

OPINIONS
OF THE
ATTORNEY GENERAL

OF THE
STATE OF WISCONSIN

VOLUME 51

January 1, 1962, through December 31, 1962

JOHN W. REYNOLDS
Attorney General



MADISON, WISCONSIN
1962

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. HJWE, Green Bay	from Jan. 2, 1860, to Oct. 7, 1862
WINIFIELD SMITH, Milwau- kee	from Oct. 7, 1862, to Jan. 1, 1866
CHARLES R. GILL, Water- town	from Jan. 1, 1866, to Jan. 3, 1870
STEPHEN S. BARLOW, Dellona	from Jan. 3, 1870, to Jan. 5, 1874
A. SCOTT SLOAN, Beaver Dam	from Jan. 5, 1874, to Jan. 7, 1878
ALEXANDER WILSON, Min- eral Point	from Jan. 7, 1878, to Jan. 2, 1882
LEANDER F. FRISBY, West Bend	from Jan. 2, 1882, to Jan. 3, 1887
CHARLES E. ESTABROOK, Manitowoc	from Jan. 3, 1887, to Jan. 5, 1891
JAMES L. O'CONNOR, Madi- son	from Jan. 5, 1891, to Jan. 7, 1895
WILLIAM H. MYLREA, Wausau	from Jan. 7, 1895, to Jan. 2, 1899
EMMET R. HICKS, Oshkosh	from Jan. 2, 1899, to Jan. 5, 1903
LAFAYETTE M. STURDE- VANT, Neillsville	from Jan. 5, 1903, to Jan. 7, 1907
FRANK L. GILBERT, Madison	from Jan. 7, 1907, to Jan. 2, 1911
LEVI H. BANCROFT, Richland Center	from Jan. 2, 1911, to Jan. 6, 1913
WALTER C. OWEN, Maiden Rock	from Jan. 6, 1913, to Jan. 7, 1918
SPENCER HAVEN, Hudson	from Jan. 7, 1918, to Jan. 6, 1919
JOHN J. BLAINE, Boscobel	from Jan. 6, 1919, to Jan. 3, 1921
WILLIAM J. MORGAN, Mil- waukee	from Jan. 3, 1921, to Jan. 1, 1923
HERMAN L. EKERN, Madison	from Jan. 1, 1923, to Jan. 3, 1927
JOHN W. REYNOLDS, Green Bay	from Jan. 3, 1927, to Jan. 2, 1933
JAMES E. FINNEGAN, Mil- waukee	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, Mil- waukee	from Nov. 15, 1948, to Jan. 1, 1951
VERNON W. THOMSON, Rich- land Center	from Jan. 1, 1951, to Jan. 7, 1957
STEWART G. HONECK, Madi- son	from Jan. 7, 1957, to Jan. 5, 1959
JOHN W. REYNOLDS, Green Bay	from Jan. 5, 1959, to

ATTORNEY GENERAL'S OFFICE

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

* Appointed March 1, 1961

** Appointed November 1, 1961

OPINIONS
OF THE
ATTORNEY GENERAL
OF
WISCONSIN

VOLUME 51

Legislature—Governor—The governor has the power to call the legislature into special session during a period between the date when the legislature, then in regular session, adjourns to a date certain some time distant, and such date certain.

January 10, 1962.

HONORABLE GAYLORD A. NELSON,
Governor.

You ask my opinion on the question of whether or not you, as governor, have the power to call the legislature into special session during a period between the date when the legislature, then in regular session, adjourns to a date certain some time distant, and such date certain.

I will hereinafter refer to the above-described period between the legislature's day of adjournment to a date certain and such date certain as the "interim period".

It is my opinion that the governor of this state has the power to call the legislature into special session during such interim period if the legislature cannot be said to be in its general session during such period. If the legislature must be viewed as being in general session during the interim period, then in my judgment the governor would not have the power to call it into special session during such period.

The People v. Fancher (1872), 50 N. Y. Reports 288 has provided me with the most helpful case law I have been able to find on this subject. In such case, decided by the Court of Appeals of New York, it was held that the words "in session" as used in a provision of the New York Constitution authorizing the governor, when the senate was not in session, to fill temporarily, by appointment, a vacancy in the office of the justice of the supreme court, indicated a present acting or being of the senate as a body. The court held that when the sittings of the senate were terminated by a long adjournment, and the actual meetings of the body thus interrupted, although the session was continued, the senate was not "in session" within the intent and meaning of such constitutional provision, and an appointment made by the governor during such adjournment was valid.

In the *Fancher* case, the court said:

"It is * * * conceded that the senate had not been on any day after the 10th day of September actually assembled as a body, and that it had adjourned on that day to meet again on the 20th of November. The actual sittings of the senate were suspended on the 10th day of September, and the senators could only regularly be assembled or convened with authority to transact any business or perform any act as a senate prior to the day to which the body had adjourned by the governor, under the power conferred upon him, to convene the legislature (or the senate only) on extraordinary occasions (Const. art. IV, sec. 4), and if 'in session', they could not be convened by the governor in another session" (Emphasis mine).

This language from the *Fancher* case, at pages 290-291, would support the proposition that our legislature, if "in session" during the above-mentioned interim period, could not be convened by the governor in another, special session. However, in the *Fancher* case, the court, in arriving at its decision that the New York senate was not "in session" during the period September 10 to November 20, made certain observations that in my judgment are sound, well-reasoned, and germane to the question considered herein, with such observations indicating that the legislature of this

state cannot be properly regarded as being "in session" during the interim period. The court, at pages 294-295 said:

" * * * * The word 'session' may mean the actual sitting of a court or legislative body, or the time during which a court or legislature meet for the transaction of business, and the connection in which it is used must determine its meaning as used. When it is said that a court or legislative body is in session, *the meaning is that the members are assembled for business*. It is not denied that a single 'session' may be interrupted and consist of several actual sittings, with weeks or months intervening. In that case the session will be continued over the intervening time, and the several sittings will be connected together as one session by the adjournments. Although the months between the several sittings will be between the commencement and the final termination of the session, *in no proper sense will they be included as part of the session*. They are only constructively, if at all, a part of the session. While the session substantially continues adjourned from day to day, or over holidays, or with brief and usual recesses, so that the session is practically continuous, the body might possibly be regarded as practically in session during such recesses. That need not be considered. *But when the sittings are terminated by an adjournment for months, and the actual meeting or sitting of the body thus interrupted, although the session is continued, it cannot be said that the body is 'in session'*. * * * *"

(Emphasis mine).

In the light of these observations made in the *Fancher* case, it seems to me that in the interim period above-mentioned our legislature is not "in session", and that, such being the case, there is nothing to prohibit the governor from exercising his constitutional power to call the legislature into special session during such interim period.

A conclusion that our legislature would be "in session" during the interim period, and that therefore it could not be called into an "overlying" special session, would of necessity be a conclusion putting the power of the governor to call the legislature into special session at the mercy, to some extent, of the legislature. If our Legislature were to be

deemed to be "in session" from a day upon which it adjourned to a date certain, during a general session, to such date certain, it could, if it so desired, use a lengthy "interim period" device to create long periods of time during which the governor could not call it into special session. This would be a substantial entrenchment upon the power of the governor to call the legislature into special session, and in my judgment such an entrenchment is neither possible nor tolerable under the unrestricted grant of power to the governor "to convene the legislature on extraordinary occasions" contained in Art. V, sec. 4, Wis. Const. See also Art. IV, sec. 11, Wis. Const.

Additional cases which support my opinion that the governor has the power to call our legislature into special session during the above-mentioned interim period are the following: *Ralls v. Wyand* (1914 — Okla.) 138 p. 158, 162, 163; *Shaw v. Carter* (1931 — Okla.) 297 p. 273, 276, 277; and *United States v. Dietrich* (1904) 126 F. 659, 660.

JHM

Conservation Commission—Land Purchase—It is a policy decision for the conservation commission to determine whether Bong Air Base should be purchased in outright fee or whether limited title should be acquired without cost.

January 18, 1962.

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

In your letter to me of January 4, 1962, you state:

"It has been proposed that the Conservation Commission purchase the lands known as Bong Air Base from the United States Government at its appraised value, and that it execute an option and agreement to sell the lands to a proposed Surplus Property Development Corporation to be formed by the State of Wisconsin when it shall be determined that the highest and best use of the lands is no longer

for conservation, but for industrial development and platting for residential and light commercial development. The Conservation Commission is at present considering an offer of a gift of the Bong site, if used for conservation purposes under Chapter 310, 62 Statutes 240, 16 U.S.C.A. 667b, Public Law 537, 80th Congress, as amended."

Thereafter you state a series of eight specific questions concerning the above transaction. Each question will be stated as submitted and the answer will be given immediately following. The answers to your questions are all found in the express terms of the statute under which your department operates and under which the state lands, including conservation lands, may be sold.

"1. Does the Conservation Commission have authority to acquire lands for any purpose or purposes other than those enumerated in Wis. Stats. 23.09 (7)?"

For the purposes of this inquiry the answer is no. No search is made for specialized powers of the conservation commission which do not affect this problem.

"2. May expenditures of State funds be made from those appropriated and allocated by the Legislature under Wis. Stats. 20.703 (41) (b) (1. c.2.), (Ch. 427, Laws of 1961) and Wis. Stats. 20.280 (71b), (Ch. 427, Laws of 1961) for acquisition or development of land, and in particular Bong Air Base, for any purpose other than game management?"

Answer: No.

"3. May the Conservation Commission make expenditure from funds appropriated and allocated as stated in question 2, above, to purchase land for the purpose and intent of declaring such land excess to its needs and selling said land under the provisions of Wis. Stats. 24.085?"

Answer: No.

"4. If lands are made available to the Wisconsin Conservation Commission for wildlife conservation purposes without transfer of funds, under 16 U.S.C.A. 667 b, pursuant to P.L. 537, 80th Congress, as amended, may any of the

funds appropriated and allocated as stated in question 2, above, be expended for purchase of such lands?"

Answer: If the state, acting through the state conservation commission of Wisconsin, can obtain the full fee title for nothing, the answer is no. In the event the full fee title cannot be obtained without cost, the commission does have statutory power to expend state funds in order to obtain the full fee title. This should be a policy decision by the commission.

"5. If lands are made available to the Wisconsin Conservation Commission by the U. S. Government without transfer of funds as stated in question 4, above, may any state funds be expended regardless of source or appropriation?"

State funds may be expended only for the purpose for which they are appropriated. Hence, only funds appropriated for the purpose contemplated in question 4 could be used for that purpose and only under the conditions stated in the answer to question 4.

"6. Does the Conservation Commission have authority to acquire lands by purchase for cash for the purpose of conveyance to a proposed surplus property development corporation, organized by the State, for industrial development and a residential and light commercial development?"

Answer to question as stated: No. An immediate reconveyance by the state would indicate that the lands were not needed for conservation purposes in the first place.

"7. Does the Conservation Commission have authority to acquire lands by purchase when it could acquire such lands by gift, simply because the purchase for cash would remove any restrictions as to conservation use?"

Answer: Yes. See answer to question No. 4., supra.

Your question No. 8 will be subdivided into two parts.

[a] "8. Can the Conservation Commission, if it purchases said property from the U.S., sell said property or any portion thereof to the proposed surplus property development corporation on the basis of an appraisal made by the surplus development corporation, the purchaser, . . ."

Answer: No.

[b] "8. . . . or is the Conservation Commission compelled to sell on the basis of its own appraisal?"

Answer: The conservation commission has present statutory power to sell lands only in accordance with the provisions of sec. 24.085. Briefly, these require a determination by the commission itself that the lands are "no longer necessary for the state's use for conservation purposes." The price at which the land shall be sold may be affected by the general provisions governing the sale of state lands found in Ch. 24, which will not be discussed in detail at this point.

In summary the question really posed by the proposed transaction stated in your opening paragraph is whether or not the state acting through its conservation commission can purchase a portion of the land known as the Bong Air Base outright for conservation purposes when at present it could acquire a limited title to the land for conservation purposes without any expenditure other than possible administrative expense. Under the existing statute, first, the conservation commission does have the power to make the purchase, but whether it desires to do so in light of the interests in the land which it may acquire for nothing, is a policy decision which only the conservation commission itself can resolve.

It is, of course, necessary that the land be useful now and in the foreseeable future for conservation purposes. Under the terms of subsec. 20.280 (71b) not more than \$208,000 of the funds provided by ch. 427, Laws 1961, the state recreation committee act, may be used for this acquisition. It is for the conservation commission to determine whether it believes the best interest of the state would be promoted by acquisition of the full fee title in order that if ever a better and higher use of the land should develop that the conservation use would then be abandoned and the value of the land at that time returned to the state for other conservation purposes.

RGT

Charitable Organizations—Reports—A charitable organization which received contributions in 1961 must file a report as provided in sec. 175.13 (4), created by ch. 600, Laws 1961.

January 30, 1962.

ROBERT C. ZIMMERMAN,
Secretary of State.

You ask whether ch. 600, Laws 1961, creating sec. 175.13, Stats., relating to solicitation and collection of funds for charitable purposes, requires charitable organizations to file annual reports for 1961 or comparable fiscal year by March 31, 1962.

The law became effective November 14, 1961. Sec. 175.13 (2) requires those defined as charitable organizations to register with the secretary of state "prior to any solicitation". Subsec. (4) requires every organization required to register pursuant to sub. (2) "which has received contributions during the preceding calendar year" to file a report by March 31 of each year, covering the preceding fiscal year of operation, with variation of filing date for organizations keeping their records on a different fiscal year.

The foregoing provision applies only to organizations which did receive contributions during the preceding calendar year, so that, if an organization received none, it is not required to file a report.

If, however, it received contributions, the legislative objective is apparently that an accounting for such funds be made a matter of public record before further solicitations are made.

The statute itself does not specify the form in which the report must be made, so that the fact that records may have been kept in a different manner prior to adoption of the law than may be required in the future does not make impossible the filing of some sort of financial statement by March 31, 1962, or such other date as may be based on a different fiscal year.

The requirement that a financial report be filed after the effective date of the law, covering financial transactions prior to such date, does not of itself render the law retroactive. Such requirement is in the nature of a condition or qualification for future operation. It would hardly be suggested that a new license law is retroactive because it provides that no person may qualify who has not attained the age of 21 years, or who is not a citizen of the United States, even though at the time the law is first applied those conditions must have accrued prior to its effective date.

It was said in *Holt v. Morgan* (1954), 274 P. 2d 915, 917, 128 C. A. 2d 113:

“Respondent contends that section 7.3, supra, is not applicable because said section has no retroactive effect, and the application to said agreement would be retroactive as the debt for which the transfer of the license was pledged as security antedated the effectiveness of the section. The contention is based on a misunderstanding of ‘retroactive’ as a legal concept. ‘A statute is not made retroactive merely because it draws upon facts antecedent to its enactment for its operation.’ *Earle v. Froedtert Grain & Malting Co.*, 197 Wash. 341, 85 P. 2d 264; *Cox v. Hart*, 260 U. S. 427, 43 S. Ct. 154, 67 L. Ed. 332. It must give the previous transaction to which it relates some different legal effect from that which it had under the law when it occurred. *Ware v. Heller*, 63 Cal. App. 2d 817, 821, 148 P. 2d 410. This meaning of the word ‘retroactive’ applies both to the rule which disfavors the construction of a statute as having retroactive application, 82 C. J. S., Statutes, secs. 412, 414, pp. 980, 981 et seq., and to the retroactive character of a statute as ground of possible unconstitutionality. * * *

See, also, the authorities discussed in 41 OAG 142.

It is my opinion that any charitable organization which has received contributions in 1961 must file a financial statement as provided in sec. 175.13 (4), created by ch. 600, Laws 1961.

Voting Machines—Approved voting machines equipped to provide a printed tally without being opened is lawful for use in Wisconsin.

February 28, 1962.

FRANCIS L. EVRARD,
Corporation Counsel, Brown County.

You have inquired:

“Are printer-type voting machines, whereby vote totals are directly printed and embossed on specially carbonized return sheets, without the necessity of ‘opening the registry and recording compartment,’ legal under the laws of the State of Wisconsin, particularly Section 11.12 (2), 1959 Wisconsin Statutes?”

The answer to your question is “yes”. The only requirements for the structure of a voting machine are found in sec. 11.03. This section provides in substance: (1) That the machine must be so constructed as to afford every elector a reasonable opportunity to vote for any person for office and for or against any proposition on which he is by law entitled to vote, and to enable him to do this in secrecy; further, it must be constructed to preclude an elector from voting on any subject more than once; it further provides (2) that it must admit the voting of a split ticket if the voter so desires, and “it must also be so constructed as to register or record every vote cast”. After providing (3) for the method of voting for presidential electors it concludes with subsec. (4), which reads as follows:

“(4) The machine must be constructed so that it cannot be tampered with or manipulated for any fraudulent purposes; and the machine must be so locked, arranged or constructed that during the progress of the voting, no person can see or know the number of votes registered or recorded for any candidate.”

We are informed that the machine in question is manufactured by the same company that manufactures the standard voting machines now widely used in Wisconsin,

but it has an added feature whereby prior to the casting of the first vote the status of all the counters in the machine may be printed on a paper memorandum which may be withdrawn without opening the machine, and at the close of the election a similar printed record showing the tally on all the counters may be withdrawn without opening the machine. The advantage of the machine is that it furnishes a complete printed tally of the votes for all candidates and of the votes for or against any referendum question without the need for opening the machine and having the election officials make a handwritten tally of the votes shown on each of the counters. The machine is so designed that it could be opened and the counters visually inspected at the close of the election if that is desired at that time.

As your question indicates, you are concerned about the effect of sec. 11.12 (2), which directs the manner of taking off the tallies from the standard machines. The first sentence of this subsection reads :

“(2) As soon as the polls of the election are closed, the inspectors shall immediately lock the machine, or remove the recording device so as to provide against voting, and open the registering or recording compartment in the presence of any person desiring to attend the same, and shall proceed to ascertain the number of votes cast for each person voted for at the election, and to canvass, record, announce and return the same as provided for on the return sheets and certificates furnished. * * *”

In my opinion the direction to open the registering or recording compartment “in the presence of any person desiring to attend the same, * * *” is only a directory provision designed to insure the integrity of the election when a standard machine is used. It is clear from the description of the proposed printing machine that the election inspectors can proceed to ascertain the number of votes cast for each person voted for at the election without opening the machine at that time, and it is within their discretion to do so. If after the inspection of the tally sheets the inspectors or any person present desires that the seal on the machine be broken and the counters inspected immediately, the ma-

chine is designed so that this could be done. Whether or not the seal should be broken for such inspection immediately at the close of the election or await some proper challenge to the tally is a question that need not be answered at this time.

In my opinion the printing voting machine described as above is lawful for use in the state of Wisconsin.

RGT

Estates—Fees—Under sec. 253.29 (2) (a) only one filing fee for one estate should be accepted. Methods of refunding in case of double payment discussed.

March 28, 1962.

R. E. GIERINGER,
District Attorney, Adams County.

You have called attention to a question involving the application of sec. 253.29, to a problem which has arisen in probate proceedings in your county.

A will was filed in county court. Objections were made to its allowance, but the will was admitted to probate and Letters Testamentary were issued. An inventory was filed and the fee of \$100 for estates of \$100,000 or more provided by sec. 253.29 (2) (a) was paid.

Subsequently an appeal was taken to the Wisconsin supreme court which reversed the county court and remanded the cause with directions to dismiss the probate proceedings based upon the will and codicil in question.

This was done and thereafter an earlier will was offered for probate. The proponents of the invalid will first offered for probate now seek a return of the \$100 filing fee and the opinion of this office is requested since the problem does not appear to be specifically covered by statute and the question is one of general interest that is likely to arise again.

In an official opinion dated June 23, 1954, 43 OAG 177, it was concluded among other things that only one fee is chargeable against any one estate under sec. 253.29 (2) (a). In the same volume of attorney general opinions there is another opinion dated November 10, 1954, 43 OAG 291, in which the answer to one of the questions raised was that where a register in probate had made an overcharge under sec. 253.29 (2) (a), which error was not discovered until after the fee had been turned over to the county treasurer who in turn had sent it to the state treasurer as required by law, the proper way to obtain a refund out of the state treasury would be under sec. 20.06 (2), [now 20.555 (42)] relating to refund of moneys paid into the state treasury in error.

Since we are concerned here with the same estate there is no reason for charging a second filing fee, and if the first executor paid the \$100 out of assets of the estate in his hands, he should be entitled to a credit for that amount when he turns over the remaining assets to the second executor. On the other hand, if he paid the \$100 out of his own pocket, he has a legitimate claim against the estate for that amount. The second executor could reimburse him and take a credit for the \$100 in his final account and report. If the second executor refuses to reimburse the first executor voluntarily, the first executor could file his claim against the estate and have it allowed.

However, if the second executor has already paid an additional \$100 fee, the public treasury now has \$100 to which it is not entitled and the method of refund discussed in 43 OAG 291 is applicable, if the money has already been forwarded to the state treasury.

Attention is also called to sec. 253.29 (3) which provides in part:

“(3) The register in probate and the clerk of the county court shall, on the first Monday of each month, pay into the office of the county treasurer all fees collected by him and in his hands and still unclaimed as of said day. * * *”

This language seems to imply that while such fees are in the hands of the register in probate or clerk of the county court they could be "claimed" prior to the first Monday of the following month and returned in case of error.

Apparently, although there is no express statutory authority for it, the practice has been followed in some counties of handling problems such as this by having the register in probate deduct the overcharge in a previous month in his next settlement with the county treasurer and the county treasurer in turn makes the same deduction in his next settlement with the state treasurer, with the appropriate notations in the respective reports being made to show exactly what happened. See 43 OAG 291, 293 and 294.

All of these troublesome problems of bookkeeping and refunds can be avoided if the register in probate would follow the practice of accepting but one fee for one estate regardless of the number of wills that may have been disallowed.

WHR

University of Wisconsin—Charitable Organizations—Sec. 175.13 created by ch. 600, Laws 1961, is not applicable to an arm or agency of the state. It does apply to private non-profit units engaged in solicitation of contributions to aid the university.

March 28, 1962.

A. W. PETERSON, *Vice President,*
University of Wisconsin.

You have requested an opinion on the applicability of ch. 600, Laws 1961, to the following organizations:

1. The Regents of the University of Wisconsin;
2. Wisconsin Alumni Research Foundation;
3. University of Wisconsin Foundation;
4. Wisconsin Alumni Association;
5. Memorial Union Building Association, Inc.

Ch. 600, Laws 1961, creates sec. 20.730 (48) and sec. 175.13 of the statutes, relating to the regulation of the solicitation and collection of contributions for charitable purposes.

Sec. 175.13 sets up numerous requirements relating to the registration, records and reports of charitable organizations soliciting contributions from persons in this state.

With reference to definitions, sec. 175.13 (1) (a) provides that the term "charitable organization" includes any benevolent, philanthropic, patriotic or eleemosynary person or one purporting to be such. It should perhaps also be noted that the word "person" where used in the statutes include all partnerships, associations and bodies politic and corporate. See sec. 990.01 (26).

Sec. 175.13 (3) provides a list of those who are not required to register. None of the exemptions there provided are applicable here.

However, it should be noted that with respect to the regents of the university of Wisconsin we are dealing with an arm or agency of the state itself. See, *Sullivan v. Board of Regents of Normal Schools* (1932) 209 Wis. 242, 244 N.W. 563; *Holzworth v. State and Regents of University of Wisconsin* (1941) 238 Wis. 63, 298 N.W. 163; *Aberg v. Moe* (1929) 198 Wis. 349, 224 N.W. 132.

Statutes in general form, such as ch. 600, Laws 1961, do not affect the state if they tend in any way to restrict or diminish its rights or interests. General prohibitions in general laws apply to all private parties but are not rules of conduct for the state. The state may have the benefit of general laws but is not adversely affected by any unless it is expressly so provided. See, *Milwaukee v. McGregor* (1909) 140 Wis. 35, 121 N.W. 642, where the court said at p. 37:

"The infirmity of appellant's position has been, from the first, in supposing that the state, in respect to constructing a building in the city of *Milwaukee*, has no more free and than a private person or corporation, while the fact is that the people of the state, in their sovereign capacity, except as

restrained by some constitutional limitation, and there is none in this case, is as exempt from mere general or local laws as the king was of old in the exercise of his sovereign prerogatives as 'universal trustee' for his people. So it has been said, 'The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not' the sovereign 'in the least, if they may tend to restrain or diminish any of his rights and interests.' So general prohibitions, either express or implied, apply to all private parties, but 'are not rules for the conduct of the state.' *Dollar Sav. Bank v. U.S.*, *supra*. That has been applied in many ways. For examples: The state may sue as freely as an individual, but cannot be sued except by its consent. It may have the benefit of a general cost statute, but it is not liable for costs without express written law to that effect. It may plead the statutes of limitations the same as an individual, or recover interest as use or damages, but is not subordinate in adversary proceedings to the law on either subject, unless expressly named therein showing unmistakable legislative intent to that effect."

None of the other entities named in your request are arms or agencies of the state. They are private organizations even though their purpose is to aid the university as a state agency. They are in part at least benevolent and philanthropic and the applicability of ch. 600 to their activities depends upon the facts in each case. They are subject to registration under sec. 175.13 (2) (a) if they intend to solicit contributions from persons in this state, and they are required to report to the secretary of state under sec. 175.13 (4) if they have received contributions during the preceding calendar year. If their activities require them to register they must pay the \$5 fee provided by sec. 175.13 (2) (c). If they employ professional fund raisers or professional solicitors these persons must register and comply with all of the provisions of ch. 600 pertinent to such persons.

WHR

Courts—Taxable Costs—Under sec. 62.24 (3) (e), 1961 stats., taxable costs in municipal justice to the peace courts are the same as in other justice courts as provided by statutes. References in secs. 66.12 (3) (a) and 288.195 to clerk's fees do not apply in such courts.

April 2, 1962.

HENRY A. HILLEMANN,

Executive Secretary, Judicial Council.

You have inquired about the fees that are to be collected in municipal justice of the peace courts under court reorganization, particularly in traffic ordinance violation cases.

The term "justice of the peace" where used in the statutes includes "municipal justices of the peace." Sec. 990.01 (17m), 1961 Statutes.

Sec. 60.595, 1961 Stats., provides that town boards may create, and provide for election to the office of municipal justices of the peace. Sec. 61.305, 1961 Stats., makes a similar provision for village boards. Both of these sections provide that such a municipal justice of the peace shall have the jurisdiction provided by sec. 62.24.

Sec. 62.24 (1) (a), 1961 Stats., provides that the common council of any city may by ordinance provide for the election of a justice of the peace to be "municipal justice of the peace" in addition to justices of the peace otherwise provided by law.

Sec. 62.24 (1) (b), 1961 Stats., provides that the council shall fix a salary for such justice which shall be in lieu of fees and costs.

Sec. 62.24 (2) (a), 1961 Stats., sets forth at length the jurisdiction of a municipal justice of the peace. Among other things he has exclusive jurisdiction of offenses against municipal ordinances.

Perhaps reference should also be made at this point to sec. 66.12 (1) (a), 1961 Stats., which reads:

“66.12 Actions for violations of municipal regulations. (1)
(a) An action for violation of a city or village ordinance, resolution or bylaw is a civil proceeding. All forfeitures and penalties imposed by any ordinance, resolution or bylaw of the city or village, except as provided for in ss. 345.20 to 345.46, may be collected in an action in the name of the city or village before the municipal justice of the peace, or a court of record, to be commenced by warrant or summons as provided in s. 954.02; but the marshal, constable or police officer may arrest the offender in all cases without warrant, as provided in s. 954.03. The affidavit where the action is commenced by warrant may be the complaint. The affidavit or complaint shall be sufficient if it alleges that the defendant has violated an ordinance, resolution or bylaw of the city or village, specifying the same by section, chapter, title or otherwise with sufficient plainness to identify the same. All of the provisions of s. 954.034 pertaining to bail upon arrest shall apply to such actions. In arrests without a warrant or summons a statement on the records of the court of the offense charged shall stand as the complaint unless the court directs that formal complaint be issued; then the defendant's plea shall be guilty or not guilty and shall be entered as not guilty on failure to plead, which plea of not guilty shall put all matters in such case at issue, any other provision of law notwithstanding.”

It might be noted further that the provision “except as provided for in ss. 345.20 to 345.46” was included by the draftsman in anticipation of the passage of a traffic forfeiture procedure bill (236, A). Since no such bill passed, the provision is meaningless.

Sec. 62.24 (2) (b), 1961 Stats., provides that the municipal justice of the peace may punish a violation of a city ordinance by ordering payment of a forfeiture plus costs of prosecution or by imprisonment in case the forfeiture and costs are not paid.

Sec. 62.24 (3) (b), 1961 Stats., provides that the procedure shall be the same as is applicable to other justices of the peace, except as otherwise provided.

Perhaps most important of all is sec. 62.24 (3) (e), 1961 Stats., which provides:

“(e) The taxable costs shall be the same as in other justice courts, and shall be paid into the city treasury in the manner directed by the common council.”

It would seem rather clear that in the absence of any other statutory provisions to the contrary the language quoted above should be controlling as to costs and that these costs are those provided generally for justice of the peace in sec. 307.01 covering fees of justices of the peace and sec. 307.02 relating to taxable costs in justice court, since this latter provision commences with the language:

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

However, you have raised a question as to the possible applicability of sec. 66.12 (3) (a) and sec. 288.195, 1961 Stats., which are identical in content but which differ slightly as to form by reason of the fact that sec. 288.195 is split into two subsections. Accordingly, it will suffice if only sec. 66.12 (3) (a), 1961 Stats., is quoted here. This reads:

“66.12 FINES TO MUNICIPAL TREASURY. (3) (a) In forfeiture actions for violations of ordinances other than those provided in ss. 345.20 to 345.46 on default of appearance or on a plea of guilty or nolo contendere, the clerk's fee shall be not more than \$2, but if it is necessary to issue a warrant or summons and the action tried as a contested matter, additional fees may be added not to exceed \$3.50, except that a municipality need not advance clerk's fees, but shall be exempt from payment of such fees until defendant pays costs pursuant to this section. Contested matters in which the municipality prevails, costs shall be allowed to the municipality not to exceed \$15.”

This language, on its face, obviously refers to a court of record which has a clerk. There are no provisions for clerk's fees in ordinary justice court practice. The justice himself keeps the docket and is entitled to the various fees set forth in sec. 307.01. However, as a municipal justice of the peace

he may not keep these fees, since under sec. 62.24 (1) (b) referred to above he receives a fixed salary "which shall be in lieu of fees and costs." These he must pay into the municipal treasury as provided in sec. 62.24 (3) (e) previously mentioned.

As a matter of logic it would seem that since under sec. 66.12 (1) (a) ordinance violations may be tried either before the municipal justice of the peace or in a court of record, the costs and fees should be the same in either event. Unfortunately the legislature has failed to bridge this gap by any express language and there is no ambiguity in any of the relevant statutes which warrants the indulgence of supplying the missing language by implication or construction.

It is therefore concluded that the costs in municipal justice of the peace courts are the same as in justice courts generally and that secs. 66.12 (3) (a) and 288.195 are limited to courts of record so far as any language therein contained relates to clerk's fees.

WHR

Wages—Contracts—Highway Commission—Drivers delivering materials to state highway construction site whose employers are in no way a party to a state construction contract made pursuant to sec. 84.06 (2), are not within the state prevailing wage law as set forth in 103.50.

April 16, 1962.

HARVEY O. GRASSE,

Chairman, State Highway Commission.

You have asked whether drivers of ready-mixed concrete trucks, who are employed by operators of established commercial concrete plants, having a fixed and permanent place of business, acting only as material suppliers are subject to sec. 103.50 (1) of the Wisconsin Statutes, when delivering

ready-mixed concrete to contractors who are doing construction work on state highways. You have stated that in many instances, the owner of the concrete plant is not the "contractor, * * * subcontractor, agent or other person doing or contracting to do all or a part of the work under a contract based on bids as provided in section 84.06 (2), * * *" See sec. 103.50 (1). You have also pointed out that the interpretation of the United States department of labor of the Davis-Bacon Act, which contains provisions similar to sec. 103.50 (1), is that it does not apply to ready-mixed concrete drivers employed under similar circumstances.

In 38 OAG 481, it was assumed that the act of pouring ready-mixed concrete from the truck into forms constituted part of the work of executing the improvement, and that the relationship of the state to the contractor made no difference.

However, since the issuance of 38 OAG 481, it has become generally recognized that the pouring of concrete into forms, even if it is considered to be part of the work of executing the improvement, does not constitute a sufficiently substantial part of work and must be considered *de minimis*. See opinion letters No. DB-14, October 11, 1961 and No. DB-1, April 3, 1961 issued by the solicitor of labor under the Davis-Bacon Act.

The statutes in question are as follows :

"103.50 (1) Hours of Labor. No laborer or mechanic *in the employ of the contractor, or of any subcontractor, agent, or other person doing or contracting to do all or a part of the work under a contract based on bids as provided in section 84.06 (2)* to which the state is a party for the construction or improvement of any highway, shall be permitted to work a longer number of hours per day or per calendar week than the prevailing hours of labor determined pursuant to this section ; nor shall he be paid a lesser rate of wages than the prevailing rate of wages thus determined, for the area in which the work is to be done ; except that any such laborer or mechanic may be permitted or required to work more than such prevailing number of hours

per day and per calendar week if he shall be paid for all hours in excess of the prevailing hours at a rate of at least 1½ times his hourly rate of pay."

It should be noted that the provisions of the statute are limited in scope to employees of "the contractor, or any sub-contractor, agent, or other person doing * * * work under a contract based on bids as provided in section 84.06 (2) * * *." This section reads as follows:

"(2) BIDS, CONTRACTS. All such highway improvements shall be executed by contract based on bids unless the commission finds that another method as provided in sub. (3), (4) or (5) would be more feasible and advantageous. Bids shall be advertised for in the manner determined by the commission. The contract shall be awarded to the lowest competent and responsible bidder as determined by the commission. If the bid of the lowest competent bidder is determined by the commission to be in excess of the estimated reasonable value of the work or not in the public interest, all bids may be rejected. The commission shall, so far as reasonable, follow uniform methods of advertising for bids and may prescribe and require uniform forms of bids and contracts. The contract shall be entered into on behalf of the state by the commission. Every such contract is excepted from the provisions of ss. 16.70 to 16.82 and ss. 16.87 and 16.89. Any such contract involving an expenditure of \$1,000 or more shall not be valid until approval of the governor is indorsed thereon. The commission may require the attorney general to examine any contract and any bond submitted in connection therewith and report as to the sufficiency of the form and execution thereof. The bond required by s. 289.16 for any such contract involving an expenditure of less than \$1,000 is exempt from approval by the governor and shall be subject to approval by the commission. The provisions of this subsection shall also apply to contracts with private contractors based on bids for maintenance under s. 84.07."

It is clear that a material supplier has no obligation to the contractor for the actual delivery of the concrete in

terms of the plans and specifications of the public improvement. He must make delivery, but such delivery is not measured by the quality of the delivery, or "work" on the project which may incidently be accomplished by the delivery. There is no reason to believe that the term "subcontractor" envisioned by sec. 103.50 (1) is any different than that defined in sec. 66.29 (1). The normal material supplier cannot be considered to be the "agent" of the prime contractor in any sense of the word.

In essence then, if employees are to be considered to be included in the provisions of sec. 103.50 (1), they must perform work for an employer who qualifies under the language "or other person." By the rule of *ejusdem generis*, the general phrase "or other person" is limited by the enumerated class which precedes it. It is clear that the class includes but one common characteristic. The contractor, the subcontractor, and the agent, all bear some portion of the responsibility imposed by the contract let by the state. Each of them assumes a portion of the contractor's responsibility. It is my opinion that an employer falling under the scope of the words "or other person" must also bear that responsibility.

Accordingly, it is my belief that in those cases where the material supplier is not responsible for any portion of the contractor's obligation to the state, his employees are outside of the scope of the statute.. The test of coverage under the statute hinges first, on the nature of the employment relationship, and second, on the character of the operation performed.

It is therefore my opinion that "ready-mixed concrete" drivers working out of and employed at permanently established commercial plants, are not subject to the state prevailing wage law on highway construction projects.

This opinion, of course, does not apply to such cases where the concrete plant is a part of the operation of the principal contractor, subcontractor, or others enumerated in sec. 103.50 (1), who are contracting to do all or a part of the contract based on bids as provided in sec. 84.06 (2).

This opinion is in accordance with the current rulings of the United States department of labor relative to the Davis-Bacon Act.

It is also my opinion that the mere act of pouring the concrete into forms is, as it relates to highway construction, *de minimis*, and should not be considered a part of the contracting work in any event. As I understand it, the driver merely sets up the spouts to which the concrete is run into the forms and does no finishing or other work after the concrete has been dumped from the truck into the place designated by the contractor. In the hauling operation itself, he is merely the driver of materials to be delivered to the contractor's site and does not assume any responsibility in any way, shape or manner regarding the completion of the project or the manner in which the construction is done.

The same principle would, of course, apply to drivers delivering other materials whose employers are in the position here considered.

REB

Licenses—Plumbers—No city, village, township, county, or metropolitan sewerage district can lawfully require a plumber, duly licensed by the state to post an idemnity bond and/or public liability insurance policy as a prerequisite to operate in such district.

April 23, 1962.

EDMUND A. NIX,

District Attorney, Eau Claire County.

You ask my opinion on this question: may the city of Eau Claire lawfully require a plumber, duly licensed as such by the state of Wisconsin, to file an indemnity bond

and a public liability insurance policy with the city clerk before he can engage in plumbing in such city?

As background for this question you state:

“Before a duly licensed plumber can engage in plumbing or obtain a plumbing permit in the City of Eau Claire, he must under city ordinance file a bond and an insurance policy with the City Clerk. The bond is an indemnity bond, ‘to be approved by the Common Council, in the sum of Three Thousand Dollars (\$3,000.00), conditional that he or they will perform faithfully all work with due care and skill and in accordance with the law, ordinances, rules and regulations governing the installation of plumbing and drainage. The bond shall state that the person, firm or corporation will indemnify the City of Eau Claire, and save it harmless against all damages, costs, expenses, outlays and claims of every nature and kind arising out of any unskillfulness or negligence on his or their part in connection with plumbing or drainage work, as prescribed in this Chapter. Such bond shall remain in force until the expiration of the license of such obligor, except that on such expiration it shall remain in force as to all penalties, claims and demands that have accrued thereunder prior to such expiration; provided that such obligor may at any time substitute a new bond for the same, of like amount and tenor, with different sureties to be approved by the Common Council unless some claims, penalties, and demands accruing under the former bond remain unsatisfied in which case such old bonds shall not be surrendered until such claims, penalties and demands are satisfied: provided, further, that if the sureties on such bond or any of them shall become insolvent or remove from this state, the Common Council shall require a new bond before granting any further permits to such obligor.’

“ ‘Bonds in compliance with the foregoing provisions shall be executed and filed annually, and on or before the 15th day of January of each year.’

“The insurance policy is a liability policy, ‘which shall name the City of Eau Claire as a party assured and shall insure the City of Eau Claire against liability in the amount

of \$20,000.00 for the damage to property and \$50,000.00 for damage arising out of personal injuries or death.' ”

You point out that sec. 145.04 (2) provides that, “No city, village, township, county or metropolitan sewerage district commission shall require the licensing of plumbers or prohibit plumbers licensed under this chapter from engaging in or working at the business of plumbing.” You cite *Massachusetts Bonding and Insurance Co.*, (1928 - Texas) 10 S.W. 2d 770, wherein it was held that an ordinance requiring plumbers to execute a \$3,000.00 bond in order to secure a license to carry on their business in the city of Dallas was invalid.

It is my opinion that the city of Eau Claire may not lawfully require the filing of the bond and insurance policy in question before a duly licensed plumber may engage in plumbing in that city. In effect, such a requirement clearly prohibits a plumber, licensed under Ch. 145, from engaging in or working at the business of plumbing until he complies with it. This being so, the requirement violates sec. 145.04 (2) since that statute specifically denies to cities and the other governmental units named the power to “prohibit plumbers licensed under this chapter from engaging in or working at the business of plumbing.”

Even if sec. 145.04 (2) did not exist, it would still be my opinion that the bond and insurance policy in question must be deemed unlawful under the principle, well recognized in Wisconsin, that where the state has entered the field of regulation, municipalities may not make regulations inconsistent or in conflict therewith. See *Fox v. Racine*, (1937) 225 Wis. 542, 545. Clearly, an ordinance of the kind in question, denying a plumber, duly licensed by the state, the right to act under such license in Eau Claire, unless and until he meets the bond and insurance policy requirement of such ordinance, is an ordinance in conflict with and inconsistent with state law. It should here be noted that the decision of *Massachusetts Bonding and Insurance Co. v. McKay*, 10 S.W. 2d 770, 771 mentioned above, holding a bonding requirement of the type under consideration invalid, is based on the rationale of *City of Houston v. Richter*, (1913)

157 S.W. 189, 192, 193, in which a city's bonding requirement imposed on a state licensed plumber was condemned as being inconsistent with state law. Under Texas law, municipalities were prohibited from enacting ordinances "inconsistent with the laws of Texas", a statutory recognition of the principle that where the state has entered the field of regulation, municipalities may not make regulations inconsistent therewith. So the above-mentioned Texas cases make it plain that a bonding and insurance policy requirement of the kind here in question must be condemned under the "inconsistency with state law" principle, whether embodied in a statute (as in Texas), or found in case law (as in Wisconsin).

This opinion is not to be construed, of course, as a condemnation of the idea that a municipality may find it wise to impose a bonding requirement of the kind in question on plumbers, *where authorized by law to do so*. There are sound reasons why a municipality, authorized by law to do so, may find it desirable to impose such a requirement on plumbers. Those reasons are well set forth in *State v. District Court In and For Burleigh County*, (1934 - So. Dak.) 253 N.W. 744, 748. But no matter how sound the reasons for the imposition of that requirement, there must be statutory authorization for its imposition and no such authorization now exists in Wisconsin law.

It should here be noted that this opinion has no bearing whatsoever on the right of a city of the first, second or third class having a system of waterworks or sewerage, or of a village or city of the fourth class or of any township or county or any metropolitan sewerage commission, to require by ordinance that no plumbing shall be done, except repairing leaks, without permit upon prescribed conditions. This right to require a duly licensed plumber to obtain permits for his work (except repairing leaks) is provided by sec. 145.04 (1) is indisputable, and is in no way affected adversely by this opinion. It should be said, however, that this opinion does make it clear that a permit, lawfully required of a plumber under sec. 145.04 (1), cannot be denied him because he refuses compliance with a bonding and in-

surance requirement violative of sub. (2), sec. 145.04, and also inconsistent with the state licensing of plumbers.

JHM

Industrial Commission—Authority—The industrial commission may delegate to its deputies authority to obtain enforcement of sec. 101.104 through district attorneys under secs 101.24 (2) and 101.28.

April 24, 1962.

MATHIAS F. SCHIMENZ,
Chairman, Industrial Commission.

You have asked several questions relative to methods of obtaining enforcement of sec. 101.104, which reads:

“101.104 Mines, tunnels, quarries, pits; operation in violation of safety aids. If any shaft or workings of a mine, or any tunnel, trench, caisson, quarry, or gravel or sand pit is being operated or used in violation of the safety orders of the industrial commission applicable thereto, the owner or operator upon receiving notice of such violation from the commission shall immediately cease such operation or use. The operation or use of such shaft or workings of a mine, or of such tunnel, trench, caisson, quarry or gravel or sand pit, shall not be resumed until such safety orders have been complied with.”

You indicate that one of the reasons for your inquiry is that, although sec. 101.24 (2) makes available to the commission the legal services of both the attorney general and of district attorneys throughout the state, you have formerly followed the practice of using the service of the attorney general exclusively to obtain enforcement through injunctive actions.

Section 101.24 reads:

“101.24 Attorney general, district attorney, special prosecutor. (1) The commission shall have authority to direct any

deputy who is a citizen to act as special prosecutor in any action, proceeding, investigation, hearing or trial relating to the matters within its jurisdiction.

“(2) Upon the request of the commission, the attorney-general or district attorney of the county in which any investigation, hearing or trial had under the provisions of sections 101.01 to 101.29, inclusive, is pending, shall aid therein and prosecute under the supervision of the commission, all necessary actions or proceedings for the enforcement of said sections and all other laws of this state relating to the protection of life, health, safety and welfare, and for the punishment of all violations thereof.”

The legislative provision for use of facilities of 71 law offices and special prosecutors, in addition to those of the attorney general, is in apparent recognition of the fact that adequate enforcement throughout the state may entail the use of more facilities than a single law office. There may be some cases in which local enforcement will be more expeditious because of a local aspect; and there may be cases in which a question of general applicability throughout the state makes centralized legal services desirable. Those are largely questions of policy which cannot be anticipated.

In approach to your specific questions, however, the commission has authority under sec. 101.24 (2) to obtain from district attorneys every legal service which it may obtain from the attorney general.

Your first question is:

“Under the provisions of Section 101.104, is the Industrial Commission empowered to delegate authority to its deputies to obtain law enforcement at the local level?”

Although you have not designated exactly what you mean by “to obtain law enforcement at the local level”, we are assuming that you mean to take the steps necessary to cause a district attorney to initiate appropriate legal action, whether it be for injunction, for forfeiture, or for imposition of a criminal penalty. The answer is yes.

Sec. 101.10 (2) and (4) authorizes the commission to enforce all laws and all its orders relating to public safety. Section 101.10 (1) authorizes it to "employ * * * deputies and * * * other assistants as needed * * * to assign them their duties * * *."

While there are principles of law which would preclude the commission from delegating such discretionary powers as rule-making, the enforcement functions of a modern administrative agency can ordinarily be carried out only through delegation of administrative functions to deputies.

A deputy may be assigned duties of investigation, service of notices and other papers, interviewing witnesses and obtaining evidence, making reports to local officials, or signing complaints and such other documents as are necessary to carry out the functions of the agency which he represents. This would include such steps as serving notices of violation under sec. 101.104, reporting violations to a district attorney for forfeiture actions, signing complaints to initiate criminal proceedings, requesting civil action on behalf of the commission to obtain injunctions, and assisting district attorneys in obtaining evidence.

Your second question is:

"In signing a complaint against an employer for violations of an administrative code provision where extreme danger to workmen is involved, does a Commission Deputy become personally liable for such action?"

The opinion was given in 49 OAG 43, 45, that if an individual signs a complaint "in good faith and without malice, * * * 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." The discussion there is equally applicable here and will not be repeated.

Your third question is:

"In the same set of circumstances, does the Deputy have immunity from charges of false arrest? If a judgment is obtained, would the state pay it?"

You do not state the circumstances under which you anticipate that a deputy might have occasion to make an arrest. It would be no more necessary for a deputy to make an arrest to "obtain an enforcement at the local level" than it is to obtain enforcement at a state level. We know of no statutory authority for a deputy of your commission to make an arrest. Signing a complaint to initiate a proceeding and making an arrest are two distinct functions. The "false arrest" charges would arise in connection with the latter function; and liability for the former are discussed under the preceding heading.

If a deputy of your commission should sign a complaint to institute a criminal proceeding, a warrant of arrest would then be served by a peace officer. If the deputy should make the reports or requests necessary to bring suit for injunction or other civil action, no arrest would be involved.

RGM

Veterans—Widows—Grand Army Home—Discussion of sec. 45.37 (6) relative to eligibility requirements of veteran's widow for admission to Grand Army Home.

April 25, 1962

JOHN R. MOSES,

Director, Department of Veterans Affairs.

You have asked whether a widow of a particular veteran is eligible for admission to the Grand Army Home for Veterans at King. Your question involves the interpretation of sec. 45.37 relative to eligibility of a woman whose marital status is questioned.

You submit the following pertinent facts:

The widow applicant married husband No. 1 in 1917 at Winona, Minnesota. This husband in fact was using an as-

sumed name and was already married. She was informed that he died in Arkansas, and subsequently married husband No. 2 on June 30, 1928. She left husband No. 2 in 1936 with the idea that he would obtain a divorce. She received a newspaper article stating that the divorce action was started in 1940. She assumed that the divorce was granted and married the veteran on May 26, 1944, in St. Charles, Missouri.

This veteran had a previous wife No. 1, but lived with her a day or two and separated. He received word that she died in a hospital prior to marrying the applicant. The veteran was later informed that wife No. 1 was still living. The veteran then obtained an annulment from the applicant and started divorce action against wife No. 1. Upon completion, the veteran remarried the applicant in Jackson, Michigan, on July 15, 1952.

The applicant never dissolved her marriage to husband No. 2 until 1960. No information is available as to husband No. 1. The veteran died on December 15, 1960, at La Crosse, Wisconsin.

The following sections of the statutes are applicable and must be considered:

"45.37 (6) ADDITIONAL ELIGIBILITY REQUIREMENTS OF WIDOWS. The widows of veterans who would be eligible if living, are eligible if:

"(a) They were married to and living with their veteran husbands not less than 10 years immediately prior to the death of the veteran, or were married to the veteran at the time the spouse entered the service and were widowed by the death of the spouse in the service or as a result of physical disability incurred during such service and before they were married 10 years, or the period in which they were married and lived with the spouse plus the period of their widowhood is 10 years or more; and

"* * *"

"245.03 Who shall not marry; divorced persons. (1) No marriage shall be contracted while either of the parties has a husband or wife living, * * *"

“245.24 Removal of impediments to subsequent marriage.

If a person during the lifetime of a husband or wife with whom the marriage is in force, enters into a subsequent marriage contract in accordance with s. 245.16, and the parties thereto live together thereafter as husband and wife, and such subsequent marriage contract was entered into by one of the parties in good faith, in the full belief that the former husband or wife was dead, or that the former marriage had been annulled, or dissolved by a divorce, or without knowledge of such former marriage, they shall, after the impediment to their marriage has been removed by the death or divorce of the other party to such former marriage, if they continue to live together as husband and wife in good faith on the part of one of them, be held to have been legally married from and after the removal of such impediment and the issue of such subsequent marriage shall be considered as the legitimate issue of both parents.”

For the purpose of this opinion, it is assumed that the deceased veteran, through whom the applicant claims eligibility, had all basic eligibility requirements.

The key to this applicant's eligibility is whether she is the widow or was this veteran's legal wife for a period of 10 years, including the period of her widowhood, immediately preceding the application.

The term “widow” is defined in Webster's New International Dictionary (3d ed) as “a woman who has lost her husband by death and has not since remarried.” See also *Will of Buchanan*, (1933) 213 Wis. 299, 251 N.W. 250.

Prior to enactment of sec. 245.24 by ch. 218, Laws 1917, (formerly sec. 245.32) actual contract of marriage after the removal of the impediment was necessary to have a valid marriage. *Hall v. Industrial Commission*, (1917) 165 Wis. 364, 162 N.W. 312.

On the basis of the facts it may be presumed that the veteran lived as husband in good faith with his now widow. By sec. 245.24, the marriage was valid after the widow's

1960 divorce became final. See *Estate of Tufts*, (1938) 228 Wis. 221, 280 N.W. 309; *Hoffman v. Hoffman*, (1943) 242 Wis. 83, 7 N.W. 2d 428.

The legislative intent is clear that there must have been a valid marriage during which the widow lived with her veteran husband for not less than 10 years immediately prior to his death, or that the period during which they were validly married and living together, plus the period of her widowhood, must amount to 10 years or more.

This applicant widow does not meet the requirements of sec. 45.37 (6) (a) to establish her eligibility to enter the Grand Army Home at King, because her marriage to the veteran did not commence until her divorce from a former husband became final in 1960.

RGM

Teachers—Retirement Fund—Survivors—Teacher who should have but did not contribute to state teachers retirement fund prior to her death may not be classed as a member of a combined group of said system for coverage under OASDI for self and surviving children.

April 25, 1962.

RAY L. LILLYWHITE,
Executive Secretary,
State Teachers Retirement Board.

From your statement of facts it appears that Mrs. P. was born on November 25, 1928. She was a full-time teaching assistant at the University of Wisconsin from September 1952 to June 1953 and from September 1955 through February 1961. During this period she was employed half-time in the mathematics department at \$200 per month and part-time in the extension division where she earned over \$200 in each of the months in question. University officials are in agreement that she was carrying a full-time teaching

load during these periods. However, no deposits were made by or for her in the state teachers retirement system.

Mrs. P. died in 1961. Federal officials who are administering social security have inquired whether she should have been a member of the combined group of the teachers retirement system, and if so, whether such membership would have given her social security coverage and her children dependent benefits under the OASDI.

You have requested my opinion concerning:

1. The eligibility of Mrs. P. for membership in the state teachers retirement system and the date of such eligibility.
2. Her status with respect to the combined group and separate group.
3. The responsibility of the state teachers retirement board in connection with this case.

Sec. 42.35 (1) and sec. 42.28, Stats. of 1951, provided:

"42.35 Classification, exceptions. (1) Members of each retirement association, all of whom shall be members of the state retirement system, are classified as follows:

"Class A. All persons who, on the day preceding July 8, 1921, were members of, or entitled to a benefit from, the teachers' insurance and retirement fund.

"Class B. Senior teachers employed in the public schools, the teachers colleges or the university, after July 8, 1921, who prior to said date were teachers in any of said schools but were not members of the teachers' insurance and retirement fund.

"Class C. All members not included in Class A or in Class B."

"42.28 University retirement association. The university retirement association shall include as members all senior teachers in the university and all teachers and former teachers in the university who have a credit in the retirement deposit fund or have a reserve in the annuity reserve fund, but shall exclude all part-time teachers at the uni-

versity below the grade of instructor and all teachers who are or may be entitled to any benefit from the Carnegie foundation for the advancement of teaching under any plan in force prior to the seventeenth day of November, 1915."

Sec. 42.20, Stats. of 1951, provided in part:

"42.20 Definitions. * * *

" 'Senior teacher' designates a teacher who shall have arrived at the twenty-fifth birthday anniversary on the first day of July preceding.

" 'Teacher' means any person legally or officially employed or engaged in teaching as a principal occupation.

" 'Teaching' includes the exercise of any educational function for compensation, in any of the public schools, the teachers colleges, or the university, or in any school, college, department or institution, within or without this state, in instructing or controlling pupils or students, or in administering, directing, organizing or supervising any educational activity."

Since Mrs. P. was born November 25, 1928, she did not become twenty-five years of age until November 25, 1953. Consequently, she was not a "senior teacher" when she taught during the period from September 1952 to June of 1953. Although she was a "teacher" in the university during said period, she did not "have a credit in the retirement deposit fund or have a reserve in the annuity reserve fund" since she had made no contribution whatever to the state teachers retirement system. Thus, during said period she was not a member of the university retirement association under sec. 42.28 or a member of the state teachers retirement system under sec. 42.35 (1).

The statutes quoted above had not been changed at the time that Mrs. P. began to teach in September of 1955.

In the meantime Wis. Adm. Code TR 3.01 became effective and read in part:

"The board will deem it prima facie evidence that teaching is a person's principal occupation if a person is engaged in teaching amounting to 50% or more of what is considered a normal load of a regular full-time teacher in the same school, college or university * * *."

During all of the 1955-1956 school year and for some time thereafter Mrs. P. was one of the "senior teachers" in the university. Under sec. 42.28, Stats. of 1955, she was a member of the university retirement association, and under sec. 42.35 (1) of said statutes she was a Class C member of the state teachers retirement system.

Sec. 42.241 (1), (2), (3) and (4), Stats. of 1957, as created by ch. 12, Laws 1957, provided:

"42.241 SYSTEM DIVIDED; REFERENDUM ON OASI. (1) Division Into Groups. The state teachers retirement system is divided into two parts known as the separate group and the combined group.

"(2) Combined Group. The combined group shall be composed of:

"(a) Members who indicate in accordance with this section that they desire coverage under an agreement under section 218 of Title II of the federal social security act;

"(b) Individuals who become members after the effective date of this section (1957);

"(c) Inactive and retired members who become active members after said date; and

"(d) Persons who become members of the combined group under par. (b) or (c) shall become members of the combined group on or after July 1, 1957.

"(3) Separate Group. The separate group shall be composed of all other members.

"(4) Information And Forms To Be Furnished to Members. Not later than April 15, 1957, or not more than 15 days after the effective date of this section (1957) if such date is after March 31, 1957, the executive secretary shall

mail or deliver to each person who is an active member on the effective date of this section (1957) information concerning the contributions, benefits and other features of the 2 groups into which the system is divided under this section, together with an envelope addressed to the system, with postage prepaid, and a form to be signed and returned to the office of the system by each member who desires to become a member of the combined group. A member who chooses to become a member of the combined group shall thereby elect to become subject to the laws relating to the combined group, and the form provided under this subsection shall contain a statement to that effect."

Sec. 42.20 (6r), Stats. of 1957, as created by ch. 12, Laws 1957, provided:

"(6r) (a) 'Member' means a person who, as a result of having been engaged in Wisconsin teaching, has a credit in the retirement deposit fund or a reserve in the annuity reserve fund, or who is or may be entitled to a present or future benefit under the teachers' insurance and retirement law as provided by s. 42.51.

"(b) For the purposes of s. 42.241:

"1. 'Active member' means a member who is not receiving an annuity under s. 42.242, 42.49 or 42.51 and who has made a required deposit in the retirement deposit fund based on earnings after June 30, 1956, * * *

"2. 'Inactive member' means a member who is not receiving an annuity under s. 42.242, 42.49 or 42.51, who has not made a required deposit in the retirement deposit fund based on earnings after June 30, 1956, and is not on a leave of absence from a Wisconsin teaching position.

"3. 'Retired member' means a member who is receiving an annuity under s. 42.242, 42.49 or 42.51.

"* * *

"(c) Each member shall be a member of the separate group or the combined group, upon completion of the procedures under s. 42.241; except that if less than a majority of the members of the combined group vote in favor of

OASI coverage in a referendum under s. 42.241 (11), all members shall thereafter be deemed members of the separate group.”

Mrs. P. was not a “member” within the meaning of sec. 42.241 because she never had a credit in the retirement deposit fund or a reserve in the annuity reserve fund, and she did not teach prior to 1921 and consequently could not have been entitled to any benefit under the teachers’ insurance and retirement law which existed prior to said year. Mrs. P. was not an “active member” within the meaning of sec. 42.241 because she had not made a required deposit in the retirement deposit fund based on earnings after June 30, 1956, or based on any other earnings. Therefore, the executive secretary of the state teachers retirement system had no right or obligation under sec. 42.241 (4) to deliver to her information and other documents for the purpose of enabling her to elect membership in the combined group.

Mrs. P. never became an “inactive member” within the meaning of sec. 42.20 (6r) (b) 2 because she never had a credit in the retirement deposit fund or a reserve in the annuity reserve fund or was entitled to a benefit under the teachers’ insurance retirement law and hence never became a “member” within the meaning of sec. 42.20 (6r) (a).

From the foregoing it appears that Mrs. P. did not become a member of the combined group of the state teachers retirement system and did not become subject to social security coverage which was extended to members of the combined group under sec. 42.241 (12) of the Wisconsin Statutes of 1957.

Therefore, it is my opinion that the state teachers retirement board does not have any responsibility in this case.

This conclusion appears to coincide with the conclusion reached by the assistant general counsel to the bureau of old age, survivors and disability insurance of the social security administration in the department of health, education and welfare, who advised the division of claims policy as follows: “It is apparent, however, that the privilege of ex-

pressing a desire for or against coverage under the State's section 218 agreement is available only to those individuals who are members of the retirement system which has been divided. Accordingly, it would not be in accord with the terms of the Act to extend such privilege to an individual after such individual has, by reason of his death, ceased to be a member of the system."

JRW

Words and Phrases—Clerks of Court—Alimony and dependent children payments received by clerk of court and deposited in public depository, constitutes public deposit under 34.01 (1) and public moneys under 34.01 (5).

April 26, 1962.

WM. E. NUESSE,

Commissioner of Banks.

You have requested my opinion as to whether funds received by a clerk of the court "in connection with alimony payments, payments for dependent children, etc.," which are received from private individuals and paid out to other private individuals, all pursuant to an order of the court, are public deposits under the provisions of sec. 34.01, when deposited by the clerk of court in a public depository.

Section 34.01, relating to public deposits, contains the following definitions:

"(1) 'Public deposit' shall mean moneys deposited by * * * any county * * * or officer of any governmental subdivision of the state, or any court of this state, in any state bank, savings and trust company, mutual savings bank, or national bank in this state, including private funds held in trust by a public officer for persons, corporations or associations of individuals.

"* * *

“(3) ‘Public depositor’ shall mean * * * any county * * * or officer of any governmental subdivision of the state or any court of this state which deposits any moneys in a public depository.

“* * *

“(5) ‘Public moneys’ shall include all moneys coming into the hands of * * * any * * * officer of any governmental subdivision of the state, or the clerk of any court in this state, by virtue of his office without regard to the ownership thereof.”

In the case of *Tesch v. Board of Deposits*, 237 Wis. 527, it was held that moneys contributed by the city of Milwaukee and policemen to the Milwaukee policemen’s annuity and benefit fund of which fund a retirement board is the administrator and the city treasurer is the custodian, are, when deposited in a designated depository bank in a special account in the name of such fund, considered “public deposits” or “public funds” or “public moneys” under sec. 34.01. In that case the court said at p. 531;

“The money here involved is considered a ‘public deposit’ within sec. 34.01 (1), Stats., because it was deposited by a commission or board or officer of a governmental subdivision of this state. Were it a private fund held in trust, it would still fall into this classification. There is no question but what this fund was money coming into the hands of the city treasurer by virtue of his office. The duty as custodian is coupled with the office of the city treasurer. Therefore, the fund constitutes ‘public moneys’ as defined by sec. 34.01 (5).”

In the case of the alimony payments and payments for dependent children, they constitute money coming into the hands of the clerk of the court by virtue of his office. His duty as custodian of these funds is coupled with the office of clerk of the court. Under sec. 34.01 (1) they are a “public deposit” even though they might be construed to be “private funds held in trust by a public officer for persons.” They would likewise be “public moneys” within sec. 34.01 (5) “without regard to the ownership thereof.”

Sec. 59.12, Wis. Stats., enumerates the clerk of the circuit court as one of the county officers.

In 21 OAG 131, it was stated:

“The office of clerk of the court is a constitutional office. The county board having authority to designate county depositories, it follows that, as to all money directed to be paid to the clerk of the court, the county board shall designate the clerk of the court’s public depositories and that, on depositing such public moneys in the banks heretofore designated by the county board, the clerk of the court will have complied with the provisions of and have the protection of chapter 34 of the statutes.

“* * *

“It follows that moneys deposited in accordance with the provisions of chapter 34 by any such commission, committee, board or officer of any government subdivision of the state are within the provisions and protection of chapter 34.

“Clerks of the courts come within the provisions and have the protection of chapter 34 of the statutes.”

That opinion also specifically held that moneys held in trust by the superintendent of the home for dependent children at Milwaukee for the benefit of wards of the home are public moneys and come within the provisions and protection of ch. 34 of the Wisconsin Statutes.

In view of the aforesaid comprehensive statutory definitions and the rulings based thereon, it is my opinion that the alimony payments and payments for dependent children when received by the clerk of court by virtue of his office and deposited in a public depository, constitute a “public deposit” under sec. 34.01 (1) and “public moneys” within sec. 34.01 (5).

JRW

Licenses—Restaurant—Board of Health—Discussion of license requirements relative to industry or private club or

caterers serving food to persons drawn from the general public.

April 27, 1962.

CARL N. NEUPERT,
State Health Officer.

You ask my opinion on four questions relative to state supervision of restaurants through the state board of health.

Two of such questions are these:

(1) Does the state board of health have the authority to require a restaurant permit of an industry or private club which prepares, sells or serves meals or lunches to its employees, or to its members and guests, even though uninvited members of the general public are excluded from receiving such services?

(2) Does such board have the authority to require a restaurant permit of caterers who prepare or serve or sell meals or lunches to employees of industrial establishments, members of private clubs and their guests, wedding parties and their guests?

It is my opinion that both of these questions should be answered "Yes."

As to the first question: Sec. 160.01 reads as follows:

"(2) 'Restaurant' means and includes any building, room or place wherein meals or lunches are prepared or served or sold to transients or *the general public*, and all places used in connection therewith. 'Meals or lunches' shall not include soft drinks, ice cream, milk, milk drinks, ices and confections. The serving in taverns of free lunches consisting of popcorn, cheese, crackers, pretzels, cold sausage, cured fish or bread and butter shall not constitute such taverns to be restaurants. *The term 'restaurant' does not apply to churches, religious, fraternal, youths' or patriotic organizations, service clubs and civic organizations which occasionally prepare or serve or sell meals or lunches to*

transients or the general public nor shall it include any private individual selling foods from a movable or temporary stand at public farm sales."

The term "general public" is interpreted to mean "members of the general public." If the persons served were limited, for example, to members of a particular race, creed or color, they would not, as such, be members of the general public. If, for example, a university club limits its membership to persons who have attended a university or college, it does not draw its membership from the general public, and therefore would not be within the rule. On the other hand, if employees, members and guests are all chosen from the general public, it would seem that they are part of the general public and entitled to the protection contemplated by the statute.

As to the second question:

The caterer prepares meals for sale to members of the general public when the persons so served are employees of industrial establishments, members of private clubs and their guests, wedding parties and their guests. Again, all such persons are drawn from the general public.

Your third question is: Does the state board of health have the authority to require a restaurant permit of caterers who prepare meals and lunches for sale to operators of automatic vending machines and equipment, or operators of restaurants? My opinion is that it does have such authority. Under sec. 160.01 (2) a restaurant is not only a building, room, or place wherein meals or lunches are served or sold to the general public, but also any building, room or place wherein meals or lunches are merely prepared for eventual serving or sale to transients or to the general public. Clearly, a caterer preparing meals or lunches for sale to transients or to the general public in restaurants or through the medium of automatic vending machines is operating a restaurant in the place where such meals or lunches are prepared. In answering this question affirmatively, I am assuming that the automatic vending machines therein men-

tioned are accessible to and for the use of transients or members of the general public.

Your fourth question is: Should the answer to any of these three [preceding] questions be in the affirmative, would the state board of health be required to adopt administrative rules, defining the term "general public" and spelling out which establishments would be required to have a license as a result of this definition? If the board, as the result of the answers hereinabove given, specifically adopts a statement or statements of general policy or an interpretation or interpretations of a statute or statutes in order to govern its enforcement or administration of the restaurant licensing law of this state; then it must issue and file such policy statement or statements and such statutory interpretation or interpretations as a rule. See sec. 227.01 (4). The board is free, however, to determine whether or not it wishes to adopt specifically such statements and interpretations, and to determine whether or not, in doing so, it should define the term "general public" and spell out which establishments are required to have a restaurant license as a result of such definition.

ENW

Driver's license—Revocation—Penalty—Those who drive on the public highway after the driving privileges have been revoked and never properly reinstated are subject to the penalty prescribed by 343.44 (2).

April 27, 1962.

NICK F. SCHAEFER,

District Attorney, Outagamie County.

You ask for my opinion concerning the status of an individual driving without a license subsequent to expiration of the revocation period. The question is whether such person should be charged with operating a motor vehicle after

revocation in violation of sec. 343.44, or merely operating with no driver's license in violation of sec. 343.05 (1).

The rule is stated in *State v. Stehlek*, (1593) 262 Wis. 642, 645, 56 N.W. 2d 514, that driving of automobiles upon a public highway is a privilege, and not property right, and is subject to reasonable regulation under the police power in the interest of public safety and welfare.

The following sections of the statutes must be considered and interpreted together :

"343.05 Operators to be licensed; exceptions. (1) Except as provided in sub. (2), no person shall operate a motor vehicle upon a highway in this state unless such person has a license issued to him by the department, which license is not revoked, suspended, canceled or expired. A valid chauffeur's license satisfies the requirements of this section only when the licensee is operating a vehicle in the performance of his duties as chauffeur.

"* * *

"(3) Any person violating sub. (1) may be fined not more than \$100 or imprisoned not more than 6 months or both."

"343.38 License after revocation or suspension; reinstatement of non-resident's operating privilege. (1) LICENSE AFTER REVOCATION. Except as provided in ss. 343.10 and 343.39, the department shall not issue a license to a person whose operating privilege has been duly revoked unless the period of revocation has expired and such person :

"(a) Files with the department an application for license together with the required fee; and

"(b) If the commissioner so prescribes, passes an examination including the tests specified in s. 343.16 or such parts thereof as the commissioner may require; and

"(c) Unless 3 years have elapsed since the expiration of the period of revocation, files with the department proof of financial responsibility in the amount, form and manner specified in ch. 344. Such proof of financial responsibility shall be maintained at all times during such 3-year period

when the license is in effect. No such proof shall be required for a vehicle subject to the requirements of s. 40.57, 194.41 or 194.42 or a vehicle owned by or leased to the United States, this state or any county or municipality of this state."

"* * *"

"343.44 Driving after license revoked or suspended. (1)

No person whose operating privilege has been duly revoked or suspended pursuant to the laws of this state shall operate a motor vehicle upon any highway in this state before he has obtained a new license in this state or his operating privilege has been reinstated under the laws of this state. No person whose regular license has been duly revoked or suspended pursuant to the laws of this state, but whose chauffeur's license is still valid, shall operate a motor vehicle upon any highway in this state other than as a chauffeur before he has obtained a new license or has had his license reinstated under the laws of this state.

"(2) Any person violating this section may be fined not less than \$50 nor more than \$200 or imprisoned not more than 6 months or both, except that if a person violates this section after having had his operating privilege revoked because of a conviction of any offenses mentioned in s. 343.31, he shall be imprisoned not less than 2 nor more than 30 days for the first violation of this section and shall be imprisoned 60 days for the second such violation and 180 days for the third and each subsequent violations."

Subsection (1) of section 343.05 states the general requirement that all persons must be licensed in order to operate a motor vehicle on the highways of this state. See *State v. Stehlek, supra*, and *State v. Seraphine*, (1954) 266 Wis. 118, 62 N.W. 2d 403.

Section 343.44 (1) is applicable to a different class of drivers—those whose licenses have been revoked after having acquired such licenses in compliance with section 343.05 (1). The applicable penalty to this class of drivers is prescribed in subsection (2) which carries a mandatory progressive jail sentence, instead of the lesser penalty of fine

or jail sentence or both for those who violate section 343.05 (3). Also section 343.38 provides for more stringent requirements for reinstatement after revocation than for an initial applicant.

Section 343.05 (1) prohibits all persons, except those expressly exempted, from operating a motor vehicle upon the highways without a license. This subsection clearly speaks in terms of persons whose privilege to drive has not been suspended or revoked, while subsection 343.38 applies only to those whose operating privileges have been duly revoked.

When read together, the several statutory provisions cited above evince the legislative intent that different penalties apply to those driving after revocation from those who never suffered revocation of the privilege. See 44 OAG 306.

The purpose of applying a more severe penalty to those who have their licenses revoked but drive before reinstatement is to protect the public. By requiring that such persons be insured prior to reinstatement, the legislature has recognized the need to insure that such persons will be able to pay for any damages resulting from their operation of a motor vehicle. The legislature deems this class of drivers to be more dangerous and irresponsible on the highways and has fixed a more severe penalty to discourage the unlawful practice.

It is my opinion that those who drive after revocation and before their driving privileges have been reinstated by meeting the requirements of section 343.38 have violated section 343.44 (1).

RGM

School District—Agreement—Unified school district is authorized by secs. 40.095 and 40.22 to enter into deferred use plan transaction with U. S. Dept. Health, Educ. and Welfare for acquisition of a site for future school buildings.

May 1, 1962.

ANGUS B. ROTHWELL,
Superintendent of Public Instruction.

Under the Federal Property and Administration Service Act of 1949, as amended, (48 U.S.C.A. sec. 471 et seq.) certain federal agencies are authorized to dispose of surplus federal property. The secretary of health, education and welfare is empowered pursuant to sec. 484 (k) thereof to convey surplus property to the states and their subdivisions and educational instrumentalities for school, classroom and other educational uses. In accordance with a deferred use plan promulgated by the department of health, education and welfare there is under consideration a proposal whereby certain surplus real property of the United States in the Racine unified school district will be transferred to such school district as a site for a future high school. An opinion has been requested as to the authority of the school district to enter into and acquire the property pursuant to such plan.

Under this deferred use plan as promulgated by the department of health, education and welfare, a program or plan of construction of school buildings on the surplus property is submitted. If approved, then a fair value of the property is arrived at and the property conveyed to the school district by quitclaim deed setting forth the terms and conditions of the conveyance. It will be provided that no later than eight years after the date of the deed the school district must have completed the contemplated building construction and placed it in use. Until such time as the building program is completed and put in use, the district is to pay annually one-twentieth of such fair value, plus interest at a prescribed rate upon the unpaid balance. After such school facilities are constructed and placed in use, the district will not be required thereafter to pay such annual payment, but shall be entitled to a public benefit allowance or credit for the entire remaining unpaid balance of the fair value. There will be a provision in the deed prohibiting the school district from selling, encumbering or

otherwise disposing of the property within the twenty years without the consent of the department of health, education and welfare. The deed will contain a provision that if the school district discontinues use of the property as a school site at any time within twenty years from the date of the deed or otherwise breaches any of the terms of the deed, the title to the property will revert to the United States.

There also will be an escrow agreement for the deposit of an executed quitclaim deed from the district conveying the property back to the United States. If the school district does not complete the construction of the school facilities and place it in use within the eight-year period, or fails to make an annual payment required of it, this quitclaim deed will be delivered to the United States and the school district will lose all rights in the property. On the other hand, if the school district completes the contemplated construction and places it in use at any time within the eight-year period, then the quitclaim deed from the district will be returned to it and the escrow agreement will end.

The school district will incur no liability to make any of the annual payments during such eight-year deferred use period. It can decide not to continue the program and decline payment of an annual payment. The only result will be a loss of whatever amount it had previously paid and a termination of any and all of its rights, title and interest in the property by the delivery of the deed held in escrow.

If, after having completed the construction and placed it in use during the eight-year deferred use period, the school district should breach any of the terms and conditions during the twenty years, such as failing to continue to use it for school purposes, then the property will revert to the United States. The only liability of the district in that situation would be under a provision that it will be responsible for the decrease in value of the property not due to reasonable wear and tear, acts of God and any alterations or conversions made to adapt the property to the educational use for which the district acquired it, and for any costs incurred

in recovery of title under the reverter provision. However, it will be provided that after the proposed school facilities have been constructed and put in use, the district may obtain the property free of the several conditions by paying to the department of health, education and welfare, or its successor in function, the amount of the stated fair value remaining after crediting thereon the total of any payments of principal made during the deferred use period and also after crediting thereto a public benefit allowance of one-twentieth of the fair value for each year that the school facilities have been in use.

The Racine unified school district is an independent legal entity existing under the provisions of sec. 40.095. It is a body corporate which by subsec. (4) thereof is specifically empowered to acquire, hold and dispose of property. Subsec. (5) grants the board of a unified school district all the powers granted to common school district boards by secs. 40.29, 40.30, 40.31, 40.33, 40.34 and 40.35 Stats. Said subsec. (5) also provides that a unified school district board has all the powers of a common school district meeting as set forth in sec. 40.22 Stats., except that provided in subsec (3). Subsec (3) of sec. 40.22 is omitted from the powers granted as being inappropriate. It authorizes a common school district meeting to elect the district board. Sec. 40.095 (3) provides for the election of the members of the board of a unified school district.

Sec. 40.22 provides in part:

“40.22 Powers of annual district meeting. The annual common school district meeting may:

“* * *

“(4) BUILDING SITES. Designate sites for district schoolhouse or teacherages and provide for the erection thereon of suitable buildings or for the lease of suitable buildings for a period not exceeding 20 years with annual rentals as fixed by the lease.

“(5) TAX FOR SITES, BUILDINGS AND MAINTENANCE. Vote a tax to purchase or lease suitable sites for

school buildings, to build, rent, lease or purchase school-houses or teacherages or out-buildings, and to furnish, equip and maintain the same, which tax may be spread over as many years as may be required to pay any obligations authorized or approved at such meeting, including payment of rentals due in the future years under any lease then authorized.

“* * *

“(9) PAY DEBTS. Vote a tax as necessary to discharge any debts or liabilities of the district.

“* * *”

By the above quoted provisions of sec. 40.22 a common school district has the power to obtain sites for the erection thereon of suitable school buildings by purchase of property or by leasing property for such purpose. An annual common school meeting is given the authority by subsec. (4) to select the sites for school buildings and by subsec. (5) the power to vote a tax to obtain such sites. It is specifically provided in subsec. (5) that a tax therefor may be spread over as many years as are required to pay any obligation authorized or approved at the meeting, including payment of rentals in future years under a lease if that is the method the meeting selects to obtain a site. See 31 OAG 266, 267. If under whatever arrangement is adopted a district incurs a debt or liability subsec. (9) authorizes a tax to pay it. Such overall powers of a district meeting certainly would include the authorization for entering into an option to acquire a site.

Sec. 40.29 (1) provides:

“40.29 District board; duties. (1) Subject to the authority vested in the district meeting and to the authority and possession specifically given to other officers, the school district board shall have the possession, care, control and management of the property and affairs of the district.”

On occasions school boards, in embarking upon proposing construction of new or additional school buildings to the annual meeting, and as the result of preliminary investiga-

tion of suitable sites, have taken options on property and then presented them to the annual meeting for decision as to what site is to be selected. It has been deemed that the taking of such options or proposals by the district board for submission to the electors falls within the authority given the board by sec. 40.29 (1) as being an affair of the district. But, even if it were not, still it would be within the power of a district meeting to authorize the board to obtain an option to purchase or lease property and submit it at a later meeting for final approval of that site and authorization to exercise the option and complete a purchase pursuant thereto.

All of the above would be within the power of the board of a unified school district, as it is specifically given these powers by sec. 40.095 (5). The only limitation thereon is that subsec. (5) says that before the board of a unified school district can issue bonds or incur any indebtedness it must obtain approval thereof by the electors in any instance where a common school district is required to obtain such prior approval. But, this is merely a matter of the mechanics of exercise of the power of the district and does not go to the power itself, for when such approval is obtained then the board has the authority and power to take the necessary steps to complete the transaction. In this connection, as previously noted, the school district incurs no liability that can be enforced against it. It incurs no debt by agreeing to make the annual payments during the deferred use period. Upon failure to make a payment all that results is a default in the conditions of the deed which triggers a reconveyance back by delivery of the escrowed quitclaim deed and a cancellation of any and all right or interests of the district in the property.

In addition, sec. 40.301 authorizes school boards to receive, accept and use gifts or grants of "furniture, books, equipment, supplies, monies, securities or other property used or useful for school and educational purposes." Unless the words "other property" are to be restricted to personal property, this provision would include real property. If it were viewed that the amount of the fair value of the pro-

perty which is not paid by annual payments during the deferred use period is a gift, this provision would authorize the acceptance and receipt thereof. Historically, in years gone by, many sites were donated by the owners for use for school purposes, with a reverter provision when no longer so used. Sec. 40.22 (8) takes cognizance of this in providing that any removal of buildings in such cases must be within eight months after use as a school ceases.

Probably the closest this plan fits into conventional transactions is as an option to acquire the property in fee simple absolute by the making of the annual payments during the deferred use period and then utilization of the property thereafter for twenty years in operation of a public school thereon. However, it does have the elements of a conveyance with conditions subsequent and a reverter provision.

Whether the transaction be viewed as an option, a conveyance upon condition with a reverter, or a lease, there is ample authority in the Wisconsin statutes for a school district to enter into it. It is, therefore, my opinion that the Racine unified school district is authorized to enter into the deferred use plan arrangement outlined.

HHP

Words and Phrases—Dependent Children—Discussion of 49.19 (4) (b) relative to aid to dependent children. "Resided" as used in the statute is not synonymous with "domicile" and one year limitation is to prevent abuses of statute.

May 2, 1962.

WILBUR J. SCHMIDT,

Director, Department of Public Welfare.

You have asked a number of questions relative to the eligibility of a child for aid where such child comes from outside of the state into Wisconsin.

You have stated your questions as follows:

1. "Our first question is whether a child transferred under Section 48.98 with permission of the Wisconsin State Department of Public Welfare would after the period of one year residence in the foster home become a charge of the county in Wisconsin under Section 49.19 (10)."

2. "Our second question is whether a child whose custody has been given by a court in another state to the welfare department of that state and placed by such welfare department in the home of a relative in Wisconsin would after the period of one year gain a residence in Wisconsin so as to be eligible for a grant of Aid to Dependent Children from the Wisconsin county where such child was present on the basis of Section 49.19 (4) (b), Stats."

3. "Our third question is whether a child whose custody has been given to a private individual who places the child in the home of a relative in Wisconsin for one year would gain a residence under Section 49.19 (4) (b), Stats., so as to establish eligibility for a grant of Aid to Dependent Children in the county where such child is present."

4. "Would the answer to this question be any different if the court in the other state had given custody directly to the relative in Wisconsin or had instructed the person granted custody to place the child with the relatives in Wisconsin?"

You also state, "In all of the above cases, we are assuming that the court in the other state has found that the child should be taken from the custody of the parents and has placed such custody or guardianship in the party indicated in the question. We would assume that as long as the court makes a placement or custody in other than the parents, it is immaterial whether the parental rights have been terminated. We would also assume that it is immaterial that the child under each of these questions would have required support for the first year from public funds provided by the state in which the child previously was present and brought before the court."

Dependent children are eligible for aid in all of the situations which you have mentioned.

Section 49.19 (4) (b), reads in part as follows:

“Each child to be eligible for aid shall have *resided* in the state for one year immediately preceding the application for such aid * * *.”

The question is: What is meant by “resided”?

It was early pointed out in 18 OAG 549 that a child may obtain a residence for school purposes even though the child’s parents may not have established their residence in the school district. The rule is stated as follows:

“While it may be the general rule that a minor child’s residence is the same as that of his parents, yet, for school purposes, such child may have a residence other than that of his parents. Where a child of school age is sent or goes into a school district with the primary purposes of securing a home, as distinguished from the primary purpose of locating in such district to participate in the advantages which the public schools therein afford, the supreme court has held that he is a resident of the district for school purposes and entitled to admission to the public school therein.”

This rule has also been recognized in considering the eligibility of a dependent child for aid.

37 OAG 66:

“* * * It is not necessary to cite authority for the fact that the word ‘residence’ (as distinguished from ‘domicile’) is broad enough to include a temporary place of abode. * * *”

The rule is repeated in 39 OAG 345.

The opinions referred to above and other attorney general opinions have considered this subject as it relates to which of two or more counties within the state is liable for such aid. Much of the discussion therefore is not pertinent here. But the definition of “residence” clearly applies.

Further, sec. 48.98 recognizes that a child brought or sent into the state may become eligible for public assistance. The statute requires prior consent from the state depart-

ment of public welfare and permits the department to require a bond.

The purpose of sec. 49.19 is to provide assistance so that a dependent child who is in this state making his home will have adequate support. It is enacted out of concern for the welfare of children. The limitations in subsec. (4) are to prevent abuses and limit assistance to instances where the child has been in the state long enough to evidence that Wisconsin is its permanent abode and that it did not come into the state primarily to get such assistance.

ENW

Words and Phrases—Motor Vehicle Department—Investment Board—Moneys deposited with motor vehicle commissioner under 344.20, placed in custody of state treasurer, are public moneys under 34.01 (5) and subject to placement by investment board under 25.17 (61).

May 3, 1962.

CHARLES F. JACOBSON, JR.,
Executive Director, Investment Board.

You have requested my opinion upon the question of whether money which has been deposited with the motor vehicle commissioner and placed in the custody of the state treasurer by such commissioner pursuant to sec. 344.20 constitutes "public moneys" as defined in sec. 34.01 (5) so that the state of Wisconsin investment board has the power and duty to direct the placement of such money under sec. 25.17 (61).

Title XLIV of the Statutes is entitled "Vehicle Code." Ch. 344 which is a part of said title relates to "Financial Responsibility". Certain sections of ch. 344 provide that under some circumstances the owner or operator of a motor vehicle shall furnish proof of his ability to respond in damages arising from the operation of such vehicle or shall deposit

with the motor vehicle commissioner security for the payment of damages.

Sec. 344.17 (1) provides in part: "The security required under s. 344.14 shall be in such form and in such amount as the commissioner may require * * *."

Sec. 344.20 (1), as amended by ch. 662, Laws 1961, provides in part: "Security deposited in compliance with this chapter shall be placed by the commissioner in the custody of the state treasurer and shall be applied only as provided in this section." Sec. 344.20 thereafter provides the procedure under which the security so deposited with the state treasurer may be applied to the payment of judgments and assignments by the state treasurer under order of a court.

Ch. 34 relates to "Public Deposits". Sec. 34.01 (5), provides:

"(5) 'Public moneys' shall include all moneys coming into the hands of the state treasurer or the treasurer of any county, city, village, town, drainage district, power district, school district, sewer district, or of any commission, committee, board or officer of any governmental subdivision of the state, or the clerk of any court in this state, by virtue of his office without regard to the ownership thereof."

Sec. 25.17 provides that the state of Wisconsin investment board "* * *" shall have power and authority and it shall be its duty: "* * *" and subsec. (61) as created by Ch. 507, Laws 1961, provides:

"(61) To designate public depositories for the deposit of public moneys, as defined in s. 34.01 (5), coming into the hands of the state treasurer; allocate the deposits of all public moneys coming into the hands of the state treasurer, and limit the amount of such public moneys, as determined from the state treasurer's records, which may be deposited in any public depository so designated. * * *"

The substance of present sec. 344.20 formerly was found in sec. 85.09. In 36 OAG 4 it was stated:

..An opinion has been requested as to the handling of security deposits made under the motor vehicle safety responsibility act, sec. 85.09, Stats. We are informed that these deposits as delivered to the state treasurer are in variant form, including among others bank drafts, bank money orders, personal checks, certified checks, war savings stamps and cash.

“Your primary concern is whether the cash, checks, money orders, drafts and other cash items are to be treated as state funds subject to deposit in the bank and the regular procedure of withdrawal by warrants of the secretary of state upon vouchers of the motor vehicle department. We fail to find anything indicating that, as you suggest, such was the intention of the legislature. There is nothing in sec. 85.09 or elsewhere in the statutes that either authorizes or permits it. Had such been the intention some language permitting the same would have been used. It may be that the legislature had reasons for not doing so. In any event in the absence of something to that effect this statute cannot be viewed as providing that these deposits shall be treated and handled as stated funds.

“Sec. 85.09 (10), Stats., specifically says that the security deposits made in compliance with that section ‘shall be placed by the commissioner in the *custody* of the state treasurer.’ Accordingly when the state treasurer receives them upon transmittal by the motor vehicle department, as this statutory language necessarily implies is his duty, they come into his possession by virtue of his being the state treasurer, but solely for the purposes of custody. This is far from making them state funds. They remain private property that is put in his official custody for only the prescribed purposes that are set out in this statute.

“* * *

“It is our opinion that security deposits made under sec. 85.09 Stats., are not to be treated as state funds but retained by the state treasurer in his own custody. The details of just how he shall effectuate such custody are for the state treasurer to determine. As we view the matter the state treasurer is merely the custodian and his duties of re-

ceiving, safely keeping, and at the proper time disbursing or delivering the property deposited are ministerial only.

* * *

“* * *

“Having received the security deposit the duty of the treasurer then is to keep it safely in order to carry out the purpose of the deposit. Subsec. (10) of sec. 85.09, Stats., specifies that such deposited security ‘shall be applicable only to the payment of a judgment or judgments rendered against the person or persons on whose behalf the deposit was made, for damages arising out of the accident in question.’ Such of said deposits as are transmitted to and received by the treasurer that are in a form other than cash, or what is usually treated as the equivalent thereof, may be kept by him in that form. He can then deliver them in kind when his official custody is ended. But such items as bank checks, drafts, money orders, personal checks and the like which are cash items are not susceptible of retention in that form and should be converted into cash. This may be effected by depositing all the cash and cash items with a bank in a trust account for the purposes of sec. 85.09, Stats., in the name of the state treasurer subject to withdrawal by checks signed by such official. * * *”

The opinion in 36 OAG 4 in no way was directed to a consideration of the applicability of sec. 25.17 (61) or sec. 34.01 (5) to the security deposits.

Nevertheless, it is my understanding that said opinion is being cited as holding that since the security deposits therein referred to are not to be treated as “state funds” for certain purposes, they are not subject to control by the state of Wisconsin investment board under sec. 25.17 (61) quoted above. However, under sec. 34.01 (5) “* * * all moneys coming into the hands of the state treasurer * * * by virtue of his office without regard to the ownership thereof” are “public moneys”.

Pursuant to sec. 344.20 (1) these moneys come into the hands of the state treasurer by virtue of his office and are “public moneys” under 34.01 (5).

Under sec. 25.17 (61) the state of Wisconsin investment board has authority to designate public depositories for the deposit of public moneys as defined in sec. 34.01 (5) coming into the hands of the state treasurer and to allocate the deposits of such moneys.

Hence, it is my opinion that the state of Wisconsin investment board has the power and duty to direct the placement of the money deposited with the motor vehicle commissioner as security and placed in the custody of the state treasurer by such commissioner under sec. 344.20.

Nothing herein is intended to overrule or change the aforesaid opinion in 36 OAG 4.

JRW

Dependent Children—Discussion of eligibility status of dependent children when mother or stepmother changes marital status.

May 3, 1962.

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

You have requested an opinion as to the statutory construction of sec. 49.19 (4) (d) as amended by ch. 505, Laws 1961, with respect to a number of fact situations hereinafter set forth concerning eligibility of a mother to receive aid to dependent children.

We are concerned here with the eligibility of the mother or stepmother, with whom the dependent child is living, to receive aid. There must be a dependent child. Sec. 49.19 (1) (b) requires that there be an *application* for aid by some person. Sec. 49.19 (2) requires that there be a prompt *investigation* of the circumstances of the child, that a written *report* be made of the investigation and that the applicant be *notified* of the disposition of his application and that aid shall be furnished with reasonable promptness to any eligi-

ble individual. Sec. 49.19 (3) (b) provides that the county agency shall *direct payment* of such aid to the eligible individual by order on the county clerk or county treasurer.

The difficulties in administering the statute have been occasioned by a change in the marital status of the mother or stepmother having the care and custody of the child between the date of the original application and the date of the order directing payment.

Sec. 49.19 (4) provides in part:

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

“* * *”

Sec. 49.19 (4) (d), as amended by ch. 505, Laws 1961, provides:

“49.19 (4) (d) The period of aid must be likely to continue for at least 3 months except as hereinafter provided with respect to the wife of a husband committed to the department pursuant to s. 959.15. *Aid may not be granted to the mother or stepmother of a dependent child unless such mother or stepmother is without a husband, or is the wife of a husband who is incapacitated for gainful work by mental or physical disability, likely to continue for at least 3 months in the opinion of a competent physician, or is the wife of a husband who has been sentenced to a penal institution for a period of at least 3 months, or is the wife of a husband who has been committed to the department pursuant to s. 959.15 irrespective of the probable period of such commitment, or is the wife of a husband who has continuously abandoned or failed to support her for at least 3 months, if the husband has been legally charged with abandonment under s. 52.05 or with failure to support under s. 52.055 or in proceedings commenced under s. 52.10 (1) to (31), or if the mother or stepmother has been divorced or legally separated from her husband for a period of at least 3 months, dating either from any temporary order under s. 247.23, or in the absence thereof, then from the granting of the judgment in court, and unable through use of the pro-*

visions of law to compel her former husband to support the child for whom aid is sought, *or if proceedings have been instituted under s. 247.08 to compel support and a determination has been made by the court requiring the payment of a certain sum which is either insufficient to adequately meet the needs of the child or is unenforceable to the extent of adequately meeting the needs of the child.*"

Sec. 49.19 (4) (d) clearly provides that aid may not be granted to the mother or stepmother of a dependent child unless such mother or stepmother is without a husband, except in those cases where the mother or stepmother qualifies under an express exception set forth in the said section. She can qualify on the basis of any single exception. There is no waiting period before aid may be granted, except for the necessary application, investigation, report and notification in the case of a mother or stepmother without a husband, or in case of a wife of a disabled husband, a wife of a husband committed to a penal institution, a wife of a husband committed to the department pursuant to sec. 959.15, a wife whose husband has abandoned, or failed to support her for a period of three months, or a wife who has proceeded under sec. 247.08 to compel support and the court has required a payment either inadequate or unenforceable. However, there is a three month waiting period before aid can be granted to a mother or stepmother, *divorced or legally separated* from her husband and the three month period commences with the issuance of the temporary order or divorce judgment. The divorce or legal separation referred to would be one granted under the provisions of secs. 247.07, 247.24, 247.33, and an individual cannot become eligible, *on the basis of said exception*, until the judgment of divorce or legal separation is granted, although the three month waiting period begins to run when a temporary order is entered under sec. 247.23, if one has been secured, otherwise the waiting period begins when the judgment is granted.

No aid can be granted to an individual who is not eligible for aid at the time the grant is made. Where an application has been made by or on behalf of a mother or stepmother,

to receive aid to dependent children, and there is a change in the marital status of the mother or stepmother before a grant is made, a redetermination of eligibility should be made on the basis of the changed status. For example, a mother without a husband loses her eligibility for aid to dependent children if she marries.

A judgment of divorce in Wisconsin, however, does not dissolve the marital status of the parties until the expiration of one year from the granting of such judgment. A wife who has divorced her husband, remains his wife during the one year period, absent death of either of the parties, but the parties may not cohabit together.

Sec. 247.37 (1) provides in part:

“(1) (a) When a judgment of divorce is granted it shall not be effective so far as it affects the marital status of the parties until the expiration of one year from the date of the granting of such judgment, except that it shall immediately bar the parties from cohabitation together and except that it may be reviewed on appeal during said period. But in case either party dies within said period, such judgment, unless vacated or reversed, shall be deemed to have entirely severed the marriage relation immediately before such death. * * *”

See White v. White, (1918) 167 Wis. 615, 168 N.W. 704; *State v. Grengs*, (1948) 253 Wis. 248, 32 N.W. 2nd 248.

This construction can be applied to the various fact situations you have presented.

Fact Situation 1. Husband sentenced for more than 3 months on January 5. Mother, who is also the wife, makes application for aid to dependent children on February 1. Judgment of divorce is entered on February 10 before the agency has determined eligibility. On February 20 the agency determines that mother is qualified except for the fact of the intervening divorce judgment.

Question 1. May aid be granted to the mother immediately?

Answer 1. Aid may be granted immediately. The mother qualifies as she is still the wife of a husband sentenced to a penal institution for a period of at least three months.

Fact Situation 2. Husband has abandoned family and on January 5th this abandonment has continued for three months and husband has been legally charged. On February 1st the wife makes application for aid. On February 10th the judgment of divorce is entered before eligibility is determined and grant made.

Question 2. May aid be granted to the mother immediately?

Answer 2. Yes. The mother is the wife of a husband who abandoned her, even though judgment of divorce has been entered.

Fact Situation 3. Wife is suing husband for divorce and on January 5th obtains temporary support order. She makes application for aid to dependent children on February 1st. The divorce judgment is entered February 10th.

Question 3. When does the three month waiting period begin?

Answer 3. The three month waiting period begins on January 5th on entry of the temporary order.

Fact Situation 4. Wife brings action under sec. 247.08, Stats., and obtains a support order on January 5th. On May 1st she makes application for aid to dependent children because she is not receiving sufficient money under the support order. On May 10th judgment of divorce is entered.

Question 4. Is the mother eligible for aid immediately?

Answer 4. Yes. She is entitled to immediate aid when it is determined that the sum fixed by the court is insufficient or unenforceable.

RJV

*Teachers Retirement Board—Annuity Rates—*Under 42.34, if annuity rates are changed effective July 1, 1962, and application is made prior to said date for annuity to begin on or after such date, such annuity may be granted at the old or new rate at option of applicant.

May 4, 1962.

RAY L. LILLYWHITE,
Executive Secretary,
State Teachers Retirement Board.

You have requested an official opinion interpreting sec. 42.34, which provides in part:

“Teachers retirement board to fix annuities. The state teachers retirement board shall make such investigations of the mortality, disability, service and compensation experience of the several funds [of the state teachers retirement system] as shall be necessary. On the basis of such investigation the board shall determine, adopt and certify the rates at which the annuities and other benefits shall be granted. The rates shall be adequate to provide for all benefits as near as may be at actual cost, but shall not be less than the rates based on the minimum standard prescribed by law for granting annuities in this state. The rates last adopted * * * shall continue to be the prevailing rates until changed by action of the state teachers retirement board. No revision of rates shall affect adversely the rights of any beneficiary or annuitant under an application made prior to the date when such revision becomes effective. * * *”

The state teachers retirement board has conducted an investigation of the experience of the several funds of the state teachers retirement system and proposes to change the rates at which annuities will be granted. In connection therewith you have asked the following questions:

1. “Assume new rates are made effective on July 1. On an application made before July 1, for a retirement annuity to begin July 1 or later, would the annuity come under the old rates?”

2. "Would such an applicant have the option of taking his annuity under the old rates or the new rates?"

Sections 42.48 and 42.49 (2) provide in part:

"42.48 **Application for benefits.** A member may apply at any time to the state teachers retirement board, on a form furnished by it, for a benefit. * * *"

"42.49 (2) **ANNUITY FROM MEMBER'S DEPOSITS.** When a member has ceased to be employed as a teacher, and is not on a leave of absence from a teaching position, the accumulation from the member's deposits may be applied by the member as a net single premium at the rate certified by the state teachers retirement board, to the purchase of an annuity, the first payment to be made in such month and year after the application for the annuity is received by the board as the member shall direct * * *."

The state teachers retirement system is fundamentally a "money purchase" system; that is, the amount of the retirement benefit is directly related to the amount of money in the account of the member at the time that the retirement benefit is taken. In some cases the new rates will be higher and will be more favorable to the members because their respective accumulations at retirement will purchase a larger annuity than under the present rates. In some cases the new rates will be lower and hence less favorable to the members of the system.

Ordinarily the amount of an annuity is determined by application of the appropriate rate from the rate table last adopted by the board. An exception to this rule apparently is intended by that portion of sec. 42.34 which reads: "No revision of rates shall affect adversely the rates of any beneficiary or annuitant under an application made prior to the date when such revision becomes effective."

The statutes relating to the state teachers retirement system do not contain any definition of "beneficiary" or "annuitant" as used in said statutes.

Statutes relating to public employe retirement systems have defined "beneficiary" as:

“Any person receiving a retirement allowance or other benefit.” *Sedlak v. Board of Commissioners of City of Bayonne*, 54 A. 2d 730;

“Any person in receipt of a pension or other benefit provided by the retirement system.” *Stafford v. Los Angeles*, 270 P. 2d 12; and as a

“Person in receipt of a benefit, an annuity, a retirement allowance or other benefit.” *Katz v. New York City Teachers’ Retirement Board*, 52 N.E. 2d 902.

While these definitions are not controlling in the construction of sec. 42.34, they do indicate the tendency in such systems to consider a “beneficiary” to be one who is actually receiving a benefit. I also believe that it is the tendency of such systems to consider an “annuitant” to be one who is actually receiving an annuity which is a fixed amount payable annually or at other specified intervals absolutely and without contingency. See *State ex rel. Smith v. Annuity & Pension Bd. of Milwaukee*, 241 Wis. 625, 6 N.W. 2d 676.

However, in the construction of a statute the meaning of certain words must be determined by reference to the context in which they are used. *State v. Gregory*, 202 Wis. 326, 232 N.W. 546; *Wis. Livestock Association v. Bowerman*, 202 Wis. 618, 233 N.W. 639; *State v. Langlade Co.*, 204 Wis. 311, 236 N.W. 125; *State v. Industrial Commission*, 207 Wis. 652, 242 N.W. 321.

In the present instance, if one attempts to apply the aforesaid meanings of “beneficiary” and “annuitant” to said words as used in sec. 42.34 that part of the aforesaid sentence in said statute which reads “under an application made prior to the date when such revision becomes effective” would be meaningless because one who was a beneficiary or annuitant on the effective date of a rate revision must have become such by virtue of an application which could only have been made prior thereto.

Under these circumstances some other meaning must be assigned to “beneficiary” and “annuitant” as used in sec. 42.34. In my opinion the interpretation intended by the leg-

islature can be given by interpellating "prospective" before each of said words. This coincides with the following definitions frequently given for these words: Beneficiary — "The person named (as in an insurance or annuity policy) as the one who is to receive proceeds or benefits accruing." Annuitant — "One that receives benefits or payments from an annuity or that is entitled to receive such benefits." Webster's Third New International Dictionary.

In the case of *State ex rel. Curran v. Brookes*, 60 N.E. 2d 62, the court said "The term 'beneficiary' is not limited to one in possession of the benefit. It comprehends one who is named as the person to whom a benefit will accrue at a certain time or upon certain contingencies * * *."

In the *Stafford* case, supra, the court held that the statutory definition of "beneficiary" quoted above, had to be disregarded because of the context in which it was used and a meaning given thereto which included one who had a right to a future allowance.

The construction given above is consonant with the interpretation of sec. 42.34 which has been given by the agency which administers it. On May 21, 1954, the state teachers retirement board took the following action relative to the prior revision in annuity rates:

"On motion of Mr. D. with a second to the motion by Mr. E., the Secretary is instructed to have annuities becoming effective July 1, 1954, on applications received prior thereto, computed on rates which have been in effect since January 1, 1942 or the new rates to become effective July 1, 1954 whichever prove to be more favorable * * *."

The administrative interpretation of a statute is entitled to great weight in construing it. *Fort Howard Paper Co. v. Town of Ashwaubenon*, 9 Wis. 2d 329, 100 N.W. 2d 915; *Wis. Axle Division (Timken-Detroit Axle Company) v. Industrial Commission*, 263 Wis. 529, 60 N.W. 2d 383.

Therefore, it is my opinion that if the change in rates is made effective July 1, 1962, on an application for an annuity which is made prior thereto for an annuity to begin on or

after such date, such annuity could be granted under the rates in effect prior thereto and the applicant would have the option of taking the annuity on the old rate or the new rate applicable to his or her sex and age.

JRW

Employment Relations Board—Authority—Employment relations board has authority to adopt rule for conduct of hearings by examiners, while reserving to the board the function of making findings and orders on the records of such hearings.

May 4, 1962.

EMPLOYMENT RELATIONS BOARD.

You ask whether you may adopt a rule under which the board may refer any proceeding before it to a single board member or to an examiner, for the limited purpose of conducting a hearing and taking testimony, but leaving to the board the function of making its own decision upon the record thus made.

You state that the number of proceedings before the board is now so great as to make it impractical for board members to hear all unfair labor practice matters, and that the additional cases arising under the new provisions of sec. 111.70, created by ch. 663, Laws 1961, will increase the difficulties. The use of examiners for the conduct of hearings would effect a substantial saving of the time for board members both for the actual conduct of hearings and for travel.

There are two primary considerations involved in your question: one, the effect of constitutional requirements of due process; and, second, the board's statutory authority.

The rule appears to be uniform that it is not an infringement of constitutional rights for a hearing to be conducted

by a hearing officer other than the administrative tribunal which makes the decision. It is said in 42 Am. Jur. 484-485 :

“Due process of law does not require that the actual taking of testimony be before the same officers as are to determine the matter involved. A hearing is not inadequate or unlawful merely because the taking of testimony is delegated to less than the whole number, or even to a single member, of the administrative tribunal, or to an examiner, hearer, or investigator employed for this purpose, even though such procedure has not been expressly authorized by the legislature.”

See, also, the cases collated in the note in 18 A.L.R. 2d 606, 607-608, where the general rule is summarized :

“As a general proposition, due process or the concept of a fair hearing does not require that the evidence be taken before the officer who decides or participates in the decision. The courts agree as to this proposition in a situation in which authority to take evidence is delegated by an administrative tribunal to a hearing officer or officers. * * *”

Among the cited cases is *Lake Superior D. P. Co. v. P.S.C.*, (1944) 244 Wis. 543, 547, 13 N.W. 2d 89, where it was said :

“* * * This practice of hearing testimony by an examiner is a well-settled method of procedure and has facilitated the functioning of the commission. A requirement of hearings conducted by the commission in person would add immensely to the duty of the commission and in a considerable degree counteract the result sought to be accomplished by that legislation. * * *”

The constitutional problems have arisen, generally, not from a delegation of authority to a subordinate to take testimony, but from the delegation, or attempted delegation, to a subordinate to participate in the decision-making process.

Where the delegation is limited to taking testimony, it amounts to little more than is involved in the taking of depositions, where the effect of the testimony is determined

by a different person than the one who presided when it was taken. One qualification should be noted, however, on the basis of the discussion in *Wright v. Industrial Comm.*, (1960) 10 Wis. 2d 653, 660, indicating that "where credibility of witnesses is a substantial element" the board's record should show that it had access to the benefit of impressions of the hearing officer by either written or oral reports. To avoid attack on grounds of due process, it might be advisable for the board's rules to provide either for participation of the examiner in a conference, or for a written report in any case where credibility of witnesses is a substantial element.

The second consideration is whether the board has statutory authority to make such a rule as you propose. There is no *express* provision authorizing the conduct of hearings by examiners.

Sec. 111.03, however, provides, in part, that the board "may employ * * * deputies * * * other assistants, and examiners, * * * and assign them to their duties, consistent with the provisions of this subchapter. * * *"

Sec. 111.07 provides certain basic procedural requirements for protection of the parties, but also provides in subsec. (12):

"A substantial compliance with the procedure of this subchapter shall be sufficient to give effect to the orders of the board, and they shall not be declared inoperative, illegal, or void for any omission of a technical nature in respect thereto."

The board is also authorized by sec. 111.09 to "adopt reasonable and proper rules and regulations relative to the exercise of its powers and authority and proper rules to govern its proceedings and to regulate the conduct of all elections and hearings."

While the foregoing rule would not permit the board to supersede any specific statutory requirements, it does permit it to amplify procedural regulations not expressly covered.

Sec. 227.014 also defines the rule-making authority of administrative agencies to include:

“* * *

“(2) Rule-making authority hereby is expressly conferred as follows:

“(a) Each agency is authorized to adopt such rules interpreting the provisions of statutes enforced or administered by it as it considers to be necessary to effectuate the purpose of the statutes, but such rules are not valid if they exceed the bounds of correct interpretation.

“(b) Each agency is authorized to prescribe such forms and procedures in connection with statutes to be enforced or administered by it as it considers to be necessary to effectuate the purpose of the statutes, but nothing in this paragraph authorizes the imposition of substantive requirements in connection with such forms or procedures.”

The authority which a hearing officer would need in order to administer oaths is conferred by secs. 325.01 (4) and 326.01 (1) upon any examiner or commissioner authorized to take testimony.

The foregoing provisions, I believe, are sufficient to warrant the commission in adopting a rule providing that an examiner shall exercise the function of conducting a hearing without participating in the decision, in the absence of any statutory provision to the contrary.

Sec. 111.07 (5) provides that the board may authorize a commissioner or examiner “to make findings and orders.” It makes no reference to conduct of hearings, which implies that the more ministerial process is left to the administrative rules of the board. It is only the delegation of authority to participate in the decision-making process which the legislature deemed to require the safeguards set out in sec. 111.07 (5). Even where the board has, in the first instance, delegated some of the decision-making functions under sec. 111.07 (5), that does not mean that it has relinquished them irrevocably. Under sec. 111.07 (6) it has the power to “remove or transfer the proceedings pending before a com-

missioner or examiner." Where it has never authorized an examiner to make findings and orders in the first instance, it has retained in its own hands the power which it could otherwise exercise by removal.

It is my understanding that the board plans to have transcripts made if the practice is adopted for hearings before examiners, in the same manner provided in sec. 111.07 (3). It might be advisable, in the rule you propose, to make provision for availability of transcripts not only for the board's review of evidence, but for their examination by parties. Such a rule might aid to insure against claims of lack of due process.

BL

School Districts—Under 40.025 (1) (c) where a reorganization order dissolves several school districts and includes territory in creation of new district, any petition filed thereafter but before such order is effective to attach territory to new or dissolved districts is void.

May 9, 1962.

EVERETT C. GORSENER,

District Attorney, Clark County.

By the joint action of county school committees, an order dated July 18, 1960, effective July 1, 1961, consolidated the territory of the Dorchester and Abbotsford school districts and created a new common school district, designated Joint School District No. 1 of the Villages of Abbotsford, Dorchester and Curtis, etc., out of the territory thereof. Such new district includes the entire territory of the town of Mayville and other adjoining territory. By another joint county school committee order dated September 6, 1961, to take effect July 1, 1962, the Colby Union Free High School District and the eight common school districts underlying it were dissolved and a new common school district, to be

known as Joint School District No. 1 of the City of Colby, et al, created to include the entire territory of said union high school district, the eight underlying common school districts and some additional territory.

On April 4, 1962, a petition was filed with the county superintendent of Clark county, as the secretary of the county school committee of Clark county, for the detachment of the north half of said town of Mayville from said Joint School District No. 1 of the Villages of Abbotsford, Dorchester and Curtis, etc., commonly called the Dor-Abby District, and the attachment of such detached territory to the Colby Union Free High School District. Then on April 5, 1962, another petition was filed with the said county superintendent of Clark county for the detachment of said north half of the town of Mayville from said Dor-Abby district but for attachment of such detached territory to the new Joint School District No. 1 of the City of Colby, etc., which will come into existence on July 1, 1962, the effective date of said September 6, 1961 order of the joint county school committees.

You have requested an opinion as to the validity and effectiveness of the above petitions filed with the county superintendent of Clark county on April 4 and 5, 1962, respectively.

It is provided in sec. 40.025 (1) (c) that when a school district reorganization order has been made and has not yet gone into effect, any other reorganization proceeding by that or any other reorganization authority "pertaining to all or any part of the territory included in the order, is void." The territory included in the September 6, 1961, joint county school committee order is the entire territory of the presently existing Colby union free high school district, the eight elementary districts underlying it and the additional territory that will make up the new school district, Joint School District No. 1 of the City of Colby, etc., which will come into existence when that order goes into effect July 1, 1962. Therefore, under the provisions of sec. 40.025 (1) (c), no other reorganization proceeding that per-

tains to all or any part of that territory may be commenced until after the order has gone into effect on July 1, 1962.

The petition filed on April 4, 1962, for the detachment of the north half of the town of Mayville from the Dor-Abby district seeks the attachment of that territory to the Colby union free high school district. Such petition, thus, pertains to territory that was "included in the order" of September 6, 1961. Similarly, the petition filed April 5, 1962, asking detachment of the same territory from the Dor-Abby district but for attachment thereof to the new district, Joint School District No.1 of the City of Colby, etc., pertains to territory that is "included in the order" of September 6, 1961. By the very language of this statute those petitions, as the commencement of reorganization proceedings, are void and of no effect. Therefore, as it is prerequisite to the invoking of the jurisdiction of a county school committee, or a joint county school committee, that there be a petition which is valid, neither the petition filed on April 4, 1962, nor the one filed on April 5, 1962, conferred upon or activated any jurisdiction of the county school committees, or of any of them, that would be involved if the petitions were valid.

The factual situation presented in this instance is entirely different from that covered by the opinion in 47 OAG 86. There the territory of the school district A was not territory "included" in a prior order. The territory "included" in the order attaching school district B to school district A was the territory of said school district B. Therefore, any subsequent proceedings to attach other territory, such as in school district C, to said school district A would be valid. The provision precluding any reorganization proceeding being commenced pertaining to territory "included" in the order until it went into effect, applied only in respect to the territory in school district B and not to the territory of school district A. The second reorganization proceeding for detachment of territory from district C and attachment to said school district A did not pertain to any territory that was "included" in the order which attached the territory of school district B to said school district A. Here, however,

the territory of the school district to which the attachment is requested, whether it be the Colby union free high school district or the new district, Joint School District No. 1 of the City of Colby, etc., that will come into existence July 1, 1962, pertains to territory that was "included" in the order of September 6, 1961, which has not gone into effect and will not do so until July 1, 1962.

In addition, the second petition of April 5, 1962, requests the attachment to a school district which is not in existence until the order has taken effect on July 1, 1962. Until the said new district has come into existence, no additions thereto or detachments therefrom can be made. But, regardless of the nonexistence of such new district until July 1, 1962, the inclusion in the order of September 6, 1961, of the territory out of which it creates prospectively such new district, renders all of that territory as "included in the order" of September 6, 1961, and the attempted attachment to it by the petition filed April 5, 1962, constitutes such petition a proceeding "pertaining" to that territory. As such, the proceeding is void under sec. 40.025 (1) (c) as previously stated.

Therefore, it is my opinion that neither of the above-mentioned petitions filed on April 4 and 5, 1962, are valid and, therefore, no county school committee or joint committee that would otherwise be involved has any jurisdiction or authority to act thereon.

HHP

Court Reporter—Fees—Discussion of court reorganization legislation relative to fees for transcripts by county court reporter.

May 10, 1962.

JOHN E. FLYNN,

District Attorney, La Crosse County.

You have requested an official opinion on the following two questions:

"1. Is a County Court Reporter entitled to transcription fees for transcribing of testimony in a probate, mental, juvenile hearing or any other type of action heard by the County Judge where there is no appeal but where such transcript is ordered by the court to aid the court in rendering its decision?

"2. Is the County Court Reporter to be compensated over and above her salary for the transcribing of testimony taken under direction of the County Judge pursuant to Section 954.11 of the Wisconsin Statutes."

I.

The basic statute relating to court reporter fees is sec. 252.20 as amended by ch. 495, Laws 1961. While ch. 252 of the statutes relates to circuit courts, sec. 253.35 (5) as created by ch. 315, Laws 1959, provides that a county court reporter shall furnish to any party a transcript of the testimony taken by him in any matter or proceeding in the manner and for the fees provided in sec. 252.20.

Hence, it is necessary to turn to sec. 252.20 which now reads:

"252.20 Transcripts. Every reporter shall, upon the request of a party to any action, transcribe in longhand or typewriting, the evidence or any other proceedings taken by him in such action or any part thereof so requested, and when requested make any number of carbon copies, each duly certified by him to be a correct transcript thereof, for which he shall be entitled to receive, from the party requesting the same, 20 cents per folio for single transcript and 5 cents per folio for each carbon copy; except that when transcript is requested by the state or any political subdivision thereof, the charge shall be 15 cents per folio for single transcript and 2½ cents per folio for each carbon copy. In the trial of any criminal action or proceeding the court may, and, in case of commitment to any state penal or reformatory institution or to a house of correction in counties hav-

ing and maintaining same, shall order such transcript of the evidence and proceedings to be made and certified by the reporter and filed with the clerk of the court, and a certified duplicate of such transcript to be filed with the warden or superintendent of the institution to which the person may be sentenced, and the cost thereof, not exceeding 15 cents per folio for the original transcript and 2½ cents per folio for the duplicate, shall be certified and paid by the county treasurer upon the certificate of the clerk of the court. In case of application for a pardon or commutation of sentence said duplicate transcript shall accompany the application. In all actions in which any court orders a compulsory reference the court may direct the reporter thereof to attend the trial of such action, take the evidence and proceedings therein and furnish the referees with a transcript thereof in longhand or typewriting, when the court so orders. Such reporter shall receive the same fees for such transcript of testimony, paid in the same manner as hereinbefore provided. This section does not prohibit an additional charge, made by special arrangement, for transcribing proceedings in longhand or typewriting from day to day during the progress of a trial."

Nothing is said in this section about fees for making transcripts of probate proceedings at the direction and request of the court for his use in aiding him to reach a decision, and the same is true so far as sanity and juvenile proceedings are concerned.

It does make provision for the ordering of transcripts by parties. Obviously the court is not a party. Also sec. 252.20 does make provision for transcripts in criminal cases. Where there is a commitment this is mandatory and the responsibility is on the court to order the transcript. The cost is borne by the county.

Also there is provision in sec. 252.20 for the discretionary ordering of a transcript by the court in all actions in which the court orders a compulsory reference and the court has directed the reporter to attend the trial. You have raised no question on this point.

Lastly, under sec. 252.20 reporters may make special arrangements for transcribing proceedings from day to day during the progress of the trial at extra cost. No question is presented on this provision.

Sec. 253.35 (1) (a), as created by ch. 315, Laws 1959, and as repealed and recreated by ch. 495, Laws 1961, provides that every county judge may appoint a competent phonographic reporter and as many assistant reporters as necessary, "and may remove them at pleasure." There is a separate provision, however, for counties of over 500,000 population, but there is no need to discuss that here.

Also attention is called to the fact that under sec. 253.35 (2) (a) the reporter is required to attend the sessions of the court for which he was appointed and, on request of the judge appointing him, sessions of court presided over by that judge in other counties "and shall perform any other duties as the judge directs."

There is another interesting provision in sec. 253.35 (2) (a) in the sentence reading: "Any *such* transcript in a non-contested matter ordered filed by the court shall be paid for by the county treasurer upon the certificate of the clerk of court or register in probate." This apparently relates back to the preceding sentence which commences with the wording: "In counties having a population of 500,000 or more, the court may order transcripts to be filed in noncontested matters;". This language because of limitation to Milwaukee county furnishes no guide to follow here, and even if it were of state-wide application it would not cover the situation where the judge requests a transcript or partial transcript for his own use but does not order it "to be filed."

Perhaps some further search should be made for statutes relating to testimony in specialized types of proceedings such as, for instance, those relating to sanity or juvenile proceedings about which you have inquired. In juvenile cases sec. 48.25 (4) provides that stenographic notes of the hearing shall be kept but shall be transcribed only upon order of the court.

Sec. 51.03 provides for a jury trial if demanded in sanity cases with the procedure to "be substantially like a jury trial in a civil action." This would imply a stenographic record which might or might not be transcribed depending upon orders placed by counsel or a request from the judge himself for such a transcript or part thereof.

From all of the foregoing it would appear that in the absence of any specific statute covering the subject the reporter is not entitled as a matter of right to compensation where the judge has requested a transcript of any part of the testimony for his own use in deciding any matter before him.

Sec. 20.930 in line 14b, 20.265 (1) provides a \$6000 salary for the county court reporter except in the case of Milwaukee county. See sec. 253.35 (3) (a) as amended by ch. 495, Laws 1961. Under this section the county may pay an equal amount to each county court reporter in addition to that specified by sec. 20.930.

If any substantial additional burden is placed upon the county court reporter by reason of the demands made upon such reporter for transcripts ordered by the court for its own use, this provision could be utilized as authority on the part of the county to increase the salary provided by sec. 20.930.

II.

Your second question relates to the compensation, if any, over and above the regular salary to which the county court reporter is entitled under sec. 954.11.

Sec. 954.11 provides:

"The testimony shall be written by the magistrate or under his direction."

This refers to preliminary examinations in criminal cases.

Sec. 954.17 provides that all examinations and the evidence and bonds taken by a magistrate shall be certified and returned by him within 10 days to the clerk of the court before which the defendant is bound to appear.

Sec. 252.20, 1961 Stats., provides that when a transcript is requested by the state or any political subdivision thereof, the charge shall be 15¢ per folio for single transcript and 2½¢ per folio for each carbon copy.

The state is a party in a criminal case and has the duty to see that the examination in a preliminary hearing is filed with the clerk of the court before which the defendant is bound to appear. Hence, this transcript would appear to be one "requested by the state" within the meaning of sec. 252.20, and the reporter would be entitled to the fees therein provided for transcripts requested by the state.

WHR

Suit Tax—One dollar state suit tax in small claim cases in county court under 271.21 should be collected at the time the summons is issued.

May 11, 1962.

DONALD J. BERO,

Corporation Counsel, Manitowoc County.

You have requested a formal opinion on the question of when the \$1 state suit tax is payable in small claims actions commenced in county court.

Art. VII, sec. 18, Wis. Const., provides:

"The legislature shall impose a tax on all civil suits commenced or prosecuted in the municipal, inferior or circuit courts, which shall constitute a fund to be applied toward the payment of the salary of judges."

By sec. 129 of ch. 495, Laws 1961, sec. 271.21 of the statutes, as repealed and recreated by ch. 315, Laws 1959, was amended to read:

"271.21 In each civil action, special proceeding, except probate proceedings, and cognovit judgment in the circuit

or county court, excluding all matters brought into the probate branches, a suit tax of \$5 shall be paid at the time the action is commenced, except that in actions by small claim type procedure and forfeiture actions in the county court, the tax shall be \$1. *A municipality need not advance the \$1 tax but shall be exempt from payment of such tax until the defendant pays costs pursuant to s. 299.25.* The tax paid in circuit courts shall be paid into the state treasury; the tax paid in county courts shall be paid one-half into the state treasury and one-half into the county treasury.”

The underscored language indicates the amendment made by ch. 495.

This language would seem to furnish the key to answering your question. The implication is that since there is a special provision to the effect that a municipality need not advance the \$1 tax, all others must advance the tax and cannot be exempt until the time costs are taxed under sec. 299.25, 1961 Stats.

This conclusion is further supported by sec. 299.25 (1) which provides with reference to taxing costs that the clerk shall without notice to the parties tax and insert in the judgment as costs in favor of the party recovering judgment “any suit tax *paid*.”

In other words, it is assumed that the tax has been paid some time before trial.

As indicated in sec. 271.21 quoted above, the suit tax “shall be paid at the time the action is *commenced*.”

When is an action commenced?

Ch. 299 contains no direct provision answering this question, but sec. 299.04 (1) provides:

“Except as otherwise provided in this chapter, the general rules of practice and procedure in title XXIV and title XXV shall apply to actions and proceedings under this chapter.”

Sec. 262.02 (1) which is a part of title XXV provides that a civil action in a court of record is commenced by the service of a summons or an original writ.

Strictly construed this would mean that the action is commenced the moment service of the summons is completed whether by personal service, completion of service by publication, or receipt of the summons through the mail where service is had by mail under ch. 299.

Sec. 299.08 provides for the payment of the clerk's fee at the time the summons is issued by the clerk, but it says nothing about payment of the tax at that time, and, of course, the action might never be commenced even though the summons is issued, if the summons in fact is never served.

With reference to service by mail, sec. 299.13 (1) provides among other things that service of the summons is considered completed when it is mailed, unless the envelope enclosing the summons has been returned unopened to the clerk prior to the return date.

One of the difficulties which presents itself is in the case where the service of the summons has been completed and the defendant pays up before the return date. In that case there would probably be no appearance on the return date followed by entry of judgment. It might be difficult for the clerk to collect the tax in such a case and he would be responsible for it when his records are audited by the state auditor, since the record would show that the summons had been mailed and that the envelope containing it had not been returned unopened. Thus the action would have been commenced within the meaning of sec. 299.13 (1) and the tax would be due.

In substance the prevailing party would have received the benefit of the state's legal machinery in collecting a debt through the medium of court process without paying the state tax which is clearly due and payable.

This being true it would seem that the only safe procedure is to require the *advance* payment of the state tax at the time of the issuance of the summons by the clerk at the same time the clerk's fee is paid under sec. 299.08 subject, however, to its return in the event that the action is never

actually commenced by service of the summons on the defendant.

While no survey has been conducted by this office as to the practice being followed in the collection of the tax, the clerk of the small claims branch of the county court for Dane county states that it is the practice in that court to collect the \$1 tax at the same time the clerk's fee is collected under sec. 299.08, which is to say at the time of issuance of the summons.

WHR

School Districts—Reorganization—Certification of results of referendum elections on school district reorganization orders is made for purposes of sec. 40.025 (1) (d) 4 and (5) at the time the document of certification is filed with the county superintendent of schools.

May 17, 1962.

LOUIS F. GERARD,

Corporation Counsel, Racine County.

You have requested an opinion as to when the certification of the adverse results of a referendum election pursuant to sec. 40.03 (6) is effective to terminate the preemptive effect under sec. 40.025 (1) of an order.

By the joint action of the county school committees of Racine, Walworth and Waukesha counties pursuant to sec. 40.03 an order was issued March 14, 1962, to be effective June 11, 1962, which dissolved eight common school districts, detached designated parts from eight other common school districts and dissolved the Waterford union high school district which was comprised of and overlay the territory of said dissolved districts and the territory detached from the other districts, and then created out of all of such territory a new common school district. This order, pursuant to the provisions in sec. 40.025 (5) was filed with the

county superintendent of schools of Racine county, as the major portion of the entire area lies in Racine county.

Pursuant to sec. 40.03 (6) a referendum was held April 3, 1962 on said order, at which the vote was adverse. The county clerk of Racine county on April 5, 1962 at 10:20 a.m. completed the canvass of the vote at his office in the court house in the city of Racine, but did not mail his certificate thereof to the county superintendent of schools of Racine county at his office in the village of Union Grove until 4:00 p.m. that day.

On April 5, 1962 at 10:24 a.m. a petition was filed with the clerk of the town of Norway requesting the consolidation of two of the common school districts that were included in the order. On April 6, 1962 at approximately 8:20 a.m., a petition was filed with the county superintendent of Racine county at his office requesting the consolidation of one of the districts included in the April 5 petition with a different district. You ask whether the petition filed on April 5 was valid or not in view of the fact that it was filed before the county clerk had sent his certificate of the result of the election to the county superintendent.

Under the provisions of sec. 40.025 (1) (c) the March 14, 1962 order of the joint committee has a preemptive effect and precludes the filing of any other petition pertaining to the territory included in it so long as such order has not gone into effect or been rendered inoperative. This preemption is accomplished by two parts in sec. 40.025 (1) (k). It is there first provided that once jurisdiction to make an order relative to territory has been acquired by a reorganization authority as provided in paragraphs (a) and (b), it continues until the matter is disposed of or it loses jurisdiction because of the occurrence of something falling within some provision in the eight subdivisions of paragraph (d). Then, it is stated specifically that when a reorganization authority has acquired jurisdiction then so long as that proceeding is pending before it, or if an order of reorganization has been made, then until such order has gone into effect, no other reorganization proceeding relating to all or

any part of the territory involved can be commenced and any attempt to do so is void.

The main purpose of these provisions is to eliminate conflicting reorganization proceedings by giving absolute preemption to the one first started and to set forth when such preemption terminated with precision. In furtherance of and as a part of this purpose, it is provided in subdivision 4 of sec. 40.025 (1) (d) that such preemption ceases:

“Upon certification by a school district, town, village, city or county clerk or a county election commission of a referendum vote of nonapproval;”

Subsec. (5) of sec. 40.025 sets forth the detailed requirements as to the filing of orders. It provides for filing with the county superintendent of schools and requires that he shall immediately place thereon the date of receipt by him. This time of receipt is made the controlling criteria for loss of jurisdiction in some instances and in others it is the time to which something else is geared. The purpose is to provide a precise and ascertainable time when preemption ceases or to which some other time provision is related. The obvious reason in so selecting this filing as the controlling criteria is that it is a public office which is open and thus readily accessible and the time of filing there is certain and not susceptible of inaccuracy or indefiniteness. This eliminates all possibility of miscalculation or misunderstanding as to the time something is done because it is an open and above-board public disclosure by such filing that the act or thing involved has been done. Using the date and time of acts of that office, whether as to filing or sending out notices etc., gives absolute certainty as to time and eliminates any question or misunderstanding in relation thereto.

It is in furtherance of this underlying scheme of the statute that subsec. (5) contains provisions relative to the time when the results of a referendum election are to take effect. It is there stated:

“* * * A referendum petition or resolution shall stay an order until the result of the referendum has been certified by the school district clerk, municipal or county clerk or the

county election commission to the county superintendent of schools. When the results of a referendum election have been canvassed the proper clerk shall certify the same to the county superintendent of schools with whom the order was filed. * * *

As this last quoted provision is in the same section as subdiv. 4 of subsec. (1) (d), above quoted, the two are in *pari materia* and must be construed together. As subsec. (5) provides that the certification of the results of a referendum shall be certified to the county superintendent, clearly when subdiv. 4 says "upon certification by a * * * county clerk * * * of a referendum vote of nonapproval" it means a certification made to the county superintendent. Until the proper clerk has affixed his signature to a certification of the results of a referendum vote and also transmitted such a document to the county superintendent, such clerk has not made a certification. The mere signing his name to a paper in his office that recites the referendum vote without it having passed out of his possession and control does not constitute a certification by such clerk. His official act of certification is not complete until he has placed it beyond his control. Until then it is merely a paper he has signed with the intention of issuing it and he could change or destroy it. It is the issuance of a signed document that constitutes the official act of making that document.

Thus, under the facts recited, at best it certainly was not until the county clerk at 4:00 p.m. on April 5, placed his signed official statement in the mail for transmission to the county superintendent that he had made his official certification. Therefore, until then the order which was struck down by the adverse referendum vote continued to have preemptive effect and the jurisdiction attaching thereto was not lost.

It is perfectly clear that if the effective date of the order were prior to the date of the holding of the referendum, the act of filing the referendum petition would have the effect, as stated in sec. 40.025 (5), of staying the effective date of the order. Then, if the referendum vote were favorable,

there would arise a question as to the date when the order would go into effect. Under subsec. (5), it clearly would not go into effect until the certification had been issued to the county superintendent. When so issued by the proper clerk then the certification would be made and until then the order would not go into effect. If in the instance of a non-approval by the referendum vote it were to be taken that the mere signing of the certification form by the county clerk at the completion of the canvass of the vote constituted "certification" for the purposes of subdivision 4, this would give to the statute the effect of prescribing of a different time criteria in the instance of nonapproval from where there was approval. No reason appears for such difference.

Furthermore, it would mean that although the main purpose was certainty in time in such matters, it was intended to leave the time determination uncertain and subject to confusion upon nonapproval but to provide certainty in the case of approval. There is nothing in the statute to suggest this. Rather, recognition of the over-all purpose negates it and requires like treatment in both instances.

While the time of mailing out of the certified official statement of the referendum results is sufficient to render the April 5 petition void, in view of the objective of the statute I am of the opinion that in both approval and non-approval the results of a referendum have not been certified by the appropriate clerk until such official statement thereof is actually received by the county superintendent's office, whether by mail or by delivery there. Unless the receipt of the certification is the controlling time, there is still uncertainty, as there is normally no public record made of the sending out or mailing of such matters and the time would depend on oral statements only. There readily could arise differences and bona fide disputes as to the exact time when placed in the mail. However, using the actual receipt by the county superintendent or his office as the determinative time dispells all uncertainty and gives effect to the very obvious intention of this statute. It is at this central location that other matters are determinable and controlling.

It is, therefore, my opinion that where there is a referendum on a school district reorganization order the certification of the results thereof occurs at the time when the official document certifying thereto is filed with the proper county superintendent of schools by delivery to him personally or his office.

HHP

Employment Relations Board—Investigations—If a petition is filed with the employment relations board under 111.70 (4) (f) to initiate fact-finding in a labor dispute between a municipal employer and its employees, the board must conduct an investigation and determine whether the conditions exist under which fact finding should be initiated. If requirements of 111.70 (4) (m) are met, the board should certify the results of its investigations to local agency.

May 18, 1962.

ARVID ANDERSON, *Commissioner,*
Wisconsin Employment Relations Board.

Your inquiry is concerned with the procedures preliminary to fact finding in disputes between municipal employers and employees under the provisions of sec. 111.70 (4) (e) to (g) created by ch. 663, Laws 1961, when the municipal employer has provided fact finding procedures of its own.

The statutory provisions with which you are primarily concerned are:

“111.70 (4) * * *

“(e) *Fact finding.* Fact finding may be initiated in the following circumstances: 1. If after a reasonable period of negotiation the parties are deadlocked, either party or the parties jointly may initiate fact finding; 2. Where an employer or union fails or refuses to meet and negotiate in

good faith at reasonable times in a bona fide effort to arrive at a settlement.

“(f) *Same*. Upon receipt of a petition to initiate fact finding, the board shall make an investigation and determine whether or not the condition set forth in par. (e) 1 or 2 has been met and shall certify the results of said investigation. If the certification requires that fact finding be initiated, the board shall appoint from a panel established by the board a qualified disinterested person to function as a fact finder.

“(g) *Same*. The person appointed as fact finder may establish dates and place of hearings which shall be where feasible in the jurisdiction of the municipality involved. He shall conduct said hearings pursuant to rules established by the board. Upon request, the board shall issue subpoenas for hearings conducted by the fact finder. The fact finder may administer oaths. Upon completion of the hearings, he shall make written findings of fact and recommendations for solution of the dispute and shall cause the same to be served on the municipal employer and the union.

“* * *

“(m) The board shall not initiate fact finding proceedings in any case when the municipal employer through ordinance or otherwise has established fact finding procedures substantially in compliance with this subchapter.”

Your specific question is:

“If a petition for fact finding is filed with the Board involving a municipal employer who has, through ordinance or otherwise, established fact finding procedures substantially in compliance with Chapter 111.70, can the Board make an investigation as provided by Section 111.70 (4) (f) to determine whether or not the conditions set forth in paragraphs (e) (1) or (2) exist, and certify the results of said investigation to the municipal employer for the purposes of initiating the local fact finding procedure by the appointment of the fact finder?”

Since the parties regulated by the statute include only governmental agencies and public employees, who are sub-

ject to the legislative will to a greater extent than are private parties (*Holland v. Cedar Grove*, (1939) 230 Wis. 177, 282 N.W. 111, 282 N.W. 448), your question involves primarily an analysis of the statute to ascertain the legislative intent.

The statute prohibits strikes by public employees (sec. 111.07 (4) (1)), and seeks to provide means of settling disputes through weighing of facts without interruption of public services.

The proceedings can culminate only in "findings of fact and recommendations for solution of the dispute" by a "qualified disinterested person." Even the final result of the fact-finding procedure is not made enforceable by legal sanctions.

The functions of the board are limited to the legal steps *preliminary* to the fact finding, similar in some respects to those involved in *Wisconsin Tel. Co. v. Wisconsin E. R. Board*, (1948) 253 Wis. 584, 34 N.W. 2d 844, where the statute, sec. 111.54, provided that the board should appoint a conciliator upon the filing of a petition "if in its opinion, the collective bargaining process, notwithstanding good faith efforts on the part of both sides to such disputes, has reached an impasse and stalemate * * *".

The most the board's preliminary action could accomplish is to set in motion procedure before a fact finder, where both parties can be heard. Such institution of fact finding is somewhat comparable to institution of lawsuit which may be commenced by service of summons and complaint by an adversary party without any preliminary determination whether the litigation is warranted. As pointed out in *Myers v. Bethlehem Corp.*, (1938) 303 U. S. 41, 51-52, 82 L. Ed. 638, 58 S. Ct. 459:

"* * * Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact."

See, also, *State ex rel. Meissner v. O'Brien*, (1932) 208 Wis. 502, 243 N.W. 314. There are a number of considera-

tions pertinent to the question whether the existence of a local ordinance establishing "fact finding procedures" prevents the Wisconsin employment relations board from exercising the steps *preliminary* to fact finding.

1. Sec. 111.70 (4) (m) designates no agency other than the board to determine whether the local procedures are "substantially in compliance with" the state law. The agency charged with enforcement of a law must, in the first instance, determine whether the conditions invoking application of the law or exceptions to it, exist.

2. Whether the local "fact-finding procedures" may include the steps *preliminary* to the fact finding is questionable. Unless the local procedures established by the employer under sec. 111.70 (4) (m) are agreed upon between employer and employees, the agency charged with determining whether fact finding should take place would be one of the parties to the dispute, or an agency designated by it.

It seems unlikely that the legislature intended that one party to the dispute, or an agency representing it, should determine whether the conditions precedent to fact finding exist as enumerated in sec. 111.70 (4) (e).

One of the reasons for designation of the board to determine whether such conditions exist is to insure that the decision shall not rest with either of the parties to the dispute.

Leaving open the question whether a local plan might, in any circumstance, substitute a local agency for the Wisconsin employment relations board to determine whether the conditions to initiate fact finding have been met, it seems clear the procedures would not be "substantially" in compliance with the state plan if they left any determination to one of the parties to the dispute, particularly when one of the questions is whether that party failed to bargain in good faith.

3. Designation of the board to make the preliminary investigation also evidences a legislative intent that the determination whether fact finding should ensue should be

based on a uniformly applied state-wide standard rather than upon varying local practices. The statutory standards enumerated in sec. 111.70 (4) (e) are of a specialized nature dealt with frequently by the board, but more rarely by local agencies.

4. Sec. 111.70 (4) (m) provides that the board shall not "initiate" fact finding under certain circumstances. What constitutes the initiation of fact finding is to be determined from the legislative definition.

Sec. 111.70 (4) (e) does not define *when* the fact finding is initiated, but only the *conditions* upon which it may be initiated.

Sec. 111.70 (4) (f), however, provides an express indication of when the fact finding is deemed initiated. It *follows* a certification by the board requiring "that the fact finding be initiated". Under that provision, fact finding is "initiated" only after the board has completed its preliminary investigations. If any community has made adequate provision for fact finding, the board should go no further than to certify the results of its investigation to the proper party, and the appointment of the fact finder will then be governed by the local plan.

5. The board's authority in any case arises only upon the filing of a petition. (Sec. 111.70 (4) (f)) In a case where no petition is filed, the board may not act, so that if local procedures are satisfactory to both sides of the dispute, presumably no petition will be filed, and none of the questions above discussed will arise.

BL

Real Estate Brokers—Mortgages—Discussion of 136.075 and REB 6.01 relative to mortgage broker, licensed as real estate broker, collecting and depositing loans and payments.

May 22, 1962.

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

You indicate that in certain instances a mortgage broker representing a large bank, insurance company or other investor, will, after having placed a loan on a commission basis, enter into an agreement with the mortgagee to service such loan for a fee to be paid by the mortgagee. The mortgage broker collects the monthly mortgage payments from the mortgagor. These monthly payments consist of a payment on principal, interest, taxes and insurance. The payments on taxes and insurance represent a prepayment of the tax or insurance item to the extent of one-twelfth of the anticipated debt. The amounts collected in prepayment of taxes and insurance are to be held in trust by the mortgagee and applied, pursuant to the mortgage provisions, to the payment of taxes and insurance premium when due.

A common form of mortgage used in Wisconsin contains a provision as follows:

“(a) A sum equal to the ground rents, if any, next due, plus the premiums that will next become due and payable on policies of fire and other hazard insurance covering the mortgaged property, plus taxes and assessments next due on the mortgaged property (all as estimated by the mortgagee, and of which the mortgagor is notified), less all sums already paid therefor, divided by the number of months to elapse before one month prior to the date when such ground rents, premiums, taxes, and assessments will become delinquent, *such sums to be held by mortgagee in trust to pay said ground rents, premiums, taxes, and assessments.*” (Emphasis added) 9 Am. Jur. Legal Forms 654.

A similar provision is used in Veterans' Administration Home Loan Mortgages. Modern Legal Forms, Sec. 5586.

You indicate that some mortgage brokers, without the consent of the mortgagor, and with or without the consent of the mortgagee may be using such money for investment

or other purposes without compensation, and to the possible detriment of the mortgagor and mortgagee.

You inquire whether such moneys are required to be maintained in a real estate trust account as required by section 136.075, and if so, whether the account is subject to the rules of the board and subject to audit by the board.

If the moneys are trust funds, a fundamental principle of the law of trusts would prohibit the trustee, its officers and agents from using the funds for their own benefit, and such persons must account for any profits made through improper use of such funds. *Dick & Reuteman Co. v. Doherty Realty Co.*, (1962) 16 Wis. 2d 342, 114 N.W. 2d 475.

Sec. 136.075, provides:

“Trust accounts. All down payments, earnest money deposits or other trust funds received by a broker or salesman on behalf of his principal or any other person, shall be deposited in a common trust account, maintained by said broker for such purpose in a bank designated by the broker, *pending the consummation or termination of the transaction*, except as such moneys may be paid to one of the parties pursuant to such contract or option. The name of said bank shall at all times be registered with the board, along with a letter authorizing the board to examine and audit said trust account when said board deems it necessary.”

REB 6.01, Wisconsin Administrative Code is concerned with trust accounts and (4) and (6) of said rule provide in part:

“(4) Each broker shall only deposit trust funds received on real estate or business opportunity transactions as defined in section 136.01, Wis. Stats., in said common trust account and shall not commingle his personal funds or other funds in said trust account with the exception that a broker may deposit and keep a sum not to exceed \$100.00 in said account from his personal funds which sum shall be specifically identified and deposited to cover bank service charges relating to said trust account.

“(6) Each broker shall maintain a single entry bookkeeping system in his office, listing the following information on all trust account deposits:

“* * *

“(d) Rent contracts, dates, names of parties, amount of rent installments.

“(e) Mortgages, dates, names of parties, amount of payments of principal and interest.

“* * *

“(i) Any other receipts pertaining to the sale, exchange, purchase, rental of real estate or business opportunities, dates, names of parties, amount of payment.”

You indicate that the mortgage broker in question is licensed as a real estate broker, and we are informed that it is also licensed as a loan company, but is not licensed as a collection agency.

The collection activities of the mortgage broker would necessitate being licensed as a collection agency if the company does not meet one of the exceptions of sec. 218.04 (1) (f), which provides:

“(f) ‘Collection agency’ means any person engaging in the business of collecting or receiving for payment for others of any account, bill or other indebtedness. It shall not include attorneys at law authorized to practice in this state and resident herein, banks, express companies, savings and loan associations organized under the laws of Wisconsin, insurance companies and their agents, trust companies, or professional men’s associations collecting accounts for its members on a nonprofit basis, where such members are required by law to have a license, diploma or permit to practice or follow their profession, real estate brokers, real estate salesmen and justices of the peace whose principal business is not collections.”

Collection agencies are licensed and supervised by the banking department.

Persons who are engaged in the business of negotiating loans to be secured by a mortgage or other encumbrance on

real estate are required to be licensed as real estate brokers unless specifically exempted.

Sec. 136.01 (2) provides in part that a "real estate broker" means any person not excluded by sub. (6), who:

"* * *

"(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.

"* * *"

Subsec. (6) provides:

"(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."

A mortgage broker is not a land mortgage association as such an association is one organized under Ch. 225. 29 OAG 105.

Since a broker is usually given only such authority as is commensurate with the duty of negotiating a deal, he is generally deemed to have no implied power to receive payment in behalf of his employer. He may be expressly given such power however. 8 Am. Jur. 1014. *Delafield v. Smith*, (1899) 101 Wis. 664, 78 N.W. 170, 30 A.L.R. 2d 805. An agreement granting such authority was present in the mat-

ter under consideration. The real question we have is whether the activity of servicing a loan secured by a mortgage, after the loan has been negotiated and closed, is activity which is within the scope of the licensing law.

Sec. 227.014 (2) (a) provides that an administrative agency may adopt rules interpreting the provisions of statutes enforced or administered by it to effectuate the purpose of the statutes, but the rules are not valid if they exceed the bounds of correct interpretation of the statutes.

The power is sufficiently broad to permit the board to define permissible activities of a real estate broker. *State v. Grayson*, (1958) 5 Wis. 2d 203, 92 N.W. 2d 272.

Real estate brokers have for many years engaged in the business of servicing loans for mortgagees on a fee basis and the real estate brokers' board, in its administrative rules REB 6.01 (e) and (i), has recognized such activity as part of a real estate broker's business.

Where the loan has been negotiated by the mortgage broker, and is closed by delivery of mortgage and note, and commission has been paid, and where the mortgage broker and mortgagee enter into an agreement whereby the broker is to collect the mortgage payments, the transaction may be considered pending and continuing within the terms of sec. 136.075.

The time, manner and amount of the payments to be made by the broker to the mortgagee, or to be directly applied by the broker to payment of insurance premiums or taxes, are matters which are controlled by the agreement for servicing between the broker and mortgagee.

We are of the opinion that such moneys are required to be deposited to and maintained in a real estate trust account prescribed by sec. 136.075, and REB 6.01, and are subject to audit by the board.

RJV

State Board of Health—Licenses—Sec. 146.30 does not provide authority for state board of health to require a nursing home license for facilities caring for persons diagnosed as mentally deficient. Definition of nursing home precludes admission of mentally deficient persons.

May 23, 1962.

CARL N. NEUPERT,
State Health Officer.

You ask my opinion on this question: Does sec. 146.30 provide authority for the state board of health to require a nursing home license for facilities caring for persons diagnosed as mentally deficient?

In answering the above-stated question, I am assuming that the "persons diagnosed as mentally deficient" referred to therein are not persons suffering from mental impairment due to senility, but are persons with a congenital mental deficiency or persons whose mental deficiency is neither congenital nor due to senility, e.g., a person who had sustained a severe head injury leaving his mental faculties permanently impaired.

It is my opinion that sec. 146.30 does not provide authority for the state board of health to require a nursing home license for facilities caring for persons diagnosed as mentally deficient, and it is my further opinion that facilities used, in whole or in part, to care for persons diagnosed as mentally deficient may not be licensed as a nursing home under sec. 146.30.

There are several reasons which provide strong support for this opinion. They are these:

(1) In its present form, sec. 146.30, was enacted in 1951. See L. 1951, c. 715, sec. 2. (There was a minor amendment of sec. 146.30 in 1955, of no importance here.) The Wisconsin Legislative Council in its 1950 Report, Vol. IV, analyzed the proposed bill which was to become sec. 146.30, and in doing so stated, at page 40 of such report, that, "The pro-

posed bill confers the licensing authority on the state board of health. That board is authorized to establish standards for the care and treatment of patients in nursing homes, both public and private. Hospitals, tuberculosis sanatoriums, *Institutions for the mentally ill*, and child care institutions are *not* included." This comment on or analysis of the Wisconsin Legislative Council is an extrinsic aid to the proper construction of sec. 146.30, if construction thereof is necessary, and as such aid it clearly shows that the bill which became sec. 146.30 was not intended to bring "institutions for the mentally ill" within the definition of "nursing home" appearing therein. In my judgment, an institution for the mentally ill is, not only an institution in which all the patients are mentally ill, but also an institution in which only a portion of the patients are mentally ill.

(2) The above-mentioned definition of "nursing home" appearing in sec. 146.30, clearly indicates to me that such a home is not to be used for the care of "persons diagnosed as mentally deficient." That definition reads:

" 'Nursing home' means any building, structure, institution, agency or other place, whether proprietary, nongovernmental or governmental, for the reception and care or treatment not less than 72 hours in any week of 3 or more unrelated individuals hereinafter designated patients, *who* by reason of aging, illness, blindness, disease or physical or *mental infirmity desire* any such service, and for which reception and care or treatment a charge is made; * * *."

I think it significant that the phrase "mental infirmity" is used in this statute rather than "mental deficiency" or "mental illness", and it seems significant, too, that the legislature apparently felt that a person suffering from such infirmity would be capable of desiring the services of a nursing home. To "desire" such services a patient of a nursing home suffering from a mental infirmity would obviously have to have periods of mental lucidity wherein to form and entertain a wish for nursing home care, and such periods are often experienced by persons having a mental impairment due to senility, but are not found, for

example, among persons whose mental deficiency is congenital. This leads me to believe that when the legislature referred to "mental infirmity" in sec. 146.30 it had in mind an infirmity of that kind arising out of age.

Sec. 146.30 contains a very clear indication that the phrase "mental infirmity", as used in the definition of "nursing home" therein, was not meant to cover mental illness requiring psychiatric treatment. This indication is found in the fact that sec. 146.30 (1) (a) provides that the term "nursing home" as defined therein shall not include "institutions for the treatment and care of psychiatric * * * patients".

(3) Your letter requesting this opinion reads in part as follows:

"(b) The State Board of Health has thus far taken the position that the specific reasons or causes for admission to a nursing home are limited and enumerated in the statute to persons *'who by reason of aging, illness, blindness, disease or physical or mental infirmity* desire such service * * * and that none of these reasons can be construed to include mental deficiency." (Emphasis supplied by you).

This statement shows that for ten years there has been an administrative construction of sec. 146.30, which supports my above-stated opinion, and provides a third reason for it. If the language of sec. 146.30 is not clear on the matter of whether or not such statute authorizes the state board of health to require a nursing home license for facilities caring for persons diagnosed as mentally deficient, then such administrative construction is entitled to controlling weight. " * * * where the language of the statute is not clear, and an ambiguity exists, and practical construction has obtained for many years, then it is entitled to controlling weight." *State ex rel. West Allis v. Dieringer*, (1956) 275 Wis. 208, 218.

In your letter requesting my opinion on the question above-stated and answered, you also ask my opinion on two other questions. One of them requires no answer herein, as

it was to be dealt with only if my answer to your above-stated question was in the affirmative. The third of your questions was: Does Section 146.30 preclude the admission of mentally deficient persons to nursing homes licensed by the State Board of Health? It is my opinion that it plainly does, as the presence of such persons in a nursing home would make it something other than a nursing home, and would prevent its licensing as such.

JHM

Hunting and Fishing Laws—Menominee Indians—Conservation Commission—Wisconsin hunting and fishing laws apply to Menominee county and to the Menominee tribe in the same manner and extent as they apply to any other person and area in the state.

May 23, 1962.

L. P. VOIGT,
Director, Conservation Department.

You have requested my formal opinion as to whether or not Public Law 399, 83rd Congress, popularly known as the "Termination Act" (68 Stat. 250, as amended 70 Stat. 544, 70 Stat. 549, 72 Stat. 290, 74 Stat. 867; 25 U.S.C. secs. 891-902) terminates the hunting and fishing privileges heretofore enjoyed by the Menominee Indians within what was formerly the Menominee Indian Reservation ". . . so that the Wisconsin laws and rules with respect to hunting and fishing apply to the lands of Menominee County and to those citizens of Wisconsin that trace their ancestry to the Menominee Indian Tribe as well as to any other person hunting or fishing in Menominee County."

It is my opinion that upon termination, Wisconsin laws and rules with respect to hunting and fishing apply to the lands in Menominee county and to those persons who trace their ancestry to the Menominee Indian tribe, as well as to

any other person hunting or fishing in what was formerly the Menominee Indian reservation and what is now Menominee county in the same manner and to the same extent as such laws and rules apply to any other person within the state. The "Termination Act", cited above, provides, in part, as follows:

"[After title to the property of the tribe has been transferred] . . . all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction. . . ."

The intent of congress in passing the termination act was to terminate its trusteeship over the Menominee Indians. This is evident not only from the face of the termination act itself, but from *House Concurrent Resolution 108* (67 Stat. B 132, 83rd Congress, 1st Session 1953) which declares as follows, in part:

"Whereas it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States *subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship;* and Whereas the Indians within the territorial limits of the United States should assume their full responsibilities as American citizens: Now, therefore, be it

Resolved by the House of Representatives (the Senate concurring), That it is declared to be the sense of Congress that, at the earliest possible time, all of the Indian tribes and the individual members thereof located within the States of California, Florida, New York, and Texas, and all of the following named Indian tribes and individual members thereof, should be freed from Federal supervision and control and from all disabilities and limitations special-

ly applicable to Indians: . . . the Menominee Tribe of Wisconsin . . ." (Emphasis supplied)

The extent to which tribal Indians should be emancipated from their status as wards of the federal government is a matter which rests entirely within the discretion of congress. *United States v. Waller*, (1917) 243 U.S. 452, 459-460. The power to make treaties with the Indian tribes was abolished in 1871 (16 Stat. 544, 566, 25 U.S.C. §71) and the United States now deals with the Indians by statute. Congress has plenary power to deal with the Indians and may abrogate Indian privileges and rights, including treaty rights, by statute. *Super, et al v. Work*, (1925) 3 F. 2d 90, affirmed per curiam, 271 U.S. 643. The power of congress over Indian tribes and tribal property cannot be limited by treaty so as to bar repeal or amendment by later statute. See, *Ward v. Race Horse*, (1896) 163 U.S. 504; *United States v. Waller*, (1917) 243 U.S. 452; *Anderson v. Gladden*, (1960) 188 F. Supp. 666, affirmed (1961), 293 F. 2d 463, cert. den., 368 U.S. 949; See, also, *Organized Village of Kake v. Egan*, (1962) 82 S. Ct. 562, 570-571. In *Anderson v. Gladden*, (1961), *supra*, 293 F. 2d 463, 466, the United States court of appeals confirmed the jurisdiction of the state of Oregon to try an Indian for homicide under state law pursuant to the provisions of Public Law 280 (67 Stat. 588) although the homicide had been committed within the boundaries of the Klamath Indian reservation, which prior to P.L. 280 was within the exclusive jurisdiction of the United States, and stated in part:

"* * * The plenary power of Congress over Indian tribes and tribal property cannot be limited by treaties so as to prevent repeal or amendment by later statute. *Nicodemus v. Washington Water Power Co.*, 9 Cir., 264 F. 2d 614, 617. No principle of the Constitution requires that a tribe which has enjoyed benefits under a treaty with the United States be first disbanded before such benefits may be wholly or partially withdrawn."

Decisions respecting jurisdiction over Indians and Indian lands have been based upon the ground that the Indians are the wards of the United States (*State v. Rufus*, (1931)

205 Wis. 317, 329-330, 237 N.W. 67) but this has not barred the application of state law to Indians and Indian lands where such application would not interfere with reservation self-government or a right granted under federal law. *Organized Village of Kake v. Egan*, (1962) 82 S. Ct. 562, 571. In the *Egan* case, *supra*, the U. S. supreme court held in part as follows at page 571:

"These decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law. Congress has gone even further with respect to Alaska reservations, 72 Stat. 545, 18 U.S.C. § 1162, 28 U.S.C. § 1360, 18 U.S.C.A. § 1162, 28 U.S.C.A. § 1360. State authority over Indians is yet more extensive over activities, such as in this case, not on any reservation. It has never been doubted that States may punish crimes committed by Indians, even reservation Indians, outside of Indian country. See Cohen, *Indian Rights and the Federal Courts*, 24 Minn. L. Rev. 145, 153 (1940), citing *Pablo v. People*, 23 Colo. 134, 46 P. 636, 37 L.R.A. 636. Even where reserved by federal treaties, off-reservation hunting and fishing rights have been held subject to state regulation, *Ward v. Race Horse*, 163 U. S. 504, 16 S. Ct. 1076, 41 L. Ed. 244; *Tulee v. Washington*, 315, U.S. 681, 62 S. Ct. 862, 86 L. Ed. 1115, in contrast to holdings by state and federal courts that Washington could not apply the laws enforced in Tulee to fishing within a reservation, *Pioneer Packing Co. v. Winslow*, 159 Wash. 655, 294 P. 557; *Moore v. United States*, 157 F. 2d 760, 765 (C.A. 9th Cir.). See *State v. Cooney*, 77 Minn. 518, 80 N.W. 696.

"True, in Tulee the right conferred was to fish in common with others, while appellants here claim exclusive rights. But state regulation of off-reservation fishing certainly does not impinge on treaty-protected reservation self-government, the factor found decisive in *Williams v. Lee*. Nor have appellants any fishing rights derived from federal laws. This Court has never held that States lack power to regulate the exercise of aboriginal Indian rights, such as claimed here, or of those based on occupancy. * * *

While the foregoing establishes the power of congress to abrogate Indian privileges and rights, including treaty rights, by statute and to terminate the status of Indians and Indian tribes as wards of the federal government, it is of interest to note that the Menomonee Indian Treaty of 1856 (11 Stat. 679) expressly provides, as follows, in part:

“ARTICLE 3. To promote the welfare and the improvement of the said Menomonees, and friendly relations between them and the citizens of the United States, it is further stipulated —

“1. That in case this agreement and the treaties made previously with the Menomonees should prove insufficient, from causes which cannot now been [be] foreseen, to effect the said objects, the President of the United States may, by and with the advice and consent of the Senate, adopt such policy in the management of the affairs of the Menomonees as in his judgment may be most beneficial to them; or Congress may, hereafter, make such provision by law, as experience shall prove to be necessary.”

It is plain from the terms of the termination act that the jurisdiction of the United States over what was formerly the Menominee Indian reservation has been terminated insofar as such jurisdiction was applicable because of the status of the reservation area as an Indian reservation, and the status of the Menominee Indians and the Menominee Indian tribe as wards of the federal government has likewise been ended. The United States has divested itself of all right, title and interest to the lands which comprise what was formerly the Menominee Indian reservation, and has ended its trusteeship over the lands. Title to the land is now held by Menominee Enterprises, Inc., a private Wisconsin stock corporation, with the exception of a few parcels which have been conveyed by the corporation to individuals. What was formerly the reservation is now Wisconsin's 72nd county governed by a Wisconsin county board and town board. (Wis. Laws, 1959, Chapter 259). The entire land area is now on the tax rolls. Jurisdiction over hunting and fishing in the area, and over the members of what

was formerly the Menominee Indian tribe, is therefore vested in the state of Wisconsin without exception. *State v. Johnson*, (1933) 212 Wis. 301, 249 N.W. 284; *State v. Tucker*, (1941) 237 Wis. 310, 296 N.W. 645; *State v. Shepard*, (1941) 239 Wis. 345, 300 N.W. 905. In *State v. Johnson, supra*, the supreme court stated as follows, in part, at page 309:

“The jurisdiction of a state to try in its courts an Indian charged with an offense committed outside of territory of the United States, even though the offender be a ward of the federal government, has never been seriously questioned. Such jurisdiction apparently has never been denied by any statute of the United States or by the federal courts. If such jurisdiction were denied by a federal statute, such statute would probably have to be held unconstitutional as an infringement upon the sovereignty of the states. *State v. Superior Court*, 107 Wash. 238, 181 Pac. 688; *Pablo v. People*, 23 Colo. 134. 46 Pac. 636; *State v. Buckaroo Jack*, 30 Nev. 325, 96 Pac. 497; *State v. Spotted Hawk*, 22 Mont. 33, 55 Pac. 1026.

“We think the correct rule, supported by sound reason and the weight of authority, is that the state courts have jurisdiction to try Indians for offenses committed upon fully patented lands even though such lands are located within the exterior boundaries of an Indian reservation; that when the lands are fully patented by the United States they cease to be territory of the United States and become subject to the jurisdiction of the state and its laws. * * *”

The foregoing is sufficient to sustain the jurisdiction of the state of Wisconsin to enforce its regulatory laws and rules respecting hunting and fishing upon the area formerly known as the Menominee Indian reservation, and upon the members of what was formerly the Menominee Indian tribe. It should be pointed out, however, that the Treaty of 1854 (10 Stat. 1064) between the Menominee Indians and the United States which created the Menominee Indian reservation, and the Treaty of 1856 (11 Stat. 679), the final treaty between the United States and the Menominee In-

dians, are both silent as to the granting of any hunting and fishing privileges in favor of the Indians. The Act of April 20, 1836 (5 Stat. 10), creating the Territory of Wisconsin, expressly reserved Indian rights. The Act of August 6, 1846, (9 Stat. 56) to enable the Territory of Wisconsin to become a state and the Act of May 29, 1848, (9 Stat. 233) admitting Wisconsin into the Union are silent as to the reservation of rights in favor of the Indians. Wisconsin was admitted into the Union on an equal footing with the original states. Accordingly, this is not a case like *Tulee v. Washington*, (1942) 315 U.S. 681, in which the supreme court held that where a treaty with the Yakima Indians expressly reserved to members of the tribe certain fishing privileges, and where the Enabling Act which admitted Washington as a state preserved the treaty rights of the Indians, the state could not require the Indians to pay license fees, although the state could impose purely regulatory restrictions upon the fishing privileges of such Indians outside of their reservation.

The Act of August 6, 1846, (9 Stat. 56) and, more particularly, the Act of May 29, 1848, (9 Stat. 233) admitting Wisconsin into the Union on an equal footing with the original states, are in patent conflict with any reservation, express or implied, of hunting and fishing privileges in favor of the Indians following a conveyance of title to the reservation lands to a private corporation, and the dissolution of the trusteeship of the United States over the Indians thereby ending their status as wards of the federal government as was done by the Termination Act. See, *Ward v. Race Horse*, (1895) 163 U.S. 504. Indeed any such attempted reservation of hunting and fishing rights or privileges in favor of the Indians following termination would be of doubtful constitutionality. *State v. Johnson*, (1933) 212 Wis. 301, 309, 249 N.W. 284.

By the Treaty of 1848, (9 Stat. 952) between the Menominee Indians and the United States, the Menominees ceded all of their lands in the state of Wisconsin to the United States. The Menominee Indian tribe did not remove from Wisconsin and by the Treaty of 1854, (10 Stat. 1064)

between the Menominee Indians and the United States, the United States set apart the lands established as the Menominee Indian reservation for the Menominee Indian tribe. As pointed out above, the Treaty of 1854 granted no hunting and fishing privileges to the Indians. Whatever privileges the Menominee Indian tribe may have enjoyed as to hunting and fishing on such lands ended upon termination. *State v. Johnson*, (1933) 212 Wis. 301, 309-313, 249 N.W. 284. In the *Johnson* case the supreme court held that a Chippewa Indian is subject to the Wisconsin game laws on lands retained by the Chippewa Indians under a treaty with the United States but which were subsequently patented by the United States to an Indian and thereafter conveyed in fee to a citizen of the state, and stated, in part, at pages 311-312:

“* * * We entertain no doubt that the rights of the Indians to hunt and fish upon their own lands continued. If the lands here involved were not fully patented we should have no difficulty in concluding that as to such lands the fish and game laws of this state are without force and effect. But the present action involves lands fully patented to an Indian and thereafter sold and conveyed without reservation or restriction to a citizen of this state. As to such lands, may it be said that they were sold subject to an implied covenant or condition that members of the Chippewa tribe might perpetually hunt thereon without restriction. We think it would be unreasonable so to hold.”

The lands which comprise what was formerly the Menominee Indian reservation therefore are not subject to a condition that members of what was formerly the Menominee Indian tribe may hunt and fish thereon immune from state law.

Finally it is to be noted that by statute state sovereignty and jurisdiction extends to all places within the boundaries of the state subject only to such jurisdiction as may have been acquired by the United States. Sec. 1.01. The United States has now relinquished its jurisdiction over the Menominee Indian people, and over what was formerly the

Menominee Indian reservation and any hunting or fishing within that area is done. “. . . off Indian reservation lands . . .” and is subject to the provisions of Chapter 29. Sec. 29.09 (1).

You are therefore advised that the hunting and fishing laws of the state of Wisconsin apply to the members of what was formerly the Menominee Indian tribe and upon what was formerly the Menominee Indian reservation.

JHB

Justices of the Peace—Court Reorganization—Territorial jurisdiction of municipal justices of the peace under 62.24 (2) (a) discussed.

May 24, 1962.

R. E. GIERINGER,
District Attorney, Adams County.

You have raised a number of questions relating to the jurisdiction of a municipal justice of the peace under court reorganization as compared with jurisdiction of other justices of the peace.

I.

One question is whether such a justice elected in a city has country-wide jurisdiction when exercising those powers wherein he enjoys the same jurisdiction as to subject matter as is exercised by the ordinary justice of the peace.

Sec. 62.24 (2) (a), 1961 Stats., provides that the municipal justice of the peace shall have the jurisdiction, both as to subject matter and as to territory, of any other justice of the peace.

While, as will be pointed out later, the municipal justice of the peace has additional powers not possessed by other justices of the peace, it seems clear from sec. 62.24 (2) (a)

that he has all of the powers of any other justice of the peace and within that area of jurisdiction his powers are co-extensive with those of the regular justice both as to subject matter and territory. Hence, if a regular justice of the peace has county-wide jurisdiction as to any particular subject matter, the municipal justice of the peace also has county-wide jurisdiction as to the same subject matter.

II.

The next question relates to jurisdictional comparisons with respect to city ordinances.

Here sec. 62.24 (2) (a) 1 provides that the municipal justice of the peace shall have exclusive jurisdiction of offenses against ordinances of the city. Hence the other justices of the peace may not exercise this jurisdiction.

III.

A question is raised as to whether the jurisdiction of the municipal justice of the peace in actions to recover the possession of personal property of not exceeding \$200 in value is limited to the city or is county-wide.

Sec. 62.24 (2) (a) 2 gives such justice jurisdiction of actions to recover the possession of personal property, with damages for the unlawful taking or detention thereof, wherein the value of the property claimed does not exceed \$200.

In this type of case the municipal justice of the peace would have county-wide jurisdiction the same as any other justice. To put it another way, where both types of justices have jurisdiction over the subject matter such jurisdiction is county-wide.

IV.

Does a municipal justice of the peace have country-wide jurisdiction in forcible entry and unlawful detainer actions?

Sec. 62.24 (2) (a) 3 gives municipal justices of the peace jurisdiction of actions for forcible entry and unlawful detainer.

However, sec. 291.05 as amended by sec. 148, ch. 495, Laws 1961, reads:

"291.05 Action, how commenced. The plaintiff shall file with the county court or with a municipal justice of the city, town or village where the premises are located, a complaint signed by him, his agent or attorney, giving therein a description of the premises of which possession is claimed, stating the facts which authorize the removal of the defendant, naming him, and praying for his removal. If the complaint is filed in the county court the provisions of ch. 299 with respect to pleading and practice shall apply. If the complaint is filed with a municipal justice, the justice shall thereupon issue a summons, directed to the sheriff or any constable of the county, commanding him to summon the defendant to appear before him on a day in such summons named, which shall not be less than 6 nor more than 15 days from the day of issuing the same and shall deliver the summons and complaint to such officer."

It seems quite clear from the foregoing language that where such an action is not brought in county court but is brought before a municipal justice of the peace the action must be commenced before a municipal justice of the peace of the city, town or village where the premises are located.

The former sec. 291.05 gave county-wide jurisdiction in these cases to the ordinary justice of the peace, but now such an action may be brought only in county court or before a municipal justice of the peace. The county court has county-wide jurisdiction but as above indicated, the municipal justice of the peace does not.

V.

A question is raised as to the territorial jurisdiction of a municipal justice of the peace under sec. 62.24 (2) (a) 4, which reads:

"Jurisdiction of actions for a penalty or forfeiture, not exceeding \$200, given by statute."

This presumably relates to forfeitures under state law and not under local ordinances.

Ch. 288 of the statutes on "forfeitures" has for the most part remained intact under court reorganization. In fact there are no changes except an amendment of sec. 288.19 by adding the words "or county court" at the end of the sentence and by creation of sec. 288.195 on clerk's fees. These changes were effected by secs. 143 and 144 of ch. 495, Laws 1961, and by sec. 10 of ch. 643, Laws 1961. However, such changes have no relevance in answering the present question.

The answer would appear to be that to the extent an ordinary justice of the peace has county-wide jurisdiction of forfeiture actions brought under state statutes pursuant to Ch. 288, the same jurisdiction is enjoyed by a municipal justice of the peace, since under sec. 62.24 (2) (a), 1961 Stats., the municipal justice of the peace has the jurisdiction, both as to subject matter and as to territory, of any other justice of the peace.

With respect to county ordinance violations the municipal justice of the peace has not been given the exclusive jurisdiction which has been vested in him in the case of town, village and city ordinances by secs. 60.595, 61.305, and 62.24 (2) (a) 1, respectively. Hence, as to county ordinances he has the same county-wide jurisdiction as does the ordinary justice of the peace.

VI.

The next question relates to criminal jurisdiction of the municipal justice of the peace where the penalty does not exceed \$200 or 6 months' imprisonment or both, battery and disorderly conduct cases and state traffic cases.

This is answered by sec. 62.24 (2) (a) 5 which gives the municipal justice of the peace jurisdiction of crimes *arising within the county*, the penalty for which is not more than \$200 or 6 months or both. The penalties for ordinary state traffic cases come within that category. (We are not here discussing offenses such as negligent homicide involving use of a motor vehicle.) The same comment applies to ordinary battery and disorderly conduct cases.

VII.

With reference to accepting guilty pleas, inquiry is made as to territorial jurisdiction of the municipal justice of the peace.

Sec. 62.24 (2) (a) 6 gives the municipal justice of the peace jurisdiction to accept pleas of guilty if the defendant upon arraignment requests to enter a plea of guilty and the offense is one punishable by not more than \$500 or 6 months, or both, or is for violation of secs. 348.15, 348.16 or 348.17 regardless of the monetary penalty involved (motor vehicle weight violations).

This jurisdiction is not restricted to the local municipality and is hence county-wide.

VIII.

The same is true of sec. 62.24 (2) (a) 7, which reads :

“7. Jurisdiction to cause the laws for the preservation of peace to be kept, to cause to come before him persons who break or attempt to break the peace and commit such persons to jail or bail; to cause to come before him the keepers of houses of ill fame and frequenters of the same or common prostitutes, and compel them to give security for good behavior, to cause to come before him persons who are charged with committing any crime and commit them to jail or bail;”

The same is true of sec. 62.24 (2) (a) 8, which provides :

“8. Jurisdiction of garnishment actions and actions commenced by warrant of attachment against the property of a debtor, as provided by and subject to the limitations set forth in ch. 304. Justices of the peace, other than municipal justices of the peace, shall not have jurisdiction of such actions.”

The limitations contained in Ch. 304 referred to in the language quoted above have nothing to do with municipal

boundaries within the counties. Hence, the jurisdiction is county-wide.

WHR

Prisoners—Workmen's Compensation—A county may not require prisoners sentenced to the county jail to work outside the jail premises except as provided in 56.08, and if so employed, are entitled to workmen's compensation under Ch. 102.

June 1, 1962.

JOHN W. SLABY,
District Attorney, Price County.

You ask whether the county would be liable for injury to prisoners sentenced to the county jail if they are used for work away from the jail, such as at the county fair grounds.

The opinion was given in 41 OAG 219 that a person sentenced to imprisonment in a county jail may not be required to work at places other than the jail unless provision for hard labor is made either by the commitment or by statute. The opinion state at P. 220:

"It is the almost universal rule that 'express statutory authority is necessary to the imposition of hard labor as a punishment for crime.' 41 Am. Jur. 902—Prisons and Prisoners §26; 72 C.J.S. 873—Prisons §18 d.

"Sec. 56.08, the Huber Law, is now the only statutory authority for requiring prisoners in county jails to work at hard labor. Since the prisoner to whom you refer is not subject to the Huber Law, there is no authority to require him to do work and to go outside the prison enclosure for that purpose.

"While I have found no authority on this point, it is my opinion that the sheriff, although he may not require such prisoners to do work which would ordinarily be done by paid

employes, may nevertheless require that they perform housekeeping tasks in the jail, such as sweeping and cleaning the cells and corridors and possibly doing occasional kitchen police. This practice has always been followed and is considered to be part of the institution discipline which the sheriff is authorized to enforce. But for reasons which will appear later, such work by prisoners sentenced to actual confinement must be limited to the jail enclosure, at least unless under the control of a guard or jailer."

Following issuance of the foregoing opinion, the legislature enacted sec. 53.37 (4) by ch. 71, Laws 1953. It reads, in part:

"(4) The sheriff or other keeper of a jail is authorized to use without compensation the labor of those sentenced to actual confinement in the county jail in the maintaining of, and the housekeeping of the jail, including the property on which it stands. * * *"

Prior to 1959, sec. 56.08 (1) provided that any person sentenced to the county jail was committed at hard labor unless the court specified otherwise. The so-called "Huber Law" was revised by ch. 504, Laws 1959, so that the court might grant to a prisoner the privilege of working outside the jail. As amended, sec. 56.08 (2) provides:

"(2) Unless such privilege is expressly granted by the court, the prisoner is sentenced to ordinary confinement. The prisoner may petition the court for such privilege at the time of sentence or thereafter, and in the discretion of the court may renew his petition. The court may withdraw the privilege at any time by order entered with or without notice."

Since the "whole subject is said to be within the power of the legislature" (41 Am. Jur. 902), and there is now no statutory provision under which a prisoner may be required to engage in hard labor, no prisoner committed to a county jail may be required, or even permitted, to work away from the jail premises except pursuant to sec. 56.08, which is based on privilege granted by the court.

If the county employs prisoners under sec. 56.08, it assumes the status and obligations of an employer, and would be subject to the workmen's compensation act under the definition in sec. 102.04 (1).

With respect to liability in civil actions, the factual circumstances allow for so much variation that the only helpful generalization is that the county would probably be liable for injury of a prisoner working away from jail premises in any situation in which it would be liable for injury to any other employee.

I am assuming your county is not contemplating practices beyond its statutory authority; and this opinion does not purport to deal with the question of liability in the course of *ultra vires* operations.

BL

Conservation Commission—Bong Base—Conservation commission has power in the development of long range conservation programs to make general statements of policy for information and guidance of the department and future commissions.

June 6, 1962

GAYLORD A. NELSON,
Governor of Wisconsin.

You have inquired what powers the state conservation commission of Wisconsin presently has to cooperate with other state agencies including the executive office, the department of resource development, the Wisconsin federal surplus property development commission, Kenosha county, local school districts in Kenosha and Racine counties, and a proposed surplus property development corporation to be formed, in acquiring the premises known as the Bong air base from the United States government.

You have informed me that the state of Wisconsin has developed a comprehensive plan for the acquisition of Bong air base from the federal general services administration which envisages a multiple use program for conservation, industry, residential areas, park areas and a local airport. You have further informed me that it is basic to the plan that certain areas shall be dedicated permanently to conservation, certain areas shall be dedicated to industry, while other areas in a transitional stage shall be dedicated to their highest and best use as it shall develop.

Under the provisions of ch. 427, Laws 1961, which created sec. 20.280 (71b), the conservation commission was authorized to spend not more than \$208,000 to acquire full fee title to a portion of the present Bong air base. It is this area to which full fee title is intended to be obtained which may be considered to be in a transitional stage, which would be used for conservation purposes for many years in the future, but which a subsequent commission or a subsequent legislature might direct to be transferred to a more intensive land use.

The powers of the conservation commission to enter into any formal and binding contract at this time are fully covered in my opinion dated January 18, 1962, addressed to Mr. L. P. Voigt, director of the Wisconsin conservation department, and will not further be discussed. Briefly, the conservation commission has no present statutory power to enter into any binding contract affecting these lands.

However, since its inception in 1927, the conservation commission has recognized that the need for long range planning necessitated the declaration and explanation of certain general statements of policy which the declaring commission believed were useful and proper for guiding the future work of both the conservation department and future conservation commissions for many years in the future. By custom, these declarations of policy have most generally been adhered to by succeeding commissions and have made possible the carrying out of continuing programs.

Such general statements of policy, of course, are always subject to a principle similar to the maxim of international

law of *sic stantibus rebus*. To paraphrase, as long as the conditions which inspired the general statement of policy continue, it is to be assumed that the policy will continue to be persuasive and respected by successive commissions.

Accordingly, it is my opinion that the present conservation commission could make a general statement of policy in regard to its participation in the acquisition of Bong air base in language somewhat as follows:

“The conservation commission declares it to be a matter of commission policy:

“(1) To acquire lands dedicated permanently to conservation without cost to the state but subject to appropriate federal restrictions;

“(2) To purchase in outright fee, using the appropriation of \$208,000 an area of some 1,700 acres presently useable and useful for conservation purposes, but for which it is contemplated a higher and better use may develop, and consistent with its statutory powers as they now exist or may be amended, to transfer any part or all of the said 1,700 acres to the appropriate agency when such higher and better use shall arise.”

RGT

Barbers—District Attorneys—Constitutionality—Discussion of 158.04 (14) relative to advertising of fees for barbering service discussed. District attorney has duty to enforce criminal statute even though he doubts constitutionality; but should direct court's attention to constitutionality question.

June 8, 1962.

CARL N. NEUPERT,
State Health Officer.

You ask my opinion as to whether or not a certain sign “is a violation of Sec. 158.04 (14) and subject to the penalties provided in Chapter 158.”

Section 158.04 (14), Stats., was created by ch. 154, Laws 1961, and reads as follows:

“It is unlawful for any person to advertise a definite price for any barbering service by means of displaying a sign containing such prices so that the same is visible to persons outside the barber shop. Nothing contained in this subsection shall be construed to prohibit advertising of prices or services in newspapers, radio, television or by other lawful methods.”

Your letter requesting this opinion shows that your request for it arises out of a situation involving a barber shop operated in Milwaukee. Your letter states:

“A photograph of the shop taken from the outside is enclosed. It would appear to advertise a price for barbering services visible to persons outside the shop. The small print part of the sign in Polish has been translated for us to mean ‘Shears sharpened here.’ ”

With reference to the above-quoted statute and the above-described situation, your letter states:

“While trying to obtain enforcement of this statute the district attorney’s office in Milwaukee County indicated to us that they were not willing to issue warrants in this situation until we could secure an attorney general’s opinion to the effect that section 158.04 (14) is being violated.”

This position on the part of the district attorney for Milwaukee county produced your request for this opinion.

In my judgment, the sign in question is a violation of sec. 158.04 (14). It seems to me that persons unable to read the Polish portion of such sign would readily view and accept the price appearing in such sign as a price for barbering services, namely, a hair cut, and this would be especially true of men unacquainted with the Polish language. Moreover, it would seem to me a distinct possibility that even persons able to read Polish, and able to read the Polish portion of such sign, would not necessarily connect

that portion of the sign with the price therein advertised, and would, in fact, despite their understanding of the Polish portion of the sign, be likely to view the price stated therein as one for barbering services rather than for shears sharpening or any other service.

It may be that the district attorney, Milwaukee county, has some misgivings as to the constitutionality of sec. 158.04 (14). Such misgivings would be understandable, in view of the decisions rendered in the following cases: *People v. Osborne*, (1936 - Cal.) 59 P. 2d 1083, 1087; *Jones v. Bontempo*, (1940 - Court of Appeals of Ohio, Hamilton County) 29 N.E. 2d 428, 429; and *Jones v. Bontempo*, (1941 - Supreme Court of Ohio) 32 N.E. 2d 17, 18. If the district attorney of Milwaukee county does have misgivings about the constitutionality of sec. 158.04 (14), it is nevertheless his duty to enforce that statute. He can, however, and indeed, should, call the attention of the trial court to any question relating to the constitutionality of sec. 158.04 (14). See 28 OAG 86, wherein one of my predecessors advised a district attorney that in a criminal action being prosecuted by him he "need not hesitate to call to the attention of the court any factors which will tend to safeguard any fundamental rights of the accused, even though a conviction might be more readily assured by remaining silent." In the same opinion, the district attorney who requested it was advised as follows:

"* * * we do not mean to imply that it is your duty to see a man punished for violation of an invalid statute while keeping secret from the court the fact that the statute is probably unconstitutional. It is as much the duty of a district attorney to see that a person on trial is not deprived of any of his constitutional or statutory rights as it is to prosecute him for the crime with which he is charged. *State v. Osborne*, 54 Ore. 289, 103 Pac. 62, 20 Ann. Cas. 627. It has been held that since the oath of office of the prosecuting attorney requires him to support the state constitution, if a legislative act violates that constitution, he is under no duty to refrain from challenging it and submitting to

the court the question of its validity. *People v. Fullenwider*, 329 Ill. 65, 160 N.E. 175.”

JHM

Real Estate Brokers Board—Contracts—Real estate brokers board has neither the express nor implied power to engage in research activities and cannot use license moneys appropriated under 20.700 (41) for such purpose.

June 8, 1962.

F. J. WALSH,

Deputy Commissioner, Department of Administration.

You indicate that the Wisconsin real estate brokers' board proposes to contract with the school of commerce at the university of Wisconsin to have the school of commerce survey, study and report on several aspects of the real estate brokerage business in Wisconsin.

The subject of one study would be:

“Proposal for Research on Comparative Responses to Real Estate Advertising in the State of Wisconsin”.

Its scope can be best described by quoting the purpose section of the proposal.

“Purpose

The objective of this study is to measure the relative effectiveness of various methods of real estate advertising in the media usually employed by real estate brokers—newspapers, signs, radio and television. Because of the greater methodological problems in analyzing radio and television advertising, we propose to divide the project into two parts. Part I is to analyze real estate signs and newspaper advertising, both classified and display. On the basis of the experience gained in Part I, Part II can proceed with the analysis of results from radio and television advertising.

This research project will be so designed and directed to produce measures of advertising results which will be of value to real estate brokers in budgeting their advertising expenditures among the various media and in preparing advertising copy which will be effective."

The cost of this project is estimated at \$18,250.

The second proposal is entitled :

"Proposal for a Study of the Business of Real Estate Brokerage in the State of Wisconsin"

The purpose section of this contract provides :

"Purpose

The objective of this study is to describe in detail and to analyze the real estate brokerage business in Wisconsin, the characteristics of the business firms, the nature of the services offered, and the characteristics and qualifications of the persons engaged in the business. In addition, recent trends in the business are to be analyzed to reveal changes which may be taking place in the functions of the broker in the real estate market.

The study is to be so directed and organized as to be of the greatest value to the Wisconsin Real Estate Brokers' Board in guiding its regulatory and educational activities, to the industry in its self-regulation and in the services and activities of the trade associations and professional societies, and from an academic standpoint, in throwing additional light on the nature and importance of the brokerage function in the real estate market."

The estimated cost of this project is \$15,000.

It should be noted that the advisory committee for each study would consist of representation from the school of commerce, the Wisconsin real estate brokers' board, and from the voluntary association known as the Wisconsin association of real estate brokers. The latter association is not a state agency.

It is proposed that the costs of these research projects be paid from appropriations made by section 20.700 (41), which provides:

“(41) GENERAL ADMINISTRATION. There is appropriated from the general fund to the Wisconsin real estate brokers’ board for the execution of its functions, all moneys received by the board under ch. 136.”

You inquire whether the Wisconsin real estate brokers’ board is authorized to engage in research projects of this nature, and if so, whether appropriations made under sec. 20.700 (41) may be used.

The Wisconsin real estate brokers’ board is an agency of the state of Wisconsin.

Sec. 136.03 provides:

“**Brokers’ board.** The Wisconsin real estate brokers’ board consists of 3 persons, at least 2 of whom shall be real estate brokers in this state. The governor, by and with the advice and consent of the senate, shall appoint the members of said board. The terms of members shall be 6 years and until their successors are appointed and qualify. Each member shall, before entering upon his duties, take and file the official oath.”

Sec. 136.04 (1), (2), and (3) provide:

“(1) ORGANIZATION, QUORUM. The board, immediately following the qualification of the member appointed in any year, shall organize by appointing a secretary and by selecting from its number a president, vice president and a treasurer, and may promulgate rules and regulations for administering this chapter and for the performance of its duties and functions. A majority of the board shall constitute a quorum for the exercise of the powers or authority conferred on it. In case of a vacancy, the remaining 2 members of the board shall exercise all the powers and authority of the board until such vacancy is filled.

“(2) DUTIES. (a) The board shall receive applications for and issue licenses to real estate brokers and salesmen

and business opportunity brokers and salesmen and shall administer this chapter.

“(b) The board may issue letters and bulletins, and conduct clinics disseminating information to its licensees.

“(3) MEETINGS, HEARINGS. The board may hold meetings, hearings or investigations anywhere in the state which may be conducted by any member of the board, the secretary or by any duly authorized employe of the board.”

In *American Brass Co. v. State Board of Health*, (1944) 245 Wis. 440, 448, 15 N.W. 2d 27, our supreme court stated:

“* * * No proposition of law is better established than that administrative agencies have only such powers as are expressly granted to them or necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds. *Monroe v. Railroad Comm.* (1919) 170 Wis. 180, 174 N.W. 450; *Wisconsin Telephone Co. v. Public Service Comm.* (1939) 232 Wis. 274, 287 N.W. 122, 287 N.W. 593.”

There is no specific authority in sec. 136.04, or elsewhere in Ch. 136 which would permit the Wisconsin real estate brokers' board to engage in the research projects proposed. Nor do we find any language in the statutes from which the power is necessarily implied.

The legislature enacted the real estate brokers' licensing law for the protection of the public from dishonest or incompetent brokers and salesmen and to prevent abuses in the sale of real property. *State ex rel. Green v. Clark*, (1940) 235 Wis. 628, 294 N.W. 25; *State ex rel. Durham Corp. v. Brokers Board*, (1927) 192 Wis. 396, 211 N.W. 292.

Our supreme court has said that the board has wide discretion in exercising its functions in granting, denying or revoking licenses. *Wall v. Wisconsin R. E. Brokers' Board*, (1958) 4 Wis. 2d 426, 430, 90 N.W. 2d 589. The power sought to be exercised must, however, be clearly set forth in a statute or arise by necessary implication.

Sec. 136.04 (2) (b) quoted above was created by ch. 364, Laws 1959.

We are of the opinion that the power there granted is not sufficient to give rise to any authority to engage in the research projects proposed, which are essentially designed improve the economic status of brokers by pointing out to the most efficient methods of advertising, and by an analysis of the nature and importance of the brokerage function in the real estate market.

In passing we point out that the school of commerce of the university of Wisconsin has no apparent authority to enter into a contract of this nature. It is a department of the university of Wisconsin, and any contract would have to be entered into with or authorized by the board of regents of the university of Wisconsin.

It is our opinion that the Wisconsin real estate brokers' board cannot use appropriations made under sec. 20.700 (41) for this purpose.

RJV

Highways—Damages—Landowner—Landowner who dams natural depression, not a natural watercourse, at his property line is not responsible for damages to abutting highway. Landowner ponding surface water on his land which backs up onto highway through percolation or otherwise, may cause actionable damage.

June 11, 1962.

ROBERT W. WARREN,
District Attorney, Brown County.

You state that an owner of land abutting on a county highway is filling in a natural depression on his land along the right of way line. While the depression is not a "natural watercourse" having well defined bed or banks, it is the usual drainage course for surface waters.

A highway culvert drains into the area. You say that the county highway authorities fear that the blocking off of

the natural drainage will damage the roadbed. You have advised them of their rights to remove obstructions to drainage and the assessment of damages therefore. (Secs. 83.18 and 81.06) You have also advised them of their rights to condemn drainage easements. (Sec. 83.07) The question you ask is whether or not the county can recover damages from the property owner, should the expected damages occur.

Without discussing all the cases in point, the Wisconsin law of waters is that the owner of land has a legal right to rid the same of surface water, as it comes thereon from any source, by permitting or causing it, by such means as may be reasonably necessary, to flow in the natural course of drainage to and upon adjacent lands, and, the successive proprietors, whose premises are affected, have no remedy, save the exercise of the same right. This rule was discussed at length and affirmed by our court in 1957. See *Laur v. Milwaukee*, (1957) 1 Wis. 2d 561. Under the circumstances stated above, the county would have no recourse against the landowner.

The rule, however, does not extend to allow landowners to do exactly as they will with surface waters. Adjacent landowners are not without protection of the law. The rule is, perhaps, best stated in the early case of *Pettigrew v. The Village of Evansville*, (1870) 25 Wis. 223. Here, the court stated at page 229:

“* * * It is the duty of every owner of land, if he wishes to carry off the surface water from his own land, to do so without material injury or detriment to the lands of his neighbors, and if he cannot, he must suffer the inconvenience arising from its presence, and cannot complain that others refuse to allow it passage over their lands. Such is the sound and wholesome doctrine of the law upon this subject; and although it does not go so far as to require the owner to resort to any artificial means to prevent the surface water from his land flowing on to the land of another, when such flowing is produced by natural causes, yet it will prevent him from using such means for the purpose

of making it flow there, whenever the same would be materially injurious to the interests of the proprietor thereof.
* * *

In the case of *Schuster v. Albrecht*, (1898) 98 Wis. 241, the owner of a pond did not seek to discharge the water directly upon his neighbor, but proposed to conduct it by an artificial channel, to a point on his own land in close proximity to the line, where it would inevitably permeate the surrounding soil and percolate through the same into his neighbor's land, and permanently injure the same. The court said it could perceive no logical difference between the quality of the two acts, and that the injury caused by percolation, artificially caused, may easily be as great, or greater, than the injury caused by direct discharge in a stream. The court cited the *Pettigrew* case as a leading authority.

The case of *Watters v. National Drive-In, Inc.*, (1953) 266 Wis. 432, again cited the *Pettigrew* case by using it as authority for the proposition that a landowner may not collect surface water on his premises in a reservoir and then discharge it directly onto the land of another, and held that under the facts in that case, the owner of a drive-in theatre may grade and fill his land in such a manner as to change the natural contour of his land, thus draining surface water onto the plaintiff's land. However, this case does not involve the ponding of waters or the causing of any damage other than increasing the natural run-off.

However, our problem has been finally concluded in *Eickstedt v. Seifert*, (1955) 273 Wis. 122, wherein the *Pettigrew* and *Watters* cases are discussed at some length.

The facts in this case were that the owner of an artificial pond, wherein surface waters were collected, sought to have the pond pumped out into a highway ditch. This would have caused damage to the land of the plaintiff through percolation of the diverted waters. The owner of the pond claimed that the damage would not result from any direct overflowing of the surface and that the pond drained directly into a highway ditch within the boundaries of the highway, which

ditch constituted the natural watercourse. The court held that the rule in the *Schuster* case would prevail. The court quoted as authority the following language from the *Schuster* case, pp. 127-128:

“In the present case the owner of the pond did not propose to discharge the water directly upon his neighbor’s land, but proposed to conduct it, by an artificial channel, to a point on his own land in close proximity to the line, where it would inevitably permeate the surrounding soil and percolate through the same into his neighbor’s land, and permanently injure the same. We perceive no logical difference between the quality of the two acts. In either case there is a permanent injury to his neighbor’s land, caused by water conducted thereto by an artificial channel; and the injury caused by percolation artificially caused may easily be as great, or greater, than the injury caused by direct discharge in a stream. Gould, Waters, par. 271’ ”

The court went on to say:

“In footnote 14, appearing at page 523 of the annotation entitled, ‘Liability for overflow or escape of water from reservoir, ditch, or artificial pond,’ 169 A.L.R. 517, the author of the annotation states:

‘. . . seepage cases have been included, since the distinction between surface and underground passage is only material as a circumstance of negligence.’

“Under the facts of the instant case, we deem it to be entirely immaterial whether the damage to plaintiff’s lands from the diversion of the waters of the gravel-pit pond resulted by reason of such waters directly overflowing the surface of such lands, or reaching the same through percolation.

“Defendants’ brief cites several cases in support of the contention made that the drainage of the water out of the gravel-pit pond into the highway ditch relieved defendants of any liability for damage resulting from the route pursued by such waters after reaching such natural watercourse. However, none of such cases are in point because they are

all concerned with the diversion of surface waters and not waters which had been accumulated in an artificial pond or reservoir.”

Here, again, the court reaffirmed the doctrine of the *Pettigrew* case.

It is my opinion that if the landowner ponded the water on his own land and thus backed ponded water onto a highway, through percolation or otherwise, he would be responsible for damages.

REB

School Districts—County School Committee—Discussion of 40.025 (1) (e) relative to dissolution of and creation of school districts, and the county school committee’s power to create districts.

June 29, 1962.

ANGUS B. ROTHWELL,

State Superintendent of Public Instruction.

You have requested an opinion as to the validity and effect of an order of a county school committee recently made, to become effective July 1, 1962, which dissolves a union high school district and the underlying common school districts and creates out of the territory thereof “a common school district to operate both elementary and high school grades for all school purposes.” The union high school district operates only high school grades and is superimposed upon and includes only and all of the territory of several underlying common school districts that operate only elementary grades. This order was made pursuant to a petition filed therefor and for the purposes of this opinion it is assumed that all procedural requirements in Ch. 40, Stats., were followed.

First, there is the question as to the validity of this order in view of the provision in sec. 40.025 (1) (e), which

prohibits detachment of territory from a school district which operates high school grades except if it is attached to another district which operates such grades. Specifically, your question is whether a county school committee has the authority to dissolve a union high school district and the underlying common school districts and create a common school district out of the territory thereof.

The pertinent language in sec. 40.025 (1) (e) is:

“* * * No territory shall be *detached* from a district which operates high school grades unless by the same order it is attached to another district which operates high school grades, or a state graded school. * * *”

The word “detached” in this provision is to be given its common meaning and usage that effects the purpose and objective of this statute. Sec. 990.01 (1). It, thus, means a dismemberment, taking away, separation or withdrawing of territory from a school district. In contrast thereto a dissolution of a school district destroys and terminates the very existence of a school district as a legal entity. Thus, a detachment of territory from a school district is something different from a dissolution of the district. Although a reorganization order might recite that it detached all of the territory from a district, in substance it would be a dissolution of the district and treated as such. On the other hand, an order would be a detachment even though it used the terminology and went through the motions of dissolution, if in substance the net result is a detachment.

This provision came into the statutes as a part of the creation of sec. 40.025 in the clarification and co-ordination of the school district reorganization provisions by ch. 536, Laws 1957. It was included to put a stop to certain types of alteration of school districts. In some instances where a common school district was operating both elementary and high school grades an order had been made taking a part of the territory therefrom and attaching it to an adjoining district that did not have a high school and was not within a union high school district. In other situations, an order

had been made detaching from a common school district a part of its territory, also detaching the same territory from the union high school district which overlaid it, and attaching such territory to an adjoining common school district that operated only elementary grades and was not within a union high school district. In still other instances, an order was made in such a situation which merely detached the territory of the underlying common school district from the union high school district. It was to stop such orders from being made that this provision was inserted in sec. 40.025 (1) (e), and the word "detached" was used because there was a taking away of only a part of the territory of the district that provided the high school grades.

If this provision were to be read to preclude the making of an order dissolving a union high school district and the comm school districts underlying it, then the existence of such common school districts and the superimposed union high school district would be frozen and the doubling up could never be eliminated. Furthermore, to read the word "detached" as including the word "dissolution" would also mean that such underlying common school districts could not be consolidated by dissolution of them and formation of a single common school district out of the territory thereof. It was never the intent that this provision should have any such effect.

While no formal opinion has been given, the state superintendent of public instruction has been advised orally in conferences that this provision does not prevent an order being made which dissolves a union high school district and the underlying common school districts and creates a new common school district out of the territory thereof. The department of public instruction has followed such oral advice and so indicated in conferring with school district officials, county school committees, municipal officials and persons interested in school district reorganization. Factually, there has been a number of instances where orders to such effect have been made and the new large common school districts created to replace a union high school district and the underlying common school districts for some time have been, and

now are, operating a 12-grade, or kindergarten through 12th grade, school system.

It is, therefore, my opinion that a county school committee does have the power and authority to dissolve a union high school district and the common school districts underlying it and create a new common school district out of the territory of said districts.

Secondly, you ask whether a county school committee is authorized to create a common school district to operate both elementary and high school grades. If by this is meant whether such committee can create such a common school district for the purpose and with the expectation that it will operate not only the elementary grades but also high school grades, the answer would be in the affirmative. But, if the question is whether the committee has the power to create a common school district with the authority to operate both elementary and high school grades, the answer is the committee has no such power.

As pointed out in an opinion of June 7, 1961, 50 OAG 122 there is only one kind or variety of common school district provided for in the statutes. When a common school district is created, it has the same character and powers as every other common school district. Thus, when a common school district is created, whether it may operate a school offering high school grades depends upon possession of a certificate of approval thereof from the state superintendent. Under sec. 40.10 a common school district may not establish or operate a high school until it obtains a certificate of authorization from the state superintendent. 46 OAG 118, 120; 50 OAG 122, 123.

The order in question thus is either invalid as beyond the authority and power of the county school committee because it attempts to create a kind of school district that it has no power to create, or valid as creating a common school district, with the words "to operate both elementary and high school grades for all school purposes" given effect merely as an expression of the suggestion or expectation of the committee in that regard. As such, said words do not go to the

quality, power or authority of such district, but are surplusage or immaterial as respects whether such district may operate high school grades.

An order should be given validity and upheld if there is any reasonable basis therefor. Accordingly, it is my opinion that the order is valid as creating a common school district out of the territory and the language therein does not, in and of itself, give the district any power to operate high school grades. In order to do so the new district must have the necessary approval under sec. 40.10 in order to operate high school grades.

HHP

Conservation Commission—Land Acquisition—Conservation commission has no present statutory power to acquire and develop portion of Bong Air Base on a temporary basis nor delegate to federal surplus property development commission power to decide whether such lands shall be transferred to other than conservation uses.

August 8, 1962.

L. P. VOIGT,

Director, Wisconsin Conservation Department.

On January 4, 1962 you submitted to me an opinion request for a definition and delineation of the powers of the conservation commission to participate in a comprehensive state plan for the acquisition of Bong air base from the federal general services administration.

You raised some eight specific questions which were answered in my formal opinion to you dated January 18, 1962.

Under date of April 11, 1962 you have requested a supplementary opinion on the following question:

“May the Conservation Commission make expenditure from funds appropriated and allocated by the Legislature under Wis. Stats. 20.703 (41) (b) (1.c.2.), (Ch. 427, Laws of 1961) and Wis. Stats. 20.280 (71b), (Ch. 427, Laws of 1961) for acquisition and development of the property known as Bong Air Base with full knowledge and intent that the property so acquired is to be used only temporarily on an interim basis for game management, said property to be resold, in whole or in part, at private sale on request of the Federal Surplus Property Development Commission, or its authorized agent, from time to time for a higher and permanent use, to include industrial and residential development, such higher and permanent use to be determined by the Federal Surplus Property Development Commission?”

Concurrently, with your request of April 11, I had a similar request from the executive office for a statement of the limit of the powers of the conservation commission to participate in the plan for the acquisition of Bong air base, which was answered under date of June 6, 1962 and copies were furnished to your office. In that letter I expressed the opinion that the maximum that the conservation commission could do under the existing statutes was to adopt a general statement of policy, but it did have power to adopt such a general policy statement.

Referring to the specific question, or multiple questions, raised by your inquiry of April 11, the answer is obviously "no". I will explain this answer briefly.

First, you inquire whether the commission can acquire a portion of Bong air base "with full knowledge and intent that the property so acquired is to be used only temporarily" for conservation purposes. In my opinion of January 18 in answer to question 8, I stated:

"It is, of course, necessary that the land be useful now and in the foreseeable future for conservation purposes."

This requirement would obviate any intentional temporary acquisition.

Second, you inquire whether the power to determine a change in use of the property to include industrial and residential development can be surrendered by your commission to the federal surplus property development commission. I will again quote from my answer to question 8 in my letter of January 18, 1962:

"Answer: The Conservation Commission has present statutory power to sell lands only in accordance with the provisions of sec. 24.085. Briefly, these require a determination by the *Commission itself* that the lands are 'no longer necessary for the state's use for conservation purposes.'"

As I have stated above, and I reiterate, the limits of your powers in participating in the general plan for the acquisition of Bong air base are set forth in my opinion of June 6,

1962 to Governor Nelson, copy of which opinion is herewith enclosed.

RGT

Licenses—Transient Merchants—Discussion of transient merchant licenses under sec. 129.05 (1) relative to leasing privately-owned land and selling of various manufactured and produced items.

August 9, 1962.

JOHN PEYTON,

District Attorney, Racine County.

You ask my opinion as to whether or not certain persons carrying on activities described in your letter requesting this opinion must be licensed either as truckers, hawkers or peddlers under sec. 129.01 (1), Stats., or as transient merchants under sec. 129.05 (1), Stats.

You describe the activities of these persons and the site of their operations as follows:

“A Racine County resident operates what is known as the 7 Mile Fair, this being a leased 40-acre tract of land located in Racine County which has been improved with gravel roadways and from which individual spaces are leased to various individuals. The space leased is large enough to accomodate a truck or other similar vehicle and the lessee there sells or trades various merchandise owned by him. These individuals also are residents of the county or adjoining counties in the State of Wisconsin. Produce, livestock and other agricultural products are bartered or sold or exchanged along with a variety of items including used furniture, tools, knick-knacks, ad infinitum. Enclosed is a fair ad indicating the type of activity referred to.”

The fair ad which you sent me reads as follows:

"Come to the 7 Mile Fair. Handy Work of All Kinds. Home Made Sausages. Swaps. Easy to get to — 11 miles South of Oklahoma Avenue on Highway 41. (Northwest Corner of Highway 41 and 7 Mile Road.) Every Saturday and Sunday. Early Morning to Late Evening. Buy-Save-Have Fun. Everything to Buy! From Hot Dogs to Farm Produce; from Cats-Dogs-Pigeons to Pigs-Calves-Ponies; Freshest of Garden Vegetables-Greens-Fruits; Everything for Your Home; from Knick-knacks-Dishes, Etc., to Furniture-Antiques; Tools and (WhatNot). Necessities of All Kinds. All local Farm Products Make Their Appearance Here Long Before They Are in the Stores. Good Things to Eat of All Descriptions. Rides and Interests for the Kids. An Artists' Paradise."

As further background for the question above-stated on which you desire my opinion, your letter advises me as follows:

"Recently a member of the State Traffic Patrol came upon the grounds in the Fair and advised the various tenants that it would be necessary that they obtain either a hawker or peddler's license or a transient merchant's license. From the facts outlined above it would not seem that the tenants come within the definition of peddler or hawker inasmuch as they do not go from place to place in conducting the sale of merchandise. However, the question arises as to whether or not these tenants are transient merchants under Sec. 129.05 and whether under that section they would be required to obtain state and local licenses."

It would appear possible that some of the persons participating in the above-described activities at 7 Mile Fair are persons who confine their activities there to distributing or selling agricultural products grown by them in this state. No license can be required of such persons under any provision of Ch. 129 inasmuch as sec. 129.01 (1) reads in part:

"* * * nothing in this chapter shall prevent any person from distributing or selling any agricultural product which he has grown in this state."

In view of this provision, it is clear that sub-lessees at 7 Mile Fair who confine their activities to distributing or selling agricultural products grown by them in Wisconsin cannot be required to obtain a trucker's, hawker's or peddler's license under sec. 129.01 (1), nor can they be required to obtain a transient merchant's license under sec. 129.05 (1).

Even if the above-mentioned exemption from licensing under Ch. 129, for persons distributing or selling agricultural products grown by them in this state did not exist, it is clear from the situation here under consideration that, as indicated in your letter, none of the sub-lessees at 7 Mile Fair is engaged in the business of "a trucker, hawker or peddler" so as to require him to obtain a license under sec. 129.01 (1). Such sub-lessees, as shown by your letter, conduct their business from and at a fixed location, and do not travel from place to place in conducting their business. Such "place to place" travel, in the conduct of his business, is an essential characteristic of a hawker or peddler. See 21 OAG 159 (1932). "By a comprehensive and approved modern definition a peddler is one *who goes from place to place and from house to house* carrying for sale and exposing to sale goods, wares, and merchandise which he carries, or, better, he is an *itinerant*, solicitant vendor of goods who sells and delivers to consumers the identical goods which he carries with him." (Emphasis ours). 40 Am. Jur. Peddlers, Transient Dealers, and Solicitors. Nor are such sub-lessees truckers within the meaning of "trucker" as used in Ch. 129, which is "a person who transports produce not grown by himself in truck or other vehicles, from a point without or within the state, and who sells the same direct from such vehicle *to retail merchants* without advance order." (Emphasis ours). Sec. 129.01 (2). From the information you have supplied me, it is clear that the sub-lessees at 7 Mile Fair are selling their merchandise to the general public, rather than to retail merchants.

In the situation here under consideration, as described by you, it seems plain that some of the sub-lessees at 7 Mile Fair, and perhaps most of them, are engaged in the sale at

7 Mile Fair of products and items other than agricultural products grown by them in this state. While such persons are not truckers, hawkers or peddlers within the meaning of sec. 129.01, it is my opinion that they are transient merchants required to be licensed as such under sec. 129.05 (1) which reads in part as follows:

“A transient merchant is one who engages in the sale of merchandise at any place in this state temporarily, and who does not intend to become and does not become a permanent merchant of such place. No person shall engage in the business of transient merchant without a license authorizing him to do so. * * *”

It seems plain to me that sub-lessees at 7 Mile Fair, who, at the sites there leased by them, engage in the sale of items or products other than agricultural products grown by them in Wisconsin, are transient merchants subject to the license requirement of sec. 129.05 (1). While your letter does not state the period or periods of time for which sub-lessees at 7 Mile Fair lease their respective sites, I assume that because of weather conditions the 7 Mile Fair would not be in operation more than four to five months per year, and perhaps for only two or three months during a given year. I further assume, therefore, that the leases of the sub-lessees at 7 Mile Fair are leases covering only a period of five months during a year at the maximum, and are more likely leases covering only a period of two or three months. Moreover, the sub-lessee at 7 Mile Fair, according to the advertisement you sent me, conducts his business there only on Saturdays and Sundays during the week, so that in a three-month lease period a sub-lessee at 7 Mile Fair would actually conduct his business there for a period of less than 30 days. It is my opinion that such a sub-lessee, in carrying on his business at 7 Mile Fair, would clearly be engaging in the sale of merchandise at a place in this state temporarily, and that it would be manifest that such sub-lessee would harbor no intention to become and would not become a permanent merchant of such place. Several of my predecessors, in situations analogous to that here under consideration, have reached the conclusion that the persons involved in

such situations were transient merchants subject to licensing. In 14 OAG 572, 573 (1925) the then attorney general said:

“In my opinion a person who sets up a store and engages in the sale of merchandise only for the duration of the holiday season, with no intention of continuing in business thereafter and with the intention of quitting business at the end of the holiday period, and who does quit business at the end of the period, is engaged in the business temporarily without any intention to become, and without becoming, a permanent merchant of the place. Such a person is therefore a transient merchant under the statute. * * *”

This statement was made with reference to the activities of certain persons in Milwaukee, who, just before the holidays [apparently the Christmas holidays] secured stocks of lamps, ties, scarfs, etc. and set up stores for a month or so to get the holiday business. As soon as the holiday season was over, they closed up and quit business. Most of such persons were residents of Milwaukee. The activities of such persons in Milwaukee, in my judgment, bear marked similarities to the activities of sub-lessees at 7 Mile Fair here under consideration. The sub-lessee at 7 Mile Fair conducts his weekend selling activities there only for the duration of his lease, and the duration of his lease is presumably, at the maximum, only that period of several months in the spring, summer, and autumn when weather permits outdoor sale activities of the kind conducted at 7 Mile Fair. It is obviously the intent of the sub-lessee at 7 Mile Fair to quit business at the end of his lease period, and he doubtless quit business at the end of such period. It is equally obvious, it seems to me, that such sub-lessee would have no intention of becoming a permanent merchant at 7 Mile Fair.

In an opinion reported at 43 OAG 257 (1954), one of my predecessors concluded that a person who rented a building by the month and conducted the sale there only one night a month, having only a small stock of merchandise there for the balance of the month, and carrying on the same type of sale in a different place each night, was a transient mer-

chant under sec. 129.05. The then attorney general, in reaching that conclusion, cited 14 OAG 572 above-mentioned, and other opinions of this office in support thereof. He stated:

“* * * Where space is rented temporarily and the merchant has no intention of doing business from this locality permanently, he is a transient merchant. 19 OAG 273. Sale of goods from a temporary stand makes the seller a transient merchant. 1912 OAG 719. Where goods are sold from a truck at a particular time and place each working day, the truck is a temporary place of business and the proprietor is a transient merchant. 22 OAG 714.”

In my judgment these earlier opinions cited in 43 OAG 257, and the opinion there reported, provide strong support for this opinion.

In providing you this opinion, I am aware of the opinion reported at 22 OAG 454 (1933), wherein it was concluded that a person who owned a store, paid taxes on it, and sold merchandise from it for a short period every year was not a transient merchant under sec. 129.05 (1). I do not view this 1933 opinion, however, as an opinion in conflict with that herein given you; nor do I view it as being in conflict with 14 OAG 572 and other opinions of my predecessors mentioned above as supporting my conclusion in this matter. That no such conflict exists is very clearly shown in the 1933 opinion itself, at page 455, where the then attorney general said:

“It is true that in XIV Op. Atty. Gen. 572, it was held that one who opens up a store and sells merchandise only during the holiday season is a transient merchant under sec. 129.05 (1).

“In that case, however, it was not shown that the individuals involved were persons who owned and maintained any property of any kind at their places of business during the whole year round or paid any taxes to any municipality whatsoever. It also did not appear but what the individuals concerned were different persons each and every year.”

Other authorities also support my opinion herein, namely, that those sub-lessees at 7 Mile Fair who are selling merchandise other than agricultural products grown by them in Wisconsin are transient merchants subject to the licensing requirement of sec. 129.05 (1). In 40 Am. Jur., Peddlers, Transient dealers, and Solicitors, sec. 4, it is said:

“* * * A transient or itinerant dealer is generally conceived to be one who establishes himself in business in a locality *with the intention and determination to remain there for a short period of time only*, whether such period is a definite or indefinite one, *such as a period of one or more weeks or months*, or until a particular stock of merchandise is disposed of, or until the local market for the commodity handled by the dealer has been exhausted, and *who for such limited period engages or occupies a building or other place for the exhibition and sale of his goods or wares* * * *” (Emphasis ours).

In my judgment, the above-mentioned sub-lessees at 7 Mile Fair fit very well into this definition of “a transient or itinerant dealer”, which is also the definition for a transient merchant.

Two cases referred to in 94 A.L.R. at p. 1088 also support this opinion. They are *Com. v. Newhall*, (1895) 164 Mass. 338, 41 N.E. 647, and *State v. Long*, (1920) 203 Mo. App. 427, 220 S.W. 690.

JHM

Words and Phrases—Banks—Branch Banking — Discussion of banking statutes relative to location of office and parking facilities and the use of a tunnel to connect main building with separated structures.

August 22, 1962.

WILLIAM E. NUESSE,

Commissioner of Banks.

You state that a state-chartered bank proposes to purchase a parking lot across the street from the main office of the bank and establish thereon a banking office wherein to perform all types of banking functions, including, but not limited to, receiving deposits, cashing of checks, selling drafts or bank money orders, taking loan applications, executing loans and accepting loan payments. This office on the parking lot would be connected with the main office of the bank by a tunnel constructed under the intervening street, through which tunnel employes could pass from the main office to the office on the parking lot.

You state that the construction area is within 300 feet of the bank's present offices.

You inquire as follows:

1. Would the office on the parking lot represent a part of the main office of the bank, and therefore not be in conflict with the prohibition against branch banking as set forth in sec. 221.04 (1) (f), Stats.?

2. If the proposed office on the parking lot is in conflict with the restriction against branch banking, what functions may be carried on there in view of the provisions of sec. 221.14 (4) (b), Stats.?

3. Does the provision "The windows so established shall be exterior windows . . ." in section 221.14 (4) (b) preclude construction and use of an enclosed lobby into which customers may enter through a doorway?

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

“* * * 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. Applications for the establishment of bank stations which were on file with the banking commission on or before April 1, 1947 may be granted, subject to the provisions of this section as they existed prior to May 17, 1947.”

Sec. 221.14 provides in part that a bank may purchase, hold and convey real estate for the following purposes only:

“(1) Real estate necessary for the convenient transaction of its business, including with its banking offices other apartments to rent as source of income. * * *

“(2) * * *

“(3) * * *

“(4) (a) Real estate purchased or leased by a bank, subject to the approval of the commissioner of banks, for the purpose of providing parking facilities for immediate and reasonable future needs. The distance between the bank premises and the parking facility shall not exceed 1,000 feet. Parking fees and property rentals may be derived from the acquired real estate.

“(b) There may be established and maintained on such real estate, if such real estate is within 300 feet of the main office of the bank, paying and receiving windows. Such windows may be established with specific approval by the commissioner. The windows so established shall be exterior windows for paying and receiving only, and the transactions handled therein shall be processed in the main office of the bank. The operation of paying and receiving windows, as

herein permitted, shall not be deemed to constitute branch banking.”

“* * *”

Sec. 221.03 (2) (c) provides that the articles of incorporation shall contain:

“(c) The particular village, town or city, and the county where such bank is to be located.”

Sec. 221.01 (2) (a), specifies that an application for a charter 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 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.

In *State ex. rel. City B. & T. Co. v. Marshall & I. B.*, (1958) 4 Wis. 2d 315, 90 N.W., 2d 556, it is stated at page 321-322:

“It is true that the banking department ‘shall have charge of the execution of the laws relating to banks’ (sec. 220.01, Stats.), and that the commissioner of banks is vested by law with the duty and authority to ‘enforce all laws relating to banks’ (sec. 220.02 (3)), and ‘to enforce and carry out all laws relating to banks’ (sec. 220.02 (4)), and to ‘ascertain whether such bank transacts its business at the place designated in the articles of incorporation, and whether its business is conducted in the manner prescribed by law’ (sec. 220.04 (2)), and that if a bank violates any provisions of ch. 221, Stats., with the knowledge of its directors and

after a warning from the commissioner continues such conduct, it may become the duty of the commissioner to institute proceedings to forfeit the charter of the bank and wind up its affairs (sec. 221.41). Thus the commissioner of banks has authority to make an administrative determination as to whether the change in location of defendant's branch office will violate the statute invoked by the relators, and if he considers that the move is prohibited by the statute, to order the bank not to make the move, and to take appropriate action if it persists in doing so."

In 6 OAG 600, it was stated that a state bank has authority to remove its main office, and an existing branch from one location to another within the municipality named in its articles of incorporation. This opinion was cited by the supreme court in support of a history of administrative construction of sec. 221.04 (1) (f) to permit removal of a branch bank from one location to another in the same city. *State ex rel. City B. & T. Marshall & I. B.*, (1959) 8 Wis. 2d 301, 306, 99 N.W. 2d 105.

Sec. 221.04 (1) (f) provides that no bank shall establish more than one "office", with exceptions, but neither that section nor any other section specifically requires that such "office" must be contained in a single building. That section and other sections contemplate, however, that the bank "office" be reasonably compact.

Sec. 220.11 provides:

"Location of bank, how removed. In the event that any 2 banks shall be doing business in the same building, upon the same floor, and in such close proximity as to interfere with the proper examination of either bank, the commissioner of banks may require either of said banks to remove its banking office to some other location within such reasonable time as may be fixed by the commissioner."

Sec. 221.14 (1) uses the term "its banking offices".

Some courts have held that the word "office" is synonymous with place of business.

Jones v. Board of Adjustment, 119, Colo. 420, 204 P. 2d 560, 564, 565; *Weinstein v. Burns*, 198 N.Y.S. 2d 76, 78, 20 Misc 2d 362; *State v. Parsons*, 70 Ariz. 399, 222 P. 2d 637, 640; *Katschor v. Eason Oil Co.*, (1939) 185 Okla. 275, 91 P. 2d 670, 672.

The attorney general of Michigan in an opinion numbered 2315, dated November 25, 1955, Vol. 1, 1955, p. 676, stated that, in his opinion, it would be a violation of Michigan branch banking laws if a bank should be enabled to extend its banking house, by tunnel or other physical connection, across a physical barrier such as a street or public alley. He recognizes that a bank should be permitted to extend its business office by upward construction, or by additions on adjacent land, but believes that the physical barrier doctrine should be followed.

The attorneys general of Texas and Oklahoma would permit the expansion by tunnel connection as merely an extension of a bank's "banking house", and not in violation of statutes prohibiting branch banking. The Texas opinion is at OAG 1950, No. V-1046. In a later opinion the Texas attorney general stated that construction of additional facilities in the next block west from its main bank would be in violation of the Texas branch banking law. Texas OAG 1957, No. WW-22.

Neither the Wisconsin statutes nor Wisconsin case law offers a definition of the terms branch bank, branch office or bank station, but the terms must mean a branch, office or station located at least some distance away from the main office of the bank, at which some banking functions or services are carried on which a banking corporation is permitted to carry on at its main office. *MacLaren v. State* (1910) 141 Wis. 577, 124 N.W. 667. Also see 49 OAG 9, 12-14, *Commercial State Bank of Roseville v. Gidney*, (D.C., 1959) 174 F. Supp. 770 Affd., C.A. 278 F. 2d 871, 108 U.S. App. D.C. 37. *Marvin v. Kentucky Title Trust Co.*, (1927) 218 Ky. 135, 291 S.W. 17, 50 A.L.R. 1337.

If a facility is a part and parcel of the main office, it cannot be a branch office or branch bank.

Whether the facilities proposed will constitute a single office of the banking corporation is a fact question which cannot be determined on the basis of the limited facts given. The commissioner of banks as enforcer of the banking laws, including the branch banking statute, should make the initial determination of such question.

In arriving at a determination, the commissioner should consider the physical adequacy of the present facilities as well as the plans for the proposed facility. Duplication of services and facilities, while not determinative, should be considered.

The branch banking statute has been said to have a three-fold purpose. First as a restraint against concentration of the banking business in a few large banking corporations, second, as an aid to proper administration by insuring that centralized records are available and that responsible officers of the bank are close at hand to act in banking transactions in the interests of the bank and its depositors, and third, to aid regulatory officials in their tasks of supervision, examination and investigation. *State Bank of Drummond v. Nuesse*, (1961) 13 Wis. 2d 74, 82, 108 N.W. 2d 283, *Marvin v. Kentucky Title Trust Co.*, (1927) 218 Ky. 135, 291 S.W. 17, 50 A.L.R. 1337, 7 Am. Jur. 40.

Accessibility of the proposed facilities to the present facilities is of utmost importance. The purpose and construction of the tunnel or other connecting passageway must be considered. An adequate tunnel might well weld the two buildings into a single main office, however it can fairly be stated that a banking corporation could not establish a number of facilities in various parts of a city, and honeycomb the area with underground passageways, and sustain a claim that all of the facilities constitute a single main office.

It is also necessary to consider the underlying purpose for the proposed expansion. Is it for the expansion of main office facilities or is the primary purpose the acquisition of additional parking facilities?

If the primary purpose is the acquisition of land, by purchase or lease, for providing parking facilities for im-

mediate or future needs, such lands must be within 1,000 feet of the main office of the bank, and specific approval of the commissioner of banks is necessary.

If the primary purpose of the acquisition of lands is for providing parking facilities for immediate or future use, and such real estate is within 300 feet of the main office of the bank, a structure can be erected providing exterior windows, for paying and receiving only, and no other banking services can be provided from such structure. This would preclude construction and use of an enclosed lobby into which customers may enter through a doorway, if it is intended that banking services be offered customers by means of windows or offices adjoining such lobby. This would not preclude construction and use of a structure containing an enclosed lobby into which customers could enter through a doorway, if the facilities therein were in the nature of waiting rooms or rest rooms. The general nature of your inquiry precludes concise answers to the questions posed, however, the general discussion above should be sufficient basis for the formulation of a determination of fact which you must make in regards to a specific situation.

RJV

*Trading Stamps—Savings and Loan Association—*Issuance of trading stamps to members of a savings and loan association does not violate sec. 100.15, but there must be no discrimination between members of the same class except as provided in 215.03 (6).

August 28, 1962.

R. J. WINKOWSKI,

Commissioner, Savings and Loan Department.

You have requested an opinion on the question of whether a savings and loan association may issue trading stamps to members who open new share accounts.

Sec. 100.15 Wis. stats. regulates trading stamps.

It is not necessary to take the space here to set forth the somewhat lengthy provisions of this statute. Suffice it to say that the statute is limited to the issuance of trading stamps "in connection with the sale of any goods, wares or merchandise" and that a penalty is provided for the violation of the statute. It should perhaps also be noted that under the statute trading stamps are redeemable only in cash for the amount stated thereon in amounts aggregating 25¢ or more of redemption value. There are certain exceptions to this particular provision which are irrelevant here.

There are an amazing number of opinions of the attorney general on the validity of various trading stamp plans that have been proposed from time to time. Some of these have been found proper and others not. Most of these opinions, however, relate not so much to what is meant by "goods, wares or merchandise" within the meaning of the statute as they do to redemption features of one sort or another that have been designed by sales promotion experts.

Nevertheless, there are several opinions which have a bearing, direct or indirect, on the question you have raised.

There is an opinion issued in 1921, 10 OAG, 259, to the effect that the trading stamp law is not applicable to the serving of meals to patrons of restaurants, hotels or cafeterias.

The attorney general stated in that opinion at p. 260:

"* * * In common parlance, they [restaurant and hotel keepers] are not engaged in the sale of goods or in merchandising but are rather engaged in giving drink to the thirsty and food to the hungry. A restaurant is not a shop or store. The keeper thereof is not a merchant. He renders services, rather than sells merchandise, when he supplies meals to his patrons. His helpers are called cooks and waiters, and not clerks or salesmen. To say that the furnishing of meals to boarders and transients is the 'sale of goods, wares or merchandise' is a strained use of English."

However, it should be noted that this opinion was overruled *sub silentio* in 1955. 44 OAG 17.

It was pointed out in that opinion that the majority view is that where food is served to a person for immediate consumption for a stipulated price, the transaction is a sale and not a service, although there is a sharp conflict in the authorities on this point with a minority holding that the serving of meals is a service and not a sale. 7 A.L.R. 2d 1032.

The other question presented for consideration in 44 OAG 17 was whether trading stamps redeemable in merchandise may be issued to hotel guests in proportion to their payment of room rent. This question was answered in the affirmative for the reason that the renting of a hotel room is not a "sale of goods, wares or merchandise."

In 1931 there was an opinion that trading stamps redeemable in merchandise could be given for the sale of a service such as laundry. 20 OAG 1107.

21 OAG 442 (1932) holds that the sale of coupons to parties entitling each purchaser to service or credit on merchandise purchased does not violate the trading stamp law for the reason that the coupons were not given in connection with the sale of merchandise.

The opinion which perhaps comes closest to answering your question so far as the trading stamp law is concerned is 12 OAG 656 (1923). The plan and the ruling of the attorney general thereon are contained in the following two paragraphs of the opinion at p. 657:

"A certain newspaper will distribute without charge to any individual calling at its office a surprise package containing a ticket good for one dollar on a savings account at a certain bank, when presented with an initial deposit of two dollars or more. The original deposit must be left a year and an additional deposit made within six months for the depositor to secure the initial dollar credited to his account. Public announcement of this offer would appear in the news columns of the newspaper.

"These tickets are not given out with the sale of any goods, wares or merchandise but are pure gifts. Neither do

the tickets entitle the holder to procure any goods, wares or merchandise privileges in exchange for such ticket. It is true, however, that the tickets do entitle the holder to a thing of value, in exchange therefor. To violate the trading stamp law, the ticket or other similar device must be given in connection with a sale of goods or merchandise, and as these tickets are not to be so given, in my opinion, there will be no violation of such law."

While you have not spelled out the details of the proposed plan, it is assumed that it would embody the essential elements of the above plan and that the new member of a savings and loan association at the time of opening his account would be given trading stamps redeemable in cash based upon the amount paid in by the member. No doubt there would be restrictions as to the length of time that the money would have to be left with the association, since otherwise the purpose of the plan would be defeated by persons going into the business of making deposits one day and drawing them out the next to the great discomfiture of associations participating in trading stamp plans.

It seems very clear that when a person becomes a member of a savings and loan association by making an initial deposit, the certificate or pass book that is issued to him is not "goods, wares or merchandise" but merely evidence of the relationship which has been created between the association and the member and that the member will be entitled to the privileges of such membership including the right to receive dividends declared by the association to members on the basis of the earnings derived by the association on the reinvestment of funds in mortgage loans.

However, the conclusion reached here that the plan involves no violation of sec. 100.15, the trading stamp law, is only a partial answer to your question.

Equally important is the question of whether the plan involves any violation of the Savings and Loan Associations Act, Ch. 215, or any administrative rules issued pursuant thereto. In answering this question no reference will be

made to federal savings and loan associations which operate under federal rather than state law.

It might help in approaching this problem to resort to an assumed set of facts. For purposes of illustration let us consider two assumed members, — A, who opens an account of \$1000.00 on January 1, 1962, before any trading stamp plan has been adopted, and B, who opens a \$1000.00 account on July 1, 1962, after such a plan has been adopted. We will assume that trading stamps redeemable in cash are issued to B in an amount equal to 2% of his deposit, or \$20.00, but that such stamps are not issued or at least will not be redeemed until after he has been a member for 6 months so as to thwart the overly-ambitious person who becomes a member one day and then withdraws his money almost immediately so as to obtain a quick profit.

Assuming further that the association is paying a current dividend of 4%, the net result would be that for the period from July 1, 1962, to January 1, 1963, A would receive \$20.00 on his investment while B would receive \$40.00. In other words, the rate of earning to A for the 6 months' period is 4%, but the rate to B is 8%.

Is this permissible?

The only statutory authorization for discriminating between members on dividend rates is that contained in sec. 215.03 (6) which provides:

“The by-laws may provide for a reward dividend plan on savings shares to be paid to members for consistent savings at a dividend rate to be fixed by the commissioner of savings and loan associations and the savings and loan advisory committee.”

For instance, under such an approved plan an ordinary member who has made a lump sum investment or who may add something thereto at irregular intervals but not pursuant to any consistent plan of specified amounts at specific times will receive the current regular dividend of 4% or whatever the standard dividend may be, whereas the member who follows a consistent program of adding definite

minimum amounts or more to his account at specified installment dates may receive an extra 1% or whatever amount has been fixed by the commissioner and advisory committee under sec. 215.03 (6). This encourages a definite savings program for the member and at the same times enables the association to plan its own reinvestment program on the reasonable expectation that it will have new money available from its members in amounts and at times which can be predicted and anticipated with some degree of accuracy.

To all intents and purposes a trading stamp plan would operate substantially as such a reward dividend plan. However, under the above statute this, by implication, would have to be restricted to members following a consistent savings plan. It could not be used as a reward for the initial investment. This follows under the rule of statutory construction known as *expressio unius est exclusio alterius*, — the expression of one results in the implied exclusion of others. By expressly authorizing a reward dividend plan for members on a consistent savings program at a rate to be fixed by the commissioner and the advisory committee, the legislature has stated in effect that no other type of reward dividend plan is permissible.

Further indirect support can be found for this conclusion in sec. 215.39 (2) which reads:

“(2) Nothing in this section shall prohibit an association from distributing prizes in cash or otherwise to officers, directors, and employes engaged in new savings or account drives or contests conducted by the association, nor prohibit such officers, directors and employes from receiving the same.”

This is the only provision in the chapter which recognizes anything in the nature of rewards for new accounts, and it is to be noted that the association's authorization for distributing prizes in cash or otherwise for new accounts is limited to officers, directors, and employes. If the legislature had intended that such rewards could be made available directly to the new members instead of just to the officers,

directors, or employes obtaining the new accounts, it would have been very easy to say so in this subsection. The doctrine of implied exclusion stated above would likewise apply here.

Accordingly you are advised that trading stamps may not be issued to members who open new accounts. This is not because of any violation of sec. 100.15, the trading stamp law, but it results from the fact that the issuance of trading stamps amounts to a reward dividend plan which may be made available only to members who are following a consistent savings plan under sec. 215.03 (6) and not as a reward for making an initial deposit.

This is not to say, however, that the use of trading stamps in connection with accounts in savings and loan associations is *per se* illegal under any and all circumstances. However, a plan which results in monetary discrimination between individual members is unauthorized except that different treatment may be accorded to that class of members who are following the reward dividend savings plan permitted under sec. 215.03 (6). By the same token it logically follows that a trading stamp plan is not illegal if it does not result in such discrimination.

WHR

*Dentists—Advertising—*Sec. 152.07 (6) (f) as repealed and recreated by ch. 400, Laws 1961, prohibiting dentists from advertising under corporate name, prevails over sec. 180.99 (4) as created by ch. 350, Laws 1961, to the extent that these provisions conflict.

August 30, 1962.

A. H. CLARK, *Secretary-Treasurer,*
Wisconsin Board of Dental Examiners.

You have called attention to an apparent conflict between ch. 350, Laws 1961, and ch. 400, Laws 1961, on the use of a

corporate name in the practice of dentistry. An official opinion explaining the problem is requested.

Ch. 350, Laws 1961, is an act to create sec. 180.99 of the statutes, relating to the organization of service corporations by the professions and others.

The material parts of this chapter for present purposes are secs. 180.99 (2) and (4) which read:

“(2) FORMATION OF CORPORATION. One or more natural persons licensed, certified or registered pursuant to any provisions of the statutes, provided all have the same license, certificate or registration, may organize and own stock in a service corporation under this section. Such corporation may own, operate and maintain an establishment and otherwise serve the convenience of its shareholders in carrying on the particular profession, calling or trade for which the licensure, certification or registration of its organizers is required; provided that professional or other personal services, consultation or advice in any form may be rendered only by officers, agents, or employes (as defined in sub (9)) of such corporation who are themselves licensed, certified or registered pursuant to statute in the field of endeavor designated in the articles of such corporation.

“* * *

“(4) CORPORATE NAME. The corporation may bear the last name of one or more persons formerly or currently associated with it. A corporation organized under this section may also adopt a name which does not include the surname of any present or former shareholder; provided, that if it does so, it must record such name and the names of its shareholders with the register of deeds of the county in which it is located, or has its principal office. The corporate name shall end with the word ‘Chartered’, or ‘Limited’, or the abbreviation ‘Ltd.’, or the words ‘Service Corporation’, or the abbreviation ‘S.C.’.”

Ch. 400, Laws 1961, substantially repeals and recreates the Dental Practice Act, ch. 152 of the statutes. Except for

grammatical changes, the section with which we are here concerned, sec. 152.07 (6) (f), is identical in substance with the former sec. 152.06 (5) (f), 1959 statutes.

This provision now reads:

“(6) ‘Unprofessional advertising,’ as that term is used in sub. (5), includes:

“(f) Advertising either by sign or in any manner under the name of a corporation, company, association, parlor or trade name. No dentist shall display any sign or advertise in any manner concerning his work by the use of any name except the name under which he is licensed to practice dentistry in this state, nor shall he use any parlor or trade name or display any sign or advertise in any manner under any parlor, trade or assumed name under which his practice was formerly conducted, except as permitted by s. 152.02 (2).”

Ch. 350, Laws 1961, is similar in nature to acts passed by about a third of the states in this country during the past year or two. Without going into an unduly lengthy discussion of this type of statutes, it is necessary to make some comment on their purpose.

For a number of years, practitioners of various professions have attempted to secure legislation that would permit professionals to enjoy certain tax and fringe benefits that have been available to employes of a corporation. Their main argument has centered around the idea that an inequitable tax system has discriminated against income produced from service, as opposed to income produced from capital. See Corporate Tax Status for Lawyers, 33 N.Y. State B.J. 165, 166 (1961)

The U.S. treasury department has continually been opposed to federal legislation which would allow professionals to enjoy the same tax advantages as corporate employes. The Simpson-Keogh Bill (H.R. 10 86th Congress), which would allow professionals and other self-paid taxpayers to set aside a percentage of their income for retirement, was opposed by the treasury department on the grounds that the

treasury would suffer substantial loss of revenue. This bill and similar bills were never passed by congress, although H.R. 10 is still pending and efforts are being made to seek a senate vote this month. See, *Should Lawyers Incorporate?* 11 Hastings, L.J. 150, 153 (1959).

This has resulted in the enactment by state legislatures of acts similar to our ch. 350, Laws 1961, and which were enacted in an effort to provide relief for professionals. The possible economic advantages of these professional service corporations may be many, and they are discussed in detail by Eber, *The Pros and Cons of the New Professional Service Corporation*, 15 J. of Taxation 308 (No. 5, Nov. 1961).

They are summarized by Glenn Greenwood, Research Attorney, in American Bar Foundation, Research Memorandum Series, No. 28: *Ethical Problems Raised by the Association and Incorporation of Lawyers* (Nov. 1961) at p. 7 as follows:

- “1. Permits fiscal year choice
2. Provides for continuity of practice by successor
3. Establishes a cash value for practice with a ‘market’ to qualified, eligible successors
4. Provides for withdrawal, retirement, or addition of associates without dissolutions
5. Comes under the lower corporate tax ceilings
6. Provides additional flexibility for estate planning
7. Provides for centralized and more effective management and ‘pooling’ of skills
8. Makes fringe benefit programs available (Professional associates now would have employee status and could be included in these programs)
 - a. Qualified pension plans
 - b. Non qualified pension plans
 - c. Profit sharing plans
 - d. Deferred compensation plans
 - e. Stock option plans
 - f. Various group life insurance, health, medical and disability insurance plans.”

There may also be some possible disadvantages. Mention is made of these by Gerald J. Kahn of Milwaukee in *Incorporation By Lawyers* in *The Young Lawyer*, July 1962, Vol. 18, No. 3, p. 5, published by the Junior Bar Conference of the American Bar Association, and an internal revenue service ruling on tax benefits is still awaited. See, *American Bar Association Coordinator*, Vol. 10, No. 7, July 1, 1962, p. 3.

Perhaps it should be mentioned in passing that the passage of statutes such as ch. 350, Laws 1961, has given rise to much debate on the impact that such laws may have on the age-old concept that the learned professions may not be practiced by a corporation. See, Lord Coke's report of the case of *Sutton's Hospital*, 10 Coke Reports 285, 303 (1612), where it was pointed out some 350 years ago that the corporation is only *in abstracto*, as a corporation aggregate of many is invisible, immortal and rests only in intendment and consideration of law. "It cannot commit treason, nor be outlawed, nor excommunicated for it has no soul. Neither can it appear in person but by attorney."

At least one medical association has cautioned its members against embarking upon such a venture because of the inherent inconsistency of a group of physicians seeking corporate status for tax purposes but denying corporate status for all other purposes. See, Jones, *The Professional Corporation*, 27 *Fordham L. Rev.* 353, 362-4 (1958) citing Field, *Medical Group Pension Plan*, 88 *L.A. County Med. Bull.* 31 (1958).

However, this is neither the time nor the place to discuss the ethical problems presented or to point out the approaches which have been made in the various states and by various professions in coming to grips with the problem.

With this background material on ch. 350, attention is now turned to ch. 400.

As previously pointed out, sec. 152.07 (6) (f) of ch. 400 is the counterpart of the old sec. 152.06 (6) (f). Its validity was established in *Modern System Dentists, Inc. v. State Board of Dental Examiners*, (1934) 216 *Wis.* 190, 256 *N.W.*

922. See also, *Rust v. State Board of Dental Examiners*, (1934) 216 Wis. 127, 256 N.W. 919.

A reading of these two cases will illustrate very well the wisdom of the statutory policy of prohibiting dentists from using corporate, parlor, or trade names. Among the corporations mentioned in these cases are Modern System Dentists, Inc., New System Dentists, Inc., Parks Painless Dentists, Inc., and Painless Parmer, Inc. All of these corporate names imply superior professional qualifications or the performance of professional services in a superior manner. See, sec. 152.07 (6) (b) which prohibits advertising of that type. Such names are designed to impress the credulous and unwary and constitute a plain bare fraud on the public.

It is reasonable to assume that the legislature never intended to open the door to the adoption of such misleading corporate names to those professions which have had the foresight to promote the adoption of statutes designed to protect the public from the use of corporate names which on their face constitute dishonest advertising. The evils of some of the practices that formerly prevailed in dental advertising were commented upon in *Semler v. Oregon State Board of Dental Examiners*, (1935) 294 U.S. 608, 55 Sup. Ct. 570, 572, 79 L. Ed. 1086, where the United States supreme court quoted with approval from the state court opinion to the effect that it could not be doubted that there are practitioners who are not willing to abide by the ethics of their profession who resort to improper advertising methods "to lure the credulous and ignorant members of the public to their offices for the purpose of fleecing them" and that representation of "painless dentistry", "professional superiority" etc., is as a general rule "the practice of the charlatan and the quack to entice the public."

That there is conflict between sec. 180.99 (4) of ch. 350 and sec. 152.07 (6) (f) cannot be denied.

Where two statutes conflict, the later supersedes the earlier so far as full effect cannot be given to both. *State ex rel. M. A. Hanna Dock Co. v. Willcuts*, (1910) 143 Wis. 449, 128 N.W. 97. Also where one statute deals with a sub-

ject in general terms (as does ch. 350) and a later statute deals with part of the same subject in a more detailed way (as does ch. 400) and it is impossible to harmonize the two, the provisions of the later more specific statute will prevail. *David A. Ubrich, Inc. v. Town of Saukville*, (1959) 7 Wis. 2d 173, 96 N.W. 2d 612; *Maier v. Racine County*, (1957) 1 Wis. 2d 384, 84 N.W. 2d 76.

To the extent, however, that chs. 350 and 400 are not in conflict full effect should be given to both. In interpreting statutes, they must be construed, if possible, so as to avoid inconsistency and conflict and so as to give effect to every part to the extent that this can be done. *Associated Hospital Service, Inc., v. Milwaukee*, (1961) 13 Wis. 2d 447, 109 N.W. 2d 271.

Thus there is no good reason why the dental profession cannot avail itself of all of the really important purposes that ch. 350 was designed to effectuate and as has been previously explained. The only limitation is that dentists must comply with the requirements of sec. 152.07 (6) (f) relating to corporate, parlor or trade names and may not avail themselves of sec. 180.99 (4) to the extent that these provisions are in conflict.

WHR

Licenses and Permits—Restaurant—Words and Phrases
—Restaurant permit issued to cover restaurant in building cannot be extended to cover use of mobile unit which must have a restaurant permit to sell and serve lunch and meals to the general public.

August 30, 1962.

ROBERT W. WARREN,
District Attorney, Brown County.

You ask my opinion on this question: Must a person obtain a restaurant permit under Ch. 160, stats., in order to sell so-called "pasties" from a Volkswagon microbus?

Your question arises out of a situation existing in your county, involving a person who will be referred to in this opinion under the fictitious name "Mrs. Jones".

As background for your question, you have advised me as follows: Mrs. Jones operates a restaurant in the city of Green Bay, Brown county. She has for some years past been in the business of processing "pasties" at such restaurant. A pasty is similar to a meat pie. It consists of a shell made up of flour, shortening and water and inside the shell or crust is placed beef, potatoes and onions plus seasoning. The pasty is then baked and packaged in a glassine bag.

Mrs. Jones holds a restaurant permit for the preparation, serving and selling of pasties at the premises in Green Bay.

Mrs. Jones owns a Volkswagon microbus and she uses this as an outlet for pasties prepared and packaged at her restaurant. She parks such microbus on a rented piece of property adjacent to highway 41-141 in Brown county. She takes the prepared pasties from her Green Bay restaurant, places them in the microbus, and keeps them hot there in a warming oven. She drives the microbus from the city of Green Bay out to the rented property of a highway and she then sells the hot pasties to transient motorists. The microbus is thus operated without a restaurant permit. Your question, then, is whether or not a restaurant permit is required for the microbus under these circumstances.

It is my opinion that such a permit is required for the microbus, when pasties are being sold therefrom. Section 160.01 (2) defines "restaurant" to mean and include "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." The description of a "pasty" hereinabove given makes it clear that a pasty would, in and of itself, constitute a "lunch", if not a "meal". While pasties are not prepared at the microbus here in question, they are served or sold therefrom to transients or to the general public, and their service and sale therefrom plainly makes the microbus a restaurant requiring a permit under section 160.02 (1). As you will have

noted, the statutory definition of "restaurant" as set forth above uses the disjunctive "or" between the words "prepared", "served", and "sold", thus making it plain that a building, room or place wherein meals or lunches merely are served and/or sold to transients or the general public is a restaurant, although such meals or lunches are not prepared on the premises. See 34 OAG 355 (1945) where it was concluded that the mere serving of sandwiches in a tavern, which sandwiches were prepared elsewhere, made the tavern a restaurant.

The fact that the microbus in question is a mobile unit would not prevent the state board of health from licensing it as a restaurant. See 49 OAG 196 (1960).

The permit which Mrs. Jones has for the operation of her restaurant in Green Bay cannot be extended to cover the operation of the microbus as a restaurant. Such permit was issued to her for the operation of her restaurant at the specific address in Green Bay therein named. It is a permit for that particular establishment only, and it is clear from the provisions of sec. 160.02 (3) that a separate and distinct permit must be required for her other establishment or restaurant, namely, the microbus. Sub. (3), sec. 160.02, reads as follows:

"A separate permit shall be required for each establishment excepting where more than one of the same type is operated on the same premises and under the same management a single permit for each type shall suffice."

Under this statute, if two restaurants of the same type were operated in a single building, with both restaurants under the same management, a single permit would suffice for both such restaurants. That is the only exception, however, to the general requirement that a separate permit shall be required for each restaurant as defined in sec. 160.01.

If the requirement of a separate permit for each restaurant (with the exception above noted) were not present in sec. 160.02 (3), Mrs. Jones would nevertheless need a sep-

arate and distinct restaurant permit for the operation of the microbus as a restaurant, under the general rule that where the same business is conducted at several different places, the operator must procure the required license for each establishment unless the governing statute or ordinance makes it clear that only one license is required. See *American Locker Co. v. City of Long Beach*, (1946) 170 P. 2d 1005, 1009.

In conclusion, then, Mrs. Jones, if she is to continue her sale of pasties to the general public from her microbus, must obtain a restaurant permit for such microbus.

JHM

Eminent Domain—Moving Costs—Claims for cost of moving of property, necessitated by a taking of land by a public or private body having the power of eminent domain, may be paid in cases where former landowner performs the work himself.

September 11, 1962.

ROBERT P. RUSSELL,

Corporation Counsel, Milwaukee County.

You have requested my opinion as to the correct interpretation of sec. 32.19 (2) pertaining to the now allowable claim of costs of moving in the new eminent domain law.

The statute in question reads as follows:

“32.19 Additional Items Payable. The following items shall be compensable in eminent domain proceedings where shown to exist:

“* * *

“(2) REMOVAL OF PERSONAL PROPERTY TO ANOTHER SITE. The cost of removal from the property taken to another site of personal property of land owners, or tenants under an existing unexpired written lease, the full term of which is at least 3 years. Such costs shall not exceed \$150

for removals from each family residential unit or \$2,000 from each farm or nonresidential site.”

You state that frequently a property owner will submit a claim based upon work which he, himself, has performed where he has not retained a professional mover. You state that your auditor has questioned the payment of such claims, because technically they may not be actual “costs”, since no amount has been expended.

You state,

“ ‘Cost’ is defined in Webster’s Dictionary as ‘the amount or equivalent paid, given, or charged, or engaged to be paid or given, for anything; loss of any kind; detriment; outlay, as of money, time, labor, etc.’ We believe that under the above definition of ‘cost’, particularly as being an ‘outlay, as of money, time, labor’, charges for the value of the time spent by the owner of property in removing personal property could properly be reimbursable as items of damage under Section 32.19 (2), and we have so indicated to the Auditor.”

I am in accord with your view. It was the intent of this section to make the property owner whole for the necessity of the move caused by the taking of his property for public use. It should be construed liberally in favor of the property owner. It makes no difference to the state whether he performs the work or has it done professionally. The former owner, in the instances you cite, expends his time and labor often sacrificing some other opportunity to earn money.

Further, there is little or no fear that this practice will be abused. In each instance, the condemning authority knows the property and the reasonableness of the claim. There is a ceiling of \$150 on the movement of residence property and \$2,000 on farm and nonresidential moves. The claims are sworn to be correct.

It is my opinion that such claims should be allowed, except in such cases where it can be ascertained that they are false or unreasonable.

REB

Counties—School District—County is not authorized under secs. 66.30 or 83.018, or otherwise, to contract with a joint school district for the paving by the county of a parking lot for the district.

September 25, 1962.

WILLIAM D. O'BRIEN,

District Attorney, Chippewa County.

You have inquired whether a county highway department may lawfully contract to blacktop the parking lot of a joint school district which has recently constructed a high school building adjacent to the parking lot.

Sec. 66.30 (2) provides among other things that any municipality may contract with another municipality or municipalities or the state or any department or agency thereof "for the receipt or furnishing of services or the joint exercise of any power or duty required or authorized by statute." Sec. 66.30 (1) defines the word "municipality" so as to include both counties and school districts. Also it may be noted that sec. 59.07 (11) authorizes the county board to join with the state, other counties or municipalities in a cooperative arrangement as provided by sec. 66.30.

As was pointed out in 48 OAG 231, the service must be one that the receiving municipality is authorized to receive and which at the same time the performing municipality is entitled to render. In that instance it was concluded that a county had no power to undertake excavating, filling, landscaping, or any other construction work in connection with the building of a school, public or private. Attention is also called to the discussion in 50 OAG 98 of the constitutionality of a bill which became sec. 86.105 of the statutes and which authorizes the governing body of any county, town, city or village to enter into contracts to remove snow from private roads and driveways.

The problem here, however, is not a constitutional one but rather it resolves itself into a question of finding a statute broad enough to authorize the county to render the service

in question. In other words, the county cannot do for a school district that which it cannot do for itself. There is no question, of course, as to the power of the school district to contract for the paving of the parking lot.

The general powers of the county are to be broadly and liberally construed and are to be limited only by express language. Sec. 59.07. However, you have to find the statutory power before you can construe it broadly or liberally or talk about its limitations.

Sec. 83.018 authorizes the county highway committee to sell road building and maintenance supplies on open account to any city, village, town or school district within the county and authorizes any such city, village, town or school district to purchase such supplies. This would clearly authorize the sale of the material for paving the parking lot, but it falls short of authorization to the county to do the actual work of laying the blacktop. No doubt this would authorize the sale and delivery of the material by the county highway committee to the school district, but the actual work of laying the material is construction work or service.

Attention is also called to the fact that sec. 66.29 (1) (c), which is applicable to school districts, defines the term "public contract" to mean and include any contract for the construction, execution, repair, remodeling, improvement of any public work, building, furnishing of supplies, material of any kind, whatsoever, proposals for which are required to be advertised for by law.

If the county were authorized to do the construction work for the school district as well as supply the material under sec. 83.018, this would constitute an authorized exception to the bid requirements of sec. 66.29, both as to the school district and as to the county, but in view of the limitation of sec. 83.018 to supplies as distinguished from labor, it is concluded that the county may not through its county highway committee or otherwise contract for the paving of a parking lot for a school district.

WHR

Dependent Children—Aids—A child is eligible for aid under sec. 49.19 (1) (a) if either natural parent is absent from the home, provided other statutory conditions are met.

October 16, 1962.

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

You ask about the eligibility of a child for aid under sec. 49.19 (1) (a) under the following circumstances:

“A minor child lived with her parents in ‘A’ county. The mother abandoned the family and the aunt of the child came to ‘A’ county and, with the consent and approval of the father, took the child to ‘B’ county where she has resided for seven years. There is no question that the aunt has given her better care than she received in her own home. The father subsequently divorced the mother and the custody of this girl and her two brothers was left with the father. The two brothers were placed in a children’s home in ‘A’ county for a period of time. Following the father’s marriage in 1959, the boys were returned to him. The girl has continued to live with the aunt in ‘B’ county where a grant of aid to dependent children was issued for a period of a number of months until ‘B’ county discovered that the father had remarried and ‘A’ county had returned the two boys to him. ‘B’ county then discontinued the grant of aid in behalf of the girl which was being issued to her aunt in ‘B’ county on the grounds that the girl should return to the home of her father or ‘A’ county should assume liability for the grant of aid being issued to the aunt in ‘B’ county. So far as we can ascertain, the whereabouts of the natural mother of the girl is unknown.”

Sec. 49.19 (1) (a) reads in part:

“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, * * *.”

You indicate that, in administering aid to dependent children, your department has for many years interpreted the above provision to include in the category of eligible children one whose parents are divorced even though the one which has custody is remarried.

The supreme court has regularly considered construction by officials having responsibility for administration of a law as carrying great weight, provided the language of the statute is consistent with such construction. The court said in *Trczyniewski v. Milwaukee*, (1961) 15 Wis. 2d 236, 240, for example:

“* * * the practical construction of a law by those charged with the task of applying it is of great weight and often decisive. *State v. Johnson* (1925), 186 Wis. 59, 202 N.W. 319. In speaking of practical construction, we have said:

“ ‘No rule is more helpful than that, where there is good room for its operation. None, in such circumstances, is more conclusive of legislative intent. The effect of it is to give to the language of the law, otherwise obscure, a cast in harmony with long-established administration, as plainly observable as if incorporated therein in its letter. This court has spoken very decisively on that subject and nowhere more than in *Harrington v. Smith*, 28 Wis. 43, 68: “Long and uninterrupted practice under a statute, especially by the officers whose duty it was to execute it, is good evidence of its construction, and such practical construction will be adhered to, even though, were it *res integra*, it might be difficult to maintain it.” ’ ”

The wording of the statute is, I believe, susceptible of the interpretation your department has given it. It is significant that the statute refers to the absence or incapacity of “a parent”, which indicates that the legislature did not intend to limit the statute to cases in which the father is the one who is absent or incapacitated.

Termination of a marriage by divorce does not of itself terminate the parent-child relationship nor the parental obligation to the child.

Neither does the remarriage of one parent automatically make the new spouse a parent. The difference in relationship is recognized in sec. 49.19 (1) (a) by the legislature in the use of the appellations "stepfather" and "stepmother".

The mere fact that a child may be eligible for relief under sec. 49.19 (1) (a) by reason of the absence from home of a divorced parent does not mean that such a child is eligible in all such cases. Sec. 49.19 (4) (a) requires, also, that the child must be "dependent", which term is defined in sec. 49.01 (4).

Parents are primarily liable for the support of their children (see 39 Am. Jur. 630, et seq.), so that if they are able to meet that obligation the child is not dependent within the meaning of sec. 49.01 (4). You have, however, added to your statement of facts an assumption that the father is unable to support the girl; and if that circumstance is found by the local administrators to be correct, and if other conditions prescribed by sec. 49.19 (4) exist, the child would be eligible for aid.

Questions about residence for purposes of applying for aid in such cases are discussed in 40 OAG 144 and 39 OAG 345.

BL

County Boards—Social Security—Members of Ashland county board should be reported for social security coverage since July 1, 1957 under resolution adopted by county board April 17, 1951 and sec. 66.99 (4a) as amended by ch. 331, Laws 1957.

October 25, 1962.

DAVID G. WARTMAN,

District Attorney, Ashland County.

Sec. 2, ch. 60, Laws 1951, created sec. 66.99 of the Wisconsin statutes relative to the inclusion of public employes under social security. That act became effective on April 13, 1951, and provided in part as follows:

“(1) As used in this section:

“(a) ‘Public agency’ means * * * any county * * * which is eligible for inclusion under the Federal Old Age and Survivors Insurance System.

“(b) ‘Federal regulations’ means the provisions of section 218 of Title II of the Social Security Act enacted by the Congress of the United States, and applicable regulations adopted pursuant thereto, and applicable provisions of the U. S. Internal Revenue Code.

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

“(d) ‘Director’ means the executive director of the Wisconsin Retirement Fund.

“(2) Each public agency other than the state may determine to be included under the Federal Old Age and Survivors Insurance System through the adoption of a resolution by the governing body thereof with respect to the coverage groups specified in such resolution, which shall also state the effective date of coverage.

“* * *

“(4) The director with the approval of the governor shall * * * upon the submission to him of a certified copy of a resolution adopted by the governing body of any public agency in accordance with subsection (2), execute upon behalf of the state an agreement or modification of an agreement, with the Federal Social Security Administrator for the inclusion of a coverage group of the employes and officers of such public agency under the Federal Old Age and Survivors Insurance System established by federal regulations in conformity with such resolution * * * and in conformity with federal regulations. * * * each public agency included under such agreement or modification thereof shall be bound by federal regulations * * *.

“(4a) No part-time employe or officer shall be included under such agreement when filling a position or office which does not normally require actual performance of duty for at least 600 hours in each year * * *.”

On April 17, 1951 the county board of Ashland county passed the following resolution:

“Resolved by the County Board of Ashland County, pursuant to the provisions of Section 66.99 (2) of the Wisconsin Statutes, that Ashland County hereby determines to be included under the Federal Old Age & Survivors Insurance System as of January 1, 1951, for all its eligible employees including the employees in all part time positions which are not excluded under Section 66.99 (4a). Positions whose occupants are compensated on a fee basis shall be excluded. All persons occupying offices filled by election by the voters of Ashland County shall also be covered, and

“Be it Further Resolved, that the Clerk of Ashland County submit a certified copy of this resolution to the Executive Director of the Wisconsin Retirement Fund.”

At the time that this resolution was passed it did not operate to bring members of the county board under social security since their positions did not normally require performance of duty for at least 600 hours in each year.

Sec. 2, ch. 331, Laws 1957, amended sec. 66.99 (4a) of the statutes to read as follows:

“No student or member of a board or commission, except members of governing bodies, shall be included under such agreement when filling a position or office which does not normally require actual performance of duty for at least 600 hours in each year.”

Sec. 3 of said ch. 331, Laws 1957, provided that it should take effect at midnight on June 30, 1957.

“Members of governing bodies” as used in sec. 66.99 (4a) of the statutes, as amended by ch. 331, Laws 1957, would include the members of county boards regardless of whether their positions would normally require the performance of duty for at least 600 hours in any year.

The aforesaid resolution of April 17, 1951 was the only one adopted by said county under sec. 66.99.

It is noted that said resolution excluded only those "Positions whose occupants are compensated on a fee basis."

As a result of the adoption of the aforesaid resolution all of the eligible employes and officers of Ashland county were to be brought under OASI except:

1. Those who occupied positions which were compensated on a fee basis who were intentionally excluded by the action of the county board.

2. Part-time employes and officers filling positions or offices which normally did not require actual performance of duty for at least 600 hours in each year which part-time employes and officers were excluded by the legislature which had created sec. 66.99 (4a), Stats. of 1951.

On June 13, 1951 the commissioner for social security signed the original agreement with representatives of the state of Wisconsin pursuant to sec. 66.99 (4), Stats. of 1957. Said agreement provided in part:

"(B) Services covered:

"This agreement includes all services performed by individuals as employes of the state and as employes of those political subdivisions listed in the appendix attached hereto except:

"* * *

- "6. Services performed by a part-time employe or officer in a position or office which does not normally require actual performance of duty for at least 600 hours in each year * * *."

Ashland county was not one of the political subdivisions listed in the appendix to the original agreement which was signed on June 13, 1951. However, on August 6, 1951 the first of more than 300 modifications to said agreement was signed. Said modification named Ashland county as one of the political subdivisions listed in the appendix and for such county the only exclusion was "positions for which occupants are compensated on a fee basis." It was made effective January 1, 1951 in accordance with the resolution adopted by the county board.

After the passage of ch. 331, Laws 1957, and on July 31, 1957, modification No. 146 was signed which amended (B) 6 of the original agreement to read:

“Services performed by a student or a member of a board or commission, except members of governing bodies, in a position or office which does not normally require actual performance of duty for at least 600 hours in each year.”

Said modification No. 146 also provided “This modification shall be effective as of July 1, 1957. The purpose of this amendment is to include under the agreement all those part-time employes and officers other than those specifically described above who were excluded from coverage by the original wording of this section.”

The act which became ch. 331, Laws 1957, was recommended by the director of the public employes social security fund after he had conducted an extensive poll of political subdivisions to determine their sentiment from which it was learned that the great majority of those polled favored a change in the law which would make it possible to provide social security coverage for many part-time public employes and officers who were excluded therefrom by the provisions of sec. 66.99 (4a), Stats. of 1951.

The elimination of the 600 hour provision for all except students and members of boards and commissions was recommended in the final report of the Government's Retirement Study Commission dated January 15, 1957 on Page 69-69a. The last sentence on page 69a reads: “However, by making some assumptions on the basis of our best information we estimate the total cost to local units to be about \$30,000 per year in additional OASI contributions.” The same statement was made in the report which the Joint Survey Committee on Retirement Systems made to the legislature on Bill 396, A., which became ch. 331, Laws 1957. Hence, it would appear to have been the understanding that it would cover additional employes of municipalities which had previously adopted a resolution to come under social security.

You have emphasized the fact that at no time did the county board of Ashland county affirmatively express a desire or intent to include the members of said board under OASI and that in the absence of such an expression the members of the county board should not be included. I would not contend that the county board intended to include the members thereof under social security.

At the time that the county board adopted the aforesaid resolution it could have elected to exclude all part-time positions and offices. Possibly in reliance upon the 600 hour statutory exclusion which was then in sec. 66.99 (4a) it did not do so. If it had excluded all part-time positions and offices, the change in Sec. 66.99 (4a) made by ch. 331, Laws 1957, removing the 600 hour requirement for most part-time positions would not have operated to bring any other employes or officers of the county under social security. The federal laws permit a municipal subdivision which has elected social security coverage to narrow or eliminate previous exclusions but do not permit it to broaden or add to them. Hence, Ashland county may not now take the action which it could have taken to exclude members of the county board.

No 600 hour rule ever was applicable to corporate or individual employers. When congress permitted the inclusion of public employes under OASI, it gave the public employer the right to certain exclusions which private employers did not have. The statutes relating to membership in the Wisconsin retirement fund contained a 600 hour exclusion and the legislature provided a 600 hour exclusion in sec. 66.99 (4a) for public positions and offices. This was a matter of legislative policy and it was the policy which prevailed at the time of the enactment of sec. 66.99 in 1951. It was a troublesome policy to administer and in 1957 the legislature decided to change the policy. I believe that this policy may be compared to the legislative policy which was litigated in *State ex rel. McKenna v. District No. 8 of the Town of Milwaukee*, 243 Wis. 324, 10 N.W. 2d 155. In that case the court held that the repeal of the teacher tenure statute by ch. 183, Laws 1941, without any qualifying or saving clause was in-

tended to abolish all teachers' tenure covered by the statute, and operated retrospectively so as to destroy a teacher's permanent tenure status acquired prior to the repeal of the statute under which it was acquired.

In the matter at issue the members of the county board would have been included under OASI pursuant to the language of the aforesaid resolution but for the provisions of sec. 66.99 (4a) as it was created by ch. 60, Laws 1951. When the exclusion was removed by ch. 331, Laws 1957, many of those who had been excluded thereby became included.

Although this result may not have been intended or even desired by the county board of Ashland county, I am of the opinion that this result followed as a matter of law.

The courts have held many times that counties and other political subdivisions are strictly creatures of the legislature and are entirely within legislative control subject only to provisions of the constitution. *State ex rel. Prahlow v. City of Milwaukee*, 251 Wis. 521, 30 N.W. 2d 260, *Columbia County et al. v. Board of Trustees of Wisconsin Retirement Fund* 17 Wis. 2d 310, 116 N.W. 2d 142. The legislature could have passed a law bringing all officers and employees of all counties under OASI and compelled the counties to pay their respective costs therefor. The effect of ch. 331, Laws 1957, was much less drastic since it did only a small part of what the legislature might have done.

You have also contended that since the resolution of the Ashland county board read in part:

"All persons occupying offices filled by election by the voters of Ashland County shall also be covered," and it has been held that a county board member is deemed to be an officer of the respective city, village or town in which he was elected rather than a county officer, said resolution would not, in any case, operate to bring the members of the county board under OASI.

It is true that in 47 OAG 302 it was held, in accordance with prior opinions of this office, that county board mem-

bers were officers of a city, village or town rather than of the county.

Subsequent to the issuance of the opinion cited as 47 OAG 302, the question was raised as to whether the members of a county board were not acting in a dual capacity.

In an unofficial opinion it was said :

“Sec. 59.01, Stats., provides in part: ‘Each county in this state is a body corporate, empowered to sue and be sued, to acquire and hold, lease or rent real and personal estate for public uses or purposes * * * to make such contracts and to do such other acts as are necessary and proper to the exercise of the powers and privileges granted and the performance of the legal duties charged upon it.’

“Sec. 59.02 (1) provides: ‘The powers of a county as a body corporate can only be exercised by the board thereof, or in pursuance of a resolution or ordinance adopted by it.’

“Sec. 59.07 contains about 70 subsections enumerating the powers of the county board. Paragraph (a) of subsection (1) provides that the county board may acquire, lease or rent property for public uses or purposes of any nature, including acquisitions for county buildings, parks, highways, etc. Paragraph (b) provides that the board may ‘Make all orders concerning county property and may commence and maintain actions to protect the interests of the county.’ Paragraph (d) provides that the board may construct, maintain and operate all county buildings and structures. Subsection (5) provides that the board may ‘Represent the county, have the management of the business and concerns of the county in all cases where no other provision is made, apportion and levy taxes and appropriate money to carry into effect any of its powers and duties.’ Subsection (18) provides that the county board may, outside of cities and villages exercise ‘* * * all the powers conferred on cities to regulate dance halls, roadhouses and other places of amusement.’

“Subsection (20) provides that the board may establish a civil service system for the county personnel. Subsection

(26) provides that the board may 'Create, promote and conduct and assist in creating, promoting and conducting recreational activities in the county which are conducive to the general health and welfare * * *.'

"Section 59.11 (1) provides that 'The county seat shall be fixed and designated by the county board.'

"Sec. 59.15 provides that the county board shall fix the salaries of county officers, boards, commissions, positions, etc.

"Sec. 59.97 authorizes the county board to enact a county zoning ordinance.

"Many other sections of the statutes could be cited to indicate that the members of the county board are rendering service on behalf of the county as well as representing the municipality in which they are elected, but the foregoing appear to indicate quite clearly that the members of the county board are in fact acting in a dual capacity."

Thereafter the director of the public employes social security fund issued a bulletin dated May 15, 1959 to OASDI agents for counties in Wisconsin which referred to both of said opinions and stated in part:

"It has been determined that because a supervisor serves in a dual capacity and is paid by the county for service rendered to the county, compensation paid to him by the county is properly reported for OASDI coverage by the county unless the agreement modification covering that county operates to exclude such service.

"It therefore appears that where a county has acted to provide OASDI coverage for its personnel such is applicable to the supervisors unless the exclusions incorporated in the county resolution operate to exclude supervisors. The exclusion of fee basis earnings, or officers elected by the voters, would have no effect on these supervisors. Insofar as the county is concerned, these supervisors are not elected officials since they are elected officials in the towns, cities

and villages and the provisions of the resolution of the county pertaining to elected officials would not be applicable to them."

Both the director of the public employes social security fund and the federal officials who administer the federal laws relating to social security have proceeded for about 3½ years under the aforesaid interpretations and instructions and in reliance thereon. The practical construction by officials who are charged with the duty of administration is entitled to great weight and is often decisive. *Trczyniewski v. Milwaukee*, 15 Wis. 2d 236, 112 N.W. 2d 725.

Therefore it is my opinion that all of the members of the county board of Ashland county should be reported for OASI coverage since July 1, 1957 under the resolution of April 17, 1951 and ch. 331, Laws 1957.

Although they may not have any bearing upon the soundness of the foregoing opinion, some further practical considerations may be mentioned. The state of Wisconsin, through the public employes social security fund, is engaged in administering a program which is fundamentally a federal one. In enacting sec. 66.99 the state agreed by subsec. (4) thereof to be bound by "Federal regulations". Subsecs. (5), (6) and (7) of said section provide:

"(5) Each public agency included under an agreement made pursuant to this section shall be liable for and shall make the contributions required of an employer under the federal insurance contributions act.

"(6) Each public agency included under such an agreement shall withhold from the persons compensated by such public agency who are covered by such agreement the portion of such compensation equal in amount to the tax which would be required to be withheld under the federal insurance contributions act if such services constituted employment within the meaning of that act.

"(7) The contributions required under subsection (5) and the amounts withheld under subsection (6) shall be remitted by each public agency in conformity with the provisions of federal regulations and the regulations promul-

gated under subsection (11). The state shall be liable for all such remittances due from public agencies in conformity with the agreement provided for in subsection (4), and shall make payment of all sums which shall become due under subsection (7) and become delinquent."

The federal officials engaged in administering the social security program have made it clear to the director of the public employes social security fund that if members of the county board of Ashland county are not reportable for social security purposes by virtue of the aforesaid resolution and the enactment of ch. 331, Laws 1957, it will be necessary, under 47 OAG 302 to consider their status under the various resolutions for social security coverage which have been adopted by the respective towns, cities and villages of which they have been held to be officers. Unless the resolution in any particular instance specifically excluded part-time officers or excluded all elected officers, the member of the county board who was elected as town board chairman or city or village supervisor would be covered thereunder for social security purposes. In such case the administrative problems would be multiplied. Since the compensation is paid by the county, it would have to file the report and perhaps would still have to make the matching contribution. However, the OASDI agent for the county would have to make a separate report for each county board member, using the employer number of the town, village or city instead of the employer number assigned to the county. This would require a vast increase in the number of reports for the future and a multitude of correctional reports for the past.

If the reports were made by the county but the matching contributions were to be paid by the town, city or village, confusion would be confounded. Moreover, it would mean that some members of the county board who actually desire social security coverage would be deprived of it.

I would not even speculate as to what procedure would have to be followed to rectify claims and recover social security benefits that would have been paid erroneously.

JRW

County Committee—Expenses—Sec. 59.06 (2) includes expenses of the county highway committee attending road schools and other meetings, as well as other county committees.

October 31, 1962.

FREDERICK R. SCHWERTFEGER,
Corporation Counsel, Dodge County.

You have requested my opinion as to whether or not the county highway committee may be reimbursed under the provisions of sec. 59.06, for their attendance at road schools, meetings and conventions.

The pertinent parts of sec. 59.06 read as follows:

“59.06 Committees; appointment; compensation. (1) The board may, by resolution designating the purposes and prescribing the duties thereof and manner of reporting, authorize their chairman to appoint before June 1 in any year committees from the members of the board, and the committees so appointed shall perform the duties and report as prescribed in such resolution.

“(2) Committeemen shall receive such compensation for their services as the board allows, not exceeding the per diem and mileage allowed to members of the board and such committee members shall receive such compensation, mileage and reimbursement for other expenses as the board allows for their attendance at any school, institute or meeting which the board directs them to attend. * * *”

You question whether this section is applicable to the county highway committee, since this committee is elected by the county board under the provisions of sec. 83.015, and not a committee that may be appointed by the chairman under sec. 59.06 (1).

You point out that the former sec. 59.08 (32) specifically provided for payment of expenses of the county highway committee at road schools and other meetings, but that this

section was repealed in 1955 as a part of an extensive revision of the statutes, relating to county law, known as the "Home Rule for Counties" law, ch 651, Laws 1955.

Senate Bill 535, S, which created this chapter, contains the following footnote to sec. 59.06:

"Note: Since 59.06 (2) covers expense of committee attendance at any school, institute, etc., at board direction, 59.08 (32), special provision for attendance of highway committee at road school, etc., will be repealed. This is a change to the extent that under the latter a 2/3 vote is required. Except for this no change is intended."

Without question, this note reflects the intent of the legislature so that sec. 59.06 (2) is applicable to the county highway committee.

REB

County Boards—Children's Home—County boards (other than Milwaukee county) do not have authority to establish a children's home.

November 15, 1962.

HAROLD J. WOLLENZIEN,
Corporation Counsel, Waukesha County.

You have requested an opinion from this office on the following question:

Does Waukesha County have the authority under Section 59.07 (1), Wis. Stats., to establish a children's home not operated in compliance with Section 48.31, Wis. Stats.?

The possibly pertinent portions of sec. 59.07 (1) read as follows:

"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:

“(1) (a) * * * acquire, lease or rent property, real and personal, for public uses or purposes of any nature * * *

“* * *

“(d) *Buildings; maintenance.* Construct, maintain and operate all county buildings and structures * * *.”

Section 46.22 (5) provides that:

“The county board of supervisors may provide that the county department of public welfare shall * * * have any or all of the following functions, duties and powers and such other welfare functions as may be delegated to it by such county board of supervisors:

“* * *

“(g) To administer child welfare services including services to children who are mentally defective, dependent, neglected, dilinquent, or born out of wedlock, and to other children who are in need of such services. * * *”

This statute on the face of it would appear to authorize the county board to do whatever reasonably might be necessary to implement such services, including the building of children’s homes.

However, if a county department of public welfare is designated by the county board to administer child welfare services, it would appear that such services are to be provided according to and within the limitations set forth in secs. 48.56 (1) (a), 48.57, and 48.58.

Sec. 48.56 (1) (a) provides:

“48.56 County child welfare services. (1) Each county shall provide child welfare services through the staff of one or more of the following agencies:

“(a) A county welfare department authorized by the county board under s. 46.22 (5) (g) to provide child welfare services; * * *.”

The powers and duties of county agencies to provide such services are set forth in sec. 48.57 (1). Only paragraph (e) authorizes the placement of such children in a children's home and paragraph (e) is limited to Milwaukee county (500,000 or more).

Sec. 48.58 refers to existing county children's homes. According to the note in Bill 444, S, (1955), p. 70, this refers to the Milwaukee county children's home, which was the only one "existing" then, and still is. The inference is strengthened by the reference in sec. 48.58 (1) (a) to the "children's court", which exists only in Milwaukee county. Secs. 48.06 (1), 253.13 (2).

Moreover, no provision is made for the government of children's homes outside Milwaukee county. In the case of of detention homes (an entirely different type of institution) provision is made in section 48.31. Other county institutions are under the sheriff (jail) or board of trustees (county home, mental hospital, tuberculosis sanatorium). Only Milwaukee county has provision for administration of the home for children by the director of institutions and departments, under supervision of the county board of public welfare. Section 46.21 (2) (a).

ENW

Counties—Aids—Discussion of secs. 49.61 and 49.27 (2) and (3) relative to county responsible for aid to disabled person when recipient moves from one county to another.

November 16, 1962.

HARRY J. O'LEARY,

District Attorney, Rock County.

From your request for an opinion the following facts appear: Prior to 1954 one A resided in county X and also had a legal settlement therein. He applied to X county for

aid to the disabled and such aid was granted to him and paid by said county. In 1954 A went to county Y and resided in a private nursing home in said county. A then applied to Y county for aid to the disabled and was granted such aid by said county. On June 2, 1962 A went back to X county and resided in a nursing home in said county for one month. He again applied for disabled aid from X county and received the same, starting July 1, 1962. Then A again moved back to Y county and again applied for disabled aid from the latter county.

Your question is whether X county or Y county should now pay disabled aid to A, assuming that he is eligible therefor.

Sec. 49.61 relates to aid to totally and permanently disabled persons. Subsec. (2) of said section provides the eligibility requirements for such aid. Subsecs. (3), (4) and (7) provide:

“(3) APPLICATION. Application may be made by an agent or the legal guardian of a person believing himself to be eligible. Application shall be made on forms prescribed by the state department of public welfare to the welfare agency of the county in which he resides. Any individual wishing to make application for aid to the totally and permanently disabled shall have opportunity to do so.

“(4) DETERMINATION OF ELIGIBILITY. The county agency shall promptly make an investigation to ascertain all pertinent facts as to the applicant's eligibility. Eligibility and need shall be reinvestigated as often as necessary and at least once each year. All investigations shall be reported in writing and appropriately filed.

“* * *

“(7) ORDER DIRECTING PAYMENT. If the county agency finds a person eligible for aid under this section, such agency shall, on a form prescribed by the state department of public welfare, direct the payment of such aid by order upon the county clerk or county treasurer of the county; all payments of aid shall be made monthly, except that the

director of the county agency may, in his discretion for the purpose of protecting the public, direct that the monthly allowance be paid in 2 or more instalments."

Sec. 49.27 (2) and (3) provide:

"(2) If a person eligible for or receiving old-age assistance, aid to the totally and permanently disabled or aid to the blind goes to another county to reside in a private tax-exempt, charitable, benevolent or fraternal institution or home for the aged, or a county home, or a municipal home, or a private nursing or convalescent home, and continues to be eligible for old-age assistance, aid to the totally and permanently disabled or aid to the blind as defined in this chapter while therein residing, he shall receive such assistance, including care given under s. 49.40, from the county from which he moved, or continue to receive his assistance from the county paying the same at the time he moved, or continue to receive his assistance from the county paying the same at the time he moved, respectively, unless he has a legal settlement under s. 49.10 in the county in which the institution or home is located, in which case such county shall make payment of such assistance as he is eligible to receive. As used herein a private nursing or convalescent home means a place not public, admitting 3 or more unrelated persons for indefinite residence for the purpose of furnishing them board, room, laundry and care because of prolonged illness or defect or during recovery from injury or disease, including the procedures commonly employed in waiting on the sick, such as administration of medicines, preparation of diets, bedside care, application of dressings and bandages and treatments prescribed by a physician.

"(3) If a person eligible for or receiving old-age assistance, aid to totally and permanently disabled or aid to the blind who resides in any of the facilities enumerated in sub. (2) goes to another county to reside and within the period of 6 months thereafter takes residence in any of said facilities and continues to be eligible for old-age assistance, aid to totally and permanently disabled or aid to the blind as defined in this chapter while therein residing, he shall re-

ceive such assistance, including care given under s. 49.40, from the county from which he moved, or continue to receive his assistance from the county paying the same at the time he moved, respectively, unless he has a legal settlement under s. 49.10 in a county in which the facility is located in which case such county shall make payment of such assistance as he is eligible to receive."

As indicated above, sec. 49.27 (2) provides that if a person eligible for, or receiving, aid to totally and permanently disabled goes to another county to reside in "a county home, or a municipal home, or a private nursing or convalescent home" and continues to be eligible for such assistance, he shall receive the same "from the county from which he moved, or continue to receive his assistance from the county paying the same at the time he moved" unless he has a legal settlement in the county in which the home is located, in which case the latter county shall pay such assistance as the person is eligible to receive.

The original request from your office indicates that when A moved back to Y county the second time he went to live in "a private Nursing Home" while your more recent communication indicates that he moved to "a public nursing facility." I shall assume that in any case it is one of the "homes" which are enumerated in sec. 49.27 (2).

Said statute requires that in such an event A shall receive the aid to the disabled from X county since that is both the county from which he moved and also the county which was paying the aid at the time that A moved to Y county, unless he has a legal settlement in Y county. It appears that his legal settlement still is in county X and that the aid for the disabled should continue to be paid by the latter county.

As indicated above, before A last moved back to Y county, presumably he was residing therein in one of "the facilities enumerated in (2)." It does not appear whether A is now residing "in any of said facilities." If A "takes residence in any of said facilities" within 6 months after June 2, 1962 and continues to be eligible for aid to the disabled while re-

siding therein, X county would also be responsible for the payment of such aid under 49.27 (3).

In other words, subsecs. (2) and (3) of sec. 49.27 each enumerates a set of circumstances under which county X might be liable for payment of aid. The facts coincide with the circumstances enumerated in 49.27 (2) and may also coincide with those enumerated in (3). If the circumstances coincide with those enumerated under either subsection, county X is liable for payment of the aid to the disabled.
JRW

*Navigable Waters—Conservation Department—*When construction of a dam creates a 54 acre lake which is used by the public for a number of years, conservation department would be justified in considering the lake navigable and subject to state regulations.

November 19, 1962.

L. P. VOIGT, *Director,*
Conservation Department.

You have asked the following questions about Blass lake in the town of Delton, Sauk county. May the conservation department participate in the development of a public access to this lake? May the riparian owners introduce and manage fish populations in this lake? Do persons fishing in this lake require a fishing license? Are riparian owners subject to open and closed seasons, bag limits and other fishing regulations? Do the provisions of sec. 29.29 (3) prohibiting the deposit of deleterious substances apply on Blass lake? This raises the basic question whether this lake is a public or a private lake under sec. 30.10, which declares navigable waters to be public.

Back in 1924 one Dr. Blass contacted the public service commission regarding the construction of a dam in a small

stream which he stated was one foot deep and six feet wide. In those days that commission was using a test for navigability which took into account the land area of the watershed drained by the stream. Applying that test, representatives of that commission advised Dr. Blass that the stream was non-navigable, that no permit for a dam was necessary, but that the commission would want to approve the plans. No formal commission action was taken and no adjudication as to these matters was made. Commission representatives did approve the plans and the dam was built creating a lake some seventeen feet deep and about fifty-four acres in size. The land flooded was owned by Dr. Blass.

We have no information whether Dr. Blass ever conveyed the land now covered by water. He apparently did convey land adjacent to the lake. For the last fifteen years the Jewish Community Center of Chicago, a Red Feather Agency, has owned a large parcel of land adjacent to the lake. They consider the lake to be their private property. Other persons also own lake shore lots and have cottages located thereon. They also consider that the lake is private and that they have a right to use it. For at least the last 27 years members of the public from time to time have used the lake for boating, fishing and swimming.

There are black bass, crappies, bluegills, and some northern pike in the lake. At one time a private party took fish from the Wisconsin river and stocked this lake. There are town roads platted to the lake shore, but they have not been opened for use all the way to the shore. On one occasion private parties treated the lake to kill weeds and killed a lot of fish. This office advised that they could not be prosecuted for doing this without a permit, if in fact this were a private lake.

The outlet stream below the dam runs about a mile into Lake Delton. This stream is about one foot deep and six to eight feet wide. The inlet stream divides and runs into Blass lake in two places. These two inlet streams are one foot deep and six feet wide. These are cold water streams but probably contain no trout at present.

Mr. Frank Adamske, Baraboo, Wisconsin, has been the conservation warden in the Blass lake area for the last 27 years. During that time he has enforced the fish and game laws on this lake. He requires out of state guests of the Jewish Community Center to take out non-resident fishing licenses before fishing in this lake. The Jewish Community Center does not challenge the right of the state to regulate fishing in this lake. They have not applied for and do not have a private fish hatchery license. Nevertheless, they consider the lake private. There was some beaver trapping on the lake about ten years ago. Mr. Adamske has in the past made arrests for fishing law violations on this lake.

Whether Blass lake is a public or private lake depends upon the following questions: (1) Was the stream, in its original state, navigable in fact before the dam was built? (2) If it was not navigable in fact in its original state, has the public, since the dam was built, so used the lake for navigational purposes for a period of time long enough to establish such a public right by prescription or implied dedication?

In 1924 the public service commission, under the test of navigability in use at that time, felt that the original stream was non-navigable. However, this was not a formal determination or adjudication of rights, and in any event is not binding in the sense of *res adjudicata*. The modern test for navigability is whether there is enough water to float a skiff or other light boat or canoe. *Muench v. P.S.C.*, (1951) 261 Wis. 492, 53 N.W. 2d 514. It would appear obvious that the original stream, which was admittedly one foot deep and six feet wide, would easily float and accommodate a canoe. If this were true, it would clearly have been navigable by the modern day test. This conclusion is further supported by the fact that the stream at the present time, both above and below the lake, is approximately one foot deep and six to eight feet wide. To meet the test of navigability the stream does not have to be navigable at all seasons of the year. It is sufficient if it attains this navigable capacity for a few days or weeks each year at the season of high water. *Olson v. Merrill*, (1877) 42 Wis. 203.

If in fact the stream was navigable in its original state, the waters of the lake were public navigable waters as soon as the dam was built and the lake created. The public would have all the usual rights to use such waters for navigational purposes. *Mendota Club v. Anderson*, (1899) 101 Wis. 479, 78 N.W. 185; *Pewaukee v. Savoy*, (1899) 103 Wis. 271, 79 N.W. 436. However, if it should be found that the waters of the stream in its original state were not navigable, still the navigational use of this lake by members of the public generally over the past 27 years or more establishes a public right by prescription or dedication. *Haase v. Kingston Coop. Cr. Assn.*, (1933) 212 Wis. 585, 250 N.W. 444. It would thus appear that Blass lake is at this time a public and not a private lake, regardless of whether the original stream was navigable.

I conclude that the conservation department at this time would be justified in considering this lake a public navigable water of the state of Wisconsin. Thus the answers to your specific questions are as follows. The conservation department may participate in the development of a public access to the lake under section 23.09 (15). The private riparians may not manage the fish populations therein under section 29.52. All persons fishing on Blass lake must have a proper fishing license and are subject to closed seasons, bag limits, and other fish and game regulations. The provisions of section 29.29 (3), prohibiting the deposit of deleterious substances in public waters, are applicable to Blass lake.

AH

Counties—Sanitorium Charges—Counties may enter into contracts with other counties for sanitorium care of residents but payment therefor must be governed by the statutes.

December 4, 1962.

J. B. MOLINARO,

District Attorney, Kenosha, County.

You ask my opinion on several questions arising out of a situation described by you as follows:

“Kenosha County and Racine County have been considering the economical feasibility to both counties by an arrangement and agreement whereby Racine tuberculosis patients, except Racine T. B. outpatients, will be cared for at the Kenosha Willowbrook Sanatorium. In the proposed tuberculosis arrangement and agreement, certain questions have arisen which I have been requested to refer to your office for a written opinion.

“The proposed agreement is not intended to establish a joint sanatorium, but Kenosha County and Racine County desire to enter into an agreement whereby Kenosha will accept said Racine T. B. patients (excepting Racine outpatients) including Racine T. B. patients presently in the Racine Sanatorium in which agreement Racine County agrees to make payment directly to Kenosha for the said services of Kenosha.

“The details of the aforesaid agreement have been substantially agreed upon by the said respective Counties, which are now prepared to take action thereon. It is not the intention of the said Counties to merge or consolidate their facilities. It is the expressed intention of said Counties to effect a more economical care for said tuberculosis patients, thereby reducing costs and performing a service to the taxpayers of the respective counties by the furnishing of services for pay by Kenosha County to Racine County.

"It is proposed that Racine County will pay the *actual per capita cost* of its said patients to Kenosha County. Said costs will include depreciation costs as established by the State Department of Audit. Racine County will pay directly to Kenosha on an estimated monthly basis, and adjustment to be made when the actual per capita cost is determined for the fiscal year, so there will be no need for carrying charges as provided in Section 50.09 (3) of the Wisconsin Statutes."

With the foregoing situation in mind, you then ask my opinion on these questions:

(1) May two counties contract for the care of tuberculosis patients as expressed hereinabove?

(2) May Kenosha County forego the four per cent and ten per cent referred to herein by contract with Racine County and reserve the right to charge said surcharges to other counties?

(3) May Racine make payments, as hereinbefore mentioned directly to Kenosha or must Racine make payments to the state?

Your own opinion on these questions is that all of them should be answered affirmatively.

In response to the first of your above-stated questions, it is my opinion that two counties may contract for the care of tuberculosis patients in the manner indicated above, i.e., county "A" may enter into an agreement with county "B" whereby county "A" tuberculosis patients, except county "A" T.B. outpatients, will be cared for at the tuberculosis sanatorium of county "B".

Your opinion on this particular question agrees with mine, and you apparently base your opinion on secs. 59.07 (11) and 66.30. Sec. 59.07 (11), empowers a county board to "join with the state, oher counies or municipalities in a cooperative arrangement as provided by s. 66.30." The pertinent part of sec. 66.30, so far as the first of your above-stated questions is concerned, is sub. (2), which reads:

“Any municipality may contract with another municipality or municipalities or the state or any department or agency thereof for the receipt or furnishing of services or the joint exercise of any power or duty required or authorized by statute.”

Sub. (1), sec. 66.30 defines “municipality” as used in sec. 66.30 as including a county. I have no difficulty in concluding, as you did, that under these statutes Kenosha county can lawfully enter into a contract with Racine county whereby Racine tuberculosis patients, except Racine T.B. outpatients, will be cared for at the tuberculosis sanatorium of Kenosha county (Willowbrook Sanatorium).

Your second question is whether or not Kenosha county could, in the proposed agreement, forego the four per cent and ten per cent “surcharges” referred to in your letter and provided under sec. 50.09 (3), but reserve the right to charge said surcharges to other counties. In my judgment, the proposed agreement cannot lawfully so provide. As you indicate in your letter to me requesting this opinion, the statute governing the above-mentioned surcharges is sub. (3), sec. 50.09. It reads in part as follows:

“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. * * * 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 recover replacement costs for buildings, fixtures and equipment as they are replaced.”

In my judgment, the above-quoted language shows that it was the intention of the legislature that the four per cent and ten per cent surcharges referred to in the last sentence of sub. (3), sec. 50.09, should be added, at county option,

only to the *total* charge or *total* amount due a given county maintaining a tuberculosis sanatorium "for the maintenance, care and treatment of patients at public charge." The language above-quoted from sub. (3), sec. 50.09, does not contemplate and does not permit, in my opinion, the addition of the surcharges here in question to only a part of the above-mentioned total charge or total amount due.

In your opinion, this second question should be answered affirmatively, with Kenosha county permitted to forego the four per cent and ten per cent surcharges with reference to Racine county, reserving, however, the right to charge those surcharges to other counties. It would appear that in reaching such conclusion you are relying on the language of sub. (3), sec. 66.30, which reads:

"Any such contract may provide a plan for administration of the function or the project, which may include, without limitation because of enumeration, provisions as to pro-ration of expenses involved, deposit and disbursement of funds appropriated, submission and approval of budgets, creation of a commission, selection and removal of commissioners, formation and letting of contracts."

Though you do not specifically so state, I would gather that you are convinced that this statute gives municipalities, contracting with one another, great freedom as to the details of their contract covering "provisions as to pro-ration of expenses involved, deposit and disbursement of funds appropriated, submission and approval of budgets"; and I assume that you believe that this freedom, insofar as it relates to the provisions of a contract between municipalities dealing with "pro-ration of expenses involved" would permit Kenosha county, under the proposed contract here in question, to forego the surcharges in question so far as Racine county was concerned while retaining the right to charge those surcharges to other counties. If this is your reasoning, I must disagree with it, for while I feel that it was the intent of the legislature, in enacting sub. (3), sec. 66.30, to give substantial freedom of action to municipalities in working out the details of contracts authorized by sec.

66.30, it is my opinion that it was never the intent of the legislature, in enacting sec. 66.30 or any part thereof, to give municipalities a power to ignore or override the requirements or meaning of specific statutes, such as sub. (3), sec. 50.09, above-quoted, dealing with a power conferred on municipalities and spelling out the nature and extent of such power. In my judgment, there is no conflict between the above-quoted portion of sub. (3), sec. 50.09 and sub. (3), sec. 66.30, but if such a conflict existed, the specific statute, sec. 50.09 (3), would prevail over the general statute, sec. 66.30 (3), under one of the best-known rules of statutory construction.

Your third question is whether Racine county may make payments under the contemplated agreement, directly to Kenosha county. It is my opinion that it may not. Sec. 50.09 provides a specific, detailed method of inter-county settlements for maintenance of inmates of one county's tuberculosis sanatorium 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. This method was obviously meant to be an exclusive one, and it does not contemplate or permit "direct payment" by one county to another to achieve such intercounty settlements. Where a specific statute spells out a scheme for the handling of governmental business involving several municipalities, those municipalities cannot, in the exercise of contractual power conferred on them by a general statute, thrust aside the statutory scheme in favor of one more to the liking of such municipalities.

JHM

Cities—County Boards—Wards—Discussion of ch. 62 concerning division of a city into wards and the election of aldermen and supervisors.

December 13, 1962.

WILLIAM D. BYRNE,

District Attorney, Dane County.

On November 19, 1962 you requested a formal opinion relative to a proposed 19 aldermanic district — 83 ward plan for the city of Madison. You enclosed a copy of an opinion from the Madison city attorney to the Madison common council dated October 22, 1962, which concluded that there was no sound legal basis for the plan. The city attorney did conclude, however, that the city would create 83 wards of 1,500 population each and be eligible for 83 supervisors. You also enclosed a memorandum opinion of the legal counsel of the Wisconsin league of municipalities, in which he reviewed the opinion of the city attorney and came to an opposite conclusion.

While it is true that the adoption of the plan, or a similar plan would have a practical impact upon county government, it is conceded that the city is empowered to change the number and boundaries of its wards. Sec. 62.08.

The statutes clearly provide for representation from cities on the county board as follows:

Sec. 62.09 (1) (a) provides that there shall be "one supervisor from each ward."

Sec. 59.03 (2) (b) provides:

"(b) *Same.* A supervisor from each city ward or part of city ward in the county, but each city with a population of not over 800 shall have only one supervisor unless the city is in more than one county, in which case it shall be entitled to one supervisor in each county."

The county is interested in the geographic division of a city into wards only to the extent that such division determines the number of supervisors to be elected to the county board. If the division is in compliance with the provisions of sec. 62.08, so as to constitute a valid ward, it is of no concern to the county that one or two aldermen are chosen from the ward to the city council.

Sec. 64.03 pertains only to cities operating under a city manager plan and provides that councilmen may be nominated and elected from wards, or from the city at large. However, sec. 64.03 (3), provides:

“(3) Nothing herein shall be construed to impung the authority of a city to exercise its home rule power to provide a different method of electing members of the council by districts or otherwise, or by a combination of methods, or the number or terms thereof.”

Under the city commission plan, members of the council, councilmen, shall be nominated and elected by the voters of the city at large. Sec. 64.28 (1).

Sec. 64.39 (1) provides that a city of the second or third class may, by a vote of electors therein, “increase the number of the members of the council in such cities from a mayor and 2 councilmen, to a mayor and *one councilman from each ward* * * * the councilmen to be elected by the electors of the respective wards * * *.”

Sec. 64.40 (1) provides that a city described in sec. 64.39 operating under the commission form of government may, by proceeding according to sec. 64.39, change from a mayor and two councilmen “to a mayor and one alderman for each four thousand or major fraction thereof of population to be elected at large * * *.”

“* * * A *ward* is a local geographical subdivision of a city or village. * * *”

State ex rel Witkowski v. Gora, (1928) 195 Wis. 515, 518, 218 N.W. 837.

“* * * The general question of the division of a city into wards is a legislative question, * * *.”

State ex rel. Neacy v. Milwaukee, (1912) 150 Wis. 616, 619, 138 N.W. 76.

In cities operating under ch. 62, however, wards form the geographic division from which aldermen are chosen.

Sec. 62.08 (2) provides:

“(2) Wards shall be as compact in area as possible and contain as nearly equal population as practicable in cities of the first class, and have no less than 1,500 in cities of the second class, nor less than 1,000 in cities of the third class, nor less than 500 in cities of the fourth class having more than 4 wards; except that in the event of annexation of lands to any city no limitations relating to population or area shall be effective in the creation of a new ward or wards in the area or areas or portions thereof so annexed or being annexed; and further except that all wards and ward lines may be established in such manner or be so arranged or set up as shall appear to the common council most advisable and the common council may so provide with respect to municipal election of aldermen.”

As previously pointed out, sec. 62.09 (1) (a) provides that there be “2 *aldermen and one supervisor from each ward*” except that “* * * In the event that one *alderman* from each ward is provided pursuant to s. 66.018 (1), the council may, by ordinance, adopted by a two-thirds vote of all its members, and approved by the electors at the general or special election, provide that there shall be 2 *aldermen* from each ward.”

Sec. 62.09 (1) (b) provides in part:

“* * * The council may, by charter ordinance, adopted pursuant to s. 66.01, provide that there shall be one *alderman* from each ward, and may also, in like manner, provide that, whatever the number of *aldermen*, the *supervisor* of each ward shall be the *alderman* or one of the *aldermen*. Any office dispensed with under this paragraph may be recreated in like manner, and any office created under this section may be dispensed with in like manner.”

Wards, as created by a city operating under ch. 62, also form the geographic division from which supervisors are chosen. Sec. 62.09 (1) (a), (b), and 59.03 (2) (b).

Wis. Const. Art. IV, sec. 23, provides:

“The legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable.”

A member of a board of supervisors in a county other than Milwaukee county, chosen in a city, is a city officer for some purposes, 32 OAG 404, 14 OAG 51. However, while serving on the board he has a dual capacity even though he is not a county officer within the meaning of Art. VI, sec. 4, Wis. Const. *State ex rel. Gill, Att’y Gen’l, vs. The Supervisors of Milwaukee County*, (1867) 21 Wis. *443; *State ex rel. Williams v. Samuelson*, (1907) 131 Wis. 499, 111 N.W. 712.

It is of concern to the county therefore, that the same geographic unit, the ward, which forms the basis from which one or two aldermen are chosen, be the same geographical unit from which the one county supervisor is chosen.

While the provisions of ch. 62 permit a city operating thereunder to provide for one or two aldermen per ward, there is no authority in ch. 62 which would permit less than one alderman per ward, nor is there provision permitting cities operating under ch. 62 to choose aldermen at large or on any basis other than the ward system.

We are of the opinion that the division of a city into wards is a matter of state-wide concern.

We are of the further opinion that the system of municipal representation on county boards is a matter of state-wide concern, and that since the provisions of sec. 62.09 apply uniformly to all cities, notwithstanding local option to operate under a city manager or city commission form of government, that where aldermen are chosen on a ward

basis, it is a matter of state-wide concern that the same geographical unit from which aldermen are chosen, should be used for the selection of supervisors.

I am therefore of the opinion that there is no sound legal basis for the 19 aldermanic district, 83 ward plan.

RJV

County Judges—Compensation—Discussion of secs. 253.07 (2) and 66.195 relative to increase or decrease of county judges' compensation during term of office.

December 19, 1962.

WILLIAM D. BYRNE,

District Attorney, Dane County.

You have requested a formal opinion on the following five questions:

“(1) May the extra compensation for a county judge, pursuant to Section 253.07 (2), be granted him during his term of office?

“(2) If such compensation may be increased during his term of office, may it also be decreased during his term of office?

“(3) If an increase during the term of office is legal, must the increase or additional compensation be the same for all judges regardless of their term of office?

“(4) If increases during the term of office only are authorized, pursuant to Section 66.195, does such increase have to be given to every county judge and for his full term, and if so, how can a decrease ever be achieved where the terms of the judges differ, and where, pursuant to Section 253.07 (2), the extra compensation must be the same for each *such judge*?

“(5) If you hold that increases in the extra compensation to be paid to county judges are authorized, would the same rule apply in case the legislature decided to increase the salary from the present \$12,000.00 per annum? In other words, would any increase by the State be subject to the same rule, (Article IV, Section 26, of the State Constitution) ?”

I.

Art. IV, sec. 26, Wis. Const., provides in part:

“**Extra compensation; salary change.** Section 26. The legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into; nor shall the compensation of any public officer be increased or diminished during his term of office. * * *”

The county courts are not constitutional courts, and it has been held that Art. IV, sec. 26, is applicable only to officers whose salaries are fixed by the state. *State ex rel. Smith v. Outagamie County*, (1921) 175 Wis. 253, 185 N.W. 184. In *State ex rel. Thomson v. Giessel*, (1951) 262 Wis. 51, 53 N.W. 2d 726, the court referred to *Carpenter v. State*, (1876) 39 Wis. 271, as authority for the proposition that the purpose of this constitutional provision is to limit contractors with the state to the precise compensation fixed by their contracts. In the case of *State ex rel. Martin v. Kalb*, 50 Wis. 178, 6 N.W. 557, the court said at p. 184:

“The real question in the case is, Does the provision of the constitution above quoted apply to the office of county judge? Upon this question we think this court has already decided against the appellant’s claim. In the case of the *Board of Supervisors v. Hackett*, 21 Wis., 613, it was expressly held that ‘the word “compensation,” as used in section 26, art. IV of the constitution, above quoted, signifies a return for the services of such officers as receive a fixed salary payable out of the public treasury of the state; * * *.’” (Emphasis is by the court.)

In other words, the constitutional provision is applicable only to salaries payable out of the state treasury.

The basic \$12,000.00 salary of a county judge except in Milwaukee county is paid by the state. Secs. 253.07 (1) and 20.930. The county reimburses the state for one-half of the salary.

The county board has no authority to increase or decrease this basic salary in any event, and the legislature could not do so during the term of office by reason of Art. IV, sec. 26.

However, sec. 253.07 (2) provides:

“(2) The county may pay each county judge compensation in addition to that specified in s. 20.930 but such additional compensation shall be the same for each such judge and the total salary of the county judge cannot be more than the total salary of the highest paid circuit judge for the county.”

This additional compensation does not come out of the state treasury, and as we are informed, for retirement fund purposes, the county is responsible for the employer's share of retirement payments and social security taxes so far as extra compensation by the county under sec. 253.07 (2) is concerned.

Hence, you are advised that Art. IV, sec. 26, does not preclude the county from granting additional compensation to a county judge during his term of office.

This conclusion, however, does not furnish a complete answer to your first question since it is necessary to consider also the impact of secs. 59.15 (1) (a) and 66.195 relating to increasing or decreasing an officer's salary.

Sec. 59.15 (1) (a) provides:

“(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.*"

In the absence of any other statutory provision to the contrary, the language of this statute would effectively preclude any increase or decrease of a county judge's salary by the county board since his office is an "elective office to be voted on in the county."

However, sec. 66.195 provides:

"Emergency salary adjustments. During the period commencing February 27, 1951, and ending December 31, 1963, the governing body of any county, city, village or town may, during the term of office of any elected official whose salary is paid in whole or in part by such county, city, village or town, increase the salary of such elected official in such amount as the governing body may determine. The power granted by this section shall take effect notwithstanding any other provision of law to the contrary, except that the exercise of such power shall be governed by s. 65.90 (5). The power granted by this section shall not extend to elected officials who by virtue of their office are entitled to participate in the establishment of the compensation attending their office."

This clearly permits, during the effective period of this emergency statute, action to increase but not to decrease the compensation provided by the county for the county judge during his term of office. See 45 OAG 166.

II.

The answer to your second question has already been indicated. The only authority for changing a county judge's compensation during his term of office is that provided by sec. 66.195, the emergency salary adjustment act, and it authorizes increases but not decreases. Moreover, sec. 59.15 (1) (a) constitutes an express prohibition of any decrease during the term of office, even though its prohibition against increases is nullified by sec. 66.195 until after December 31, 1963.

III.

Your third question is answered in the affirmative by reason of the language contained in sec. 253.07 (2) which provides that additional compensation provided by the county shall be the same for each county judge. The language of the statute is plain and unambiguous. There is no room for construction, and as previously pointed out, there is no constitutional or statutory impediment to giving this statute full effect.

IV.

Your fourth question appears to be a hypothetical one since in the statement of facts preceding your questions no reference is made to any action of your county board or proposed action decreasing the salary of any of your county judges. Ordinarily the attorney general does not issue formal opinions on purely hypothetical questions. To embark upon a voyage of discovery on the uncharted seas of pure speculation is a luxury which can be ill-afforded by a limited staff whose full capacities are required in the solution of actual rather than hypothetical problems. Since the district attorney has no duty to perform under a non-existing state of facts, a purely hypothetical question does not furnish occasion for advice from the attorney general under sec. 14.53 (3). See 20 OAG 389, and 18 OAG 129.

V.

Your fifth question is likewise hypothetical in that it is based not on present statutes but upon the passage of possible legislation which has not yet been introduced in a legislature that has not yet met. To gaze into the crystal ball and attempt to guess what questions might or might not arise as well as what the answers might be if certain legislation were introduced and if such legislation were passed and if the county board wanted to take certain action, which conceivably it may never take, would indeed carry us far afield.

WHR

**STATUTES AND CONSTITUTIONAL PROVISIONS, SESSION
LAWS, LEGISLATIVE BILLS AND RESOLUTIONS
REFERRED TO AND CONSTRUED**

WIS. CONST.	Sec.	11.03		
Art. IV, sec. 11.....	3		(1).....	10
sec. 23.....	202		(2).....	10
sec. 26.....	204, 205		(3).....	10
Art. V, sec. 4.....	3		(4).....	10
Art. VI, sec. 4.....	202	11.12	(2).....	11
Art. VII, sec. 18.....	82	14.53	(3).....	207
		20.06	(2).....	13
SESSION LAWS		20.265	(1).....	81
1917, Ch. 218.....	33	20.280	(71b).....	5, 7, 119
1941, Ch. 183.....	177	20.555	(42).....	13
1951, Ch. 60.....	178	20.700	(41).....	123, 125, 127
		20.703	(41) (b) (1.c.2.)	5
sec. 2.....	172	20.730	(48).....	15
Ch. 715, sec. 2.....	100	20.930		205
1953, Ch. 71.....	117		Line 14b.....	81
1955, Ch. 651.....	184	23.09	(7).....	5
1957, Ch. 12.....	37-38		(15).....	193
Ch. 331, sec. 2.....	174	24.085		5-6
sec. 3.....	174	25.17	(61).....	57-58, 60-61
Ch. 536.....	132	29		111
1959, Ch. 315.....	78, 80	29.09	(1).....	111
Ch. 364.....	126	29.29	(3).....	190, 193
Ch. 504.....	117	29.52		193
1961, Ch. 154.....	121	30.10		190
Ch. 350.....	157, 158, 159 160, 161, 163	34.01		40-41
Ch. 400.....	157, 161		(1).....	40-41, 42
Ch. 421.....	119	32.19	(2).....	166-167
Ch. 427.....	5, 7	34		42, 58
Ch. 495.....	78, 80-81	34.01	(5).....	41-42, 57-58
sec. 129.....	82	40		60-61
secs. 143 and	114	40.03	(6).....	85-86
144.....	113	40.095		48, 51
sec. 148.....	113		(4).....	51
Ch. 505.....	61		(5).....	51, 53
Ch. 507.....	58	40.025		132
Ch. 600.....	7, 8, 9, 14, 15		(1).....	85
Ch. 662.....	58		(a) and (b).....	86
Ch. 663.....	70, 90		(c) 74-75, 77, 86	86
Ch. 643, sec. 10.....	114		(d).....	86
			4 85, 87, 88	86
BILLS			(e).....	131, 132
1955, No. 444, S.,.....	186			133
No. 535, S.,.....	184		(k).....	86
			(5).....	85, 87-88, 89
STATUTES		40.22		48, 51-52
(1898 and since)			(3).....	51

	(4).....	51-52	56.08	.....	116, 118
	(5).....	51-52		(1).....	117
	(8).....	54		(2).....	117
	(9).....	52		(b).....	199, 202
40.29	(1).....	52-53	59.06	.....	183, 184
40.301	.....	53		(1).....	183
40.10	.....	134, 135		(2).....	183, 184
42.20	.....	36	59.07	.....	179
	(6r).....	38-39		(1).....	184-185
	(a).....	38-39		(11).....	168, 195
	(b) 2.....	38-39	59.08	(32).....	183
42.241	.....	27, 28, 39	59.12	.....	42
	(1) to (4).....	37	59.15	(1) (a).....	205
	(4).....	37, 39		.....	205-206, 207
	(12).....	39	62	.....	199, 201, 202
42.28	.....	35, 36, 37	60.595	.....	17, 114
42.34	.....	66, 68-69	61.305	.....	17, 114
42.35	(1).....	35, 36, 37	62.08	.....	199, 200
42.48	.....	67		(2).....	201
42.49	(2).....	67	62.09	.....	202
45.37	.....	31		(1) (a).....	199, 201
	(6).....	31-32		.....	202
	(a).....	32, 34		(b).....	201, 202
46.21	(2) (a).....	186	62.24	.....	17
46.22	(5).....	185		(1) (a).....	17
48.06	(1).....	186		(b).....	17, 20
48.25	(4).....	80		(2) (a).....	17, 111, 114
48.31	.....	184, 186		1.....	112, 114
48.57	.....	185		2.....	112
	(1).....	186		3.....	112
	(a).....	185		4.....	113
	(e).....	186		5.....	114
48.58	.....	185, 186		6.....	115
	(1) (a).....	186		7.....	115
48.98	.....	55-56		8.....	115
49.01	(4).....	172		(b).....	18
49.19	.....	57		(3) (b).....	18
	(1) (a).....	170, 172		(e).....	17, 19-20
	(b).....	61	64.03	.....	200
	(2).....	61		(3).....	200
	(3) (b).....	62	64.28	(1).....	200
	(4).....	57, 62, 172	64.39	.....	200
	(a).....	172		(1).....	200
	(b).....	54, 55, 56	64.40	(1).....	200
	(d).....	61, 62, 63	66.12	(1) (a).....	17, 18, 20
49.27	(2).....	189		(3) (a).....	17, 19-20
	(2) and (3).....	186	66.195	.....	203, 205, 206, 207
	.....	188-189, 190	66.29	.....	169
	(3).....	189		(1).....	23
49.61	.....	186, 187		(c).....	169
	(2).....	187	66.30	.....	168, 195, 198
	(3).....	187		(1).....	168, 196
	(4).....	187		(2).....	168, 195-196
	(7).....	187-188		(3).....	197, 198
50.09	.....	198	66.99	.....	172, 173, 174, 177
	(3).....	195, 196, 198		.....	181
51.03	.....	81		(4).....	175
53.37	(4).....	117		(4a).....	174, 175, 176

	177, 178	152.07	(6) (b).....	162
	(5), (6), and		(f).....	157, 159
	(7).....			161, 162, 163
81.06	.....	158.04	(14).....	120, 121, 122
83.015	.....	160	.....	163
83.018	.....	160.01	.....	43, 165
83.07	.....		(2).....	43, 44, 164
86.105	.....	160.02	(1).....	164
83.18	.....		(3).....	165
85.06	(2).....	175.13	.....	8, 14-15
85.09	.....		(1) (a).....	15
103.50	(1).....		(2).....	8
100.15	.....		(a).....	16
129.01	.....		(c).....	16
101.10	(1).....		(3).....	15
	(2) and (4).....		(4).....	7, 9, 16
101.104	.....	180.99	.....	158
101.24	.....		(2).....	158
	(2).....			157, 158, 162, 163
102.04	(1).....		(4).....	154
111.03	.....	215	.....	156, 157
111.07	.....	215.03	(6).....	151, 155, 156, 157
	(3).....	215.39	(2).....	156
	(4) (1).....	218.04	(1) (f).....	97
	(5).....	220.11	.....	148
	(6).....	221.01	(2) (a).....	147
	(12).....		(5).....	147
111.09	.....	221.03	(2) (c).....	147
111.70	.....	221.04	(1) (f).....	145, 146, 148
	(4) (e).....	221.12	.....	147
	.....	221.14	.....	146
	(e) to (g).....		(1).....	148
	.....		(4) (b).....	145
	(f).....	225	.....	98
	(m).....	227.01	(4).....	45
	.....	227.014	.....	73
	.....		(2) (a).....	99
129	.....	245.03	.....	32
129.01	(1).....	247.07	.....	63
	(2).....	247.08	.....	63
129.05	.....	247.23	.....	63
	(1).....	245.24	.....	33
	.....	247.24	.....	63
136	.....	247.33	.....	63
136.01	(2).....	247.37	(1).....	64
	(6).....	252	.....	78
136.03	.....	252.20	.....	78-79, 82
136.04	.....	253.07	(1).....	205
	(1), (2), and		(2).....	203, 205, 207
	(3).....	253.13	(2).....	186
	(2) (b).....	253.29	.....	12
136.075	.....		(2) (a).....	12-13
145	.....		(3).....	13
145.04	(1).....	253.35	(1) (a).....	80
	(2).....		(2) (a).....	80
146.30	.....		(5).....	78
	(1) (a).....	262.02	(1).....	83
152.06	(5) (f).....	271.21	.....	82-83
	(6) (f).....			

288	.....	114	343.38	.....	46, 48
288.19	.....	114	343.44	.....	46, 47
288.195	.....	114	(1)	.....	47, 48
299.04	(1)	83	(2)	.....	45, 47
291.05	.....	113	344	.....	57
299	82-84	344.17	(1)	58
299.08	.....	84-85	344.20	.....	57-58, 60
299.13	(1)	84	(1)	.....	58, 60
299.25	.....	83	348.15 to 348.17	.....	115
(1)	.....	83	945.11	.....	81
304	.....	115	954.17	.....	81
307.01	.....	19	959.15	.....	62-63
325.01	(4)	73	990.01	(1)	132
326.01	(1)	73	(17m)	.....	17
343.05	(1)	46, 47, 48	(26)	.....	15
(3)	.....	46			

INDEX

	Page
ADVERTISING	
Dentists—Sec. 152.07 (6) (f) as repealed and recreated by ch. 400, Laws 1961, prohibiting dentists from advertising under corporate name, prevails over sec. 180.99 (4) as created by ch. 350, Laws 1961, to the extent that these provisions conflict	157
AGREEMENT	
School District—Unified school district is authorized by secs. 40.095 and 40.22 to enter into deferred use plan transaction with the U. S. Dept. Health, Educ. and Welfare for acquisition of a site for future school buildings	48
AIDS	
Counties—Discussion of secs. 49.61 and 49.27 (2) and (3) relative to county responsible for aid to disabled person when recipient moves from one county to another	186
Dependent Children—A child is eligible for aid under sec. 49.19 (1) (a) if either natural parent is absent from the home, provided other statutory conditions are met	170
ANNUITY RATES	
Teacher's Retirement Fund—Under 42.34, if annuity rates are changed effective July 1, 1962, and application is made prior to said date for annuity to begin on or after such date, such annuity may be granted at the old or new rate at option of applicant	66
AUTHORITY	
Industrial Commission—The industrial commission may delegate to its deputies authority to obtain enforcement of sec. 101.104 through district attorneys under secs. 101.24 (2) and 101.28	28
Employment Relations Board—Employment relations board has authority to adopt rule for conduct of hearings by examiners while reserving to the board the function of making findings and orders on the records of such hearings	70
BANKS	
Branch Banking—Words and Phrases—Discussion of banking statutes relative to location of office and parking facilities and the use of a tunnel to connect main building with separated structures	145
BARBERS	
District Attorneys—Constitutionality—Discussion of 158.04 (14) relative to advertising of fees for barbering service. District attorney has duty to enforce criminal statute even though he doubts constitutionality; but should direct court's attention to constitutionality question	120

	Page
BOARD OF HEALTH	
Licenses—Restaurant—Discussion of license requirements relative to industry or private club or caterers serving food to persons drawn from the general public	42
BONG BASE	
Conservation Commission—Conservation commission has power in the development of long range conservation programs to make general statements of policy for information and guidance of the department and future commissions	118
BRANCH BANKING	
Words and Phrases—Banks—Discussion of banking statutes relative to location of office and parking facilities and the use of a tunnel to connect main building with separated structures	145
CHILDREN'S HOME	
County Boards—County boards (other than Milwaukee county) do not have authority to establish a children's home	184
CHARITABLE ORGANIZATIONS	
Reports—A charitable organization which received contributions in 1961 must file a report as provided in sec. 175.13 (4), created by ch. 600, Laws 1961	71
University of Wisconsin—Sec. 175.13 created by ch. 600, Laws 1961, is not applicable to an arm or agency of the state. It does apply to private nonprofit units engaged in solicitation of contributions to aid the university	14
CITIES	
County Boards—Wards—Discussion of ch. 62 concerning division of a city into wards and the election of aldermen and supervisors	199
CLERKS OF COURT	
Words and Phrases—Alimony and dependent children payments received by clerk of court and deposited in public depository, constitutes public deposit under 34.01 (1) and public moneys under 24.01 (5)	40
COMPENSATION	
County Judges—Discussion of secs. 253.07 (2) and 66.195 relative to increase or decrease of county judges' compensation during term of office	203
CONSERVATION COMMISSION	
Bong Base—Conservation commission has power in the development of long range conservation programs to make general statements of policy for information and guidance of the department and future commissions	118
Hunting and Fishing Laws—Menominee Indians—Wisconsin hunting and fishing laws apply to Menominee county and to the Menominee tribe in the same manner and extent as they apply to any other person and area in the state	103

Land Acquisition—Conservation commission has no present statutory power to acquire and develop portion of Bong air base on a temporary basis nor delegate to federal surplus property development commission power to decide whether such lands shall be transferred to other than conservation uses 136

Land Purchase—It is a policy decision for the conservation commission to determine whether Bong air base should be purchased in outright fee or whether limited title should be acquired without cost 4

Navigable Waters—When construction of a dam creates a 54 acre lake which is used by the public for a number of years, conservation department would be justified in considering the lake navigable and subject to state regulation 190

CONSTITUTIONALITY

Barbers—District Attorney—Discussion of 158.04 (14) relative to advertising of fees for barbering services. District attorney has duty to enforce criminal statute even though he doubts constitutionality; but should direct court's attention to constitutionality question 120

CONTRACTS

Highway Commission—Wages—Drivers delivering materials to state highway construction site whose employers are in no way a party to a state construction contract made pursuant to sec. 84.06 (2), are not within the state prevailing wage law as set forth in 103.50 20

Real Estate Brokers Board—Board has neither the express nor implied power to engage in research activities and cannot use license moneys appropriated under 20.700 (41) for such purpose 123

COUNTIES

Aids—Discussion of secs. 49.61 and 49.27 (2) and (3) relative to county responsible for aid to disabled person when recipient moves from one county to another 186

Sanitorium Charges—Counties may enter into contracts with other counties for sanitorium care of residents but payment therefor must be governed by the statutes 194

School District—County is not authorized under secs. 66.30 or 83.018, or otherwise, to contract with a joint school district for the paving by the county of a parking lot for the district 168

COUNTY BOARDS

Children's Home—County boards (other than Milwaukee county) do not have authority to establish a children's home 184

Social Security—Members of Ashland county board should be reported for social security coverage since July 1, 1957 under resolution adopted by county board April 17, 1951 and sec. 66.99 (4a) as amended by ch. 331, Laws 1957 172

Wards—Cities—Discussion of ch. 62 concerning division of a city into wards and the election of aldermen and supervisors 199

COUNTY COMMITTEE	Page
Expenses—Sec. 59.06 (6) includes expenses of the county highway committee attending road schools and other meetings, as well as other county committees	183
COUNTY JUDGES	
Compensation—Discussion of secs. 66.195 and 253.07 (2) relative to increase or decrease of county judges' compensation during term of office	203
COUNTY SCHOOL COMMITTEE	
School Districts—Discussion of 40.025 (1) (e) relative to dissolution of and creation of school districts, and the county school committee's power to create districts	131
COURTS	
Taxable Costs—Under sec. 62.24 (3) (e), 1961 stats., taxable costs in municipal justice of peace courts are the same as in other justice courts as provided by statute. References in secs. 66.12 (3) (a) and 288.195 to clerk's fees do not apply in such courts	17
COURT REORGANIZATION	
Justice of the Peace—Territorial jurisdiction of municipal justices of the peace under 62.24 (2) (a) discussed	111
COURT REPORTERS	
Fees—Discussion of court reorganization legislation relative to fees for transcripts by county court reporters	77
DAMAGES	
Landowner—Highways—Landowner who dams natural depression, not a natural watercourse, at his property line is not responsible for damages to abutting highway. Landowner ponding surface water on his land which backs up onto highway through percolation or otherwise, may cause actionable damage	127
DENTISTS	
Advertising—Sec. 152.07 (6) (f) as repealed and recreated by ch. 400, Laws 1961, prohibiting dentists from advertising under corporate name, prevails over sec. 180.99 (4) as created by ch. 340, Laws 1961, to the extent that these provisions conflict	157
DEPENDENT CHILDREN	
Aids—A child is eligible for aid under sec. 49.19 (1) (a) if either natural parents is absent from the home, provided other statutory conditions are met	170
Discussion of eligibility status of dependent children when mother or stepmother changes marital status	61
Words and Phrases—Discussion of 49.19 (4) (b) relative to aid to dependent children "resided" as used in the statutes is not synonymous with "domicile" and one year limitation is to prevent abuses of statute	54

DISTRICT ATTORNEYS

Page

Constitutionality—Barbers—Discussion of 158.04 (14) relative to advertising of fees for barbering services discussed. District attorney has duty to enforce criminal statute even though he doubts constitutionality; but should direct court's attention to constitutionality question 120

DRIVER'S LICENSE

Revocation—Penalties—Those who drive on the public highway after the driving privileges have been revoked and never properly reinstated are subject to the penalty prescribed by 343.44 (2) 45

EMINENT DOMAIN

Moving Costs—Claim for cost of moving of property necessitated by a taking of land by a public or private body having the power of eminent domain, may be paid in cases where former landowner performs the work himself 166

EMPLOYMENT RELATIONS BOARD

Authority—Employment relations board has authority to adopt rule for conduct of hearings by examiners, while reserving to the board the function of making findings and orders on the records of such hearings 70

Investigations—Discussion of 111.70 (4) (f) and (4) (m) relative to employment relations board fact finding investigations 90

ESTATES

Fees—Under sec. 253.29 (2) (a) only one filing fee for one estate should be accepted. Methods of refunding in case of double payment discussed 12

EXPENSES

County Committee—Sec. 59.06 (2) includes expenses of the county highway committee attending road schools and other meetings, as well as other county committees 183

FEES

Court Reporters—Discussion of court reorganization legislation relative to fees for transcripts by county court reporter 77

Estates—Under sec. 253.29 (2) (a) only one filing fee for one estate should be accepted. Methods of refunding in case of double payment discussed 12

GOVERNOR

Legislature—The governor has the power to call the legislature into special session during a period between the date when the legislature, then in regular session, adjourns to a date certain some time distant, and such date certain 1

GRAND ARMY HOME

Veterans—Widow—Discussion of sec. 45.37 (6) relative to eligibility requirements of veteran's widow for admission to Grand Army Home 31

	Page
HIGHWAY COMMISSION	
Wages—Contracts—Drivers delivering materials to state highway construction site whose employers are in no way a party to a state construction contract made pursuant to sec. 84.06 (2), are not within the state prevailing wage law as set forth in 103.50	20
HIGHWAYS	
Damages—Landowner—Landowner who dams natural depression, not a natural watercourse, at his property line is not responsible for damages to abutting highway. Landowner ponding surface water on his land which backs up onto highway through percolation or otherwise, may cause actionable damage	127
HUNTING AND FISHING LAWS	
Menominee Indians—Conservation Commission—Wisconsin hunting and fishing laws apply to Menominee county and to the Menominee tribe in the same manner and extent as they apply to any other person and area in the state	103
INDUSTRIAL COMMISSION	
Authority—The industrial commission may delegate to its deputies authority to obtain enforcement of sec. 101.104 through district attorneys under secs. 101.24 (2) and 101.28	28
INVESTIGATIONS	
Employment Relations Board—Discussion of 11.70 (4) (f) and (4) (m) relative to employment relations board fact finding investigations	90
INVESTMENT BOARD	
Words and Phrases—Motor Vehicle Department—Moneys deposited with motor vehicle commission under 344.20, placed in custody of state treasurer, are public moneys under 34.01 (5) and subject to placement by investment board under 25.17 (61)	57
JUSTICES OF THE PEACE	
Court Reorganization—Territorial jurisdiction of municipal justices of the peace under 62.24 (2) (a) discussed	111
LAND ACQUISITIONS	
Conservation Commission—Conservation commission has no present statutory power to acquire and develop portion of Bong air base on a temporary basis nor delegate to federal surplus property development commission power to decide whether such lands shall be transferred to other than conservation uses	136
LANDOWNER	
Highways—Damages—Landowner who dams natural depression, not a natural watercourse, at his property line is not responsible for damages to abutting highway. Landowner ponding surface water on his land which backs up onto highway through percolation or otherwise, may cause actionable damage	127

LAND PURCHASE	Page
Conservation Commission—It is a policy decision for the conservation commission to determine whether Bong air base should be purchased in outright fee or whether limited title should be acquired without cost	4
 LEGISLATURE	
Governor—The governor has the power to call the legislature into special session during a period between the date when the legislature, then in regular session, adjourns to a date certain some time distant, and such date certain	1
 LICENSES	
Plumbers—No city, village, township, county, or metropolitan sewerage district can lawfully require a plumber, duly licensed by the state to post an indemnity bond and/or public liability insurance policy as a prerequisite to operate in such district	24
Restaurant—Board of Health—Discussion of license requirements relative to industry or private club or caterers serving food to persons drawn from the general public ..	42
State Board of Health—Sec. 146.30 does not provide authority for state board of health to require a nursing home license for facilities caring for persons diagnosed as mentally deficient. Definition of nursing home precludes admission of mentally deficient persons	100
Transient Merchants—Discussion of transient merchant licenses under sec. 129.05 (1) relative to leasing privately-owned land and selling various manufactured and produced items therefrom	138
 LICENSES AND PERMITS	
Restaurant—Words and Phrases—Restaurant permit issued to cover restaurant in building cannot be extended to cover use of mobile unit which must have a restaurant permit to sell and serve lunch and meals to the general public	163
 MENOMINEE INDIANS	
Conservation Commission—Hunting and Fishing Laws—Wisconsin hunting and fishing laws apply to Menominee county and to the Menominee tribe in the same manner and extent as they apply to any other person and area in the state	103
 MORTGAGES	
Real Estate Brokers—Discussion of 136.075 and REB 6.01 relative to mortgage broker, licensed as real estate broker, collecting and depositing loans and payments ..	94
 MOTOR VEHICLE DEPARTMENT	
Investment Board—Words and Phrases—Moneys deposited with motor vehicle commission under 344.20, placed in custody of state treasurer, are public moneys under 34.01 (5) and subject to placement by investment board under 25.17 (61)	57

MOVING COSTS	Page
Eminent Domain—Claims for cost of moving of property necessitated by a taking of land by a public or private body having the power of eminent domain, may be paid in cases where former landowner performs the work himself	166
NAVIGABLE WATERS	
Conservation Department—When construction of a dam creates a 54 acre lake which is used by the public for a number of years, conservation department would be justified in considering the lake navigable and subject to state regulations	190
PENALTIES	
Driver's License—Revocation—Those who drive on the public highway after the driving privileges have been revoked and never properly reinstated are subject to the penalty prescribed by 343.44 (2)	45
PLUMBERS	
Licenses—No city, village, township, county, or metropolitan sewerage district can lawfully require a plumber, duly licensed by the state to post an indemnity bond and/or public liability insurance policy as a prerequisite to operate in such district	24
PRISONERS	
Workmens Compensation—A county may not require prisoners sentenced to the county jail to work outside the jail premises except as provided in 56.08, and if so employed, are entitled to workmen's compensation under Ch. 102	116
REAL ESTATE BROKERS	
Mortgages—Discussion of 136.075 and REB 6.01 relative to mortgage broker, licensed as real estate broker, collecting and depositing loans and payments	94
Contracts—Real estate brokers board has neither the express nor implied power to engage in research activities and cannot use license moneys appropriated under 20.700 (41) for such purpose	123
REPORTS	
Charitable Organizations—A charitable organization which received contributions in 1961 must file a report as provided in sec. 174.13 (4), created by ch. 600, Laws 1961	7
REORGANIZATION	
School Districts—Certification of results of referendum elections on school district reorganization orders is made for purposes of sec. 40.025 (1) 4 and (5) at the time the document of certification is filed with the county superintendent of schools	85

RESTAURANT	Page
Board of Health—Licenses—Discussion of license requirements relative to industry or private club or caterers serving food to persons drawn from the general public ..	42
Words and Phrases—Licenses and Permits—Restaurant permit issued to cover restaurant in building cannot be extended to cover use of mobile unit which must have a restaurant permit to sell and serve lunch and meals to the general public	163
 RETIREMENT FUND	
Survivors—Teacher—Teacher who should have but did not contribute to state teachers retirement fund prior to her death may not be classed as a member of a combined group of said system for coverage under OASDI for self and surviving children	34
 REVOCACTION	
Penalties—Drivers License—Those who drive on the public highway after the driving privileges have been revoked and never properly reinstated are subject to the penalty prescribed by 343.44 (2)	45
 SANATORIUM CHARGES	
Counties—Counties may enter into contracts with other counties for sanatorium care of residents but payment therefor must be governed by the statutes	194
 SAVINGS AND LOAN ASSOCIATION	
Trading Stamps—Issuance of trading stamps to members of a savings and loan association does not violate sec. 100.15, but there must be no discrimination between members of the same class except as provided in 215.03 (6)	151
 SCHOOL DISTRICT	
Agreement—Unified school district is authorized by secs. 40.095 and 40.22 to enter into deferred use plan transaction with the U. S. Dept. Health, Educ. and Welfare for acquisition of a site for future school building	48
Counties—County is not authorized under secs. 66.30 or 83.108, or otherwise, to contract with a joint school district for the paving by the county of a parking lot for the district	168
County School Committee—Discussion of 40.025 (1) (e) relative to dissolution of and creation of school districts, and the county school committee's power to create districts	131
Reorganization—Certification of results of referendum elections on school district reorganization orders is made for purposes of sec. 40.025 (1) (d) 4 and (5) at the time the document of certification is filed with the county superintendent of schools	85
Under 40.025 (1) (c) where a reorganization order dissolves several school districts and includes territory in creation of a new district, any petition filed thereafter but before such order is effective to attach territory to new or dissolved districts is void	74

SOCIAL SECURITY	Page
County Boards—Members of Ashland county board should be reported for social security coverage since July 1, 1957, under resolution adopted by county board April 17, 1951 and sec. 66.99 (4a) as amended by ch. 331, Laws 1957	172
STATE BOARD OF HEALTH	
Licenses—Sec. 146.30 does not provide authority for state board of health to require a nursing home license for facilities caring for persons diagnosed as mentally deficient. Definition of nursing home precludes admission of mentally deficient persons	100
SUIT TAX	
One dollar state suit tax in small claim cases in county court under 271.21 should be collected at the time the summons is issued	82
SURVIVORS	
Teachers—Retirement Fund—Teacher who should have but did not contribute to state teachers retirement fund prior to her death may not be classed as a member of a combined group of said system for coverage under OASDI for self and surviving children	32
TAXABLE COSTS	
Courts—Under sec. 62.24 (3) (e), 1961 stats., taxable costs in municipal justice of the peace courts are the same as in other justice courts as provided by statute. References in secs. 66.12 (3) (a) and 288.195 to clerk's fees do not apply in such courts	17
TEACHERS	
Retirement Fund—Survivors—Teacher who should have but did not contribute to state teachers retirement fund prior to her death may not be classed as a member of a combined group of said system for coverage under OASDI for self and surviving children	32
TEACHER'S RETIREMENT FUND	
Annuity Rates—Under 42.34, if annuity rates are changed effective July 1, 1962, and application is made prior to said date for annuity to begin on or after such date, such annuity may be granted at the old or new rate at option of applicant	92
TRADING STAMPS	
Savings and Loan Association—Issuance of trading stamps to members of a savings and loan association does not violate sec. 100.15, but there must be no discrimination between members of the same class except as provided in 215.03 (6)	151
TRANSIENT MERCHANTS	
Licenses—Discussion of transient merchant licenses under sec. 129.05 (1) relative to leasing privately-owned land and selling of various manufactured and produced items therefrom	138

UNIVERSITY OF WISCONSIN	Page
Charitable Organizations—Sec. 175.13 created by ch. 600, Laws 1961, is not applicable to an arm or agency of the state. It does apply to private nonprofit units engaged in solicitation of contributions to aid the university	14
VETERANS	
Widow—Grand Army Home—Discussion of sec. 45.37 (6) Relative to eligibility requirements of veteran's widow for admission to Grand Army Home	31
VOTING MACHINES	
Approved voting machine equipped to provide a printed tally without being opened is lawful for use in Wisconsin	10
WAGES	
Contracts—Highway Commission—Drivers delivering materials to state highway construction site whose employer are in no way a party to a state construction contract made pursuant to sec. 84.06 (2), are not within the state prevailing wage law as set forth in 103.50	20
WARDS	
Cities—County Boards—Discussion of ch. 62 concerning division of a city into wards and the election of aldermen and supervisors	199
WIDOWS	
Grand Army Home—Veterans—Discussion of sec. 45.37 (6) relative to eligibility requirements of veteran's widow for admission to Grand Army Home	31
WORDS AND PHRASES	
Banks—Branch Banking—Discussion of banking statutes relative to location of office and parking facilities and the use of a tunnel to connect main building with separated structures	145
Clerks of Court—Alimony and dependent children payments received by clerk of court and deposited in public depository, constitutes public deposit under 34.01 (1) and public moneys under 34.01 (5)	40
Dependent Children—Discussion of 49.19 (4) (b) relative to aid to dependent children. "Resided" as used in the statute is not synonymous with "domicile" and one year limitation is to prevent abuses of statute	54
Licenses and Permits—Restaurant—Restaurant permit issued to cover restaurant in building cannot be extended to cover use of mobile unit which must have a restaurant permit to sell and serve lunch and meals to the general public	163
Motor Vehicle Department—Investment Board—Moneys deposited with motor vehicle commission under 344.20, placed in custody of state treasurer, are public moneys under 34.01 (5) and subject to placement by investment board under 25.17 (61)	57

WORKMENS COMPENSATION

Page

Prisoners—A county may not require prisoners sentenced to the county jail to work outside the jail premises except as provided in 56.08, and if so employed, are entitled to workmen's compensation under Ch. 102	116
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----

