the state and partly chargeable over to some other county; and shall further specify, with respect to each

patient, his legal settlement, the number of weeks for which support is charged, and the amount due to the county from the state. The statements shall be verified by affidavit by the officer making it and certified by the trustees of the institution to the state board of health, for examination and approval, and a duplicate thereof shall be forwarded by the board to the county clerk of the county involved. The board shall give proper credit of the amount due the county for any recovery of maintenance and, when approved, the president and secretary of the board shall certify said statement to the director of budget and accounts, who shall pay the aggregate amount found due the county on March 22 next, except as otherwise provided in sub. (2). Unless the statement of the amount due, properly prepared on forms furnished by the board, is on file in the state board of health on or before August 15 following the close of the fiscal year just preceding, the board is not required to include the statement in its computation and statement of accounts for that fiscal year to be certified to the director of budget and accounts."

Ch. 555, Laws of 1959, added:

"* * * Beginning with the first charge made for the cost of care after July 1, 1959, the county may add 4 per cent to such charge to recover the costs to the county in carrying such charges and 10 per cent to such charge to generate sufficient earnings in addition to depreciation accruals to provide funds to cover replacement costs for buildings, fixtures and equipment as they are replaced."

The amendment does not make the addition of 14% automatic, but provides that "the county may" do so. It is conceivable that a county might find it advantageous, in order to encourage a fuller use of its facilities, to forego the additional charge. The county board, as the governing body of the county, is the agency charged with making determinations of fiscal policy. See secs. 59.02 (1), and 59.07 (1) (b), (5), Stats.

As to private sanatoria, there is nothing in sec. 50.09 (3), as amended, which authorizes private sanatoria to add 14% to their charges. The language specifically provides that the *county* may make such addition "to recover replacement costs for buildings, fixtures and equipment as they are replaced."

By far the greatest portion of the charges for care of patients in tuberculosis sanatoria is paid from public funds,

either state or county. If the legislature had intended that such public funds should be utilized for replacement of private institutions which are in competition with public institutions, I believe it would have made that intention clear by express words.

An analysis of secs. 50.03, 50.04, 50.06 and 50.09 reveals no specific authority that public funds may be expended for use by private sanatoria, except the items which properly can be included in computing the actual per capita cost of care of patients of which \$21.00 is paid by state aid.

Sec. 58.06 (2) reads in part:

"* * * if the amount charged such patients is more than the actual per capita cost as determined under s. 50.04 they shall not be entitled to state aid."

If private tuberculosis sanatoria were to add 14% to the per capita cost, they would not be entitled to the state aid, as the charge would be higher than the actual per capita cost.

Sec. 50.07 (2), Stats., 1937, which was created by Ch. 285, Laws 1937, authorized inclusion in the charges which might be made for care in a county sanatorium of a sum to apply on the cost of new additions. This office gave the opinion in 33 O.A.G. 111 (1944), that private sanatoria were not entitled to the benefit of that statute, saying:

"* * * Since no county funds can ever be available for the construction of additions to private tuberculosis sanatoriums, but the latter must be financed wholly from other sources, there is no way in which the statute can be made to apply to such institutions. This fact, together with the declared legislative purpose of encouraging the expansion of the facilities of county sanatoriums, positively excludes the private sanatoriums from the benefits of subsec. (4)."

In the absence of a clear indication of a contrary legislative intent, the same reasoning should apply here. The benefits authorized by Ch. 555, Laws 1959, are in effect a legislative grant of public funds which should not be extended to private institutions by implication. As stated in 50 Am. Jur., Sec. 425, p. 447:

"* * * Statutory grants are not to be enlarged by construction. Indeed, every reasonable doubt should be so re-

solved as to limit the powers and rights claimed under the authority of the statute. Whatever is not unequivocally granted is taken to have been withheld."

II

Your second question is:

"Are the 14 per cent additions to be included in the aggregate costs for the purpose of arriving at the 'actual per capita cost' mentioned in Section 50.04 (9); or should the 'actual per capita cost' be first established and then increased by 14 per cent? (This is primarily a matter of accounting mechanics and will not affect the final amount of the sanatorium claim. However, the answer could possibly affect by implication the answer to question 3.)"

Sec. 50.04 (9) provides:

"Beginning with the fiscal year ending June 30, 1959, the records and accounts of each county tuberculosis sanatorium and each private sanatorium approved by the state board of health under s. 58.06 shall be audited annually. Such audits shall be made by the department of state audit as provided in s. 15.22 (12) as soon as practicable following the close of the institution's fiscal year. In addition to other findings, such audits shall ascertain compliance with the mandatory uniform cost record-keeping requirements of s. 46.18 (8), (9) and (10) and verify the actual per capita cost of maintenance, care and treatment of patients. Any resulting adjustments to settlements already made under s. 50.09 shall be carried into the next such settlement."

The actual per capita cost should first be established. The items which are to be considered are costs of maintenance, care and treatment of patients. The additional charges allowed are not items included in sec. 50.04 (9), but are for carrying charges and allowance for replacement costs, granted as additional aid.

III

Your third question is whether the state aid of \$21.00 per week specified in sec. 50.04 (7) (a) is increased 14% by the provisions of Ch. 555, Laws 1959.

The answer is "No".

Sec. 50.04 (7), Stats., provides as follows:

"Each county maintaining in whole or in part a tuberculosis sanatorium shall be credited by the state, to be adjusted as provided in s. 50.09, for each patient cared for therein at public charge in the 1957-1958 fiscal year and subsequent fiscal years, as follows:

"(a) For each such patient whose support is chargeable against said county, \$21 per week.

"(b) For each such patient whose support is chargeable against some other county, the total cost of his maintenance as determined by the board of trustees of the institution and the state board of health; and the state shall charge over to such other county the difference between such total cost and \$21 per week provided through state aid."

This section fixes the state aid at a flat sum of \$21.00 per week. There is nothing in the amendment which implies that the \$21.00 per week state aid is also to be increased by 14%.

IV

Your fourth question is as follows:

"There are two private sanatoria presently qualified under Section 58.06. Their only source of financing operating costs heretofore has been short-term loans from banks and other sources. Accordingly, such interest costs have been allowed them in the past in arriving at the cost of care and resulting per capita costs on which recoveries from the state and other counties are based. Is the 4 per cent addition for carrying charges provided by Chapter 555 of 1959 in addition to the interest actually paid by private sanatoria for such purposes? In other words, is a private sanatorium entitled to both?"

The answer is "No".

We have concluded that private tuberculosis sanatoria are not entitled to the 4% additional charge. Where the means of financing operation costs is by short term bank loans, which necessarily bear some interest, and which have been approved by the board of health, the interest paid would be an expense of operation and a proper item to be reflected in the per capita cost of maintenance. See 44 O.A.G. 47. This administrative determination apparently

meets with legislative approval as it did not make any changes. *Marinette, T. & W. R. Co. v. Railroad Comm.*, (1928) 195 Wis. 462, 218 N.W. 724.

V

Your last question is as follows:

"If your answer to question 4 is No, can the private sanatoria elect which of the methods of computing carrying charges it will use; i.e., the actual interest paid or the 4 per cent addition; or does the 4 per cent addition authorized by Chapter 555 take the place of interest which will actually be paid by private sanatoria."

The answer is "No".

In the past, the inclusion of actual interest cost was permitted by implication, on the basis that it was a reasonable and necessary expense.

As stated in the answer to Question IV, when the legislature has specified a specific amount that can be collected by the county for a definite purpose, that specification excludes a similar collection in cases not covered by the enactment.

Private sanatoria cannot add 4% to cover carrying charges and so their interest must be included in per capita costs if they are to be reimbursed.

BL:RGM

Licenses—Restaurant—Under ch. 160 state board of health is authorized to license a mobile food stand as a restaurant and may limit area of operation if 160.01 (3) applies.

December 22, 1960.

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

You ask my opinion on the following questions:

- (1) Does ch. 160 permit the state board of health to license a truck or mobile food stand as a restaurant?

- (2) If question (1) above is answered, "Yes", does such chapter give the state board of health the authority to limit by regulation the area in which such a mobile food stand could operate?

As background for the first of these questions, your letter requesting such opinion advises me that a Wisconsin resident has recently obtained a franchise in this state for a specially constructed truck "designed to be used as a mobile food stand and to be used to refrigerate, prepare and cook pizzas for sale to the general public." You state:

"The trucks are equipped with a radio telephone to receive orders from a central base of operations which also will be used as a commissary for the refrigeration and storage of food and for the preparation of raw pizzas. Upon receipt of an order, the truck operator would remove a pizza from the truck refrigerator and place it in the truck oven and proceed to the delivery point where he would sell the pizza while it was still hot. The truck is designed to handle other items of food and drink as well as pizzas. The plan is that one or more of these trucks would operate from a central commissary and office, returning only at the end of the working day for cleaning and restocking. It is believed that the limit on how far the trucks will travel in filling orders will not be dependent upon municipal or county boundaries, but upon practical economic limits of operation. We are told that these specially constructed trucks are equipped with stainless steel sinks, oven, refrigerators and storage facilities for food and water, and that such equipment has all been approved by the National Sanitation Foundation for use in restaurants."

In answer to your first question, it is my opinion that ch. 160 does permit the state board of health to license a truck or mobile food stand as a restaurant. Sec. 160.01 (2) reads in part as follows:

" 'Restaurant' means and includes any *building, room or place* wherein meals or lunches are prepared or served or sold to transients or the general public, and all places used in connection therewith. * * *"

My opinion above stated is based on the meaning of the word "room", as employed in the definition of restaurant here in question. A mobile food stand is not, in my judgment, a "building" within the meaning of that word as

employed in sec. 160.01 (2). The common and approved usage of the noun "building" embraces the idea that a building covers a space of land and has a fixed location thereon. Thus Webster's New International Dictionary, 2nd Ed., defines a building as a "* * * fabric or edifice, framed or constructed, designed to stand more or less permanently, *and covering a space of land, * * *.*" (Emphasis mine). But the noun "room", in its ordinary and approved usage, does not necessarily mean a component of a building. A room may be found in a ship, or in a railway train, both, of course, mobile. Webster's New International Dictionary, 2nd Ed., defines "room" as a "space enclosed or set apart by a partition; an apartment or chamber;—often in combination; as a bedroom; bathroom; lunchroom; *a stateroom in a ship or railroad car; * * *.*" (Emphasis mine). See also *People v. Chase*, 1 F. (2d) 60, 61 (1931). Since a ship or railway car can contain rooms, I see no logical reason why the interior of a mobile food stand may not be viewed as a room within the meaning of the word "room" as employed in sec. 160.01 (2). It is therefore my opinion, as stated above, that a license may lawfully be issued for the operation of a mobile food stand as a restaurant.

Your second question was: does ch. 160 give the state board of health the authority to limit by regulation the area in which such mobile food stands can operate? Sec. 160.06 reads in part: "The board shall * * * administer and enforce the laws relating to the public health and safety in * * * restaurants * * *." As used in ch. 160, the term "public health and safety" means "the highest degree of protection against infection, contagion and disease that a hotel or restaurant or tourist rooming house will reasonably permit." Sec. 160.01 (3). Sec. 227.014 (2) (a), provides: "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." It is clear that sec. 160.06 confers on the state board of health a broad power of supervision over Wisconsin restaurants to be exercised in the interest of "public health and safety." To aid

it in exercising such power, the board has rule-making authority under sec. 227.014 (2) (a). These things being so, it is my opinion that the board has power to issue a regulation limiting the area in which mobile food stands can operate, *if such regulation subserves "public health and safety" as defined by sec. 160.01 (3)*. You state in your letter that the limit on how far the trucks or mobile food stands in question will travel in filling orders "will not be dependent upon municipal or county boundaries, but upon practical economic limits of operation." For the board to restrict a mobile food stand, licensed as a restaurant, to an area less than its "practical economic limits of operation" would work unwarranted hardships upon the licensee unless such a restriction was justified in the interest of public health and safety. If, for example, it were found that the operation of a mobile food stand serving an area of a given size prevented proper inspection of such stand, a rule designed to assure proper inspection by setting up a size limitation on the operation area of a mobile food stand would in all probability be a valid rule. On the other hand, if such a size limitation on operation area were imposed by rule without good reason, i.e., without such rule serving or promoting public health and safety as defined by sec. 160.01 (3), it would be an unreasonable and invalid rule.

JHM

Constitutional Amendment—Legislature—Mechanics of amending procedures discussed with special consideration given to situation wherein pending amendment involves section being amended by prior resolution.

December 23, 1960.

EARL SACHSE, *Executive Secretary,
Legislative Council.*

You have called attention to the fact that there was an amendment of a portion of Art. XI, sec. 3, Wis. Const., as the result of a referendum vote on November 8, 1960. This amendment was based upon Joint Resolution No. 47, S., of

the 1957 legislature which was re-introduced as Joint Resolution No. 53, S., in the 1959 session of the legislature.

Another proposed amendment of a portion of Art. XI, sec. 3, was introduced as Joint Resolution No. 6, S., in the 1959 legislature.

In order that there may be a clear understanding of the amendment and the proposed amendment, Art. XI, sec. 3, in its entirety is here set forth in full. The first amendment mentioned above is set forth in brackets and the latest proposed amendment is underscored.

"Corporations

"Municipal home rule; debt limit; tax to pay debt. Section 3. Cities and villages organized pursuant to state law are hereby empowered, to determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of state-wide concern as shall with uniformity affect every city or every village. The method of such determination shall be prescribed by the legislature. 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 [and counties having a population of 500,000 or over,] by the last assessment for state and county taxes previous to the incurring of such indebtedness and for school districts [and counties having a population of 500,000 or over] 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 and except that for any school district offering no less than grades one to twelve and which is at the time of incurring such debt eligible for the highest level of school aids, the total indebtedness of such school district shall not exceed ten 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."

In view of the foregoing the legislative council has raised the question of whether there will be any problem because of the fact that the resolution to be introduced in the 1961 legislature cannot follow verbatim Joint Resolution No. 6, S., of the 1959 legislature for the reason that a portion of the language of Art. XI, sec. 3, which section was printed in its entirety in said resolution, is no longer correct. This is true because the material in brackets is now a part of the constitution as a result of the November 8, 1960, referendum, whereas it was not a part of the constitution when Joint Resolution No. 6, S., was introduced in the 1959 legislature.

Art. XII, sec. 1, relating to amendments, provides in effect among other things that the amendment proposed by one legislature shall be referred to the legislature chosen at the next general election, and if agreed to by a majority of all the members elected to each house, it shall be the duty of the legislature to submit such *proposed amendment* to the people.

This poses no insurmountable problem so far as the mechanics of presenting it to the 1961 legislature and to the people are concerned. The legislative resolution could carry the same language as that contained in Joint Resolution No. 6, S., of the 1959 legislature except that the new mate-

rial approved at the November 8, 1960, election should be included. This could be included in brackets with an asterisk and footnote explaining the fact that it was not included in the preceding legislative resolution because it had not been approved as a constitutional amendment until the November 1960 election. This suggestion is important for the reason that the preamble of the resolution contains wording to the effect: "That article XI, section 3, of the constitution be amended to read: * * *." The use of such language would be misleading if the resolution did not go on to include the portion already amended in addition to the portion which is now in the process of amendment. The newly proposed amendment will be in italics so that no member of the legislature should be misled if the procedure here suggested is followed.

Provisions relating to the amendment of the constitution are mandatory and not merely directory. *State v. Zimmerman* (1925) 187 Wis. 180, 204 N.W. 803. The supreme court in *State ex rel. Postel v. Marcus* (1915) 160 Wis. 354, 152 N.W. 419, in referring to amendment procedure, said:

"* * * It was, doubtless, supposed that the safeguards thus thrown around the matter would enable the people, upon their coming to the point of voting directly in respect to such a proposition, *to have the benefit of that individual considerate judgment of the members of the legislature which they had provided should occur.* * * *"

The legislators know when they are voting on a joint resolution to amend the constitution that the proposed amendment is in italics and that the remainder of the section which is printed merely provides an appropriate frame of reference so that the proposed amendment may be read and understood in proper context.

The problem here presented is not without precedent as is indicated in the case of *Browne v. City of New York* (1925) 241 N.Y. 96, 149 N.E. 211, to which you have called attention.

On appeal the court there reversed a lower court holding that an amendment was abortive because between the session of the legislature held in 1922 and the session held in 1923, Article 12 of the New York constitution had been changed with the result that the Article upon which the

amendment was to operate was not the same when the amending resolution was adopted by the legislature of 1923 as it was when the same resolution was adopted in 1922. It was pointed out that although the Article upon which the amendment was to operate was not the same in the two years, the amendment itself, that is the new or substituted Article, was identical in both years and was thereafter approved by the electors. The court in its opinion written by Justice Cardozo stated that there was neither precedent nor adequately persuasive reason to support the implication that into the command that two legislatures shall accept an amendment before submission to the people should be added a condition that the Article displaced or superseded shall remain unvaried in the interval.

It should be noted that Art. XIV, sec. 1, of the New York constitution relating to the amending process is identical in substance, although not in wording, with the procedure set up by Art. XII, sec. 1, Wis. Const., and the controlling consideration pointed out in Justice Cardozo's opinion is that while the Article amended in its over-all form was not the same, the amendment itself, the new and substituted material, was the same to "the last syllable and comma," and that hence the command of the constitution that two legislatures shall accept an amendment before approval or ratification by the people, had been obeyed.

There appears to be no conflict between the terms of the proposed amendment and the one made effective at the November 1960 election. All the first amendment did was to add the classification of counties having a population of 500,000 or more to the category of school districts in ascertaining the value of the taxable property by using the value of such property as equalized for school purposes. The newly proposed amendment sets up a debt limit of 10% of the value of the school district taxable property in the case of school districts offering 12 grades of schooling of a character so as to render the district eligible for the highest level of school aids.

However, should any legislator feel that although he was agreeable to the first amendment but for some reason or other is not agreeable to the second amendment he may vote accordingly and if the vote fails to meet the approval of the

majority of both houses it cannot be submitted to the electors. Also, and assuming the second resolution meets with the approval of the legislature, each elector in the state will have his opportunity to vote for or against the latest proposal without in any way being committed to such proposal one way or the other by reason of his vote on the 1960 proposal.

Thus each of the amendments stands on its own merits and the 1960 amendment gives rise to no conflicts either as to substance or procedure in the steps necessary to be taken in completing action on the latest proposal.

WHR

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