

OPINIONS  
OF THE  
**ATTORNEY GENERAL**

OF THE  
STATE OF WISCONSIN

VOL. 47

January 1, 1958, through December 31, 1958

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STEWART G. HONECK  
Attorney General



MADISON, WISCONSIN  
1958

THE UNIVERSITY OF CHICAGO

PHYSICS DEPARTMENT

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# ATTORNEYS GENERAL OF WISCONSIN

## FROM THE ORGANIZATION OF THE STATE

JAMES S. BROWN, Milwaukee	from June 7, 1848, to Jan. 7, 1850
S. PARK COON, Milwaukee	from Jan. 7, 1850, to Jan. 5, 1852
EXPERIENCE ESTABROOK, Geneva	from Jan. 5, 1852, to Jan. 2, 1854
GEORGE B. SMITH, Madison	from Jan. 2, 1854, to Jan. 7, 1856
WILLIAM R. SMITH, Mineral Point	from Jan. 7, 1856, to Jan. 4, 1858
GABRIEL BOUCK, Oshkosh	from Jan. 4, 1858, to Jan. 2, 1860
JAMES E. HOWE, Green Bay	from Jan. 2, 1860, to Oct. 7, 1862
WINFIELD SMITH, Milwaukee	from Oct. 7, 1862, to Jan. 1, 1866
CHARLES R. GILL, Watertown	from Jan. 1, 1866, to Jan. 3, 1870
STEPHEN S. BARLOW, Dellona	from Jan. 3, 1870, to Jan. 5, 1874
A. SCOTT SLOAN, Beaver Dam	from Jan. 5, 1874, to Jan. 7, 1878
ALEXANDER WILSON, Min- eral Point	from Jan. 7, 1878, to Jan. 2, 1882
LEANDER F. FRISBY, West Bend	from Jan. 2, 1882, to Jan. 3, 1887
CHARLES E. ESTABROOK, Manitowoc	from Jan. 3, 1887, to Jan. 5, 1891
JAMES L. O'CONNOR, Madison	from Jan. 5, 1891, to Jan. 7, 1895
WILLIAM H. MYLREA, Wausau	from Jan. 7, 1895, to Jan. 2, 1899
EMMET R. HICKS, Oshkosh	from Jan. 2, 1899, to Jan. 5, 1903
LA FAYETTE M. STURDE- VANT, Neillsville	from Jan. 5, 1903, to Jan. 7, 1907
FRANK L. GILBERT, Madison	from Jan. 7, 1907, to Jan. 2, 1911
LEVI H. BANCROFT, Richland Center	from Jan. 2, 1911, to Jan. 6, 1913
WALTER C. OWEN, Maiden Rock	from Jan. 6, 1913, to Jan. 7, 1918
SPENCER HAVEN, Hudson	from Jan. 7, 1918, to Jan. 6, 1919
JOHN J. BLAINE, Boscobel	from Jan. 6, 1919, to Jan. 3, 1921
WILLIAM J. MORGAN, Milwaukee	from Jan. 3, 1921, to Jan. 1, 1923
HERMAN L. EKERN, Madison	from Jan. 1, 1923, to Jan. 3, 1927
JOHN W. REYNOLDS, Green Bay	from Jan. 3, 1927, to Jan. 2, 1933
JAMES E. FINNEGAN, Milwaukee	from Jan. 2, 1933, to Jan. 4, 1937
ORLAND S. LOOMIS, Mauston	from Jan. 4, 1937, to Jan. 2, 1939
JOHN E. MARTIN, Milwaukee	from Jan. 2, 1939, to June 5, 1948
GROVER L. BROADFOOT, Mondovi	from June 5, 1948, to Nov. 15, 1948
THOMAS E. FAIRCHILD, Milwaukee	from Nov. 15, 1948, to Jan. 1, 1951
VERNON W. THOMSON, Rich- land Center	from Jan. 1, 1951, to Jan. 7, 1957
STEWART G. HONECK, Madi- son	from Jan. 7, 1957, to Jan. 5, 1959

## ATTORNEY GENERAL'S OFFICE

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STEWART G. HONECK	Attorney General
JOHN D. WINNER	Deputy Attorney General
MORTIMER LEVITAN	Assistant Attorney General
WARREN H. RESH	Assistant Attorney General
HAROLD H. PERSONS	Assistant Attorney General
WILLIAM A. PLATZ	Assistant Attorney General
JAMES R. WEDLAKE	Assistant Attorney General
BEATRICE LAMPERT	Assistant Attorney General
ROY G. TULANE	Assistant Attorney General
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ALBERT O. HARRIMAN*	Assistant Attorney General
ROY G. MITA	Law Examiner
WILLIAM WILKER	Law Examiner
ROBERT KAY	Law Examiner
GEORGE SCHWAHN	Law Examiner
MILO W. OTTOW	Chief Investigator

\* Appointed June 1, 1958.

OPINIONS  
OF THE  
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VOLUME 47

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*County—School Committee*—Premature selection of secretary of joint county school committee prior to filing of petition for reorganization is void and not substantial compliance with law. Secs. 40.03 (1), 40.025 (1) (d) 1, 40.025 (2), and 40.025 (5), discussed.

January 2, 1958.

WAYNE W. TRIMBERGER,  
*District Attorney,*  
Clark County.

Pursuant to proper petition and notice, the joint county school committee of Clark, Jackson, and Eau Claire counties met, conducted a public hearing, and denied the petition which sought to detach from its present school district certain land in the Town of Mentor, Clark county, and attach it to another district. Anticipating future petitions concerning this same land under sec. 40.03 (1), Stats., the joint committee at this same meeting adopted a resolution naming the Clark county superintendent of schools to act as secretary. As secretary he was to act upon receipt of any such petitions, confer with the chairmen of the three county school committees concerned, set a date for the hearing on the petition and give the required notice. Subsequently, the expected petition was filed, the secretary so appointed conferred, set a date for hearing and caused the notices to be posted.

You have asked for my opinion as to whether the procedure taken as set forth above constitutes substantial compliance with the statutes.

Ch. 536, Laws 1957, amended sec. 40.03 so that upon the filing of a petition the secretary of the county school committee or the secretary of the joint school committee shall make the required publication, posting or service of notice. This served to simplify the procedure where only one county is affected, but did not alter sec. 40.02 (5) which provides :

“If territory to be affected by a proposed order of a county school committee lies in 2 or more counties the county school committees of said counties shall act as a joint committee. The secretaries shall arrange the time and place of the first meeting.”

Upon the filing of such a petition involving more than one county, it is necessary that the secretary of the committee of the county where the petition is filed make arrangements with the other secretaries concerned for the time and place of the first meeting. The secretary of the county school committee with whom the petition is filed could then notify all members of each school committee, or it could be agreed that the secretary of each school committee involved should notify the members of his school committee of the time and place of the first meeting. At this first meeting, such committees, acting as a joint committee, should then name its chairman and secretary and agree upon a time and place for the public hearing on the petition. The joint school committee secretary then is responsible for giving notice pursuant to sec. 40.025 (2), Laws 1957.

Referring to the circumstances you have described, it is the filing of a proper petition that gives the joint committee its jurisdiction and authority. Prior to such filing, it is wholly without power to act. It is my opinion that you are correct in your conclusion that the premature attempt to select a secretary for a joint county school committee prior to the receipt of a petition for reorganization was void and jurisdiction was lost under 40.025 (1) (d) 1, for failure to substantially comply with the procedural steps required by law.

JEA

*Chauffeur's Licensing—Motor Vehicle Department*—The determination of the “principal purposes” of a given employment in the administration of the chauffeur's licensing law (sec. 343.01) involves a question of fact for the motor vehicle commissioner. There is no pat formula which will determine all cases.

January 14, 1958.

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

Being responsible for the administration of the new chauffeurs' licensing law, you have requested my opinion for your guidance in determining whether persons who operate motor vehicles in the course of their employment under varying factual situations are required to obtain chauffeurs' licenses.

Sec. 343.01 (2) (e), Stats., created by ch. 551, Laws 1957, and repealed and recreated by ch. 684, Laws 1957, defines a chauffeur for licensing purposes as “. . . every person, including the vehicle owner, who is employed for the principal purpose of operating a motor vehicle, and every person who operates a motor vehicle while in use as a public carrier of persons or property for hire . . .”.

With respect to those persons whose employment duties fall within the purview of the forepart of the definition, the administrative duty to determine what the *principal* purpose of the operator's employment is, devolves upon you. In the latter part of the definition the legislature has hinged the liability for licensing of the operator as a chauffeur upon the *use* of the vehicle as described in the statute, without regard for any other consideration.

Where the *sole* purpose of a person's employment is to operate a motor vehicle, no difficulty is presented. A typical example of an operator in this class would be a taxicab driver.

Where the employment involves one or more duties in addition to the duty of operating a motor vehicle, you must determine, for administrative or enforcement purposes, which of such duties is the *principal* duty of employment.

The word "principal" is used in this statute in its ordinary sense, which is ". . . the most important, as distinguished from what is incidental, appurtenant or accessory". In those instances where the employe was hired chiefly because he possessed special skill or ability in some direction, the duty requiring that special skill or ability might well constitute the determining factor as to which of several duties of employment is the *principal* duty. Or where special training is given to an employe having a multiplicity of duties, it is conceivable that the duty for which he is specially trained may well constitute the principal purpose of his employment. A practical test which will perhaps resolve most of your troublesome cases is a weighing or balancing of the amount of time spent in the operation of a motor vehicle as against the time spent in the performance of one or more other duties.

In summary, the determination of what the principal purpose of a given employment is involves a question of fact. There is no "pat" formula by which such determination can be made. There may be tests other than skill, training and time as suggested above, which will reveal themselves to you when you probe into the facts of a case before you. In any event, the application of common sense reasoning in testing the facts of employment in any given case against the standard of "principal purpose" as prescribed by the legislature, will provide the greatest measure of certainty that your determinations will be upheld whenever challenged in the courts.

JHM

*Conservation Commission—State Building Commission—Contracts*—Additions to the project for a dam and artificial lake in Governor Dodge state park made after the effective date of sec. 13.351 (8) need not be referred to the state building commission unless they exceed in total \$15,000.

January 14, 1958.

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

You state that the conservation department is now engaged in carrying out the construction of a dam and associated facilities in the Governor Dodge state park. The contract for the dam proper in the sum of some \$47,692.76 was executed and approved by Governor Thomson effective June 11, 1957.

Thereafter on August 6, 1957, ch. 463, Laws 1957, became effective. Sec. 13.351 (8), Stats., as created by that law reads as follows:

“APPROVAL BY COMMISSION. No state board, agency, officer, department, commission or body corporate shall enter into a contract or agreement for the construction, reconstruction, remodeling or addition to any building, structure, or facility, which involves a cost in excess of \$15,000 by any means whatsoever, without completion of final plans and arrangement for supervision of construction and prior approval by the state building commission, any other provision of the statutes to the contrary notwithstanding and irrespective of the source of the funds to be used for such project.”

You state that subsequent to the passage of this law it has been determined that as an integral part of the project additional contracts in the sum of \$7,000 for clearing the lake bottom and possibly \$3,000 for the purpose of beach improvement will be necessary. Further, engineering development costs in the sum of approximately \$3,000 are anticipated subsequent to the date of the act.

You now inquire whether you may sign the supplementary contracts without the formal approval of the state building commission, which appears to be required by the terms of sec. 13.351 (8).

Provision for the construction of the dam in Governor Dodge state park, formerly known as Cox Hollow, was made by sec. 20.280 (3), Stats. 1955. This section of the statutes provided for the expenditure of \$50,000 of state funds in the event that federal funds were available for improvements and development, and in the further event that Iowa county would appropriate and deposit in the state general fund \$10,000. We understand that this has been done.

Conceding for the purpose of this opinion that the clearing of the lake bed and the construction of the beach improvements constitute an integral part of the entire project of developing the Governor Dodge state park dam and artificial lake, it is my opinion that the additional expenditure of \$10,000 necessary therefor does not come within the terms of sec. 13.351 (8). This section of the statutes appears to be a severely restrictive statute, and accordingly should be limited to those cases which are reasonably within the contemplation of the legislature. The section by its terms refers to any "addition" to a facility which involves a cost in excess of \$15,000. This language is susceptible of the interpretation that if the entire facility involved a cost of more than \$15,000 then any addition thereto would have to be approved by the state building commission. It is also susceptible of the interpretation that if there is a building structure or facility in existence which has been completed, that any addition thereto thereafter will require building commission approval only if the particular new contract or contracts for construction exceed \$15,000. In my opinion this is a logical, reasonable, and the only possible construction. Otherwise, an addition of any size to an existing structure initially costing more than \$15,000 would have to be referred to the building commission.

In the present case we are confronted with a situation where the initial expenditure of \$47,000 was not only made prior to the adoption of sec. 13.351 (8), but was in effect obligated by the provisions of sec. 20.280 (3). To apply the statute to this particular structure and facility would in effect be to give it a retrospective operation. The law is established that a retrospective operation of a statute is to be avoided if such a construction is possible.

Accordingly, it is my opinion that the proposed expenditure of \$10,000 may be lawfully made without reference to the state building commission.

RGT

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*Conservation Commission—Gifts*—Conservation commission has no power to accept gift of dam and adjoining two acres at the outlet of Mirror lake for the purpose of maintaining and repairing the dam, and maintaining the levels of Mirror lake.

January 15, 1958.

JAMES R. SEERING,  
*District Attorney,*  
Sauk County.

You state that the dam which maintains Mirror lake in your county is part of the assets of a company which is now going through bankruptcy. You state further that a group of local citizens propose to buy the dam and dam site together with approximately two acres of land and donate this area to the state conservation commission. It appears further from your request that your county board and the persons concerned believe that this is necessary for the purpose of perpetuating Mirror lake. You inquire whether the acquisition by gift and the subsequent maintenance of this dam by the conservation commission is valid in view of Art. VIII, sec. 10, Wis. Const., which prohibits the state from engaging in works of internal improvement.

In 44 O. A. G. 148 (1955) the Attorney General stated that the legislature could not appropriate funds for the reconstruction and repair of a dam at Thunder lake in Oneida county. In that opinion reference was made to the prior opinion in 36 O. A. G. 264 (1947), which extensively analyzed the circumstances under which the state might either construct, repair or maintain a dam, and pointed out that the state could only engage in such works when such works were incidental to the maintenance of a state park.

Under the circumstances in that case it was held that the state had no power to reconstruct or repair the dam at Thunder lake. In that opinion reference was made to the fact that the facts submitted did not show that the state owned any land on Thunder lake.

In a subsequent opinion, 45 O. A. G. 28 (1956), a similar statement was made in regard to the Rush lake dam at the outlet of Rush lake in Winnebago county. In that case all the lands surrounding Rush lake were private with the exception of approximately 18 acres, and it was stated that the Rush lake case was ruled by the opinion issued in regard to Thunder lake.

The facts you present do not distinguish Mirror lake from either Thunder lake or Rush lake, and accordingly the same opinion must be given that the conservation commission could not accept a gift of this dam and thereafter maintain it.

In view of the desire of your county board to perpetuate Mirror lake, I point out to you that while the state may not accept title and maintain or repair the dam, the owner is always under a continuing obligation to do so. I quote the following from Kanneberg, Wisconsin Law of Waters, July, 1946, Wis. L. Rev. p. 367:

*"In State of Wisconsin v. Tomahawk Hydro Electric Company [Docket 2-WP-103, 4 P. S. C. R. 467] involving the Tomahawk dam in the Wisconsin River, the owner of the dam had failed to make repairs to the dam as ordered by the commission on the ground, as the facts were, that all of its property, including the dam, was heavily mortgaged, and that the company was insolvent.*

*"The Public Service Commission thereupon caused an action to be brought against the owner to enforce compliance with its order. The circuit court, after a trial, ordered the dam sold free and clear of incumbrances to a purchaser willing to make the repairs. On the sale, the dam was purchased by the Wisconsin Public Service Corporation for approximately \$8,000, and it has since been reconstructed."* (Italics supplied.)

It would appear, therefore, that both the present owner and any purchaser of the dam and dam site would be under a similar obligation to repair the dam and subject to similar action by the public service commission.

RGT

*University of Wisconsin—Lands—Sale*—Regents of the university of Wisconsin under sec. 36.34 do not have legal authority to sell lands worth approximately \$88,000 for \$1 to a nonprofit corporation with the right to repurchase the land for \$1 subject to outstanding leases and conveyances.

January 15, 1958.

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

You have requested my opinion on the legality of the development of a shopping center in the University Hill Farms area. The initial step would consist of the sale of some 32 acres of land in the northeast corner of the area to a nonprofit corporation for \$1 and other valuable consideration which would include an option to the regents to repurchase the property for \$1, subject to leases and other encumbrances then outstanding.

In many other respects the subsequent development of the area as a shopping center would follow pretty much the pattern outlined in my opinion to you under date of April 1, 1957, 46, O. A. G. 83.

The essential difference here is in the very first step relating to the initial sale of the property to a nonprofit corporation for \$1. In the prior opinion it was assumed that the initial sale to the nonprofit corporation would be made upon adequate consideration and that the nonprofit corporation would obtain the sale price by a loan or gift from the so-called anonymous trust fund whose use by the regents is practically unrestricted.

The general tenor of sec. 36.34, Stats., relating to the sale of the property known as the University Hill Farms contemplates bona fide sales, and as a matter of fact subsec. (6) gives some indication of the legislature's estimate of the value of the land in providing for the use of 30 acres for state office building facilities at a base price of \$2750 per acre.

The regents hold university lands in trust for the state and it might well be questioned that any trustee is acting prudently when he sells 32 acres of land presumably worth

\$2750 per acre or a total of \$88,000 for \$1 on the strength that the purchaser will be able to develop it into an extremely valuable shopping center and sell it back for \$1.

Presumably the first step that the nonprofit corporation would take would be to encumber the fee or permit the encumbering of the fee title for working capital. If the venture for any reason should fail and the mortgage should be foreclosed the repurchase agreement would be valueless. The essence of the transaction comes pretty close to really loaning the credit of the state to a corporation in violation of sec. 3, Art. VIII, Wis. Const., since the regents in effect are making this land available for use as loan collateral for \$1.

Moreover, it may seriously be questioned whether such a transaction runs contrary to the decision of the Wisconsin Supreme Court in the case of *State ex rel. Thomson v. Giesel* (1954), 267 Wis. 331, 65 N. W. (2) 529, where it was held that the mortgaging of property in which the state has a leasehold interest, constitutes a state debt in violation of sec. 4, Art. VIII, Wis. Const.

The repurchase rights of the regents might be construed to constitute the creating or retention of some interest in the land by the regents which could not be mortgaged under the doctrine of the above decision, since an option creates a right *in rem*. American Law of Property, sec. 11.17.

For the foregoing reasons I advise you that the regents may not lawfully sell valuable land for \$1, irrespective of the purchaser's agreement to sell back for the same price. This conclusion makes unnecessary any further discussion of the subsequent steps in the proposed shopping center plan at this time.

WHR

*Forest Crop Lands—Withdrawal*—Option and easement agreement for the exploration for iron ores underlying forest crop lands which does not interfere with the surface for forest crop purposes does not require a withdrawal of the lands affected from registration under the forest crop law.

January 16, 1958.

WILLIAM T. BRADY,  
*District Attorney,*  
Juneau County.

You state that your county board of supervisors has been approached by a group of individuals who desire to explore for iron ore on county forest crop lands with the proposition that the county execute to them an "option for a lease" which would give them the right to go upon the forest crop lands, determine by various scientific and other methods whether bodies of iron ore were present, and thereupon request a lease if such bodies of iron ore were found.

You have submitted in this connection a document entitled "option" which has annexed thereto as Exhibit A the proposed lease which would be executed if iron ore is found.

You inquire whether the execution would jeopardize the rights of a county to receive payment from the state under the forest crop law.

While the document entitled "option" does not so describe itself, it is in effect an easement to go upon the property and conduct test drillings and other examinations to determine if iron ore is present. You have informed me that these borings and examinations can be conducted with little or no interference with the tree cover growing on the premises or the use of the premises for forest crop purposes.

If that statement is correct, then this proposal would appear to be covered by our opinion in 45 O. A. G. 16 (1956), which states that a document which is neither a deed nor a lease nor provides for uses inconsistent with the purpose of the forest crop law would not be a transfer of property within the meaning of that law, and would not necessitate a withdrawal of the lands from under the provisions of the forest crop law.

Lands subject to such an easement would be eligible to receive state aid under the provisions of ch. 77 of the statutes.

In order to bring your proposed option clearly within the terms of our previous opinion, I suggest that the document be so drawn that it indicates on its face that in addition to being an option it grants an easement. Instead of stating that the individuals concerned are given "the right" to enter upon the premises and explore them by various methods, it would be preferable to substitute for the words "the right" the words "an easement".

Further, in the event of a forfeiture of these options it would be desirable to strike any reference to a re-entry and re-taking of possession and substitute the words "declare such easement terminated and exclude the optionee [or other designation] from any further exercise thereof". You of course understand in accordance with our opinion in 40 O. A. G. 482 that when the option is exercised and a lease is issued by Juneau county that the lands would have to be withdrawn from registration under the forest crop law.

RGT

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*Words and Phrases—Taxes—Meaning of "preceding year" in amendment by ch. 61, Laws 1957, of sec. 74.03 (2) (a). Application of amendment by ch. 257, Laws 1957, of minimum payment provision of sec. 74.03 (2) (c) that applies to total taxes of person rather than on separate parcels.*

January 16, 1958.

GEORGE SULLIVAN,  
*District Attorney,*  
Iron County.

By chs. 61, 97 and 257, Laws 1957, the provisions of sec. 74.03, Stats., were amended and, so far as material to two questions you have submitted, the changes are shown with

deleted material stricken through and added language italicized, as follows:

**"74.03 Semiannual payment of taxes. (1) PERSONALTY TAXES ANNUAL, REALTY SEMIANNUAL.** Commencing with the 1943 tax roll, all personal property taxes shall be paid on or before February 28 and all real estate taxes may be paid in 2 instalments, as provided in this section.

**"(2) SEMIANNUAL PAYMENTS.** Each and every person or corporation charged with real estate taxes on a tax roll in the hands of the town, city or village treasurer shall pay to such treasurer the full amount thereof on or before ~~February 28~~ *the last day of February* next following the receipt of such tax roll by such treasurer, or he may pay the same in 2 equal instalments as follows:

**"(a)** The first instalment shall be paid to the town, city or village treasurer on or before January 31. *The governing body of any town, village or city may by resolution adopted by two-thirds of its membership not later than December 15 of the preceding year, fix a later date for the payment of the first instalment, which may be at a date not later than February 28.*

**"(b)** The second instalment shall be paid to the county treasurer \* \* \*.

**"(c)** Such first instalment shall not be less than \$20 if the total tax exceed \$20, nor less than the total amount of the tax if the same does not exceed \$20. *In towns this paragraph shall apply to the total tax levied against any one person and not to individual parcels or descriptions.*

**"\* \* \*"**

(1) You first inquire whether the words "preceding year" in the addition to sec 74.03 (2) (a), which was made by ch. 61, refers to the year preceding the one in which the tax levy is made or the year preceding the tax collection year. The purpose in placing a time limitation after which the extension action may not be taken is to preclude last minute action of such nature and thereby assure sufficient time thereafter for taxpayers to be advised thereof so as to be able to take advantage of it and for financial planning in respect to payment of taxes. Also whether the local unit decides to grant such extension will depend upon its financial situation and also upon general economic conditions. Such considerations would not be served by requiring that the extension action be taken by December 15 of the year preced-

ing the one in which the tax is levied as that time would be remote thereto.

Furthermore, this provision for extension follows language that says the first instalment "shall be paid \* \* \* on or before January 31". Thus, the words "preceding year" refer to such last previously mentioned date. The year which precedes the year that contains this specified date obviously is year of the tax levy.

These provisions in sec. 74.03 (2) (a) must be interpreted as meaning that the extension action must be taken on or before December 15 of the year preceding the tax collection year.

(2) The second question is how the \$20 minimum provision in sec. 74.03 (2) (c), is to be applied in a situation coming within the amendment made by ch. 257, Laws 1957, that in a town it shall apply to the total taxes levied on property of the same person rather than to the tax on each of individually or separately assessed parcels owned by such person. In considering this question effect must be given not only to the minimum payment provisions in sec. 74.03 (2) (c) but also the requirement in the opening paragraph of sec. 74.03 (2) that payment be "in 2 equal instalments".

The legislature in enacting ch. 257, Laws 1957, may have been motivated by consideration of a farm as a unit of property comprised in most instances of separately described but contiguous parcels. However, the amendment does not say this but rather uses the general language of "the total tax levied against any one person". Accordingly, if there are separate parcels in several parts of the town in the same ownership, the taxes on all of such parcels are to be totaled for purposes of arriving at the minimum payment required for postponement purposes, regardless of whether the parcels are adjoining or contiguous.

Thus, where the total of the taxes on all parcels, whether contiguous or not, owned by the same person in one town is less than \$20, no postponement is possible. The tax on each parcel must be paid in full, because whether considered separately or lumped together the \$20 minimum payment requirement is operative.

Where the total of the taxes on all parcels, whether contiguous or not, owned by the same person in one town is between \$20 and \$40, the taxes on such parcels are thus lumped together. Obviously, one-half of the tax on each, as required by the opening paragraph of sec. 74.03 (2), will be less than \$20. The amendment to sec. 74.03 (2) (c) thus makes the \$20 minimum applicable to the total of the taxes on all such parcels and accordingly \$20 is the amount that must be paid. The statute provides nothing specifying how such payment shall be applied upon the amount of tax levied on each of the respective parcels. Since the separately levied taxes on the respective parcels are totaled to determine the amount to be paid as the first instalment, it follows that each parcel included in such determination is entitled to and is to be credited with its pro rata part of the \$20 payment.

Where the total of the taxes on all parcels, whether contiguous or not, owned by the same person in one town is in excess of \$40, then one-half of the tax on each parcel must be paid. As the total of such one-half payments on the separate taxes will exceed \$20, such minimum payment requirement is satisfied and no problem of allocation or distribution of the payment exists because the amount applied on each parcel will be the one-half of the tax thereon.

It is suggested that where, by invoking the benefit of the amendment made by ch. 257, the amount that is applied as the first instalment of the tax on an individual parcel or description is less than \$20, the town treasurer should indicate in his tax receipts by cross references or other means the several parcels which were included in the calculation of the minimum payment. In this way it will be established of record as to each parcel so included that the amount credited in his books is a sufficient payment of a first instalment to postpone the balance, even though it is less than the \$20 minimum which would otherwise be applicable. Otherwise, it would appear from the amount credited on the tax on each such parcel that there was not a payment of sufficient amount to constitute a first instalment that would effect a postponement of the balance and the unpaid amount would be delinquent and subject to delinquent interest from January 1.

HHP

*Words and Phrases—Insurance*—Group life insurance plan based on eleven “major industries” is outside scope of sec. 206.60 (4).

January 16, 1958.

PAUL J. ROGAN,  
*Commissioner of Insurance.*

You have requested my opinion as to the legality of a group life insurance plan in which a life insurance company, authorized to do business in Wisconsin, proposes to issue group policies covering the “key personnel” of firms that are members of an association of employers, classifying such firms into eleven “major industries”. The “key personnel” are defined as “active owners, partners, officers, administrative and professional employes and full time salesmen”. The eleven “major industries” are described as: “Primary metals; machinery, fabricated metal products and instruments; electrical equipment, appliances and supplies; lumber, wood products and by-products; stone, mineral, clay and glass products; products of petroleum, rubber and coal; chemical, drugs and allied products; textiles, leather, apparel, and other finished products; food and kindred products; printing, publishing and allied products; engineering and other manufacturers’ service organizations”.

The proposal recites “The plan will be made available through each Industry’s Insurance Trust Fund \* \* \*”. It also states that this plan is to be administered by the association.

The chief question which arises is whether the classification of the eleven “major industries” listed above is in conflict with sec. 206.60, Stats., which provides:

“No policy of group life insurance shall be delivered in this state unless it conforms to one of the following descriptions: \* \* \*

“(4) A policy issued to the trustees of a fund established by 2 or more employers *in the same industry* \* \* \*.”

This provision was enacted into law by ch. 458, Laws 1949, and has not since been amended. The language was taken verbatim from “Group Life Insurance Definition and

Group Life Insurance Standard Provisions, Revised at New York, December 15, 1948, by the National Association of Insurance Commissioners". Further than this, there is nothing in the history of the statute to assist in construing its language or determining the intent of the legislature, except the background of this type of group insurance. Initially the authorization for such group insurance was confined to a coverage of the employes of a single employer. Then, as collective bargaining contracts came to encompass all the employes of a community in the same business, the expansion to "employes in the same industry" was made so employes could be covered by a group plan coextensive with the collective bargaining contract and they would not lose the benefits thereof in case of transfer of employment from one employer to another within the contract area.

In 1945, the Wisconsin legislature passed Bill No. 353, S., which was the first legislative action in Wisconsin designed to authorize group life insurance by trade associations. This bill did not have the "in the same industry" requirement but had a provision, not in the present law, requiring that "the association must have been formed for purposes other than obtaining insurance". This bill did not become law, however, because of veto by the governor whose veto message indicated there was doubt as to the advisability of expanding the group insurance laws.

The state of New York has a statute passed in 1947 which is very similar to sec. 206.60 (4) quoted above and does include the "in the same industry" provision. See New York Insurance Law, Section 204, Subdivision 1, paragraph d. The New York Insurance Department Revision Note in connection with this law states:

"The extension of group insurance is attended with some hazards unless the group is one selected for some bona fide purpose other than that of obtaining insurance, because the insurance may be obtained without medical examination." Sec. 27 McKinney's Consolidated Laws of New York, Annotated, Part 2, Page 40.

There seems to be no decision of the Wisconsin supreme court or of other states construing the phrase "in the same industry" as used in sec. 206.60 (4). The same language ap-

pears in sec. 204.32 (2) (a) 3 relating to group accident and health insurance. However, there likewise has been no construction or amplification thereof.

The only case involving similar language, although of little assistance, is *Jacobs v. Eisen* (1947) 68 N. Y. S., 2d 921, 188 Misc. 577, which involved the language in the New York statute precluding injunctions relative to labor disputes involving "persons who are engaged in the same industry, trade, craft or occupation". It was held that four dentists were not entitled to an injunction to restrain a union of dental technicians from striking against their employer, a dental laboratory, which manufactured and supplied dentures, bridges, inlays, and false teeth to such dentists pursuant to their individual orders and instructions. Because if the dentists did not use the services of this laboratory it would be necessary for each to employ a technician and have the necessary apparatus to make such dental fixtures, it was held they were in the same industry or trade as the employes of the laboratory. This case merely shows that each situation has to be analyzed upon its own facts.

Therefore, under sec. 990.01 (1) these words must be construed according to common and approved usage. The word "industry" is defined in Webster's New International Dictionary, 2d Ed., 1950, as "any department or branch of art, occupation, or business; esp., one which employs much labor and capital and is a distinct branch of trade; as, the sugar industry". This definition, or one almost identical, has been approved in *Chicago v. R. I. & P. Ry. Co. v. State*, 83 Okla. 161, 201 P. 260, 264; *Dessen v. Department of Labor and Industries of Washington*, 190 Wash. 69, 66 P. 2d. 867, 869; *Southern Pacific Company v. State Corporation Commission et al.*, (1931) 39 Ariz. 1, 3 P. 2d. 518, 521; *Weatherford v. Arter*, 135 W. Va. 391, 63 S. E. 2d. 572, 574; *People v. Maggi*, 378 Ill. 595, 39 N. E. 2d. 317, 318; *J. L. Brandeis & Sons v. N. L. R. B.* (C. C. A. 8), 142 F. 2d. 977, 997.

The eleven "major industries" listed above do not conform to the common and approved definition of industry. It cannot be said, for example, that "primary metals" or "engineering and other manufacturers' service organizations" is a distinct branch of trade. In fact, none of the eleven so-called "major industries" carries with it sufficient

distinctiveness of specificity to qualify itself as an industry in any recognized sense.

Whether a particular set of employers are in the same industry depends in each case upon the activities or business which each carries on in this state. What specific activities or types of business operations are necessary to constitute being in the same industry, in order to come within sec. 206.60 (4), cannot be summarized so as to provide an arbitrary test for all cases. Each case must be determined on its own peculiar facts to ascertain whether the employers attempted to be grouped do carry on business of such a nature and quantity that it can be said that they are "in the same industry".

While the exact limits of what does constitute an "industry" under various circumstances cannot be stated with precision and it is not possible to lay down any definite rule as to when several employers are "in the same industry", the proposed classifications do not fall within any reasonable construction of said terms. It is my opinion that a group life insurance plan based upon the eleven "major industries" as described above would be outside the intended scope of sec. 206.60 (4) in that the association of industries does not have the status of a separate industry, nor are the several employe firms which comprise its membership all in the same industry. The plan, therefore, is not authorized by law.

JEA:HHP

*Appointment—Election Officials*—Under sec. 6.32 (1) the basis for appointment of election officials in 1958 is the vote for presidential electors at the last general election, since it was a presidential election.

January 20, 1958.

JAMES D'AMATO,  
*District Attorney,*  
 Waukesha County.

You have asked for my opinion as to whether under sec. 6.32 (1), Stats., the basis for appointment of election officials in 1958 should be the 1956 vote for presidential electors, or the 1956 vote for governor.

Most questions received in this office are exceedingly difficult to answer, which is usually the reason why they are referred here. Your question presents a welcome change. To use baseball parlance, most questions addressed to the attorney general can be likened to hard, line drives, nearly, if not actually, out of reach. But once in a while, just as in baseball, someone bats out an easy "pop fly". Your question falls into the latter category. I want you to know it was an easy one to "field", and that I am appreciative.

Our supreme court has decided your precise question in *State ex rel. Milwaukee County Republican Committee v. Ames*, (1938) 227 Wis. 643, 278 N. W. 273. Speaking through Mr. Justice Martin, the court said at p. 655:

"We construe the statute to mean that, in the appointment of election officials, such as inspectors, clerks of election, and ballot clerks, when the preceding general election was a presidential election, the basis for division of the election officials shall be the vote of each party for its presidential electors, and that, in making such appointments following a general election in a nonpresidential year, the division shall be made upon the vote of the party candidate for governor."

That decision has received further judicial approval in *State ex rel. Central Committee v. Board*, (1942) 240 Wis. 204, 3 N. W. 2d 123.

The basis for appointment of election officials in your county in 1958, therefore, is the 1956 vote for presidential electors.

EWV

*Words and Phrases—Counties*—Counties may provide and pay for snow removal on town roads used as mail routes under authority of sec. 83.03 (1).

January 20, 1958.

GARY B. SCHLOSSTEIN,  
District Attorney,  
Buffalo County.

You have requested my opinion as to whether a county board may provide that snow removal on all town roads that are mail routes be done by the county at county expense.

The only possible authority for such action is found in sec. 83.03 (1), Stats., which reads:

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

Sec. 84.07 (1), Stats., states that:

“\* \* \* Maintenance of state trunk highways includes the operations, activities and continuing processes for their repair, preservation, restoration and reinforcement, the removal and control of snow and the removal, treatment and sanding of ice, and all measures deemed necessary to provide adequate traffic service. \* \* \*”

The question is whether the wording of sec. 83.03 (1) is broad enough to include highway maintenance. This problem was discussed at some length in 39 O. A. G. 134 (1950). It was there concluded as follows:

“The word ‘maintain’ is practically the same thing as ‘repair’ which means to restore to a sound or good state, after decay, injury, dilapidation, or partial destruction. *Missouri K. & T. R. Co. v. Bryan*, (Tex.) 107 S. W. 572, 576. The ‘maintenance’ of a street has the same meaning practically as the word ‘repair.’ *Barber Asphalt—Pav. Co. v. Hezel*, 155 Mo. 391, 56 S. W. 449, 451, 48 L. R. A. 285. In *Beal v. Erie R. Co.*, 51 Ohio App. 397, 1 N. E. 2d 328, 330, it was considered that the word ‘maintain’ in a statute relating to bridges and abutments was used in the sense of to keep in

repair or in substantially the same condition as when constructed.

“Thus to all practical intents and purposes sec. 83.03 (1) as now worded is sufficiently broad to authorize the county board to maintain or aid in maintaining any highway in the county, and the view expressed in 25 O. A. G. 702 is no longer applicable because of the subsequent amendment of the statute.”

In the case of *Webster v. Frawley*, (1952) 262 Wis. 392, 398, the court pointed out:

“\* \* \* that the term ‘maintenance’ embraces only various types of work on the highway for the purpose of keeping the highway in repair.”

This language is not conclusive but is indicative of the interchangeability of the words maintenance and repair.

It is my opinion that snow removal may be undertaken on town roads by the county as deemed necessary under authority of sec. 83.03 (1), Stats. In reaching this conclusion I place substantial reliance upon the reasoning of the attorney general’s opinion cited above, and upon the fact that that opinion has stood unchallenged for nearly eight years; and that the legislature has not undertaken to change the statute as thus interpreted in four intervening sessions.

REB

*Words and Phrases—Licenses—Motor Vehicle Dealer—*  
Any person, firm, or corporation, which is in the business of leasing motor vehicles to the public is a "motor vehicle dealer" within the meaning of sec. 218.01 (1) (a) and must have an automobile dealer's license.

January 23, 1958.

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

You have asked my opinion as to whether finance companies which lease motor vehicles come within the provisions of sec. 218.01 (1) (a), Stats., so as to require them to obtain automobile dealer licenses.

The statute in question was enacted by ch. 474, Laws 1935, and reads as follows:

"(a) 'Motor vehicle dealer' means any person, firm or corporation, not excluded by paragraph (b) of this subsection who:

"1. *For commission, money or other thing of value, sells, exchanges, buys or rents, or offers or attempts to negotiate a sale or exchange of an interest in motor vehicles; or,*

"2. *Who is engaged wholly or in part in the business of selling motor vehicles, including motor driven cycles, whether or not such motor vehicles are owned by such person, firm or corporation.*"

The wording of the paragraph in question has remained unchanged since that time. This office discussed that particular section of the statutes in 36 OAG 256, but the word "rents" as used therein was not specifically discussed.

This statute is remedial and regulatory in nature, and was enacted under the police power of the state. The object of the statute is to regulate the conduct of persons who are dealing with the Wisconsin public and by such regulation to prevent possible injury to the public.

In dealing with statutory construction we must first determine whether or not the statute is ambiguous. If it is plain and unambiguous no interpretation is necessary and the statute must be applied according to its terms. *Estate of Ries* (1951) 259 Wis. 453, 459, citing *State ex rel.*

*U. S. F. & G. Co. v. Smith* (1924) 184 Wis. 309, 316, and *Estate of Matzke* (1947) 250 Wis. 204, 208.

Another rule of law which is properly applied in this situation is that a presumption arises that the legislature acted with full knowledge and information as to the subject matter of the statute, and existing conditions and relevant facts relating thereto when the statute was enacted. *State ex rel. Madison v. Industrial Comm.* (1932) 207 Wis. 652, 660-661.

It is my opinion that the statute in question is clear and unambiguous and that no absurd consequences would result from its application. It is assumed that rental of vehicles by the finance company would be for "commission, money or other thing of value" and it is further assumed that the lessors do not come within the classifications excluded by sec. 218.01 (1) (b). It should be noted here that consideration has been given to sec. 218.01 (1) (b) 4, and it is determined that such exclusion does not apply to the leasing of motor vehicles by a sales finance company.

It is worthy of note that the commercial leasing of motor vehicles has become a significant business in the modern commercial world. Many large users of motor vehicles prefer to rent the vehicles from a lessor at a stipulated rental and thereby avoid certain incidents of ownership. Certainly there are no policy factors that would justify application of less stringent regulations to a lessor of motor vehicles than to a seller of motor vehicles.

By the language of the definition any one of the acts enumerated is sufficient to render the individual in question a dealer. The acts are enumerated disjunctively. "Rents" and "leases" are synonomous terms and in the context of this statute "rents" includes a lessor.

Accordingly, I conclude that the term "motor vehicle dealer" as defined in sec. 218.01 (1) (a), includes those who are in the business of leasing motor vehicles to the public and compliance with ch. 218, is required.

WAP/LLD

*Counties—Cost of Care—Statutory Limitation—Sec. 51.18 (2)*, created by ch. 299, Laws 1957, does not place a statutory limitation upon cost of family-home care for patients of county mental institutions, but leaves the question of such cost to county authorities.

January 24, 1958.

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

You ask whether there is any limitation on the amount which a county mental hospital may pay for care of a patient placed in a family boarding home under sec. 51.18 (2), Stats., as created by ch. 299, Laws 1957.

The new law to which you refer reads:

“The superintendent of any county hospital may, with the approval of the department, place any patient in a suitable family boarding home upon such terms and conditions as he determines, if he considers that such course would benefit the patient. When any patient is so placed, the state charges or aid provided in s. 51.08 (1) or 51.24 (2), as the case may be, shall continue during the period of such placement. The county of the patient’s legal settlement shall be charged with the rates and expenses provided under s. 51.08 or 51.24 (2), as the case may be, and such charges shall be adjusted in the same manner as if the patient were at the hospital. The department may visit and investigate such home and may cause the patient to be returned to the hospital or placed in another home when deemed advisable. Such placement shall not be considered a conditional release or temporary discharge.”

The primary purpose of ch. 299, Laws 1957, appears to be to authorize family care of mental patients from county institutions, as such care has heretofore been authorized for patients in state institutions by sec. 51.18 (now renumbered sec. 51.18 (1)), Stats.

It seems significant that, in authorizing family care for patients of county institutions, the legislature has omitted

any provision comparable to the second sentence of sec. 51.18 (1), Stats. 1957, which reads:

“\* \* \* The cost to the state of the supervision and maintenance of any patient so boarded out shall not exceed the average per capita cost of his maintenance in the state hospital or colony. \* \* \*”

Such omission may be a recognition that budgetary control with respect to care of patients in state institutions is primarily a state responsibility, whereas budgetary control with respect to county institutions is primarily a matter for county authorities.

Instead of providing an express limitation of cost as in sec. 51.18 (1), Stats. 1957, above quoted, the legislature has left the “terms and conditions” of family care under sec. 51.18 (2) to the superintendent of the county hospital (who is subject to control of the governing officials under sec. 46.18 to 46.21, Stats.); and has made the following provision with respect to state aid, analogous to that covering transfer to hospitals for medical and surgical treatment under sec. 51.08 (1) :

“\* \* \* When any patient is so placed, the state charges or aid provided in s. 51.08 (1) or 52.24 (2), as the case may be, shall continue during the period of such placement. \* \* \*”

Under the comparable provision of sec. 51.08 (1), above quoted, you report that:

“\* \* \* it has been the practice, of necessity, for the county hospital to pay the contract rate of the private hospital, physician and surgeon, and such payments are absorbed in the overhead of the county mental hospital as a part of its per capita costs.”

Since the family-care treatment for patients of county institutions is primarily a matter of operation for which county authorities have been made responsible, the legislature has elected to leave the fixing of conditions with respect to costs for the county budget-making processes. The “cost to the state” under sec. 51.18 (1), Stats. 1957, is a direct cost, whereas cost to the state under sec. 51.18 (2) is in-

direct to the extent that the cost of family care affects *per capita* cost of maintenance.

In the event of abuse in any particular case, the legislature has retained control to the extent of authorizing the department to "cause the patient to be returned to the hospital or placed in another home when deemed advisable".

BL

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*Counties—Highway Contracts—Parking*—A county maintaining a state highway by contract pursuant to sec. 84.07 has no authority to regulate parking on such highway under sec. 349.13.

January 27, 1958.

ROBERT E. MCINTYRE,  
*Assistant Corporation Counsel,*  
Milwaukee County.

You advise that Milwaukee county has a general ordinance, enacted pursuant to sec. 85.84, Stats., purporting to regulate stopping and parking on county and state trunk highways within the limits of your county. It has been recommended that a certain area in front of a church on state trunk highway 32, in the city of Oak Creek, be made a "No Parking" area. You inquire concerning the authority of Milwaukee county to regulate parking in this municipality and call my attention to sec. 349.13, Stats., created by ch. 260, Laws 1957, which reads in part as follows:

"AUTHORITY TO REGULATE THE STOPPING, STANDING OR PARKING OF VEHICLES. (1) The state highway commission with respect to state trunk highways outside of corporate limits and the local authorities with respect to highways under their jurisdiction, including state trunk highways or connecting streets within corporate limits, may, within the reasonable exercise of the police power, prohibit, limit the time of or otherwise restrict the stopping, standing or parking of vehicles beyond the prohibitions, limitations or restrictions imposed by ch. 346, except

that they may not modify the exceptions set forth in s. 346.50. The state highway commission may also restrict or prohibit the stopping, standing or parking of vehicles on any part of a state trunk highway or connecting street within corporate limits if the local authority having jurisdiction has not enacted any stopping, standing or parking regulation applicable to the highway or part thereof in question. The authority granted by this subsection may be delegated to a traffic officer or to the officer in charge of the maintenance of the highway in question \* \* \*.”

You state that Milwaukee county's sole contact with the area in question is by virtue of a contract with the state highway commission pursuant to which the county highway department maintains that portion of the highway. This is in accordance with the authority of sec. 84.07, Stats. You ask the following questions:

“1. Does the County Board of Milwaukee County have authority to enact an ordinance designating the area in question as a no parking area?

“2. Can the state highway commission delegate the authority to enact such an ordinance to the County Board in view of the fact that the highway area in question is maintained by the county highway commission?”

While the statute above quoted states that authority to regulate the parking of vehicles may be delegated to the officer in charge of the maintenance of the highway, it is my opinion that this was not meant to include any officer of Milwaukee county. You stated that the highway in question is a state highway in a city of the county, and that Milwaukee is maintaining the same for the state. When acting in such capacity, the county is a mere contractor of the state highway commission. This relationship has been the subject of a number of cases and has recently been reconsidered at some length in *Firemen's Ins. Co. v. Washburn County* (1957) 2 Wis. 2d 214, and cases reviewed therein. There is no doubt in my mind that since the county is a mere contractor for maintenance purposes that it does not have maintenance responsibility as a governmental duty. In this case the officer in charge of maintenance would be the district engineer or some other official of the state highway commission designated by it, so that it necessarily follows

that Milwaukee county has no power to restrict parking on a state highway. Your first question must therefore be answered in the negative.

In response to your second question—while the statute delegates certain authority to the highway commission, it contains no language which either expressly or impliedly empowers the commission to delegate its authority to another governmental agency. In the absence of such power, I therefore answer the second question also in the negative.  
REB

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*Counties—Airport—Leases—Sec. 114.14 (3) construed:*  
Where the county is the owner and operator of an airport it can lawfully lease space in its terminal building to a car rental agency upon the condition that it will not lease space to any other car rental agency, but it is doubtful whether it can lawfully exclude other rental agencies from soliciting business in the airport or terminal unless such regulation can be shown to be necessary for the convenience of the flying public or the efficiency of the operation of the airport.

January 28, 1958.

JACK D. STEINHILBER,  
*District Attorney,*  
Winnebago County.

Your question is based upon the following facts: The aviation committee of the Winnebago county board in its capacity as the management of the county owned airport is preparing to lease space in the terminal building to North Central Airlines, to a restaurant concession and to an auto rental agency. Your question is: In connection with the lease of space to an auto rental agency can the airport management lawfully agree 1) not to lease space to any other auto rental agency within the airport, and 2) to permit no other auto rental agency to solicit business within the airport?

Sec. 114.14 (3), Stats., provides *inter alia* that the manager of a county-owned airport “\* \* \* may make such contracts or other arrangements as may be deemed necessary for the \* \* \* operation of the airport; \* \* \*”, and also that “\* \* \* in no case shall the public be deprived of equal and uniform use of the airport; \* \* \*”.

Assuming without deciding that the aviation committee to which you refer stands in the shoes of the airport commission referred to in the statutes, the question resolves itself into one of whether the committee is empowered to enter into such an agreement and whether all or part of such an agreement would constitute an unlawful restraint of trade.

It cannot be disputed that an agreement by the airport management to the effect that it would not rent space to a competitor and that it would not permit a competitor to solicit business within the airport, whether such agreement is an integral part of the lease or ancillary thereto, is a restraint of trade as such; the question of its legality depends upon whether or not it is reasonable under the particular facts involved. (See Toulmin's *Antitrust Laws*, 2nd ed. 1944, vol. 2, p. 64).

A partial restraint of trade, such as this is, may be upheld as valid and reasonable if it is not the major purpose of the agreement but is ancillary or incidental to a lawful contract such as a sale or lease. *U. S. v. Addystone Pipe and Steel Co.*, (1898) 85 Fed. 271, affirmed 175 U. S. 211, 20, S. Ct. 96, 44 L. Ed. 136; Toulmin op. cit. vol. 1, p. 51; 36 Am. Jur. 534, *Monopolies* par. 54. The rule is stated as follows in 36 Am. Jur. 552, *Monopolies* par. 76:

“Covenants in deeds and leases which restrict the right of either party thereto to engage in business in competition with the other or to deal with other persons, have usually been held to be valid and enforceable where they are reasonably necessary for the protection of the interests of the parties to the transaction and do not adversely affect the public interest \* \* \*.”

Without going into the fairly extensive body of cases on what constitutes reasonableness in a restraint, it is sufficient to say that a provision in such a lease of a limited du-

ration (one to five years) covering a limited area and binding only the two parties thereto, has been generally upheld. 36 Am. Jur. 587, Monopolies par. 111; 90 ALR 1450, LRA 1918 E 665. Examples of the type of lease are a lease of a building for use as a general store with a covenant not to lease the adjoining property to a competitor; a lease by a hotel of a barbershop and manicuring concession interpreted as precluding the hotel from leasing similar space to a competitor. We have found no case covering a lease of facilities to a car rental service by an airport, but see no reason why the general rule should not cover that situation.

As opposed to granting an exclusive lease, the question of granting an exclusive franchise which would prevent other car rental companies from soliciting business in the airport, involves an additional doctrine of law on which we find no authority which exactly covers the point, and conflicting lines of authority which bear upon it.

McQuillin on Municipal Corporations, 3rd Ed. 1949, states (Vol. 3, pp. 3-4, par. 11.03) :

“\* \* \* airport officers are generally held to have power to grant exclusive rights to transport passengers to public airports, carry baggage, or to grant *exclusive rights* to a telegraph company to *solicit* and handle telegraph messages on the terminal property.” (Citing two Florida cases) (Emphasis supplied).

In a somewhat analogous situation McQuillan upholds the right of a municipality to grant exclusive business rights in a park. (Vol. 10, p. 136, par. 28.53 N). Likewise, a number of other jurisdictions have held that a public body, as the owner and operator of a public airport, can lawfully grant an exclusive taxicab or limousine concession. See 40 ALR 2d. 1060, note p. 1062 in which it is commented that various jurisdictions reach this conclusion for a variety of reasons, but they have tended to reach the same conclusion.

On the other side, two Wisconsin cases have some bearing on this problem. In the case of *Wussow v. Gaida and another* (1947) 251 Wis. 328, 29 N. W. 2d 42 the plaintiff, who had leased an airport pursuant to the provisions of sec. 114.14 Stats., sought to restrain the defendants from using

the airport for their own commercial gain through the giving of flying instructions and providing taxi service. The plaintiff claimed exclusive commercial use. The court held that he did not have and could not be given such exclusive use and that the clause in sec. 114.14 (3) "in no case shall the public be deprived of equal and uniform use of the airport," extends to commercial as well as to private and personal use. (The court did not decide whether the plaintiff might be entitled to compensation from the defendants for such use, under the lease.)

The case of *Milwaukee County v. Town of Lake; Boynton Cab Co. and another, interpleaded defendants* (1951) 259 Wis. 208, 48 N. W. 2d 1, decided on a complicated set of facts which goes considerably beyond the question here, held *inter alia* that the county as owner of the airport had the exclusive right to make such rules governing the ground transportation available at the airport as were necessary to promote the efficient and orderly operation thereof. It upheld regulations which set aside a certain area as a stand for limousines only and another area for taxis, together with a requirement that taxi drivers must stay within a limited number of feet from their cabs. Although the contracts between the airlines and the Boynton Cab Co. resulted in that company having a monopoly on the limousine business, the court pointed out that the cabs of all companies were admitted without discrimination, and upheld the regulations adopted as reasonable provisions for convenience which did not exceed the proper limitations in providing accommodation for individuals using the air lines as passengers.

While this situation can be distinguished from yours, the reasoning, if applied to your situation, would say that the county may regulate the access of the other car rental agencies to the airport only so far as is necessary to promote the convenience of the public.

Whether or not the convenience of the public may require the complete prohibition of solicitation by other agencies upon the airport grounds is a question of fact which we cannot presume to answer. It must not be overlooked, however, in determining that fact that the legislature has, by

various statutes, declared a public policy of prohibiting or restricting monopolies and restraints upon trade.

The opinion in 38 OAG 105 which holds that a public airport owner may not lawfully grant, under sec. 114.14 (3) exclusive contracts for the sale of gasoline and aircraft parts, and for the repair of aircraft, reaches that conclusion on the basis that such contracts are not necessary, that the statute does not expressly or impliedly authorize them, and that they necessarily tend to create a monopoly with the inevitable lessening or ending of competition to the detriment of both the airport owner and the using public.

While this factual situation is similar to the one which prompts your question, it too differs in the respect that whereas gasoline and aircraft parts would almost necessarily have to be obtained at the airport, in the case of a car rental agency it would be possible to establish a competitor across the street from the airport exit with relatively little inconvenience to the traveling public. Nevertheless if the reasoning of this opinion were to be followed, it would preclude your excluding competition from soliciting business in the airport except in so far as might be necessary for its orderly operation.

Since Wisconsin has not decided this exact point, we cannot say for certain what the outcome of a case raising it would be. However, based upon the reasoning of the *Wussow* and *Milwaukee County* cases and the earlier opinion of this office, cited supra, it would be safer not to grant an exclusive franchise for solicitation.

It is our conclusion that it would be lawful for the county to lease space in its airport terminal to a car rental agency upon the condition and understanding that it will not lease other space in the airport to a competitor of the lessee, but that it is doubtful that the county can lawfully exclude competitors of the lessee from soliciting business in the airport unless such regulation is necessary for convenience and efficiency in the operation of the airport and the service of airline passengers.

GFS

*County Board—Election of Trustee*—It is permissible under sec. 46.18 (1) for county board of supervisors to elect trustee for a county institution for term of three years beginning January next, thereafter at its April meeting. Sec. 59.04 (1) (c).

January 29, 1958.

FREDERICK R. SCHWERTFEGER,  
*Corporation Counsel,*  
Dodge County.

You have asked whether the county board of supervisors may elect a trustee for its county institution at the April meeting of the board.

Sec. 59.04 (1) (a) establishes the November meeting as the annual meeting.

Sec. 59.04 (1) (c) provides:

“(c) The board, \* \* \*, shall meet on the third Tuesday of each April to organize and transact business. At this meeting the board may transact any business permitted at the annual meeting. \* \* \*”

Sec. 46.18 (1) provides:

“(1) Trustees. Every county home, infirmary, hospital, tuberculosis hospital or sanitorium, or similar institution, house of correction or workhouse, established by any county whose population is less than 500,000, shall (subject to regulations approved by the county board) be managed by 3 trustees, electors of the county, elected by ballot by the county board. Six months before completion of the buildings for any such institution the county board shall elect 3 trustees whose terms shall begin at once and end, respectively, on the first Monday of the second, third and fourth January next thereafter. *At its annual meeting in every subsequent year (and prior to January next) the county board shall elect one trustee for a term of 3 years to begin on the first Monday of January next thereafter.* Any vacancy shall be filled for the unexpired term by the county board; but the county chairman may appoint a trustee to fill such vacancy until the county board acts.”

For the purposes of this opinion we assume that a trustee was elected at the November meeting of the board and that neither of the two other trustees have resigned,

It is permissible, under sec. 46.18 (1), in a county having a population of less than 500,000, for a county board to elect a trustee for a term of three years beginning the first Monday of January, 1959 at either the April, 1958 meeting of the county board, at which meeting the board may transact any business permitted to be transacted at the annual meeting, sec. 59.04 (1) (c), or at the November, 1958 meeting, as in either case such election would comply with the requirement set forth in sec. 46.18 (1) as being prior to the January next.

Sec. 46.18 (1) provides that the terms of all trustees, except in the case of initial election, begin on the first Monday of January following election, and vacancies are filled for any unexpired term.

If a county board elects a trustee for a given county institution at the April, 1958 meeting for a term of three years beginning the first Monday in January, 1959, the county board could not at its November meeting elect another person to the same position, as the board would have exhausted its authority at the April meeting.

RJV

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*Juvenile Court—Documents—Public Welfare Department—Documents required to be furnished by juvenile court upon transfer of custody of delinquent, neglected, and dependent children to state department of public welfare pursuant to secs. 48.34 (3) (b) and 48.35 (2) (b), and in cases of termination of parental rights pursuant to sec. 48.43 (3), are to be furnished at the expense of the county and are not required to be paid for by the department.*

February 17, 1958.

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

You have requested an opinion whether your department or the juvenile court is responsible for payment for the papers required to be furnished to your department when the legal custody of a child is transferred to your department.

Sec. 48.34 (3) (b), Stats., relating to children adjudged delinquent, and sec. 48.35 (2) (b), relating to children found dependent or neglected, both provide as follows:

“(b) When the court transfers legal custody of a child to any licensed child welfare agency or the department, it shall transmit with the order transferring legal custody a summary of its information concerning the child or a transcript of the testimony taken at the hearing.”

Sec. 48.43 (3), relating to termination of parental rights, provides as follows:

“A certified copy of the order terminating parental rights, a certified copy of the birth certificate of the minor, and a transcript of the testimony in the termination of parental rights hearing shall be furnished by the court to the person given guardianship of the minor.”

The statute quite evidently contemplates that it shall be the duty of the court to furnish these papers at its own expense. No provision has been made for the state to pay any charges in connection with these papers, and it is my understanding that under the former statutes (prior to the adoption of the revised Children's Code in 1955) they were always furnished at the expense of the county. If the legislature had intended a change, particularly one which would involve additional expense to the state, it would have made specific provision for it. On the contrary, the notes attached to Bill No. 444, S., of the 1955 legislature, constituting the revised Children's Code, show that with reference to secs. 48.34 (3) (b) and 48.35 (2) (b) the only change made from the former law (sec. 48.01 (3), Stats. 1953) is to “allow the court the alternative of sending a summary of its information or a transcript of the hearing, while the present statute requires a transcript”. The note attached to sec. 48.43 (3), Stats., merely says that it “covers provisions in ss. 48.01 (3) and 48.07 (7) (d)”. Nothing whatever is said about imposing any liability upon the department for the cost of the required documents.

WAP

*Words and Phrases—License Regulations—Malt Beverages*—A “second offense” in the meaning of sec. 66.054 (15) (a) is one committed after a previous conviction. If a class “B” fermented malt beverage license is forfeited by reason of conviction of a second offense, pursuant to sec. 66.054 (15) (a), and the former licensee continues to operate the business, he may be prosecuted for sale without a license under sec. 66.054 (5) (a) whether or not the paper representing the license has been taken up or surrendered.

February 18, 1958.

ROBERT E. KOUTNIK,  
*District Attorney,*  
Manitowoc County.

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

I. A class “B” fermented malt beverage retail licensee was convicted on October 2, 1957 of selling fermented malt beverage to a person under the age of 18. Subsequently on October 29, 1957 the same licensee was convicted of permitting persons under the age of 18 to enter and be upon the premises. Both offenses are violations of sec. 66.054, Stats. You do not state whether the second conviction was based upon an offense committed after the first conviction.

II. On January 28, 1958 a class “B” fermented malt beverage retail licensee was convicted of two counts of violating sec. 66.054, both arising out of the same incident which occurred on October 11, 1957. Prior to January 28, 1958 the same defendant was charged with a violation of sec. 66.054 which is alleged to have occurred in December, 1957. The latter charge has not yet been tried but you expect to try it during February, 1958.

The questions with reference to case number I are whether the license was forfeited by operation of law under sec. 66.054 (15) (a); whether, if so, it is necessary that the license be surrendered to the town board; and whether if the licensee continues to operate his place of business he may be charged with the violation of sec. 66.054 (5) (a), sale without a license.

With reference to case number II the questions are whether the conviction on two counts at the same time results in a forfeiture of the license pursuant to sec. 66.054 (15) (a), and if not whether a conviction for the December, 1957, alleged violation would result in such a forfeiture.

Sec. 66.054 (15) (a) provides in part:

“Any person who shall violate any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than \$500, or by imprisonment in the county jail for a term of not more than 90 days, or by both such fine and imprisonment, and his license shall be subject to revocation by a court of record in its discretion. \* \* \* In event that such person shall be convicted of a *second offense*, under the provisions of this section such offender, in addition to the penalties herein provided, *shall forthwith forfeit any license issued to him without further notice \* \* \**”

The answers to your questions involve an interpretation of the words “second offense” in the foregoing statute. You are advised that a second offense is one which is committed after the offender has been convicted of the first offense.

It is stated in 24 A. L. R. 2d 1249 as follows:

“The general rule, embodied in specific terms in some statutes and implied from the phraseology of others referring in more general terms to previous convictions or subsequent offenses, is that it is a prerequisite that the prior conviction or convictions precede the commission of the principal offense in order to enhance the punishment under habitual criminal statutes.”

In support of the foregoing rule a large number of cases are cited including *Faull v. State*, (1922) 178 Wis. 66, 72, 189 N. W. 274. That was a case in which a defendant was found guilty of two counts of unlawful sale of intoxicating liquors contrary to the state prohibition law, the first sale having occurred July 17 and the second July 18, 1921. The statute provided that punishment for a “first offense” should be a fine *or* imprisonment and for a “second offense” it should be both fine *and* imprisonment. The trial court held that the second count was a second or subsequent offense and imposed sentence accordingly. The judgment on that

count was reversed and the cause was remanded with instructions to resentence the defendant as for a first offense. The court stated in part as follows:

“\* \* \* Clearly the circumstances here under consideration do not fall within the letter of sec. 4738a, as that refers to a prior conviction. Neither does it fall within the spirit and purpose of the so-called repeater statutes, which are intended to apply to persistent violators who, experience has shown, do not respond to the restraining influence of criminal punishment. Reformation of the offender is a dominant purpose of criminal punishment, and until the offender has suffered the penalty of the law he is not within the spirit and purpose of statutory provisions intended for persistent and habitual violators.”

*Holst v. Owens*, (CCA 5th 1928) 24 F. 2d 100, 101, was a federal prohibition law case in which three indictments were tried together. The court held that the third indictment did not charge a “third offense” warranting enhanced punishment under the statute, and stated as follows:

“\* \* \* A second offense, as used in the criminal statutes, is one that has been committed after conviction for a first offense. Likewise, a third or any subsequent offense implies a repetition of crime after each previous conviction.”

To the same effect is *Carey v. State*, (1904) 70 Ohio State 121, 70 N. E. 955, 956, where the court stated as follows:

“\* \* \* The manifest purpose is to increase the penalty for offenses after the first because the party has persisted in violating the law. With this purpose in mind, it seems clear that the term ‘second offense’ means second conviction.”

See also, *Ex parte Tung Fong*, (1922) 59 Cal. App. 499, 211 Pac. 32, 34, and cases cited.

The parole statute, sec. 57.06, formerly provided earlier eligibility for “first offenders” at the state prison than for multiple offenders. Under that statute this office erroneously issued several opinions to the effect that “the time of the conviction rather than the time of the commission of the offense governs” so that for example a person convicted June 13, 1928 in California became a second offender when he was convicted in Wisconsin on July 11, 1929 for an of-

fense committed April 12, 1928, prior to the California conviction. 19 O. A. G. 382. See also, 23 O. A. G. 532 and 29 O. A. G. 135. These opinions not only overlooked the case of *Faull v. State*, supra, they were based upon a supposed analogy to the general repeater statutes then numbered secs. 359.12, 359.13 and 359.14, Stats. It is unnecessary to consider whether that was a correct construction of those statutes as they existed at that time in view of what was said in the *Faull* case, because the repeater law has been redrafted in such manner as to make it clear that the former conviction must precede the offense involved in the present conviction. Sec. 939.62 (2) of the Criminal Code provides in part as follows:

“The actor is a repeater if he was convicted of a felony during the 5-year period immediately *preceding the commission* of the crime for which he presently is being sentenced, or if he was convicted of a misdemeanor on 3 separate occasions during that same period, which convictions remain of record and unreversed. \* \* \*”

With reference to case number I, it follows that if the offense for which the licensee was convicted on October 29 was committed after October 2, 1957, then his license was automatically forfeited by reason of his second conviction, but if the second conviction was for an offense committed prior to the first conviction, his license was not automatically forfeited. If it was automatically forfeited it makes no difference whether the paper constituting evidence of the license has been returned to the town board or not and the defendant may be prosecuted for sale without a license if he persists in operating his business. Cf. *Zodrow v. State*, (1913) 154 Wis. 551, 143 N. W. 693; *State v. McEwen*, (1949) 254 Wis. 332, 35 N. W. 2d 902.

With reference to case number II the defendant is not a second offender and has not forfeited his license by virtue of his double conviction on January 28, 1958, nor will he be a second offender if he is convicted of the charge now pending against him for a violation alleged to have occurred in December, 1957.

WAP

*Counties—County Board—Office Hours—*Sec. 59.14 (1) does not preclude the designated county officers from opening their offices to the public on February 12 and October 12. A county board may adopt a general regulation requiring all county offices to be open on such days.

February 28, 1958.

C. STANLEY PERRY,  
*Corporation Counsel,*  
Milwaukee County.

You ask two questions about the requirements of sec. 59.14 (1), Stats., relating to the offices of the sheriff, clerk of circuit court, register of deeds, county treasurer, register of probate and county clerk.

I

Your first question is whether the following provision of sec. 59.14 (1) prohibits such officers from opening their offices to public business on certain days named as legal holidays by sec. 256.17, as for example, Lincoln's Birthday and Landing Day:

“\* \* \* All such officers shall keep such offices open during the usual business hours each day, Sundays and legal holidays excepted, and except that the county board of each county may permit said officers to close their offices on Saturday for such time as the county board may direct. \* \* \*”

The primary purpose of the main clause of the foregoing sentence is to create a minimum standard of office hours which must be observed by the designated officers. There is no prohibition against giving additional service unless such prohibition can be read into the exceptions.

In other statutes, when the legislature desires to prohibit certain activities on holidays, it has used unequivocal language. See, for example, sec. 220.29, which reads in part:

“No state bank \* \* \* shall \* \* \* be open for the purpose of transacting business on Sunday or any legal holiday \* \* \*.”

If the legislature had intended to provide that the offices should be open during certain hours and should be closed at all other times, it could have used language to make that clear. Instead, it imposed a mandatory requirement, to be open during usual business hours, with certain exceptions. The purpose of an excepting clause, normally, is to define the limits of the statute's operation, and to leave the subject matter of the exceptions out of account or consideration.

The Wisconsin supreme court gave the following summation of the function of an exception in *Garcia v. Chicago & N. W. R. Co.*, (1950) 256 Wis. 633, 638, 42 N. W. 2d 288:

"It was stated in *Pabst Brewing Co. v. Milwaukee* (1912), 148 Wis. 582, 586, 587, 133 N. W. 1112:

"The distinction between an exception and a proviso in a statute is clearly stated in *Rowell v. Janvrin*, 151 N. Y. 60, 45 N. E. 398, as follows:

" "An exception exempts something absolutely from the operation of a statute by express words in the enacting clause; a proviso defeats its operation conditionally. An exception takes out of the statute something that otherwise would be part of the subject matter of it; a proviso avoids them by way of defeasance or excuse." "

The case of *City of St. Louis v. Bernard*, (1913) 249 Mo. 51, 55-58, 155 S. W. 394, dealt with a question similar to the one you present, only in reverse. It was there held that a statute prohibiting sale of certain merchandise on Sunday, with certain exceptions, left the exceptions wholly outside the purview of the statute. The exceptions were not to be regarded as an authorization, and so a city might prohibit the sale on Sunday of types of merchandise within the exceptions.

A county, or a county official, may not prohibit what a statute authorizes, nor authorize what a statute prohibits. Where certain matters are left outside the scope of a statutory regulation, however, it is the rule of this state that local restrictions in that area do not conflict with the statute. See *La Crosse Rendering Works v. La Crosse*, (1939) 231 Wis. 438, 455, 285 N. W. 393, 124 A. L. R. 511.

You have suggested that complications might arise if a county treasurer's office, for example, were open on Lin-

coln's Birthday, and the last date for advance payment of inheritance tax to secure discount fell on that day. You ask:

"Suppose a taxpayer not knowing that the office is actually open to the public, believing it to be closed as the day is a legal holiday, does not make his payment until the day following. Would not the tax authorities say that he should have paid it by appearing at the Treasurer's office on February 12th?"

I do not see how the fact that an office is kept open for the convenience of the public could deprive a taxpayer of the rights given by sec. 990.001 (4) (b), to the effect that when the last day within which an act is to be done falls on a Sunday or legal holiday, the act may be done on the next secular day.

It is my opinion that the legislature did not intend that sec. 59.14, by requiring offices to be kept open during certain days and hours, should preclude the county officers named from giving additional service to the public when they deem the duties of their offices could be more effectively performed by so doing.

## II

You also ask:

Assuming that sec. 59.14 (1) does not prohibit the named officers from keeping offices open, is the power to open the offices vested solely in the named officers or may the county board by ordinance require that said offices be open to the public on specified holidays?

The respective functions of the county board and of other statutory county officers were described in *Reichert v. Milwaukee County*, (1914) 159 Wis. 25, 35, 150 N. W. 401:

"\* \* \* The county acts through its officers as agents, but agents not of its own choice or creation. These officers are agents who represent the county in the transaction, but have their authority conferred and limited by act of the state through its legislature. Each has his appointed field of action, not created, limited, or expanded by act of the county or by usage or by contract obligations. Within the scope of the authority conferred by the legislature the county, through its board of supervisors, may by its acts arouse official action and official duties upon the part of

other county officers, but the powers of the latter derived from the state legislature may not be taken away or narrowed by action of the county board nor enlarged except in cases in which the legislature has authorized such limitation or enlargement. For illustration: Although the county board is given power to contract and to authorize and require the making and delivery of county orders, and the duty of the county clerk in signing and delivering such orders is ministerial (*State ex rel. Treat v. Richter*, 37 Wis. 275), the clerk may refuse to sign and deliver an order not legally authorized (*State ex rel. Mulholland v. County Clerk*, 48 Wis. 112, 4 N. W. 121), and if he fail to take objection in such case the treasurer may refuse to pay such order after it is issued and delivered (*Doyle v. Gill*, 59 Wis. 518, 18 N. W. 517)."

My answer to your first question indicates that, at least in the absence of action by the county board, the officers designated in sec. 59.14 (1) may determine whether the performance of their duties requires that their offices be kept open on certain days additional to those required. Whether the county board may undertake the function of determining that additional service should be given presents another question.

Statutory county officers have a certain degree of autonomy neither deriving from, nor subject to, the county board.

The county board, however, has authority under sec. 59.07 (1) (d) which is to be "broadly and liberally construed and limited only by express language" (opening par.), to "operate all county buildings". It has authority under sec. 59.07 (5) to "have the management of the business and concerns of the county in all cases where no other provision is made". The civil service system which a county board may establish under sec. 59.07 (20) may include provisions in respect to "attendance, vacations", and "hours of work". These civil service provisions are not applicable to constitutional officers but may be applicable to their subordinates. In the case of larger counties, the civil service system is governed by secs. 16.31 to 16.45, under which the civil service commission is authorized to adopt rules adapted "to secure the best service for the county in each department affected".

In the light of general doctrines respecting separation of legislative and administrative functions, I do not believe the legislature intended that a county board could undertake to prescribe rules for operation of one specific statutory office. It is my opinion, however, that a county board might adopt general regulations prescribing that a county office should be open on such days as February 12 or October 12, and prescribing the working hours of civil service employes to include such days.

Since action of a county board under its authority to manage the county's business may not run counter to express or implicit statutory requirements, this opinion will not attempt to confirm or negate the validity of any specific enactment until the details are presented. The scope of this opinion is limited to the question presented.

It is my opinion that sec. 59.14 (1) does not preclude the designated offices from being opened for the convenience of the public on February 12 and October 12, and that the county board might enact an ordinance requiring all offices to be open on those dates.

BL

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*Appropriations—Water Pollution—Forestation Tax—*Appropriation made by sec. 20.280 (72b) for costs of committee on water pollution may not be made from proceeds of state forestation tax imposed by sec. 70.58.

February 28, 1958.

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

You have asked my opinion as to whether or not the appropriation made by sec. 20.280 (72b), Stats., from the conservation fund to the general fund for part of the costs of the committee on water pollution may be made from the proceeds of the state forestation tax imposed by sec. 70.58, Stats.

Sec. 70.58 imposes an annual property tax “\* \* \* for the purpose of acquiring, preserving and developing the forests of the state, the proceeds of such tax to be paid into the conservation fund. \* \* \*” By sec. 20.280 (80), the proceeds of this tax are appropriated from the conservation fund to the conservation commission to be used for acquiring, preserving and developing the forests of the state, including certain specifically named activities. None of the activities named encompasses functions of the committee on water pollution. Thus, the entire proceeds of the forestation tax are appropriated for forestry purposes as distinguished from the purposes and functions of the committee on water pollution. The tax is levied for the specific purposes set forth in sec. 70.58 and the revenue raised cannot be spent for any other purpose without specific amendment of sec. 70.58.

Art. VIII, sec. 2, Wis. Const., provides:

“No money shall be paid out of the treasury except in pursuance of an appropriation by law. \* \* \*”

Under this provision appropriation statutes are strictly construed. 37 O. A. G. 248.

Since the proceeds of the forestation tax are, by sec. 20.280 (80), appropriated for forestry purposes, and since sec. 20.280 (72b) contains no suggestion that forestation tax moneys may be used to make the appropriations there provided, it is clear that the latter appropriation may not be made from the proceeds of the forestation tax.

EWV

*Wisconsin Real Estate Brokers' Board—Subpoena*—Wisconsin Real Estate Brokers' Board has power to issue subpoena duces tecum to require production of described papers and documents in an investigation where the board has by motion proceeded under sec. 136.08 (1), but not in informal preliminary investigation.

March 3, 1958.

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

You have requested an opinion as to whether the Wisconsin real estate brokers' board can issue a subpoena duces tecum to a bank requiring the production of records relative to trust accounts of a broker licensed by the board, in the course of an investigation by the board of said licensed broker in cases where there has been only informal complaint and no formal hearing is involved.

Sec. 136.13 (1) provides:

“(1) The board may subpoena and compel the attendance and testimony of witnesses within this state, and the production of books, papers and documents, and each member of the board and its duly authorized representative may administer oaths to witnesses.”

Sec. 136.13 (2) provides that the board may take depositions in the manner prescribed by law for the taking of depositions in actions in circuit court, and sec. 136.13 (3) provides for witness and mileage fees.

Sec. 325.01 provides for the issuance of subpoenas and subsecs. (1) and (4) provide:

“(1) By any judge or clerk of a court or court commissioner or justice of the peace, or police justice within the territory in which such officer or the court of which he is such officer has jurisdiction, to require the attendance of witnesses and their production of lawful instruments of evidence in any action, matter or proceeding pending or to be examined into before any court, magistrate, officer, arbitrator, board, committee or other person authorized to take testimony in the state.

“\* \* \*

“(4) By any arbitrator, coroner, board, commission, commissioner, examiner, committee or other person authorized to take testimony, or by any member of a board, commission or committee which is authorized to take testimony, within their jurisdictions, to require the attendance of witnesses, and their production of documentary evidence before them, respectively, in any matter, proceeding or examination authorized by law; and likewise by the commissioner of taxation and the secretary of the state board of dental examiners and by any agent of the state department of agriculture.”

The board has by rule, Wis. Adm. Code R. E. B. 3.03 (4) provided for issuance of subpoenas to require attendance of witnesses at hearings.

Sec. 136.08 (1) provides in material part:

“(1) *The board may on its own motion make investigations and conduct hearings in regard to the action of any real estate or business opportunity broker or salesman, or any person who it has reason to believe is acting or has acted in either such capacity within this state, and may make findings, after a hearing held on 10 days' notice, \* \* \**”

Administrative agencies generally are vested by statute with powers of subpoena and in discussing the power, it is stated at 42 Am. Jur. 326, Public Administrative Law:

“\* \* \* Some agencies may issue subpoenas in the course of investigations, others only in ‘proceedings’ before them. It is said that mere investigatory power without some issue presented does not any more authorize an administrative body to use a subpoena power than it does a court. There must be some issue of fact for determination within the powers of the administrative body to investigate and determine before such power may be used. The use of compulsion for the purpose of securing information against a witness or another must be based upon some proceeding before a tribunal where issues are presented for determination. \* \* \*”

Proper administration of the real estate licensing law requires that the board and its duly authorized employees make investigations into the actions of licensed brokers. In many cases these investigations are made in the course of checking out informal complaints made to the board. In

other instances the board itself becomes aware that a situation requires some preliminary investigation. Ch. 136 and the rules of the board contemplate that such preliminary investigations be made by board members or by duly authorized employes of the board.

It is my opinion that the board does not have the power to issue a subpoena requiring the production of records in such informal preliminary investigation.

It is my further opinion, however, that where the board, in proceeding under sec. 136.08 (1), on its own motion, determines that it will make an investigation in regard to the action of a real estate or business opportunity broker or salesman, or any person who it has reason to believe is acting or has acted in either such capacity within the state, there is a "proceeding" pending before the board, and the board would have power to issue a subpoena duces tecum to a bank or other person requiring the production of records before the board. Such motion, of course, should appear in the written minutes of the board, and must be duly passed prior to the time any attempted use of the subpoena is made.

Such proceeding might properly be entitled, "In The Matter of the Investigation In Regard To The Actions of 'John Doe,' Real Estate Broker".

In determining whether a subpoena duces tecum should be employed in a matter, the case of *State ex rel. St. Mary's Hospital v. Industrial Commission* (1947) 250 Wis. 516, 27 N. W. 2d 478 becomes material. It was there held that the statute, which prescribes the form of subpoenas duces tecum, requires that papers and documents be described as accurately as possible, but contains no requirement that their relevancy be alleged. See also *Stott v. Markle* (1934) 215 Wis. 528, 255 N. W. 540.

RJV

*Counties—Bridges—Contracts*—Where call of sec 81.38 is not met, it cannot be used. Secs. 81.01 (1), 83.03 (1), and 66.30 (1) authorize county to contract with towns on bridge construction. Extent of county aid depends on terms of contract.

March 4, 1958.

ALBERT J. CIRILLI,  
*District Attorney,*  
Oneida County.

You have submitted a fact situation which can be summarized as follows:

The Town of Cassian and the Town of Nokomis, both in Oneida County, jointly agreed with Oneida County to share on an equal three-way basis the cost of constructing a town-line bridge, the total cost being specified as \$33,000. This was done under the mistaken belief that the municipalities were proceeding under sec. 81.38 Stats. A petition signed by officers of the Town of Nokomis, seeking county aid under sec. 81.38, was not in conformity with the requirements of sec. 81.38. The bridge has been built and county aid given in the amount of \$11,000. The towns of Cassian and Nokomis maintain that, notwithstanding their agreement to share the cost on a one-third basis, they are entitled to county aid pursuant to sec. 81.38. This would mean the county should bear one-half the cost and the towns should bear one-fourth each. You have concluded that the county is not liable for any further aid to the towns.

You are correct in your conclusion. The pertinent part of sec. 81.38 provides:

“When any town has voted to construct or repair any bridge on a highway maintainable by the town, and has provided for such portion of the cost of such construction or repair as is required by this section, the town board shall file a petition with the county board setting forth said facts and the location of the bridge; \* \* \*.”

The call of sec. 81.38, as interpreted in *State ex rel. Hamburg v. Vernon County* (1911), 145 Wis. 191, 192, 130 N. W.

104 was not met by the towns in this case, and thus sec. 81.38 is totally inapplicable. The action of the towns and the county cannot be grounded on sec. 81.38 and it drops out of consideration entirely. Under these circumstances, the county is not liable for any more than the \$11,000 which it agreed to pay and which has been paid.

Even though the actions of the participating municipalities are not within the scope of sec. 81.38, it does appear that there is authority in other statutes. The town board of either town could construct this bridge under sec. 81.01 (1). The county board, under sec. 83.03 (1), has authority to "aid in constructing or improving or repairing any highway or bridge in the county". Sec. 66.30 (1) authorizes local governmental units (including counties and towns) to enter into agreements for the joint or cooperative exercise of their powers and prorate the expenditures involved. It is presumed, therefore, that the participating municipalities acted in accordance with the only way the law authorizes them to act.

You state that the cost of this bridge actually exceeded the specified \$33,000 by \$758.75 which has been paid by the towns. You ask if the county is liable for any part of this additional cost. This would be governed by the terms of the contract between the towns and the county. Your letter does not detail the terms of such contract and the available facts therefore are not sufficient to support a further opinion. As indicated in 45 O. A. G. 137, 139, we cannot speculate as to possible additional facts.

JEA

*Municipalities—Regional Planning—Contracts—Co-operative regional planning can be carried out by several municipalities by agreement under sec. 66.30 subject to statutory limitations; but provisions of sec. 66.945 would not apply to such arrangements except as specifically incorporated into contract by municipalities, within the scope of their authorized function.*

March 4, 1958.

R. D. CULBERTSON,  
*State Chief Engineer.*

You have asked a number of questions involving organization of regional planning commissions.

I

Your first question is:

“(1) Can a regional planning commission be organized under either Section 66.30 or 66.945, or does one of these Sections take precedence?”

There is no question that a regional planning commission can be organized under sec. 66.945, because that was the very purpose of its enactment.

Sec. 66.30 was not designed solely, or probably even primarily, as a regional planning statute. It provides that political subdivisions of the state may enter into agreements for “co-operative exercise” of any of their powers or duties.

It appears from questions submitted to this office, dealt with in such opinions as 40 O.A.G. 9, 41 O.A.G. 335, and 44 O.A.G. 8, that resort has ordinarily been had to sec. 66.30 to carry out specific projects. I see no reason why it could not furnish authority for a contract for co-operative planning, providing the participating units could reach agreement on the scope and details of a program, and providing that the matters to be planned were within the scope of the respective powers of the participating units.

Sec. 66.30 can be applied only by affirmative agreement on the part of all participating units, and the performance is limited by the specific terms of such agreements. Further,

the agreement is limited to matters within the powers of the units. It is questionable if a town, for example, could enter into a co-operative agreement for the planning of improvements outside its area, of a type which its statutory powers would not permit it to carry out. A practical difficulty would also be presented in obtaining a meeting of the minds on details of an agreement under sec. 66.30, if there were involved a large number of municipalities with diverse interests.

Your question above quoted appears to be related to a specific situation involving 4 counties, 66 towns, 8 cities and 6 villages. Since cooperation under sec. 66.30 depends upon voluntary agreement of *all* the units involved, including a plan for prorating expenditures if sharing costs is contemplated, it would seem that the difficulty of securing a meeting of the minds would, practically speaking, make it almost impossible to form so extensive a planning project under sec. 66.30. Certainly no municipality could be subjected to assessment in the manner contemplated by sec. 66.945 without its contractual consent, unless the commission were organized under that section.

The circumstance that agreements under sec. 66.30 are limited to the exercise of powers and duties authorized by statute would also involve limitations, where there are involved units with such varying statutory powers as counties, cities, towns and villages.

It was probably not contemplated by the legislature that either section should take precedence over the other; but that either or both might be utilized according to the needs and desires of the parties. One municipality might be a participant in a regional planning commission, and also be engaged in a cooperative project under sec. 66.30 at the same time.

The commission's functions under sec. 66.945 are limited to advice and recommendation similar to the functions of a city planning commission under sec. 62.23 (2), (3), (4) and (5). A local unit involved in the work of a regional planning commission may adopt the recommendations or not, as it chooses. See sec. 66.945 (11) and (12).

The differences in purpose and scope of the two sections would probably resolve, in most cases, the question which should be applied.

The conditions imposed by the respective statutes seem to point to an intent that sec. 66.945 would be used when the activities are limited to general planning, affecting a substantial number of political subdivisions with varying interests; and that sec. 66.30 would be utilized to plan and carry out specific projects in which a small number of municipalities have a common interest.

## II

Your second question is:

“(2) If the above proposed regional planning commission comprising four counties is organized under Section 66.945, *must* the membership consist of one representative from each of the 4 counties, 66 towns, 8 cities and 6 villages?”

Sec. 66.945 (3) requires that the regional planning commission “shall consist of one representative from each local unit within the region,” which elects to be included.

Although the governor or his representative designates the boundaries of the region, sec. 66.945 (2) provides:

“\* \* \* The governing body of any local governmental unit may elect that such unit shall not be included within the jurisdiction of any regional planning commission, by resolution adopted by such governing body and filed with the governor or his designee.”

Each of the units you have named is entitled to a representative if it is to be subject to the assessments prescribed by sec. 66.945 (14).

## III

Your third question is:

“(3) In view of the unwieldy nature of a commission composed of 84 members, could the 4 counties, 8 cities (or some of them) mutually contract for a joint planning agency, of a membership to be determined by themselves, under the provisions of Section 66.30, which states in substance that cities, villages, towns and counties may contract to do anything jointly that any of them may do separately?”

As indicated in our discussion of your first question, counties and cities are among the units which may enter co-operative agreements for planning such developments as are within their respective powers. Since such arrangements are matters for voluntary agreement, all details such as representation and allocation of cost would have to be spelled out by contract. The participating units would not be bound by statutory provisions relating to regional planning, unless the planning commission is created pursuant to sec. 66.945. Further, a joint planning agency organized under sec. 66.30 could not represent any units such as towns or villages which did not enter the agreement.

In other words, co-operative planning under an agreement pursuant to sec. 66.30 does not involve a "regional planning commission" in the sense that term is used in sec. 66.945.

#### IV

Your fourth question is:

"(4) If the procedure under Section 66.30 should be followed, would such a regional planning commission be capable of exercising all of the functions and duties enumerated in paragraphs (8), (9), (10) and (11) of Section 66.945, pertaining to regional planning commissions organized under that section?"

Any agency operating under an agreement pursuant to sec. 66.30, whether designated as a regional planning commission or otherwise, would have only such powers as are agreed upon, and as are within the powers of the contracting municipalities. A more specific answer would require consideration of the terms of an agreement or proposed agreement, and of the powers of the municipalities involved.

#### V

Your fifth question is:

"(5) Specifically, would a regional planning commission organized under Section 66.30 be eligible for participation in the distribution of the Federal planning funds described in Section 20.350 (45), Wisconsin Statutes, sometimes referred to as Section 701 funds?"

Sec. 20.350 (45) provides that funds received from the federal government under P. L. 560, 83rd Congress, are "to be expended in carrying out the provisions of s. 15.845 (3) (j)".

Sec. 15.845 (3) (j) empowers the director of regional planning:

"To do work to facilitate urban planning for smaller communities lacking adequate planning resources (including surveys, land use studies, urban renewal plans, technical services and other planning work but excluding plans for specific public works) and to provide planning assistance to cities and other municipalities having a population less than 25,000 according to the latest decennial census; to do similar planning work in metropolitan and regional areas in co-operation with official state, metropolitan or regional planning agencies empowered by law to perform such planning; and to accept and use therefor any planning grants made by the federal housing and home financing administrator; all as provided by s. 701, Title VII, Urban Planning and Reserve of Public Works, P. L. 560, 83rd congress, ch. 649, 2nd session, or any acts amendatory thereof or supplementary thereto. It is the intent that as to work authorized by this section, the director may proceed under this paragraph or under any other provisions of this section authorizing such work."

The foregoing provision contemplates that assistance should be in the form of services rather than distribution of money.

A planning group operating by contract under sec. 66.30 could not be considered an "official" regional planning agency. However, assuming municipalities less than 25,000 participate in such an agreement, it is my opinion that the foregoing provision authorizes the use of such funds to provide planning assistance for such communities.

BL

*Navigable Waters—Words and Phrases—Riparian Owner*—If the owner of lands abutting navigable lake excavates so that the lake waters flow over his land, sec. 31.23 precludes him from erecting barriers to exclude the public from using such waters for navigation. He is not, however, precluded from restoring the natural condition unless the artificial condition has existed for such a period of time that it is presumed to have become the natural one under the rules of dedication.

March 6, 1958.

WILLIAM E. TORKELSON, *Chief Counsel,*  
*Public Service Commission.*

You ask whether any violation of the statutes is involved in the following situation:

An owner of riparian property located on a navigable lake has created a pond or lagoon on his property and dredged a portion of the lake (under contract entered pursuant to statute), so as to create a navigable channel between the lagoon and the lake. He has erected a fence at the location of the former shoreline of the lake to prevent access to the lagoon from the lake.

Sec. 31.23 (1) reads in part:

“Every person or corporation that shall obstruct any navigable waters and thereby impair the free navigation thereof, or shall place therein or in any tributary thereof any substance whatever that may float into and obstruct any such waters or impede their free navigation, or shall construct or maintain, or aid in the construction or maintenance therein of any bridge, boom or dam not authorized by law, shall forfeit for each such offense, and for each day that the free navigation of such stream shall be obstructed by such bridge, boom, dam or other obstruction, a sum not exceeding fifty dollars. \* \* \*”

Since the fence you have described is placed on the “natural” shoreline rather than on the bed of the lake, the inquiry whether it violates sec. 31.23 (1) involves two questions:

(1) Is the water in the lagoon and the channel leading from the lake “navigable”?

(2) If it is not "navigable" within the statutory definition, is it a "tributary" of navigable waters within the meaning of sec. 31.23?

Sec. 30.01 (1) defines navigability of lakes as follows:

"All lakes wholly or partly within this state which have been meandered and returned as navigable by the surveyors employed by the government of the United States, and all lakes which are navigable in fact, whether meandered or not meandered, are hereby declared to be navigable and public waters, and all persons shall have the same rights therein and thereto that they have in and to any other navigable or public waters."

The lake with which the lagoon is connected is navigable under the above definition. The question then arises whether the artificial lagoon and channel, which are navigable in fact and physically connected with the navigable lake, are also navigable waters, with respect to which the public has a right of access for recreational purposes.

It is said in 56 Am. Jur. 655:

"\* \* \* It has been held that the raising over abutting property, by the improvement of a river, of water to a depth sufficient to be capable of practicable general use by the public for purposes of navigation, vests a right of navigation in the public."

See, also, 56 Am. Jur. 673-674, where it is said:

"Where a stream is navigable or floatable by nature, those who have occasion to use it as such may do so, notwithstanding the improvement thereof by a riparian proprietor, and may also have the benefit of such improvements as may have been put on it, having reasonable regard to the rights of the owner. \* \* \*"

For application of the principle to lakes, see 56 Am. Jur. 544, discussed *post*.

There are few cases dealing with the exact question whether the public has the right to use navigable waters artificially created, which are connected with the waters of a previously navigable lake. That may be because it is rare for a riparian owner to deal with his property so as to enlarge the lake and cut down his land. The more usual case

involved in litigation is one in which the riparian owner seeks to enlarge his land holdings by encroachments upon the lake.

The case of *Haase v. Kingston Co-operative Creamery Asso.*, (1933) 212 Wis. 585, 588, 250 N. W. 444, dealt with the respective rights of the public, and the owner of adjacent land, to title of the bed under artificially created waters, not appurtenant to waters previously navigable. It was held that the landowner retained *title* to the *bed* of an artificial body of water created on his own land. The court recognized, however, that the public's right to use the waters for navigation is not dependent on ownership of the bed. The court said:

“\* \* \* It is not necessary to the enjoyment of those rights that the title to the land under the artificially created water should be in the state. \* \* \*”

With respect to natural lakes, the rule is stated in 56 Am. Jur. 544:

“If a person artificially raises the level of the waters of a navigable lake so as to flood his own lands, the public rights in the lake will be correspondingly extended so long as such artificial condition exists. \* \* \*”

It is true that the case cited to that proposition, *Village of Pewaukee v. Savoy*, (1899) 103 Wis. 271, 79 N. W. 436, 50 L. R. A. 836, 74 Am. St. Rep. 859, was overruled by *Haase v. Kingston Co-operative Creamery Asso.*, *supra*, so far as it dealt with title to the bed under the waters. Removal of ice, which was involved in the *Haase* case was deemed a perquisite of ownership of the bed rather than of public rights to navigation. The care the court took to state that its alteration of the rule as to title of the bed would not affect the public rights of navigation, indicates that it did not intend to overrule previously established principles as to that phase of the question.

The following principles as to user were pronounced in the *Pewaukee case*:

“\* \* \* When the owner of the land raised the lake level so as to cover it, such land immediately became subject to use by the public as a part of the natural lake bed, not by

permission of the owner of the paper title, but by the same right that the public used any other part of the lake. The owner of the land possessed no right to exclude the public therefrom so long as the waters of the lake were caused to flow over the same. The principle is well settled that if the volume or expanse of navigable waters be increased artificially, the public right is correspondingly increased. *Whisler v. Wilkinson*, 22 Wis. 572; *Volk v. Eldred*, 23 Wis. 410; *Weatherby v. Meiklejohn*, 56 Wis. 73; *Smith v. Youmans*, 96 Wis. 103; *Mendota Club v. Anderson*, 101 Wis. 479. As the chief justice put it in the *Mendota Club Case*, the public may use the increased volume of water the same as though it had always been in that condition; that the right existed from the start. So long as the artificial condition existed, the person holding the title to submerged lands could not exclude the public therefrom." (loc. cit. 103 Wis. 276-277)

One of the practical reasons for such rule was recognized in *Mendota Club v. Anderson*, (1899) 101 Wis. 479, 493, 78 N. W. 185:

"\* \* \* Although an artificial structure, which considerably increased the depth, the extent, and breadth of the waters on the premises in question, yet the public had the right to navigate such waters after they were so increased in volume, the same as though they had always remained in that condition. *Whisler v. Wilkinson*, 22 Wis. 572; *Volk v. Eldred*, 23 Wis. 410; *Weatherby v. Meikeljohn*, 56 Wis. 73; *Smith v. Youmans*, 96 Wis. 103, and cases cited by Mr. Justice Pinney on page 110. Certainly, persons navigating the lake cannot be required or expected to carry with them a chart and compass and measuring lines, to determine whether they are at all times within what were the limits of the lake prior to the construction of the dam."

Your question indicates that the very purpose of the channel is to provide navigable connection between the lagoon and the public lake. In that respect, the situation differs from one in which a riparian owner diverts waters for purposes other than navigation, such as irrigation, or breeding of muskrats, as discussed in *Munninghoff v. Wisconsin Conservation Comm.*, (1949) 255 Wis. 252, 38 N. W. 2d 712.

If a riparian owner dug out a portion of his property along a lake's shoreline, so that the new shoreline presented no different appearance than the adjacent natural one, it would probably not be contended that he had a right to erect

a fence to exclude the public from the extended portion of the waters. The difference in the shape of two enlargements would hardly seem to warrant a difference in principle as to use of the extended waters.

If such a difference in shape of the enlargement should be deemed material, the statutory prohibition against placing an obstruction in a "tributary" of navigable waters (sec. 31.23 (1)) might become pertinent. The term "tributary" is sometimes used in the sense of being subordinate or auxiliary. (See Webster's New International Dictionary, 2d ed.) The natural meaning, with respect to waters, as pointed out in *The Anthony D. Nichols*, (1931) 49 F. 2d 927, 930 is "a river or lake or other similar body immediately connected with another body of water of larger size". The legislative intent in sec. 31.23 (1) that "tributaries" should include smaller bodies of water connected with a navigable lake, even though the smaller bodies might not themselves be navigable, is indicated by the prohibition against placing in tributaries substances "that may float into" navigable waters. If the term "tributaries" had been intended to include only navigable waters, it would not have been necessary to use it at all; because the section otherwise proscribed obstruction of navigable waters.

The Wisconsin cases above cited indicate that the right of public user commences at once when a navigable lake is enlarged, although the right does not become *irrevocable* until a sufficient period has expired to establish a dedication.

Stated in another way, the riparian owner who enlarges a navigable lake consents as a matter of law to immediate use by the public of the waters over his submerged land; but he may revoke that consent at any time before the public rights have become fixed, by restoring the natural condition.

That principle was enunciated in *Village of Pewaukee v. Savoy*, (1899) 103 Wis. 271, 277, 79 N. W. 436, where it was said:

"\* \* \* As the chief justice put it in the *Mendota Club Case*, the public may use the increased volume of water the same as though it had always been in that condition; that the right existed from the start. So long as the artificial con-

dition existed, the person holding the title to submerged lands could not exclude the public therefrom.

"It is not difficult to see how a person who, by artificial means, makes his land a part of the bed of a navigable lake so that the water flowing over the same is rightfully used as a part of the public waters and continues that situation for a long time, loses the right to change the condition. The creation of the condition, knowing that the public will have a right to enjoy it, necessarily carries with it a presumed intention that they shall enjoy it. A person is presumed to intend the natural consequences of his deliberate acts. A situation once created and continued for such length of time that it would be considered a violation of good faith to the public for the person responsible for it to change his position and restore the original situation, brings into play the principle of estoppel *in pais*, which precludes him from re-voaking what is legally considered a dedication of his land affected by his acts, to the public use. \* \* \*"

BL

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*School Board—Health Examination—School Employes and School Children—Sec. 40.30 (10m) discussed relative to examination of school employes and school children by optometrist and physician and the use of the proper forms for reporting or certifying such examination.*

March 7, 1958.

CARL N. NEUPERT, M. D.,

*State Health Officer.*

G. E. WATSON,

*State Department of Public Instruction.*

You have asked for my opinion on several questions relating to sec. 40.30 (10m) (d) Stats. (ch. 200, Laws 1957) and sec. 40.30 (10m) (a) Stats. (ch. 393, Laws 1957).

Sec. 40.30 (10m) (d) reads as follows: "Whenever health examinations or physical examinations made under this section include the testing of vision, such examinations of vision may be made by a licensed optometrist. Forms used therefor shall so provide".

That part of sec. 40.30 (10m) (a) relevant to this opinion reads: "The district board shall, as a condition of entering or continuing employment, except in cities of the first class, require a physical examination including a chest X-ray or tuberculin test, of every school employe of the district. If the reaction to the tubercular test is positive then a chest X-ray shall be required. Additional physical examinations shall be required thereafter at intervals determined by the board . . . The employe shall be examined by a licensed physician in the employ of or under contract with the district. If no such physician is employed or under contract, the examination shall be made by any licensed physician selected by the employe . . . The physician making such examination shall prepare a report of his examination upon a standard form prepared by the state board of health and the department of public instruction. Such report shall be retained in the physician's files and he shall make confidential recommendations therefrom to the board and to the employe on a form prepared by the state board of health and the department of public instruction. The recommendation form shall contain space for a certificate that the person is free from tuberculosis in a communicable form. The cost of such examinations, including X-rays and tuberculin tests, shall be paid out of district funds".

Your first question is this: Does sec. 40.30 (10m) (d) (ch. 200, Laws 1957) apply only to the examination of school children provided for in sec. 40.30 (10m) (c), as specified in the title of said ch. 200, or does it also apply to sec. 40.30 (10m) (a), as repealed and recreated by ch. 393, Laws 1957? It is my opinion that sec. 40.30 (10m) (d), when it went into effect on June 19, 1957, applied not only to sec. 40.30 (10m) (c), but also to sec. 40.30 (10m) (a), as such section then stood. Thereafter, sec. 40.30 (10m) (a) was repealed and reenacted by ch. 393, Laws 1957, going into effect on July 25, 1957. I believe that sec. 40.30 (10m) (d) is applicable to the recreated 40.30 (10m) (a) insofar as the latter statute is merely a reenactment of its predecessor. This is so because insofar as a later law is merely a reenactment of an earlier one, it will not repeal an intermediate act which qualifies or limits the first one, but such intermediate act will be deemed to remain in force, and to

qualify or modify the new act in the same manner as it did the first. See Sutherland Statutory Construction, 3rd Ed., sec. 2036; *George V. City of Asheville* (1935), 80 F. 2nd 50, 56; 59 C. J. 926, 927.

My opinion that sec. 40.30 (10m) (d) when it went into effect on June 19, 1957, applied not only to sec. 40.30 (10m) (c), but also to sec. 40.30 (10m) (a), in its then form is based on the fact that sec. 40.30 (10m) (d) refers to "health examinations or physical examinations made *under this section . . .*". The section alluded to is plainly sec. 40.30 in toto, which, at the time sec. 40.30 (10m) (d) was enacted, covered, as it does now, the health examinations of school employes (sec. 40.30 (10m) (a)) as well as school children (sec. 40.30 (10m) (c)). The statutory language makes it clear that sec. 40.30 (10m) (d) was meant to and does apply to all health examinations covered by sec. 40.30. It is true that the title to ch. 200, Laws 1957, reads: "An Act to create 40.30 (10m) (d) of the statutes, relating to testing of vision of *school children* by licensed optometrists". This would indicate that sec. 40.30 (10m) (d) does not apply to the health examinations of school employes, but only to those of school children. However, the underlined language of the title, which is in conflict with the clear meaning and language of the body of sec. 40.30 (10m) (d), may and should be ignored, since the title of an act may not be used as a means of creating an ambiguity when the body of the act itself is clear. *Estate of Dusterhoft* (1954), 270 Wis. 5, 11.

You have submitted to us Form SCH3R, "Physician's Record of School Employe Examination", prepared by your agencies pursuant to sec. 40.30 (10m) (a). It is this form to which I refer hereinafter, unless otherwise indicated.

You ask two questions relating to the effect of sec. 40.30 (10m) (d) on the above-mentioned form. Sec. 40.30 (10m) (d) reads: "Whenever health examinations or physical examinations made under this section include the testing of vision, such examinations of vision may be made by a licensed optometrist. *Forms used therefor shall so provide*". With this underlined language in mind, you inquire if such form is adequate, and if a statement in such form to the ef-

fect that the testing of vision covered thereby may be made by a licensed optometrist is required.

In my opinion, such a statement is required on the form, and since the form as it now stands contains no such statement, it is inadequate. The form now has on its reverse side the full text of sec. 40.30 (10m) (a), which, of course, provides that the examination to which the form pertains, including the testing of vision, be made by a physician. To comply with sec. 40.30 (10m) (d), there should be shown on such form the fact that under such section a licensed optometrist, as well as a physician, may make the examination of vision involved.

You also sent us a recommended Health Examination Record form (Form SCH-2) for examinations of school children. This form sets out neither sec. 40.30 (10m) (c), providing for health examinations of school children by licensed physicians, nor sec. 40.30 (10m) (d). To achieve compliance with the latter statute this form should set forth such statute or an accurate restatement of its contents. It should also set forth sec. 40.30 (10m) (c), or an accurate restatement of its contents, not because there is a statutory requirement to do so, but in order that no one should be misled into believing that only optometrists could conduct the testing of vision involved, an impression that might be created if the form referred to sec. 40.30 (10m) (d) but not to sec. 40.30 (10m) (c).

Pointing out that whereas sec. 40.30 (10m) (a) requires examination and certification by a licensed physician, sec. 40.30 (10m) (d) contains no requirement for certification by a licensed optometrist examining vision thereunder, you ask if a licensed physician can "certify to the visual findings of a licensed optometrist". This question, I assume, contemplates a situation where a school employe would be examined by a licensed physician under sec. 40.30 (10m) (a), who would conduct the examination except for the testing of vision, which would be done by a licensed optometrist pursuant to sec. 40.30 (10m) (d).

There appears to be implicit in this question a belief that under sec. 40.30 (10m) (a), the examining physician might be required to certify the findings of the examining op-

tometrists as to the vision of the school employe examined. No such requirement exists. The only certificate required of the examining physician under sec. 40.30 (10m) (a) is one that the person examined is "free from tuberculosis in a communicable form". He is not required to certify any other findings, including his findings, if he tests the employe's vision, as to such vision. It is therefore clear that the examining physician, under sec. 40.30 (10m) (a) need not certify the examining optometrist's findings. Since such findings are not required to be certified, it would serve no useful purpose to discuss whether or not they can be certified by the examining physician.

You ask the following question: "Is a separate distinct form necessary for visual examination by a licensed optometrist (if such is performed) and, if so, is certification of the vision tests performed by the licensed optometrist also required?"

There is no statutory requirement for a separate form covering the examination of a school employe's vision by a licensed optometrist, nor is there a statutory prohibition against the use of such a form. It is true that sec. 40.30 (10m) (a) refers to a "standard form" prepared by the state board of health and the department of public instruction, but I do not believe that the use of the singular "form" therein would preclude the adoption of two forms for a health examination thereunder, one of them designed to cover examination of vision by an optometrist, the other to cover a complete examination by a physician, from which he could omit or strike the portion relating to vision testing if an optometrist had performed such testing, or was to do so. Under sec. 990.001 (1), words used in the Wisconsin statutes importing the singular number extend and may be applied to several things, unless to so construe them would produce a result inconsistent with the manifest intent of the legislature. Certainly the word "form", as used in sec. 40.30 (10m) (a), may be construed in the plural, where need be, without producing such a result. It is therefore my opinion that although a separate form covering the testing of vision under sec. 40.30 is not necessary, your agencies may adopt and use such a form if they find it administratively desirable to do so.

Whether or not such a form is adopted, certification of the vision testing performed by a licensed optometrist is not required. There is no such requirement in sec. 40.30 (10m) (d), or in secs. 40.30 (10m) (a) or (c). As already noted above, the certificate required by sec. 40.30 (10m) (a) relates only to the freedom from communicable tuberculosis of the person examined.

Again contemplating a situation where a licensed optometrist would conduct the vision testing part of an examination of a school employe pursuant to sec. 40.30 (10m) (a), you ask these questions:

1. Is the district school board required to pay for each examination; i. e., the examination by the licensed physician, and the vision testing by the licensed optometrist?

2. Is the district school board authorized to employ or contract with a licensed optometrist for the purpose of making such visual examinations for school employes who elect to have a separate visual examination by a licensed optometrist?

Answering the first of these questions, it is my opinion that the board must pay for both examinations. Sec. 40.30 (10m) (a), referring to the physical or health examinations of school employes required thereby, states: "The cost of such examinations, including X-rays and tuberculin tests, shall be paid out of district funds". The physical examination of a school employe under sec. 40.30 (10m) (a) includes, of course, an examination of vision, and from the above-quoted language it is clear that the board must bear the cost of that examination as part of the cost of the physical examination of which it is a part, regardless of the fact that it may be performed by a licensed optometrist with a licensed physician conducting the balance of the examination.

It should be observed that nothing in the language of secs. 40.30 (10m) (a) and (d) permits the inference that if a school employe has the vision testing part of his examination done by a licensed optometrist, he relieves the board of its obligation to pay for the balance of such examination performed by a licensed physician. Nor does anything in such statutes support a conclusion that, under such circum-

stances, the board has no obligation to pay the examining optometrist. The manifest intent of sec. 40.30 (10m) (d) is to permit the vision testing part of the examinations in question to be made by a licensed optometrist in lieu of a licensed physician, if the person to be examined so desires. The free choice of such person would be badly hampered if he were required to pay for the examination of his vision should he choose an optometrist to conduct it, but would receive such examination gratis if performed by a licensed physician. Certainly the legislature intended no such penalty to attach to the choice of an optometrist, and the want of such intent is consistent with my conclusion reached above that the board must pay for each examination under the circumstances you describe.

The district school board, in my opinion, is not authorized to employ or contract with a licensed optometrist for the purpose of making examinations of vision for school employes electing to have them made by an optometrist. The powers of such board are limited to those conferred by statute or necessarily implied from those so conferred or from the duties imposed on the board. 78 C. J. S., Schools and School Districts, sec. 119. While district school boards ordinarily possess the power to contract, it has been held that they have the power to enter into such contracts, and such contracts only, as are expressly or impliedly authorized by statute. 78 C. J. S., Schools and School Districts, sec. 270. Secs. 40.30 (10m) (a), (c) and (d) contain no express language conferring upon district school boards the power to employ or contract with a licensed physician for the purpose above-mentioned. And it is my belief that neither such statutes nor sec. 40.30 in its entirety confer any power from which the power here in question is necessarily implied. Sec. 40.30 (10m) (a) does refer to examination of the school employe "by a licensed physician in the employ of or under contract with the district", but such language pertains not at all to optometrists, or to power in the board to employ them or contract with them for the vision testing of school employes. There remains the question of whether that power is necessarily implied from the duties of a district school board. Those are set forth in sec. 40.29. The character of most of those duties is such that not even a remote relation-

ship exists between them and the power in question. It is conceivable that such power might be implied, however, from the duty of the board to have control and management over the affairs of the district (sec. 40.29 (1)), or from its duty to exercise general supervision over the school (sec. 40.29 (12)). But it is not enough that the power in question may or could be implied from such duties; what is required is that it be *necessarily* implied therefrom; i. e., that the power to employ or contract with licensed optometrists for vision testing of school employes and/or school children be necessary to the fulfillment of the duties above-mentioned. That such power is not necessary to the fulfillment of those duties is readily perceived. This being so, the board does not derive that power from the existence of such duties, and since it has not been given such power expressly or impliedly, it cannot employ or contract with a licensed optometrist for the purpose you mention.

JHMcd

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*County Board—Words and Phrases—Appropriation—County Hospital—Farm machinery is “equipment” and not “material” or “supplies” and sec. 59.08 (1) requiring competitive bidding not applicable; separate “hospital account” not authorized; annual appropriation for county hospital mandatory under sec. 46.18 (11). Non-budgeted appropriation requires two-thirds vote under sec. 65.90 (5) (a); county board cannot tie hands of future board; trustees of county hospital can be authorized to buy machinery.*

March 14, 1958.

FRANZ W. BRAND,  
*District Attorney,*  
Green County.

You have asked whether a county board can authorize the trustees of the county home or hospital to purchase farm machinery without the competitive bidding required

by sec. 59.08 (1) Stats. By inference, it is understood that this machinery is to be used in connection with certain limited farming operations conducted at the county hospital.

Sec. 59.08 (1) provides:

“(1) All public work, including any contract for the construction, repair, remodeling or improvement of any public work, building, or furnishing of supplies or material of any kind where the estimated cost of such work will exceed \$1,000 shall be let by contract to the lowest responsible bidder. The contract shall be let and entered into pursuant to s. 66.29, except that the board may by a three-fourths vote of all the members entitled to a seat provide that any class of public work or any part thereof may be done directly by the county without submitting the same for bids. This section shall not apply to highway contracts which the county highway committee is authorized by law to let or make.”

The pertinent part of sec. 66.29 is sec. 66.29 (c), which provides:

“(c) The term ‘public contract’ shall 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.”

I concur in your opinion that the discussion and reasoning in 35 O. A. G. 88, 91, is applicable to this case. Farm machinery would be classified as “equipment” and not as “supplies” or “material”. Sec. 59.08 (1) would be inapplicable and there would be no requirement for competitive bidding. In this connection, notwithstanding the absence of a statutory requirement, attention is invited to the general discussion of competitive bidding on public works in *Cullen v. Rock County* (1943), 244 Wis. 237, 240, and 40 O. A. G. 22, 24, 27.

You state that the county board is considering a resolution which would authorize the trustees of the county hospital to purchase necessary farm machinery, not to exceed a total expenditure of \$7,000 from the county hospital fund. I understand that no specific amount has been budgeted or appropriated for this purpose and expenses of the hospital

are paid directly from income kept in a separate "hospital account". You ask whether the adoption of such a resolution would require a two-thirds vote, pursuant to sec. 65.90 (5) (a), which provides:

"(5) (a) Except as provided in paragraph (b), the amount of tax to be levied or certified, the amounts of the various appropriations and the purposes for such appropriations stated in such budget, after any alterations therein made pursuant to the hearing required by this section, shall not be changed thereafter unless authorized by a vote of two-thirds of the entire membership of the governing body of such municipality, except that in the case of city boards of education transfers may be authorized by a two-thirds vote of such boards for funds under their control. Any municipality, excepting towns and one-room school districts, which makes such changes shall give notice thereof by publication, within 8 days thereafter, in a newspaper in general circulation in such municipality."

There is no authority for the creation of separate and distinct funds out of the revenues belonging to the county. 21 O. A. G. 1056. These moneys are part of the general fund, and surpluses existing at the end of the year must be used as assets in the budget for the following year so as to reduce the tax rate. 34 O. A. G. 345, 347.

First of all, in addition to the resolution to authorize the purchases by the trustees, as proposed above, there must be a proper appropriation of funds for that purpose. 22 O. A. G. 797. An annual appropriation for operation and maintenance of a county home or hospital is required by sec. 46.18 (11). This is mandatory and the county board has no discretion in the matter. 21 O. A. G. 59, 63. Therefore, unless the proposed resolution would be included in the annual budget, you are correct in your conclusion that the passing of such a resolution would require a vote of two-thirds of the entire membership of the county board, as prescribed by sec. 65.90 (5) (a). See 35 O. A. G. 259, 261, and 32 O. A. G. 301, 302. The requirement of the statute concerning notice would likewise have to be complied with. 36 O. A. G. 646, 648.

Your letter indicates that several years ago the county board passed a resolution generally empowering the county

purchasing committee to "make purchases for the various county departments". I understand that this resolution has not been amended or rescinded. You ask whether the existence of this earlier resolution would affect the validity of the above proposed resolution. It is a well established principle that one legislature cannot bind the action of a subsequent legislature. *Forest County v. Langlade County* (1890), 76 Wis. 605, 609; *Baines v. City of Janesville* (1898), 100 Wis. 369, 377. Likewise, a county board cannot act so as to tie the hands of a future board. 21 O. A. G. 1056, 1057; 26 O. A. G. 313, 314. Therefore, the proposed resolution, if passed, would operate to rescind the old resolution to the extent of any conflict between the two.

The statutory authority of a board of trustees of a county institution, since revision of sec. 46.18, by ch. 268, Laws 1947, has been limited to management. 37 O. A. G. 285. While the term "manage" as used in sec. 46.18 (1) is difficult of precise definition, it would probably be construed to include the purchase of equipment, as described in the proposed county board resolution. 46 O. A. G. 9, 11. Once the conditions stated herein have been met, there would be little doubt that the proposed county board action authorizing the trustees to purchase certain machinery would be a proper delegation of power. 27 O. A. G. 489, 490; 37 O. A. G. 100, 104.

JEA

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*Real Estate Brokers' Board—Powers—*Authority of Wisconsin real estate brokers' board to regulate name or names under which a real estate broker can do business discussed.

March 17, 1958.

ROY E. HAYES, *Secretary,*  
*Real Estate Brokers' Board.*

You have asked certain questions in regard to the authority of the board to regulate the name or names under which a real estate broker can do business.

Sec. 136.05 (1) generally deals with the information which an applicant shall file with the board, and subsections (c) and (e) specifically provide:

“(c) The place or places, including the town, village or city, street number and county, where the business is to be conducted, and the *manner in which the place of business is designated*;

“(e) *Such further information as the board may reasonably require to enable it to determine the trustworthiness and competency of each applicant, including each member of the partnership, or each officer of the corporation, to transact the business of a real estate or business opportunity broker or salesman or cemetery salesman in such manner as to safeguard the interests of the public.*”

Wisconsin Administrative Code R. E. B. 2.03 deals with examinations and subsection (5) thereof is entitled “Written Examination Waived”. Subsection (5) (b) provides:

“(b) *Change of broker's status.* Individuals already licensed as brokers under this board, either individually, as corporation officers, or as members of a co-partnership or co-partnerships, making application to this board to be licensed as brokers under another title or firm name, or another form of organization, must make application in anticipation of a change in their form of organization or name under which they conduct business and the application shall be granted under the new name upon payment of the usual fee, without examination, provided said title or trade name does not conflict with any other title or trade name already registered with the board.”

Sec. 136.04 (1) provides that the board may promulgate rules and regulations for the administering of ch. 136 and for the performance of its duties and functions.

Such delegation of rule-making power is uniformly held valid when adequate statutory standards are established to guide the agency involved in declaring a rule.

Sec. 136.02, which requires that brokers be licensed, provides in part:

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

Further, under sec. 136.08 (2), there are set forth some twelve statutory grounds for the suspension or revocation of a broker's or salesman's license. Subsections (b) (c), (d), (i) and (k) provide:

"(b) Made any substantial misrepresentation with reference to a transaction injurious to a seller or purchaser wherein he acts as agent;

"(c) Made any false promises of a character such as to influence, persuade or induce the seller or purchaser to his injury or damage;

"(d) Pursued a continued and flagrant course of misrepresentation or made false promises through agents or salesmen or advertising;

"(i) Demonstrated untrustworthiness or incompetency to act as a broker or salesman in such manner as to safeguard the interests of the public;

"(k) Been guilty of any other conduct, whether of the same or a different character from that specified herein, which constitutes improper, fraudulent or dishonest dealing;"

In general, an individual is entitled to a real estate broker's license if he completes the application prescribed by statute, files it with the board, pays the license fee therefor and is trustworthy and competent. The board, in general, determines competency from the application and written examination. Trustworthiness is usually determined from information on the application and investigation, supplemented by oral interrogations in special cases.

The license issued to an individual real estate broker is personal and runs to the individual. If "John Smith" is the applicant and does business under the name and style of "Smith Realty", which the statute contemplates is proper, the license runs to "John Smith" and "the manner in which the business is designated", "Smith Realty", is usually as incidental as is the address given. The board is entitled to information as to the manner in which the business is designated just as it is entitled to information as to the address of the business. The license does not, however, run to "Smith Realty". It is noted that some individuals use at least three designations of their business, and in the past the board has apparently issued multiple certificates to one

individual without an additional license fee; i. e., "John Smith d/b/a Smith Realty"; "John Smith d/b/a Doe Realty"; "John Smith d/b/a Doe Associates", and you advise that some licensees have indicated a desire to do business under as many as ten different trade names.

As provided in sec. 136.07 (2), a corporate license runs to the corporation in its own name and entitles the president or other officer designated to act as a broker. For each other officer who desires to act as a broker on behalf of said corporation, an additional license must be obtained at a reduced fee. I interpret this to mean that said additional license is issued in the name of the corporation, but shall include thereon the name of the officer who is to act on the behalf of the corporation.

In the case of a partnership, the license is issued to the partnership.

Your attention is called to sec. 134.17, which prohibits the use of a name purporting or appearing to be a corporate name, *with intent thereby to obtain credit, and which name does not disclose the real name or names of one or more of the persons engaged in said business, without first filing a verified statement in the office of register of deeds of the county wherein the principal place of business is.* See also sec. 134.18.

The attempted use by an applicant or licensee of a name which is identical with or similar to a name used by some person, partnership or corporation already licensed by the board, or identical with or similar to some well-known corporate name, may involve a question as to the competency or trustworthiness of the applicant or licensee.

The applicant for a real estate broker's license has the burden of satisfying the board as to the applicant's trustworthiness and competency. *State ex rel. Durham Corp. v. Wisconsin Real Estate Brokers' Board* (1927) 192 Wis. 396, 211 N. W. 292.

It is not the similarity of names which governs whether or not the identical or similar name can be used. It is the reason behind the use or attempted use that is material. If misrepresentation, deceit or other improper motives are involved, then the board would be justified in refusing to is-

sue the license on the grounds of incompetency or untrustworthiness. By the same token, the use of a name, similar or identical with that of another licensee, by a licensee, may be such that misrepresentation, false advertising, or improper dealing are involved, and might constitute the basis for formal proceedings going to suspension or revocation of license.

You specifically ask the following questions:

1. Whether the board has power to limit the use of the name, "Doe," or any other name, including proper name, to one licensee?

Clearly the board is without authority to limit the use of a proper name to one person. If one John O. Smith is licensed and another John O. Smith makes application for a license and that is his given name, the board cannot refuse to license him because of the similarity of names. Where a business or trade name, including a corporate or partnership name, is involved, the board is without power to refuse arbitrarily to license merely because of the similarity of names. In such cases the board can require the applicant to show that the use of the same or similar name is not inspired by a desire to cash in on the good will of a licensee heretofore licensed, and that misrepresentation, deceit or other improper motives are not intended. In this regard geographic area of operation, intended scope of business and certain other factors may be involved. It will be remembered that the parties themselves may have adequate legal remedy where identical or similar trade names are used.

The same reasoning can be applied to the use of multiple trade names by a licensee. The board cannot arbitrarily prohibit an applicant or licensee from using multiple trade names. Trade names are not prohibited by statute and have long been held proper under the common law. Again, it becomes a question as to the intent behind the intended use of multiple trade names or the actual use to which they are put which becomes material. The board is entitled to know the various trade names under which a licensee does business and can by rule require the licensee to keep the board advised at all times. If the intended use by an applicant goes

to his competency or trustworthiness, the board would be justified in denying the application. If the actual use by a licensee results in misrepresentation of the type contemplated in sec. 136.08 (2) (b), or violates sec. 136.08 (2) (c) (d) (i) or (k), such improper use of multiple names would be the basis for formal proceedings going to suspension or revocation of license.

It appears that the board has exceeded its authority in the enactment of R. E. B. 2.03 (5) (b).

2. Whether the board should be committed to the additional administrative expense of issuing multiple certificates to one individual without an additional fee?

This question is partially answered in the negative in 46 O. A. G. 1, wherein it is stated:

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

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

"As far as individuals are concerned, once the particular individual has received a license and paid the fee therefor, we find no warrant in the statute for charging a second fee if he desires to do business under a second trade name. Absent statutory authority, you have no power to collect or receive an additional fee under such circumstances."

I find no statute which requires that a real estate broker must display his license in his place of business, and there appears to be no rule in this regard.

Sec. 100.18 (5) requires "any person, firm, corporation or association engaged in any business mentioned \* \* \* [includes real estate and business opportunity brokerage businesses] to keep a conspicuous sign posted on the outside of his establishment and another conspicuous sign in the salesroom which sign shall clearly state the name of the association, corporation or individual who actually owns said merchandise, property *or service* which are being offered to the public and not the name of any other person \* \* \*". Persons who have no control over the exterior of the building are not required to have the exterior signs.

While a license, properly posted, might qualify as the interior sign, it appears that some other and possibly larger notice is contemplated.

It is my opinion that the board is not required to furnish multiple certificates to any licensee.

3. Whether or not a corporation using a name or proper name as a part of its corporate name, but not having a real estate broker's license, would preempt an individual from using the same name or proper name when making application for a broker's license? Would the board, having knowledge of the use of the name by a corporation not licensed by the board, be permitted to deny the applicant the use thereof?

These are really two questions and can both be answered in the negative, as qualified by the foregoing discussion as to the use or intended use of same or similar name, and use or intended use of multiple trade names.

RJV

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*Corporations—Organization*—While a nonprofit stock corporation lawfully organized prior to July 1, 1953 may continue to operate under ch. 180, sec. 180.97 (1) is construed as not authorizing the organization of such corporations under ch. 180 subsequent to July 1, 1953.

March 17, 1958.

ROBERT C. ZIMMERMAN,  
*Secretary of State.*

You have inquired whether a non-profit stock corporation may be lawfully organized under ch. 180, Wis. Stats.

Articles of incorporation for a municipal industrial development corporation have been submitted to your office for filing. The articles provide among other things that no part of the net earning of the corporation shall inure to the benefit of any private shareholder or individual. The articles further provide for the issuance of 5000 shares of class A

common stock with no par value and for the issuance of 5000 shares of class B common stock with no par value. The article relating to the issuance of these shares further provides:

“\* \* \* The class B common shares shall be repurchased by the corporation, when not prohibited by law, at their paid-in value on 90 days' written notice by the holder thereof to the corporation. Neither class A common nor class B common shares shall have any preemptive rights that may exist under the laws of the State of Wisconsin.”

Another article provides:

“Upon dissolution any assets over and above capital contributions shall be distributed as provided by resolution of the Board of Directors, but such distribution shall be made only to a charitable or other organization which shall qualify as tax exempt organizations under Federal and Wisconsin Income Tax Laws.”

You state that since the present ch. 180 became effective it has been the policy of your office to refuse to accept such articles for filing, and you invite our attention particularly to secs. 180.02 (1), 180.12 (2) (b), and 180.97 (1).

Perhaps at the outset some brief mention should be made as to the duties, if any, of the secretary of state to file articles which may not be fully in accordance with law.

Sec. 180.92 (1) now provides:

“(1) If the secretary of state finds that any document, other than the annual report of a domestic or foreign corporation, required by this chapter to be filed in his office does not conform to law, he shall, within 10 days after the delivery thereof to him, give written notice of his decision to the person or corporation, domestic or foreign, delivering the same, specifying the reasons therefor. Such decision shall be subject to such judicial proceedings as are provided by law, or such person or corporation, within 60 days after receipt of the said notice of decision, may commence an action against the secretary of state in the circuit court of Dane county by service of a summons and complaint to set aside such finding, whereupon proceedings shall be had as in other actions and the matter shall be tried de novo by the court without a jury, and the court shall either sustain the action of the secretary of state or direct him to take such action as the court may deem proper.”

While as the above statute indicates the determination of the secretary of state is not final, he at least has a duty to see that the proposed articles are prima facie in conformance with law. This is no doubt a wise provision drafted in the interests of protecting the public as well as the shareholders from the results which might be expected to flow from the illegal formation of a corporation, and the important thing is that this precaution is taken before any considerable harm can be done.

Sec. 180.02 (1) provides:

“(1) ‘Corporation’ or ‘domestic corporation’ means a corporation organized for profit with capital stock which is subject to the provisions of this chapter, except a foreign corporation; and also means, to the extent provided in section 180.97, a corporation with capital stock but not organized for profit.”

This sheds some light on the problem but does not answer the question. It does say that there can be such a thing as a corporation with capital stock but not organized for profit. However, there can only be such a corporation to the extent that is provided in sec. 180.97.

Sec. 180.97 (1) reads:

“(1) DOMESTIC CORPORATIONS. After June 30, 1953 ch. 180 shall apply to all domestic corporations with capital stock, regardless of when they were organized and whether for profit or not, but any domestic corporation organized under provisions other than those in ch. 180 and corresponding prior general corporation laws shall be subject to ch. 180 only to the extent that it is not inconsistent with such provisions; any domestic corporation with capital stock but not organized for profit which has before July 1, 1953, been organized under the general corporation laws or any special statute or law of this state, shall be subject to ch. 180 only to the extent that the provisions of ch. 180 are not inconsistent with the articles or form of organization of such corporation or with any provisions elsewhere in the statutes or under any special law relating to such corporation.”

The first clause of the above provision leaves the door wide open for nonprofit stock corporations. The words “regardless of when they were organized and whether for profit or not” are about as all-embracing as human draftsmanship can devise.

However, the last clause of the above provision casts very grave doubts that the legislature intended the first clause to be so broad as it sounds. It carries the implication at least that after July 1, 1953, only stock nonprofit corporations organized prior to that date are to be subject to ch. 180. This implication arises from the well-known rule of statutory construction that the expression of one results in the implied exclusion of others,—*expressio unius est exclusio alterius*. The result of this implication is that stock nonprofit corporations formed after July 1, 1953, are not subject to the provisions of ch. 180. If they are not subject to the provisions of ch. 180 they may not be organized under that chapter.

It would have been much more explicit if the legislature had stated plainly that no stock nonprofit corporations are to be organized under ch. 180 after July 1, 1953. In this connection attention is directed to a well-written law review article in 36 Marquette Law Review 1 by Professor Kenneth K. Luce of the Marquette Law School. In this article on "The Wisconsin Business Corporation Law" Professor Luce calls attention at p. 4 to the fact that while the courts could have taken the position that corporate provisions are proper so long as they are not expressly restricted or prohibited by statute, the situation has been otherwise. Rather the courts have taken the position on the whole that no organization requirement or procedure is lawful unless express authority for it can be found in the statutes. It is unnecessary here to go into the historical reasons which have shaped this development.

In view of the rather strict rules of construction which the courts apply to corporate authority, it is my opinion that a nonprofit stock corporation cannot be lawfully organized under ch. 180 subsequent to July 1, 1953, and subject to the appeal provisions stated in sec. 180.92 (1) you would be justified in finding that the proposed articles do not conform to law.

This conclusion makes it unnecessary to discuss other provisions such as sec. 180.12 (2) (b) mentioned in your request, as this obviously relates only to authorized shares in a corporation which is lawfully organized under ch. 180.

WHR

*Police—Roadblocks—Emergency Action*—Sec. 349.02 gives authority to traffic officers to hold up, or reroute traffic when highways are blocked by storms, accidents, or other conditions requiring emergency action. Agency employing such personnel is not liable for accidents occurring to vehicles, property, or highways as a result of such halting or rerouting. Under special circumstances, secs. 86.06 and 349.16 (1) extend authority to highway maintenance personnel to hold up or reroute traffic where the highway is unsafe for travel.

March 20, 1958.

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

You have inquired as to the authority of enforcement personnel and certain highway personnel to direct, control, and reroute traffic in connection with emergency situations such as an accident or a storm. You also inquired as to the extent of this authority, and as to the liability of the agency employing such personnel for damages occurring to persons or property of others as a result of the exercise of such authority.

Your first two questions read as follows and may be considered together:

“1. Do traffic officers have authority to reroute or hold up traffic when highways are blocked by storms, accidents or other conditions requiring emergency action?”

“2. What authority does this statute give enforcement officers to temporarily close routes, hold traffic in place, or divert traffic in case of emergencies? An example of this would be a complete blocking of a highway by an accident requiring temporary halting of traffic during clearing operations. In some cases rerouting of traffic is not feasible because of the short duration of the delay, or highway available for detour might be damaged by heavy vehicles.”

Sec. 349.02, ch. 260, Laws 1957, provides:

“It is the duty of the police and traffic departments of every unit of government and each authorized department of the state to enforce chs. 346 to 348 [Rules of the Road,

Equipment of Vehicles and Weight]. Police and traffic officers are authorized to direct all traffic within their respective jurisdictions either in person or by means of visual or audible signal in accordance with chs. 346 to 348. In the event of fire or other emergency, police and traffic officers and officers of the fire department may direct traffic as conditions may require notwithstanding the provisions of chs. 346 to 348."

The applicable portion of this section that pertains to your first two questions may be abstracted as follows:

"\* \* \* In the event of \* \* \* emergency, police and traffic officers \* \* \* may direct traffic as conditions may require \* \* \*"

A study of the common law relative to this aspect of the law discloses that this section must be broadly interpreted.

One basic premise that should be kept in mind is the fact that it is not an inherent or constitutional right, but rather it is a privilege to operate a vehicle on the highways, and that it is within the police power of the state to regulate traffic for public safety and welfare. See American Digest System, Automobiles, Key No. 5 (1). As stated by the Wisconsin supreme court in *State v. Stehlek*, (1953) 262 Wis. 642, 646:

"The weight of authority is to the effect that the driving of an automobile upon public highways is a privilege, and not a property right; and is subject to reasonable regulation under the police power in the interest of public safety and welfare. \* \* \*"

See, also, *State v. Seraphine*, (1954) 266 Wis. 118.

In order to carry out the spirit and intent of this section, and the common law relative thereto, traffic officers must be granted reasonable latitude in the measures they take to put into effect this section. See 62 C. J. S., Municipal Corporations, sec. 574. As stated in 62 C. J. S., Municipal Corporations, sec. 575 a, p. 1109, "Policemen are guardians of public safety \* \* \* [it is their duty] to direct and regulate traffic. Reasonable discretion must be left to police officers in respect of performance of their duty. \* \* \*" And further (note 68), "Police officers are under a duty to anticipate un-

due inconvenience which the public may suffer through obstruction of traffic \* \* \*” *People, on Complaint of Whelan v. Friedman*, 14 NYS 2d 389.

The dearth of cases touching upon this question evidences the fact that it is generally acknowledged that police officers have the authority to do what is reasonable and necessary under any set of special circumstances.

Your third question reads:

“3. If the answers to the above questions are in the affirmative, is the agency employing such personnel liable for accidents occurring to vehicles, property or highways as a result of such halting or rerouting?”

There is no liability on the part of the agency employing such personnel. This is because the direction or control of traffic is a governmental function and, generally speaking, where the exercise of this authority is not unreasonable and does not produce a nuisance, no liability will lie on the part of municipal corporations or political subdivisions of the state for damages caused by its agents in the exercise of its governmental functions. 62 C. J. S. 575. See, also, the cases and authorities cited in secs. 665, 666 and 671 in 13 Calaghan’s Wisconsin Digest, Municipal Corporations.

In fact, the municipal government or political subdivision responsible for the maintenance of the highway or street may be liable for its failure to erect a barrier where the highway or street is impassable because of construction, alteration or repair. See *The City of Milwaukee vs. Davis*, (1857) 6 Wis. 374, \*377. And in recent years, the legislature has seen fit to make counties, cities, villages and towns liable for accidents occurring by reason of the insufficiency or want of repairs of a highway. See sec. 81.15, Wis. Stats.

Of course, the state is immune from liability as a result of accidents caused by acts of its agents. *Houston vs. State*, (1898) 98 Wis. 481; *Petition of Wausau Inv. Co.*, (1916) 163 Wis. 283; *Holzworth v. State*, (1941) 238 Wis. 63; *Trempealeau County v. State*, (1952) 260 Wis. 602.

Your fourth question, which reads as follows, is answered in the affirmative:

“4. Does authority to hold up or reroute traffic extend to highway maintenance personnel?”

Sec. 86.06 (1) provides:

"Whenever any highway is impassable or unsafe for travel or during the construction or repair of any such highway and until it is ready for traffic the authorities in charge of the maintenance or construction thereof may keep it closed by maintaining barriers at each end of the closed portion. The barriers shall be of such material and construction and so placed as to indicate that the highway is closed and shall be lighted at night."

This section, for the reasons given hereinbefore, may be broadly construed and the wording of the section itself gives ample authority on the part of highway maintenance personnel to hold up or reroute traffic.

There is also additional statutory authority in this respect for special circumstances. Sec. 349.16 provides:

"(1) The officer in charge of maintenance in case of highways maintained by a town, city or village, the county highway commissioner or county highway committee in the case of highways maintained by the county and the state highway commission in the case of highways maintained by the state may:

"(a) \* \* \*

"(b) Impose special weight limitations on bridges or culverts when in its judgment such bridge or culvert cannot safely sustain the maximum weights permitted by statute;

"(c) Order the owner or operator of any vehicle being operated on a highway to suspend operation if in its judgment such vehicle is causing or likely to cause injury to such highway or is visibly injuring the permanence thereof or the public investment therein, except when s. 84.20 is applicable or when the vehicle is being operated pursuant to a contract which provides that the governmental unit will be reimbursed for any damage done to the highway. Traffic officers also may order suspension of operation under the circumstances and subject to the limitations stated in this paragraph.

"(2) \* \* \*"

As previously stated herein, it may be negligence on the part of maintenance personnel not to reroute traffic by means of barriers where a highway or street is unsafe for travel.

REB:WHW

*School District—County School Committee*—Where school district B is attached to school district A by a county school committee reorganization order effective at a future date, the provisions of sec. 40.025, Stats. 1957, do not preclude institution of reorganization proceedings to attach other territory to district A.

April 1, 1958.

GEORGE E. WATSON,

*State Superintendent of Public Instruction.*

A county school committee order attaching school district B to school district A provides it is to be effective July 1, 1958. You request an opinion whether until said order takes effect on July 1, 1958, said county school committee or any other reorganization authority is precluded under the provisions of sec. 40.025, Stats. as created by ch. 536, Laws 1957, from entertaining reorganization proceedings or making an order for the attachment of other territory, such as school district C, to said school district A.

Sec. 40.025 (1), Stats., was created by ch. 536, Laws 1957, to avoid conflicting reorganization proceedings and orders. Pars. (a) and (b) thereof provide for the acquiring of jurisdiction by a reorganization authority. Par. (c) thereof provides as follows:

“(c) Jurisdiction, when acquired as prescribed in pars. (a) and (b), continues until the reorganization authority disposes of the matter before it, unless lost as provided in par. (d). When the making of a reorganization order is pending before a reorganization authority or such order has been made, any other reorganization proceeding or order made by that or any other reorganization authority, after jurisdiction has been acquired as provided in par. (a) or (b) and prior to the going into effect of an order made and filed pursuant thereto, pertaining to all or any part of the territory included in the order, is void.”

The provisions of par. (d) of subsec. (1) then provide, so far as here material, as follows:

“(d) Jurisdiction acquired pursuant to par. (a) is lost:

“1. \* \* \*

“2. Upon the making of an order denying the reorganization proposed by a petition or a resolution, provided that

until the expiration of 30 days after the mailing, as provided in sub. (5), of such an order made by town or village boards or city councils, acting alone or jointly, which denies a reorganization proposed by a petition, no other reorganization order shall be made and no other reorganization proceedings commenced, pertaining to *all or any part of the territory included in said proposed reorganization*, and any such other order made or other proceeding commenced is void;”

Under the provisions of par. (c) of subsec. (1), jurisdiction once acquired by reorganization authority continues until it disposes of the proposal unless lost by coming within one of the provisions of par. (d). The prohibition in said par. (c) against the taking of any other reorganization proceeding or the making of any other reorganization order is made operative so that in the case where an order is made it extends up to and including the time such order goes into effect. However, by the language of par. (c) such prohibition precludes any such other reorganization proceeding or order *only* in respect “to all or any part of the territory included in the order”.

The prohibition against conflicting reorganization proceedings or orders in sec. 40.025 (1) (d), of which subdivision 2 is illustrative, uses different language. In said subdivision 2, it is provided that jurisdiction of a reorganization authority is lost upon the making of an order denying the proposed reorganization. Thus, as soon as such an order is made, the jurisdiction of the reorganization authority is lost and there is thereafter no longer any proceeding pending that would come within the prohibition in par. (c). If the order of denial is by local board action under sec. 40.06, and it is filed, the statutes provide for an appeal therefrom if taken within 30 days following the date of the mailing out of such order. Subdivision 3 of par. (d) covers the situation where action is taken denying a proposed reorganization but no formal order is filed within 10 days after taking such action. If such denial is by local board action under sec. 40.06, there is statutory provision for an appeal therefrom if taken within 30 days from the date the action was taken. Similarly, subdivision 6a of par. (d) covers the situation where a petition is filed under sec. 40.06

and the local board or boards do not take any action thereon within 60 days. Such failure to act for that period constitutes a loss of jurisdiction. But again, in such a situation, the statutes provide for an appeal if taken within 90 days after the filing of the petition. Subdivisions 2, 3 and 6a of par. (d) are to eliminate conflicts during such appeal periods and provide that, notwithstanding jurisdiction is lost by reason of the occurrence covered by the respective subdivision, during the provided appeal period no other reorganization order may be made and no other reorganization proceeding commenced relating "to all or any part of the territory included in said proposed reorganization".

The language in par. (c) of subsec. (1) extends the prohibition to "all or any part of the territory *included in the order*", whereas that in subdivisions 2, 3 and 6a of par. (d) is different and extends the prohibition to "all or any part of the territory *included in said proposed reorganization*". It is obvious that the choice of language was deliberate in that the language in all of the said subdivisions of par. (d) is the same and covers situations only in which an appeal can be taken from local municipal board action or inaction, whereas par. (c) covers all situations where a reorganization proceeding is pending or a reorganization order has been made, regardless of whether under sec. 40.03, sec. 40.06 or some other provision of the statutes providing therefor. The language in the subdivisions of par. (d) "in said proposed reorganization" is the broader.

Where there is or is proposed an order that detaches territory from one school district and attaches such territory to another school district, the territory so detached from the first district and attached to the other is the only territory included in such order. So, also, where a whole district is dissolved and attached to another district, it is the territory in such old district that is transferred to and made a part of the other district, and so is the territory included in the order. Where the parts of several districts are detached therefrom and consolidated to form a new district or the territory of several districts is consolidated to form a new district, the territory so transferred and made to constitute the new district is the territory included in that order.

Were it intended that such language "included in the order" in par. (c) were to encompass more than just the

territory transferred from one district to another, or the territory composing the new or consolidated district, then either the words "reorganized district" or "school district affected", would have been used inasmuch as such terms are defined in subsecs. (11) and (12) of sec. 40.01. If it were meant to include not only the territory which is taken from one school district and transferred to another but also the territory of the district to which it is transferred, then the words "reorganized district" would have been used, with the meaning thereof as defined in subsec. (11) of sec. 40.01. If it had been intended to include more than would come within the definition of "reorganized district" and include the remaining portion of a district from which the territory is transferred, then the words "school district affected" would have been used and the meaning would have been as defined in subsec. (13) of sec. 40.01. Thus, it seems clear that the language which was used means something different from either "reorganized district" or "school district affected" and encompasses only the territory upon which the order or proposed order operates directly.

The language in subdivisions 2, 3 and 6a of par. (d) being "included in said proposed reorganization", the prohibitions therein extend to the territory which comes within the definition of "proposed reorganized district" in subsec. (11) of sec. 40.01. It is the creation of the proposed reorganized district which constitutes the "proposed reorganization" and it is the territory in such "proposed reorganized district" to which the language in pars. 2, 3 and 6a refers as "included in said proposed reorganization".

Therefore, after an order of reorganization has been made, the provisions in par. (c) of subsec. (1) of sec. 40.025 do not preclude any other reorganization proceeding being commenced before that reorganization authority or any other reorganization authority or preclude that reorganization authority or any other reorganization authority from making a reorganization order, except that until such order has gone into effect, no reorganization proceedings which deal directly with that territory which is "included in the order" may be commenced before the reorganization authority which made the order or before any other reorganization authority and no reorganization order which deals

directly with that territory may be made by the reorganization authority which made the order or by any other reorganization authority.

It is therefor my opinion that under the stated facts where a county school committee order attaches school district B to school district A effective July 1, 1958, the provisions of sec. 40.025, Stats., do not preclude the immediate commencement of proceedings to attach school district C to school district A.

JEA

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*Board of Health—Sanitarians—Words and Phrases—*  
Sec. 140.45 regarding sanitarians, registration and employment discussed. Registration of plumbing inspector as a sanitarian is a question of fact and not of law.

April 3, 1958.

CARL N. NEUPERT,  
*State Health Officer,*  
*Board of Health.*

Chapter 530, Laws 1957, created sec. 140.45, Stats., which relates to the registration of sanitarians and provides in part as follows:

“(1) DEFINITIONS. When used in this section:

“(a) ‘Sanitarian’ is a person trained in the field of sanitary science and technology who is qualified to carry out educational and inspectional duties or to enforce the law in the field of sanitation.

“(b) ‘Board’ is the state board of health.

“(c) ‘Municipality’ is a county, city, village or town.

“(2) REGISTRATION. In order to safeguard life, health and property, to promote public welfare and to establish the status of those persons whose duties in environmental sanitation call for knowledge of the physical, the biological and social sciences, the board is authorized to establish minimum qualifications for the registration of sanitarians.

“(3) DUTY OF PUBLIC BODIES TO EMPLOY SANITARIANS. Any pertinent agency of the state and any municipality may employ, on a full-time basis, one or more sanitarians, registered as provided in this section, who

shall enforce laws and rules (as defined in s. 227.01 (3)) of the state and municipalities, relative to environmental sanitation.”

You have requested an opinion upon the following questions:

“1. Does sub-section (3) of the sanitarians registration act make it mandatory for municipal and state agencies requiring sanitarians in the conduct of their programs to employ at least one sanitarian registered as provided in this section?

“2. In the event the reply to question (1) is in the affirmative, is it permissible for a municipality to employ an ‘assistant health officer’, ‘health inspector’ or an individual with a title other than ‘registered sanitarian’ to perform all or part of the duties of a sanitarian without supervision by a registered sanitarian?

“3. Is a plumbing inspector a ‘sanitarian’ as defined in sub-section (1) (a) and shall the Board certify a plumbing inspector as a registered sanitarian pursuant to the provisions of either sub-section 5 (b) or 5 (c) of the statute?”

Sec. 140.45 (3) provides that any pertinent agency of the state and any municipality “may employ” one or more registered sanitarians. In the early case of *Cutler v. Howard*, (1859) 9 Wis. 282 [\*309], the court discussed the construction to be given to a statute which uses the word “may” in the following language:

“That rule as deduced from all the authorities is, to use the clear and explicit language of Chancellor Kent, in *Newburgh Turnpike Co. v. Miller*, 5 John. Ch. R., 113, ‘that the word *may* means *must* or *shall* only in cases where the public interests or rights are concerned; and where the public [\*312] or third persons have a claim *de jure* that the power should be exercised.’ For the complete application of this rule it only remains to be determined in what cases the rights or interests of the public or third persons are concerned and where they have a claim *de jure* to the exercise of the power; and here fortunately there is no disagreement among the authorities. The cases fully establish the doctrine that when public corporations or officers are authorized to perform an act for others, which benefits them, that then the corporations or officers are bound to perform the act. The power is given to them not for their own, but for the benefit of those in whose behalf they are called upon to act;

and such is presumed to be the legislative intent. In such cases they have a claim *de jure* to the exercise of the power. But where the act to be done is not clearly beneficial to the public or third persons, the exercise of the power is held to be discretionary."

"The ordinary and natural meaning of the word 'may,' when used in a statute, is permissive and discretionary, not mandatory, although it is construed as mandatory when such construction is necessary to give effect to the clear purpose and intent of the statute." *Barber Asphalt Paving Company v. City of Oshkosh*, (1909) 140 Wis. 58, 121 N. W. 603.

In the case of *Curry v. Portage*, (1928) 195 Wis. 35, 217 N. W. 705, the court quoted the first sentence of the quotation given above from the case of *Cutler v. Howard* and said:

"Where a third party may insist upon the exercise of such a power it must appear that he has a right *de jure*, the enjoyment of which depends upon the exercise of the power. As stated in the syllabus in *Kelly v. Milwaukee*, 18 Wis. 83: 'Where an authority is conferred upon a city council in *permissive* language, it is still imperative upon them to exercise it, if other persons have an absolute right to have it exercised.' \* \* \*"

I do not believe that either the public or third persons could be said to have a right in law to have any state agency or any municipality employ one or more sanitarians and I do not believe that it is necessary to construe the word "may" in 140.45 (3) as mandatory in order to give effect to the clear purpose and intent of that statute. Hence, it is my opinion that said statute does not require any state agency or municipality to employ one or more registered sanitarians.

It may be that this question was prompted partly by the fact that sec. 140.45 (3) is entitled "*DUTY OF PUBLIC BODIES TO EMPLOY SANITARIANS.*" However, under sec. 990.001 (6), "The titles to \* \* \* subsections \* \* \* of the statutes are not part of the statutes".

Since your second question was predicated upon an affirmative answer to the first one, no further discussion thereof appears to be necessary.

In connection with your third question, you advise as follows:

"The Board has received an application from a plumbing inspector for registration as a sanitarian pursuant to the provisions of sub-section 5 (c) of the statutes. There is a question as to whether the duties of a plumbing inspector are equivalent to those enumerated in sub-section (c). Normally the duties of a plumbing inspector include determinations as to whether particular installations comply with laws and codes which are intended to protect public health and because of this consideration a plumbing inspector's duties may qualify him for registration as a sanitarian just as would that of a food, meat, milk, market or restaurant inspector. However, since the law does not specifically mention plumbing inspectors as being eligible for registration, there is a question as to whether the Board is empowered to register plumbing inspectors pursuant to either sub-sections 5 (b) or 5 (c) of the statute."

Section 140.45 (5) (ch. 530, Laws 1957) provides:

"(5) CERTIFICATION OF REGISTRATION. The board, upon application (on forms prescribed by it) and payment of the prescribed fee, shall certify as a registered sanitarian any person who has satisfied it by satisfactory evidence that:

"(a) He has passed the examination given pursuant to sub. (4), or

"(b) He, on or before the effective date of this section (1957), has passed a civil service examination given by the state or any municipality as certified by the state, or by any city, village, town or county personnel agency, qualifying him as a sanitarian; food, meat, milk, market or restaurant inspector; sanitary inspector; or housing inspector, or

"(c) He has been employed for not less than 2 years prior to the effective date of this section as a sanitarian; food, meat, milk, market or restaurant inspector; sanitary inspector; or housing inspector by the state, any municipality of this state."

I cannot advise as a matter of law that a plumbing inspector who makes the proper application and pays the prescribed fee either should or should not be registered as a sanitarian. Such a person should be certified as a registered sanitarian if he satisfies the state board of health that on or before the effective date of sec. 140.45 (5) he has passed a

civil service examination given by the state or any municipality as certified by the state, or by any city, village, town or county personnel agency, qualifying him as a sanitarian; food inspector, meat inspector, milk inspector, market inspector, restaurant inspector, sanitary inspector or housing inspector, or if such person satisfies the board of health that he has been employed for not less than 2 years prior to the effective date of sec. 140.45 (5) by the state or any municipality of the state as a food inspector, meat inspector, milk inspector, market inspector, restaurant inspector, sanitary inspector or housing inspector. If the person in question is seeking registration under sec. 140.45 (5) (c), and is now a plumbing inspector, it would seem unlikely that he was ever employed for at least 2 years as a food, meat, milk, market, restaurant or housing inspector and the question probably would be whether he was so employed as either a sanitarian or a sanitary inspector. In any case, the question of whether he meets the qualifications of sec. 140.45 (5) (b) or (c) is a question of fact for determination by the state board of health and not a question of law for determination by me.

JRW

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*State Treasurer—Wisconsin Investment Board—Deposit of Securities—Rights of state treasurer and Wisconsin investment board to deposit securities in or outside of state, agreement as to transfer, and liability therefor discussed.*

April 11, 1958.

DENA A. SMITH,  
*State Treasurer.*

Your recent letter requests an opinion upon the following 3 questions:

"1. As the State Treasurer of Wisconsin I am the custodian of all securities. Do I have the sole right under Chapter 25.19 to deposit such securities in vaults either in or outside of the State of Wisconsin, and does the Wisconsin Investment Board also have this sole privilege?"

"2. Do *both* the State Treasurer of Wisconsin and the Wisconsin Investment Board have to agree on the transfer of securities to vaults either in or outside of the State of Wisconsin?

"3. Can the State Treasurer be held responsible (to the people of the state) for the removal of these securities from the vaults of the state treasury?"

Your letter does not contain any statement of the circumstances which prompted this request, but the last paragraph of your letter requests an early reply "since the removal of these securities is expected to take place very shortly". Upon investigation it appears that the request stems from a plan of the state of Wisconsin investment board to move certain stocks and non-governmental negotiable bonds to a depository in the city of New York. Most of said stocks and bonds presently are in your custody. I do not understand that you regard the proposed depository as unsafe or that you have suggested the use of a different depository. Under the proposed plan the state of Wisconsin investment board will give you its receipt for all of the securities which it proposes to move and immediately thereafter will obtain a receipt therefor from the depository and deliver such receipt to you.

Sec. 25.19, Stats., provides:

"The state treasurer shall be ex officio treasurer of the state of Wisconsin investment board and shall give an additional bond in such amount and with such corporate sureties as shall be required and approved by the board, the cost of which shall be borne by the board. Any of the securities purchased by the state of Wisconsin investment board for any of the funds whose investment is under the control of the board may be deposited by the board or the state treasurer in vaults or other safe depositories outside of the office of the state treasurer, and either in or outside of the state of Wisconsin, but a safe-keeping receipt shall be delivered to the state treasurer for all securities so deposited. Every such safe-keeping receipt shall describe the securities covered thereby and be payable on demand, without conditions, to the state of Wisconsin investment board or to any designated fund under the control of the board or to the state treasurer."

Sec. 25.17 (1) provides that the state of Wisconsin investment board “\* \* \* shall have power and authority and it shall be its duty:

“(1) To have exclusive control of the investment and collection of the principal and interest of all moneys loaned or invested from any of the following funds: \* \* \*”

The funds which are listed in sec. 25.17 (1) include all of those which own any of the securities which are to be moved to the New York depository.

In *Attorney General ex rel. Blied, et al. v. Levitan*, (1928) 195 Wis. 561, 563-565, 219 N. W. 97, the question presented was whether the state treasurer could safely permit the annuity board, which is one of the predecessors of the state of Wisconsin investment board, to deposit with a bond holders' protective committee certain bonds in which it had legally invested funds of the state retirement system. The institutions which issued the bonds had become insolvent and were in liquidation. The annuity board deemed it for the best interests of the state retirement system to deposit the bonds with the bond holders' committee under trust agreements designed to protect the interests of the bond holders. In deciding that the annuity board had authority to take the proposed action, the court said:

“Sec. 42.24, Stats., provides that ‘The state treasurer shall be *ex officio* treasurer of the Annuity Board and of the State Retirement System, and shall give an additional bond in such amount and with such corporate sureties as shall be required and approved by the Annuity Board, the cost of which shall be borne by the state.’ This is all we find in the State Retirement Law relating to the duties of the state treasurer with reference to funds belonging to the State Retirement System. This provision of law does no more than make the state treasurer the mere custodian of the funds and securities belonging to the State Retirement System. He is merely the treasurer of the Annuity Board. He is charged with no responsibility concerning the investment or management of the funds and securities belonging to the State Retirement System. Being merely the custodian of these funds and securities, the management of which is vested exclusively and comprehensively in the Annuity Board, he can incur no liability in making such disposition of the funds and securities deposited with him as may be directed by the Annuity Board. His duty is to safely keep

such securities while in his custody, and there his duty ends.

"These considerations are sufficient to indicate that the state treasurer could incur no liability or obligation by complying with the order of the Annuity Board in the instances here presented. \* \* \*

"\* \* \* The original investments made by the Annuity Board in these bonds were authorized by law. The question now confronting the Annuity Board is not a matter of investments. It is a matter of realizing upon the investments lawfully made. No statute in express terms confers this duty upon the Annuity Board, but that such power and duty follows as an incident to the power and duty expressly conferred on the board \* \* \* cannot be doubted. \* \* \* It would seem that this fund should enjoy the benefit of the same business management that private owners are privileged to accord their individual affairs.

"Having arrived at the conclusion that it is the duty of the Annuity Board to realize upon these securities, we should not read into the law any limitations upon the methods which the board in the exercise of sound business judgment may employ to that end. \* \* \*"

Without attempting to analyze all of the reasons for the proposed transfer of securities, it may be said that in the judgment of the state of Wisconsin investment board substantial savings will result to the funds which own the securities if they are deposited at or near the city in which the income is paid and to which the securities must be sent for collection when they are called or mature.

In answer to your first question, it is my opinion that under sec. 25.19, in certain circumstances you as the custodian of the securities in question would have the right to deposit these securities in a vault or other safe depository outside of your office and either in or outside of the state of Wisconsin. To cite one example, if your vault in which the securities are now stored were damaged by an explosion, tornado or earthquake to the extent that you regarded the vault as an unsafe place in which to keep the securities, I believe that you would have authority to move the securities to a vault or other safe depository inside or outside of the state of Wisconsin upon obtaining a safe-keeping receipt therefor in the form specified in sec. 25.19. In these circumstances it would be your sole right to transfer the securities.

Under the proposed plan of the state of Wisconsin investment board, however, you will cease to be the custodian of the securities. Under these circumstances, as pointed out in 36 O.A.G. 504, 507, "The state treasurer is merely the custodian of the safe-keeping receipts as he would be the custodian of the securities covered by them if such securities were delivered to him". You will then have no duty beyond that of safely keeping the receipts for these securities.

After the state of Wisconsin investment board has obtained the securities and given you a proper receipt for them, said board has the right under sec. 25.19 to deposit such securities in a vault or other safe depository outside of your office and either in or outside of the state of Wisconsin, provided it delivers a safe-keeping receipt to you as required by said statute. Under the latter circumstances, it is my opinion that the state of Wisconsin investment board has the sole right to remove the securities as planned.

In answer to your second question, it is my opinion that the state treasurer and the state of Wisconsin investment board do not have to agree on any transfer of securities to vaults either in or outside of the state of Wisconsin.

Sec. 25.19 specifies that the securities may be deposited as provided therein "by the board *or* the state treasurer".

Sec. 990.01 (1) provides:

"In the construction of Wisconsin laws the words and phrases which follow shall be construed as indicated unless such construction would produce a result inconsistent with the manifest intent of the legislature:

"(1) GENERAL RULE. All words and phrases shall be construed according to common and approved usage; but technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning."

The word "or" denotes one or the other of two or several persons, things, or situations, and not a combination of them. *Central Standard Life Insurance Company vs. Davis*, (1956) 10 Ill. App. 2d 245, 134 N. E. 2d 653.

The word "or" in a statute is to be given its normal disjunctive meaning unless such construction renders the pro-

vision in question repugnant to other provisions of the statute. *In re Rice*, (1947) 165 Fed. 2d 617, 83 U. S. App. D. C. 26.

The word "or" in a statute may be construed as the equivalent of "and" where it is necessary in order to reconcile the provisions of the statute with each other and with the evident design of the legislature. *Attorney General vs. West Wisconsin Railway Company*, (1874) 36 Wis. 466.

There is no indication, however, that the word "or" in sec. 25.19 was to have any meaning other than one commonly attributed to it.

Your third question is answered in the negative upon the basis of the language of the court in the *Blied* case, supra, wherein it was stated "the state treasurer could incur no liability or obligation by complying with the order of the Annuity Board in the instances here presented".

JRW

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*Counties—Jurisdiction—Juveniles—Courts—Where parents and child reside in county A and child attends school in county B, venue for prosecution for truancy lies in county A as does prosecution for delinquency, which may occur in county B.*

April 29, 1958.

ALBERT J. CIRILLI,  
*District Attorney,*  
Oneida County.

You have asked for my opinion on this question, now stated in the exact language employed by you: under sec. 40.77 of the Wisconsin Statutes, can the parents of a child between the ages of 7 and 16, attending the Lakeland Union High School located in Minocqua, Oneida county, Wisconsin, who is habitually truant, be prosecuted in Oneida county where said parents and child are legal residents of Vilas county, assuming, of course, the facts to show that the parents would be guilty for the said child's truancy?

In my opinion, venue for this offense lies in Vilas county, where such parents and the child reside. The pertinent part

of sec. 40.77 reads as follows: "Any person having under his control a child between the ages of 7 and 16 years shall cause such child to attend some school regularly to the end of the school term, quarter, semester, or other division of the school year in which he is sixteen years of age \* \* \*". The statute penalizes the above-described person if he fails to cause the child to attend school as required thereby, although disobedience of the child is a good defense. The offense contemplated by the statute is an omission to act, i.e., a failure to act so as to cause the child in question to attend school as required by the statute. Where such an offense is involved, the weight of authority holds that venue lies in the county where the act should have been performed. See *Gilmour v. State* (1952) 230 Ind. 454, 104 N.E. 2nd 127, 128; *U. S. v. Commerford* (1933) 64 F. 2nd 28, 32; 22 C.J.S. Criminal Law, sec. 173. In the situation you describe, the child resides in Vilas county. It is in that county where the acts of the parents, designed to cause the child to attend school, would ordinarily begin and end, although the school itself was in another county. Since the failure to perform such acts would take place in Vilas county, it is there that offense would occur, and venue would be in that county.

It is conceivable, of course, that the parents, aware of their child's reluctance to attend school, might drive him to the school in Oneida county to assure his attendance. But I do not believe that such an extraordinary measure is required of parents to meet the duty imposed by sec. 40.77 (1). Since it would not be required, the failure to take it, which would involve a failure to act within Oneida as well as Vilas county, would not constitute an offense triable in either county.

Although no Wisconsin case has been found expressly adopting the rule that where the offense is an omission to act, the venue is usually the jurisdictional locality where the act should have been performed, approval of that rule may be inferred from the holding in *Adams v. State* (1916), 164 Wis. 223, 226, 159 N.W. 726 and the citing of *State v. Dvoracek*, (1908) 140 Iowa 266, 118 N.W. 399, in support thereof. In the *Adams* case, it was held that the place where the children were, not where the father was, during the pe-

riod complained of, fixed the venue of a prosecution for nonsupport of children. The reasoning behind such holding was not given, but several cases were cited in support thereof, among them the *Dvoracek* case. The *Dvoracek* case also held that venue in nonsupport cases was in the county where the duty of providing for the wife and children should be discharged, and reached this holding by reasoning that the matter involved (a) a duty of support, and (b) an omission to perform such duty (the offense), and that where such duty was owed, there the offense occurred when there was a failure to meet it, and in that county was the proper venue for the offense. In substance, the reasoning of the *Dvoracek* case was an adoption of the rule above-mentioned, so it is accurate to say that when in the *Adams* case our supreme court cited the *Dvoracek* case in support of its holding it implied its approval of such rule.

My opinion is also asked on a second question, which is as follows: under sec. 48.12 (2) would a child who attends the Lakeland union high school located in Minocqua, Oneida county, Wisconsin, but who is a resident of Vilas county, and who is habitually truant from school, be subject to the jurisdiction of the juvenile court of Oneida county or Vilas county?

This question, I believe, is answered by sec. 48.16, the relevant part of which reads as follows: "Venue for any proceeding under ss. 48.12 and 48.13 shall be in any of the following: the county where the child resides, the county where he is present \* \* \*". Under the circumstances of truancy you describe, the child in question would not, at least ordinarily, be present in Oneida county, so as to give the juvenile court of Oneida county jurisdiction over him by reason of the provision of sec. 48.16, placing venue for any proceeding under sec. 48.12 in the county where the child is present as well as the county of his residence. If the child is not present in Oneida county, venue would, of course, be only in the county of his residence under sec. 48.16, or in any other county where he might be present. If the child, though habitually truant, were to be present in Oneida county at some time during the period of his truancy, venue would then lie in Oneida county as well as in Vilas county. However, even if that were so, practical considera-

tions might indicate that institution of the appropriate proceeding under sec. 48.12 should be undertaken in the county where the child resided, rather than in a county where he was only present as a visitor for a day or less, if that were the case.

JHM

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*Motor Vehicle Department—Investigation of Complaint—* Commissioner of the motor vehicle department has a duty to investigate complaints and to hold hearings to determine if a motor vehicle distributor has unfairly and without just provocation cancelled the franchise of a motor vehicle dealer within meaning of sec. 218.01 (3) (a) 17.

April 30, 1958.

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

You ask for advice as to when and under what circumstances it is your duty to hold hearings to determine if licensees under ch. 218, i.e., manufacturers or distributors, have unfairly and without just provocation cancelled franchises of motor vehicle dealers in this state.

You include with your question the file with regard to a dealer who has had his franchise cancelled by the U. S. distributors for a foreign car corporation. The distributor is a licensee under ch. 218 and is authorized to franchise dealers within this state.

You were notified by a letter dated December 20, 1957 by Hoffman-Porsche Car Corporation, U. S. distributors for Porsche cars, located at 443 Park Avenue, New York 22, New York, the licensed distributor concerned in this matter, that the Wisconsin Auto Sales Company was no longer a dealer for the sale of Porsche automobiles. The letter went on to state that the authorization for Wisconsin Auto Sales Company, located at 3008 North Third Street, Milwaukee 12, Wisconsin, would expire on March 1, 1958, due to inability to obtain and supply sufficient Porsche cars. (Your opinion request was received March 24, 1958.)

Sec. 218.01 (3) (a) 17 provides that a license issued to the distributor may be revoked by the commissioner if the distributor has "unfairly, without due regard to the equities of said dealer and without just provocation, canceled the franchise of any motor vehicle dealer".

It is evident that this is a regulatory and remedial statute enacted under the police power to regulate manufacturers and distributors who wish to establish dealers and outlets for their products in this state. The general rule is that remedial statutes are to be liberally construed to effectuate the purpose of such legislation. 50 Am. Jur. 392, *Holl v. City of Merrill*, (1947) 251 Wis. 203, 28 N.W. 363.

The obvious purpose of the statute is to protect this state from unscrupulous manufacturers and distributors who induce citizens of this state to invest considerable sums in facilities to handle the sale of automobiles and then cancel the franchise without just cause. As our supreme court said in *Kuhl Motor Co. v. Ford Motor Co.*, (1955) 270 Wis. 488, 498, 71 N.W. 420 in regard to sec. 218.01 (3) (a) 17:

"\* \* \* The state has thus made it crystal clear that the unfair cancellation of a dealer's franchise without provocation and without considering the dealer's equities is against the public policy of this state."

and at page 502 the court says:

"It would seem reasonably clear that one of the chief objectives of the legislature in enacting sec. 218.01, Stats., in so far as it seeks to regulate the dealings between automobile manufacturers and dealers, is to promote fair dealing, which, of course, is a legitimate exercise of police power."

It is my opinion that the statute in question places a duty upon the commissioner of the motor vehicle department to ascertain whether a manufacturer or distributor has unfairly cancelled a franchise of a Wisconsin motor vehicle dealer where the case is properly presented by verified complaint by an individual, or where the department's own investigation discloses probable grounds for holding a hearing to determine whether such cancellation was unfair.

You mention that you have been of the opinion that to hold hearings on these matters would be to determine contract rights between the distributor and the franchise

holder. You feel that you would be, in effect, sitting as a court on the termination of the contract rather than on the question of whether the licensee has committed some act which requires that you revoke the license to do business in this state.

This seems to be an unfounded fear. You are not to determine whether the franchise should be reinstated after it has been canceled. That is a private contractual matter between the distributor and the franchise holder. What you are concerned with is the conduct of your licensee, the distributor, in dealing with Wisconsin franchise holders. In that respect, you, as the licensing agency, will be judging the conduct of your licensee and not whether the franchise holder has any cause of action against the distributor. Obviously, if you should revoke the license of the distributor, the franchise could not, under any circumstances, be reinstated and the dealer would be left to his remedies under law. You, as licensor, have a continuing duty to determine whether your licensees meet the standards required under the statute. To that end, it is proper for you to conduct investigations and hold hearings to aid you in determining whether the conduct of any given licensee requires that his license be suspended or revoked.

It is well established that boards and commissions charged with the supervision of certain classes of business may investigate a licensee upon complaint that he has violated regulatory statutes or standards of conduct in dealing with the public, or on the motion of the regulatory agency. A licensee is under discipline of the authorities to whom he, as licensee, is subject. *Kenneth Nolan v. Wis. Real Estate Brokers' Board, et al.*, decided April 8, 1958, 3 Wis. 2nd 510. The public policy upon which ch. 218 is grounded is further made clear by the authority confided in you by sec. 218.01 (5) which empowers you to define unfair practices between licensees in the motor vehicle industry and trade.

Accordingly, you are advised that it is proper for you, and, in fact, it is your duty, to investigate complaints of unfair cancellation of dealer franchises and to hold hearings in the manner provided for in the Wisconsin Administrative Code, Chapter MVD 1. If you receive complaints which are not verified, you should either conduct an investigation

on your own motion, or request that a verified complaint be filed before proceedings are initiated, as provided in your administrative rules. Careful attention should be paid to the notice of hearing and statement of issues to properly apprise the respondent of the issues to be determined at such hearing.

The provisions in sec. 341.49 (2) have been considered and it is not felt that the sixty-day notice period required of the manufacturer or distributor limits the period during which a complaint may be entertained against such licensee.

I note that the attorney for the complainant in the instant case has offered to furnish formal pleadings to initiate proceedings. I suggest that you direct him to so proceed.

LLD

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*Statutes—Regional Planning Commission—Municipalities—Functions of regional planning commission and local governmental units under sec. 66.945 discussed.*

April 30, 1958.

C. STANLEY PERRY,  
*Corporation Counsel,*  
Milwaukee County.

You have requested my opinion concerning certain aspects of sec. 66.945, Wis. Stats., which deals with regional planning commissions.

Your first question asks: Under sec. 66.945 (2), up to what time may the governing body of any local governmental unit elect not to be included within the jurisdiction of any regional planning commission?

Sec. 66.945 (2) provides:

“A regional planning commission may be created by the governor, or such state agency as he may designate, upon petition in the form of a resolution by the legislative body of a local governmental unit. Such a petition shall evidence the existence of an unmistakable interest in a regional planning commission and demonstrate the need for such a commission. The governor, or his designee, after receipt of such a petition, and upon finding that there is a need for a regional planning commission, shall create the regional plan-

ning commission by order and shall designate the area and boundaries of such a commission's jurisdiction taking into account the elements of homogeneity based upon, but not limited to, such considerations as topographic and geographic conformations, extent of urban development, the existence of special or acute agricultural, forestry, conservation or other rural problems, uniformity of social or economic interests and values, park and recreational needs, civil defense, or the existence of problems of physical, social and economic problems of a regional character. The governing body of any local governmental unit may elect that such unit shall not be included within the jurisdiction of any regional planning commission, by resolution adopted by such governing body and filed with the governor or his designee."

The above language should be construed in light of sec. 66.945 (14), which deals with budget and service charges. This statute provides that a regional planning commission shall annually prepare and approve a budget, the amount of which charged to any local governmental unit to be in proportion to respective equalized values of land in the unit and region.

Even if the legislature intended, as appears to be the case, that a local governmental unit may elect to withdraw from the jurisdiction of a regional planning commission at any time, it does not follow that a governmental unit can avoid its proportionate share of the regional budget. Such annual budgets necessarily must be prepared based on the assumption that the governmental units under the jurisdiction of the regional planning commission at the time of the preparation and approval of the budget will remain a part of the commission, at least for fiscal purposes, for the entire period covered by the budget. To conclude otherwise would make the task of preparing a budget almost impossible and would certainly impose grossly disproportionate financial burdens on the remaining governmental units which did not elect to withdraw from the jurisdiction. Such a construction would also be patently opposed to the general policy behind sec. 66.945, which is to encourage and assist local governmental units to plan and act cooperatively and more effectively on matters of common interest. The emphasis is on mutual and cooperative planning and development. See sec. 66.945 (10).

It is a well settled rule that a statute is to be interpreted not only by its exact words, but also by its apparent general purpose. *School Directors of Pelican v. School Directors of Rock Falls*, (1892) 81 Wis. 428, 433, 52 N.W. 1049. It is my conclusion, therefore, that any governmental unit may elect not to be included in the jurisdiction of its regional planning commission at any time but that this would not operate to relieve such governmental unit from sharing in the expenses already incurred or approved in the budget by the regional planning commission.

Your second question asks: May a city or village elect not to come under even though a county board petitions to come under the jurisdiction of a regional planning commission? The answer is yes. Sec. 66.945 provides:

“(1) DEFINITIONS. For the purpose of this section ‘local governmental units’ or ‘local units’ shall include cities, villages, towns and counties.

“(2) \* \* \* The governing body of any local governmental unit may elect that such unit shall not be included within the jurisdiction of any regional planning commission, by resolution adopted by such governing body and filed with the governor or his designee.”

Your third question asks in effect if there is any difference under sec. 66.945 (2) in the right of a local governmental unit to elect not to be included in the jurisdiction of a proposed regional planning commission as compared to electing to withdraw from an already existing regional planning commission. This is in effect answered in the above answer to question 1. Subject to conditions therein mentioned, a local governmental unit may at any time elect to be not included.

Your fourth question is: Assuming a county board petitions the governor to be a part of the regional planning commission and after a finding that there is a need the governor creates the commission, is it then possible for any municipality to refuse to be a part of the commission on the theory that they never petitioned in the first instance for the formation of a commission and should not be required to even institute any election to withdraw?

Amendment No. 1, A., to Bill No. 513, S. proposed to amend the bill so that the first sentence of 66.945 (2),

Stats., would read “\* \* \* upon petition in the form of a resolution by the legislative body of *each* governmental unit *containing any area which would be included in the jurisdiction of the regional planning commission.*” (Italic indicates change.) This amendment failed. However, the bill passed and became ch. 466, Laws 1955, and created sec. 66.945. This would indicate that the legislature concluded that it would permit the creation of a regional planning commission without the consent of each and every governmental unit having any area affected, so that it would be possible for a local governmental unit to come under the jurisdiction of such a regional commission initially without its approval. However, the rights of the local units are amply protected by the simple procedure they may follow at any time to be excluded from the commission’s jurisdiction subject to limitations discussed above.

Your fifth question is: If a county board petitions pursuant to sec. 66.945 (2) to be a part of a regional planning commission and a finding of need results and the governor creates a commission, is it possible for every city, village or town who has not elected not to be included to claim entitlement to have one representative on the regional planning commission pursuant to sec. 66.945 (3) ?

Sec. 66.945 (3) provides that “The regional planning commission shall consist of one representative from each local unit within the region \* \* \*”. From the plain language of the statute, it is manifest that each local governmental unit within the region is entitled to a representative on the commission. This was pointed out in an opinion from this office dated March 4, 1958. These local units including cities, towns and villages are entitled to this representation on the commission notwithstanding that they may not have joined in the petition to the governor which brought about the creation of the commission.

Your sixth question is: Under sec. 66.945 (14) (b), if the county board petitions to become a part of the regional planning commission and presumably represents the entire county as a “local governmental unit”, are the proportionate charges based on the county’s total valuation strictly county charges or is it implied that they may be certified to municipalities within the county for payment by the respective municipalities according to their valuations?

Sec. 66.945 (14) (b) provides:

“Where one-half or more of the land within a county is within a region, the chairman of the regional planning commission shall certify to the county clerk, prior to August 1 of each year, the proportionate amount of the budget charged to the county for the services of the regional planning commission. Unless the county board finds such charges unreasonable, and institutes the procedures set forth below for such a contingency, it shall take such necessary legislative action as to provide the funds called for in the certified statement.”

This statute must be read in conjunction with sec. 66.945 (14) (c) which provides:

“Where less than one-half of the land within a county is within a region, the chairman of the regional planning commission shall before August 1 of each year certify to the clerk of the local governmental unit involved a statement of the proportionate charges assessed to that local governmental unit. \* \* \*”

An examination of both statutes discloses that the legislature intended the county should bear the entire expense “Where one-half or more of the land within a county is within a region \* \* \*”. This is supported by the requirement that the certification be made to the county clerk rather than to the various city, village or town clerks as provided in sec. 66.945 (14) (c). The controlling factor is the fractional part of county land within the region, without regard to whether the county board initiated or joined in the petition. Furthermore, there is no basis for an inference that the county may apportion these charges to subordinate governmental units within the county in any manner different from the usual procedure followed in breaking down the cost of operation of county government to local units.

Your seventh question is: If the county board acts as described above and petitions the governor for membership and the governor thereafter creates the commission, may certain municipalities within the county elect not to come under as per sec. 66.945 (2), and if the municipalities not electing to come under still constitute more than one-half of the land within the county, then does the county absorb the charge as a county charge or may it certify the proportionate charges based on municipal valuations to the remaining

municipalities who still desire to be under the jurisdiction of the commission?

This question is answered by the answers to questions 1, 3 and 6 above.

Your eighth question is: If less than one-half of the land within a county is within a region as per sec. 66.945 (14) (c), presumably on the theory that numerous municipalities have elected not to be included within the region (rather than on the theory that the periphery of the region might bisect a county), is it clear that only the remaining municipalities will bear the proportionate charges based on their proportionate valuations and the county is not to absorb the charge as a county charge so that the municipalities who have elected not to come under would in a sense have to contribute toward the support of the commission since it would be a part of the county property tax annually fixed by the county board?

Sec. 66.945 (14) (c) is clear that where less than one-half of the land within a county is within a region the charges of the regional planning commission are to be shared proportionately by the local governmental units involved. Since the county is used here as the starting point, the use of "local governmental unit" in this subsection necessarily refers to a governmental unit subordinate to the county, such as city, village or town. Thus, in this situation, the chairman of the regional planning commission certifies directly to the city, town or village clerks the statement of proportionate charges assessed to that particular city, town or village. Under these circumstances, there is no provision by which the county board is required to pay any of these charges or apportion them to subordinate units of government. Moreover, as indicated above, the determining factor which brings this statute into operation is the existence of less than one-half of the land within a county within the region. Although this certification must be made before August 1 of each year, the critical date for determining what county land is to be included in the region for service charges is the date the budget is approved. See answer to question one above. Aside from this, the matter of whether the amount of county land in a region is due to a withdrawal by certain governmental units or otherwise is of no consequence.

Your ninth question can best be answered by dividing it in two parts. The first part reads: "If more than one-half of the land is within the region, is the law clear on the point that the charge is to be strictly a county charge with no right of chargeback to municipal units?" The answer is yes. Sec. 66.945 (14) (b) is clear. There is no authority for the county board to charge back these expenses *only* to the subordinate governmental units included in the region. See sec. 70.63. The county only has such powers as are expressly conferred upon it or necessarily implied therefrom. *Dodge County v. Kaiser*, (1943) 243 Wis. 551, 557.

The second part of your ninth question reads: "\* \* \* \* if less than one-half of the land within the county is within the region, then is it to be a strictly local charge with the county accepting the charges and charging them back or as an alternative the Regional Planning Commission certifying the proportionate charges to the municipal units within the county who are under the jurisdiction of the commission?"

Sec. 66.945 (14) (c) allows no choice or alternative method. The statute directs that the chairman of the regional planning commission shall certify to the clerk of the local governmental unit involved a statement of the proportionate charges assessed to that local governmental unit. As discussed above, this can only refer to the governmental units within the county and not the county itself.

JEA

*Licenses and Permits—Highways—Farm Machinery—*  
 Sec. 348.05 regarding width limitations of vehicles operated on a highway discussed with particular regard to implements of husbandry whether being operated temporarily on the highway or being transported for repairs.

May 13, 1958.

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

You request interpretation of sec. 348.05 (2) (a) and sec. 348.05 (3), and in connection therewith have submitted five separate questions which present themselves in connection with your enforcement of the statutes in question. Your questions are as follows:

- "1. Are farmers included in sec. 348.05 (3), under all circumstances of operation of such implements?
- "2. If your opinion is 'no', are farmers included when moving such implements for purposes of repair?
- "3. If your opinion to question 1 above, is 'yes', are Sections 348.05 (2) (a) and 348.05 (3), compatible?
- "4. Does the word 'moved' in line 3 of sec. 348.05 (3), include both towed implements and implements transported *on* another vehicle?
- "5. What is the meaning of 'temporarily operated upon a highway', in sec. 348.05 (2) (a). \* \* \*"

The statutes in question read as follows:

"348.05 Width of vehicles. (1) No person without a permit therefor, shall operate on a highway any vehicle having a total width in excess of 8 feet, except as otherwise provided in this section.

"(2) The following vehicles may be operated without a permit for excessive width if the total outside width does not exceed the indicated limitations:

"(a) No limitation for implements of husbandry temporarily operated upon a highway;

"\* \* \*

"(3) OVERWIDTH FARM MACHINERY. Notwithstanding any provision of this section to the contrary farm tractors exceeding 9 feet in width and all other farm machinery and implements of husbandry exceeding 8 feet in width may be moved over the highways of this state by *dealers* or *for the purposes of repair* without special permit

between the hours of 7 a.m. and 4 p.m. on Mondays through Thursdays and from 7 a.m. to 11:30 a.m. on Fridays subject to this section. A pilot vehicle shall accompany and travel 500 feet ahead of the machinery being moved or towed. Both the pilot vehicle and the farm machinery being moved shall carry an upright sign which shall be no less than 4 feet wide and 3 feet high on a vertical standard having an elevation of 10 feet above ground level. The background of the sign shall be in red with lettering thereon at least 6 inches high on both sides to read as follows: 'DANGER . . . OVERWIDTH . . . MACHINERY'. Such overwidth vehicles shall not operate on any Wisconsin highway which is part of the national system of interstate and defense highways without special permit."

In construing this section of the statutes, it is appropriate to consider the rule of statutory construction which dictates that any exception in a statute contrary to its general enacting clause be strictly construed and that all doubts be resolved in favor of the general provision rather than the exception. 59 Corpus Juris, p. 1092; *Palmer v. State Board of Assessments*, (1939) 226 Iowa, 92, 283 N.W. 415; *Hargett v. Kentucky State Fair Board*, (1949) 309 Ky. 132, 216 S.W. 2d 912. However, it is also important that those construing the statutes should give the most reasonable meaning intended by the legislature. See *International Union v. Wisconsin Employment Relations Bd.*, (1947) 250 Wis. 550, 558, 27 N.W. 2d 875, 28 N.W. 2d 254 and Sutherland on Statutory Construction, 3rd Ed § 4908.

Sec. 348.05 (3) is an addition to the 1957 vehicle code created by ch. 54 and amended by ch. 471, Laws 1957. Draftsman's notes in the Wisconsin legislative library in regard to these two chapters indicate that ch. 54 was designed to allow dealers to move overwidth farm tractors, equipment and implements of husbandry and was not intended to apply to farmers. Ch. 471 was an amendment to allow dealers the privileges granted in ch. 54 and to extend such privileges to anyone if the moving is for the purpose of securing repairs.

Under sec. 348.05 (2) (a) (enacted under ch. 260, Laws 1957), I construe the intent of the legislature to be that no limitation as to width should apply to implements of husbandry being operated on the highway in the *ordinary*

*course of such husbandry operations.* This exception would not apply to moving of such overwidth implements either by truck or trailer, self-propelled or towed, in connection with delivery of new units to a farmer. A dealer would not, in that case, be using or operating an implement of husbandry in the ordinary course of husbandry operations and a special permit would be necessary in each case. Applying the same rule of statutory construction, sec. 348.05 (2) (a) would not allow a farmer to move oversized farm implements over the highways to a village or city for the purpose of repairing implements. The exception would not apply because the farmer would not be operating in the course of husbandry operations. Thus, the term "temporarily operated upon a highway" is a restrictive term, applying to the husbandry operations for which such implements are used in their recognized type of work.

For instance, a farmer may have his farm separated by a highway and find it necessary to move implements from one part of the farm to another across the highway, or he may have land separated by other farms and find it necessary to move his implements on the highway in order to perform his husbandry operations. It is clear that in those situations the farmer would be exempt from width limitations imposed by sec. 348.05 (2) (a). However, where the purpose of being on the highway is other than to go to or return from husbandry operations, a special permit would be needed for overwidth vehicles.

Ch. 471, Laws 1957, amended ch. 54, which applied only to dealers, by the addition of the words: "or for the purposes of repair," and a prohibition against operation of exempt vehicles on any of the highways which constitute a part of the national system of interstate and defense highways. The caption in connection with this chapter omitted any reference to dealers, and merely read: "AN ACT to amend 85.455 of the statutes as created by chapter 54, Laws of 1957, relating to moving overwidth farm machinery on highways without permit".

Thus, ch. 471 broadened the exceptions created in ch. 54 to include anyone moving farm tractors, farm machinery or implements of husbandry over certain highways and during certain hours for purposes of repair.

Accordingly, in answer to your first question, farmers are not included under all circumstances of operation of such implements. In answer to question two, farmers are included when moving such implements for purposes of repair. Question three needs no answer in view of our reply to your first question.

Your next question is in regard to the use of the word "moved" in line three of sec. 348.05 (3). In 44 O.A.G. 103, which was rendered on May 31, 1955, in regard to sec. 85.45 (2) (a), you were advised that the exception therein which applied to "implements of husbandry temporarily propelled or *moved* on the highway" did not include the transportation of new farm machinery by motor truck or trailer from the dealer's place of business to a farm for delivery to the farmer purchaser.

Without repeating the reasoning used in the above opinion regarding the primary purposes of limiting width of vehicles on public highways, I am of the opinion that the legislature has not extended the exception under sec. 348.05 (3) to include transporting of overwidth machinery by motor truck or trailer, since such a vehicle could not be classed as a farm tractor, farm machine or implement of husbandry. A farm tractor is defined in sec. 340.01 (16) as "a motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines and other implements of husbandry". A farm machine is not defined in the vehicle code, although it appears to be practically synonymous with implement of husbandry, which is defined under sec. 340.01 (24) as "a vehicle or piece of equipment or machinery designed for agricultural purposes and used exclusively in the conduct of agricultural operations".

The legislature has been in session during two terms since the opinion in 44 O.A.G. was rendered. It has not seen fit to change the ruling presented in that opinion, and such acquiescence on the part of the legislature must be interpreted to be agreement with the opinion. Had the legislature desired to extend the exception under 348.05 (3) to include transporting of farm implements on trucks by dealers, they could have easily done so by the addition of the words "or transported by truck or trailer" after the word "moved" in line three.

Accordingly, you are advised, in answer to your fourth question, that the word "moved" does not include the transportation or towing of implements by another vehicle unless the other vehicle is also an implement of husbandry as defined by sec. 340.01 (24).

In regard to your last question, I wish to remind you that the phrase "temporarily operated upon a highway" of course is modified by the preceding words "implement of husbandry". Our previous discussion in regard to sec. 348.05 (2) (a) indicated that the intention was to allow only such movement as is in connection with the husbandry operations of the owner, and, therefore, it is first necessary for your officers to determine whether the movement is, in fact, a normal functional operation as contemplated by the statute. See *Mason et al. v. Case*, (1939) 2 2d Wash. 33, 97 P. 2d, 165, 169. The word "temporarily" is defined in Webster's New Collegiate Dictionary as being transitory or lasting for a time only. Whether or not an operation is temporary would be subject to fact determination in each case, and the mere fact of a movement of several miles would not necessarily remove the operation from the temporary class.

LLD

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*County Board—Circuit Court—Salaries—*Under sec. 252.071, in a single county circuit, county board may not elect to pay different salary supplements to circuit judges concerned.

May 13, 1958.

JOSEPH W. BLOODGOOD,  
*District Attorney,*  
Dane County.

You state that the county board of Dane county has for several years, pursuant to resolution, appropriated \$1500.00 per year to supplement each of the circuit judge's salaries for branches 1 and 2 of Dane county circuit court. However, you state that, contrary to your advice, the county board has refused, by formal vote, to appropriate a similar (or

any) sum to supplement the salary of the judge of the newly created branch No. 3 of Dane county circuit court. It is understood by inference that the duties of all the judges concerned are substantially the same.

In substance, you ask the following question :

In a county which comprises a judicial circuit having several branches, may the county board, acting under sec. 252.071, Wis. Stats., elect to pay different amounts to supplement the salaries of the various circuit judges presiding over their respective branches of the circuit court?

Since you have indicated that the above is the only question concerning which you wish advice, this opinion does not inquire into or discuss other related questions not included in your request.

As amended by ch. 252, Laws 1957, sec. 252.071 provides as follows :

“In every judicial circuit each county of such circuit may pay to each circuit judge of such circuit, a sum which shall not exceed in the aggregate \$3,000 for the entire circuit as annual salary, payable as other salaries in said county, out of the county treasury, in addition to the salary paid him out of the state treasury and that provided for in s. 252.016 such sum as the county board of each county shall determine.”

The particular language of the statute which is here significant is “\* \* \* each county \* \* \* may pay to each circuit judge of such circuit *a sum* which shall not exceed in the aggregate \$3000 \* \* \* in addition to the salary paid *him* out of the state treasury \* \* \* *such sum* as the county board shall determine”. The use of the singular forms of “a sum” and “such sum” indicates that the legislature intended that the action of any particular county board should deal only with a *single sum*. Sec. 990.001 (1). This interpretation is further supported by the use of “salary paid him” in the statute. The conclusion is inescapable that the legislature must have intended this statute to enable county boards to supplement the salaries of circuit judges as might be required by variations in local conditions, such as changes in work load and economic conditions. In single county circuits, which are the only ones having more than one judge,

there is no basis for an inference that the legislature intended to permit the county board to supplement the various circuit judges' salaries unequally. To interpret the statute otherwise would produce obvious absurdities and a statute should not be construed so as to work an absurd result. *Laridaen v. Railway Express Agency, Inc.* (1950), 259 Wis. 178, 47 N.W. 727.

I concur in your conclusion that under the provisions of sec. 252.071 in a single county circuit having more than one circuit judge, the county board may not elect to pay different salary supplements to the various circuit judges concerned.

JEA

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*Public Welfare—Diagnostic Center—Appropriations and Expenditures*—Division between state and county of funds collected for care of patients at the Wisconsin diagnostic center, under sec. 46.04 (3) should be in proportion to the amount charged against each.

May 26, 1958.

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

You ask whether collections recovered for care of patients at the Wisconsin diagnostic center, under sec. 46.04 (3) should be apportioned equally between the state and the county of legal settlement, or in proportion to the amounts originally charged against each.

Under sec. 51.08, the amount charged against the county of legal settlement for care at the diagnostic center is \$5 a week. To apportion collections recovered equally between the county and state would result, in most cases, in counties receiving more than was charged against them.

The governing statute is sec. 46.04 (3) which reads:

“Liability of a patient or relative under s. 46.10 for care and maintenance at the diagnostic center shall be at the same rate as charged for the institution from which the patient was transferred, and any collections shall be pro-rated with the county of legal settlement based on such

rate. When a patient is transferred directly from the diagnostic center to the Wisconsin general hospital the provisions of s. 46.115 shall apply."

In using the term "prorate", the legislature may be presumed to have had in mind the common meaning of the word. The definition given in Webster's New International Dictionary, unabridged, second edition, reads in part:

"\* \* \* to divide or distribute proportionally \* \* \*."

The word is based on the phrase "pro rata", which is defined in the same dictionary as:

"In proportion; proportionately according to share, interest, or liability."

A proportional distribution is not necessarily an equal one. If the legislature had meant that the collections should be divided equally, it would have been simple to use the latter term. It was held in *Brombacher v. Berking*, (1897) 56 N. J. Eq. 253, 39 Atl. 134, 135, that when a testator provided certain funds should be divided pro rata between his children, he did not mean in equal shares, but in the same proportion as other funds given in preceding paragraphs. The court said:

"\* \* \* The query is, what did the testator mean by the use of the phrase 'pro rata'? Did he mean that the income was to be equally divided among his children, or did he have in mind the proportions fixed by him in the third paragraph for the payment of the rest of the income? 'Pro rata' means according to a measure which fixes proportions. It has no meaning unless referable to some rule or standard. \* \* \*"

You have suggested that an equal division is implied by use of the phrase "based on such rate". The division, however, would be "based on such rate", whether equal or proportional. The phrase merely means that "such rate" is to be taken as 100 per cent for purposes of division; and the division made according to the percentage the respective charges against state and county bear to "such rate",

BL

*Old Age Assistance—Real Estate Lien—Broker's fee—*  
A recipient of old-age assistance may not contract for the sale of land which is subject to lien under sec. 49.26 (5) in order to give broker's fees priority over county's lien where proceeds are insufficient to satisfy the lien in full. Under 49.26 (9) county may contract to pay broker's fees where title is taken by county to liquidate its lien. County cannot pay for legal fees incidental to sale.

May 26, 1958.

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

You ask a number of questions as to whether real estate broker's fees or attorney's fees involved in the sale of property which is subject to an old-age assistance lien under sec. 49.26 (5), Stats., may take priority over the lien. Your first question is:

"1. Because the recipient of old-age assistance can no longer live in the home and it must be sold, the recipient arranges for the sale of the property through a real estate broker and is charged a commission."

As the supreme court stated in *Goff v. Yauman*, (1941) 237 Wis. 643, 650, 298 N.W. 179, 134 A. L. R. 952, the county's statutory lien for old-age assistance "is comparable to the lien under a mortgage".

Property which is subject to a lien under sec. 49.26 (5) cannot be sold free of such lien except in the manner and under the circumstances authorized by statute. Sec. 49.26 (5) prescribes certain circumstances under which a county court may order sale of the realty free of the lien; subsec. (7a) enumerates certain public claims which shall be on an equal footing with the lien; and subsec. (8) provides how and under what circumstances the county may release its liens. Except under conditions such as those above outlined, any sale of realty by a recipient of old-age assistance is subject to any lien existing under sec. 49.26 (5), and can convey no interest greater than the recipient's equity in the property. The grantee is chargeable with constructive notice of a recorded old-age assistance lien. See *Fitzgerald v. Buffalo County*, (1953) 264 Wis. 62, 58 N.W. 2d 457.

Under ordinary circumstances a broker has no lien on realty for his commission in negotiating a sale (see 8 Am. Jur. 1107) ; and even if he did contract with a recipient of old-age assistance for a lien, such lien could not take priority over the county's pre-existing one.

Sec. 240.10 provides that a contract to pay a commission to a broker for selling realty shall be void unless the contract is in writing.

According to *Otto v. Black Eagle Co.*, (1954) 266 Wis. 215, 63 N.W. 2d 47; *Leuch v. Campbell*, (1947) 250 Wis. 272, 26 N.W. 2d 538; and *Hale v. Kreisel*, (1927) 194 Wis. 271, 215 N.W. 227, the above statute prevents recovery on a *quantum meruit* basis.

If a real estate broker negotiates sale of property under a contract with a recipient of old-age assistance, the sale can convey nothing more than the recipient's interest; and whatever right to a commission exists can be enforced only against the recipient with whom the broker contracted.

The broker in the case you have described would have no claim against the county; and certainly his commission could not take priority over the county's lien.

Your second question is:

"2. The recipient is under a guardianship and through the court the guardian makes a sale of the property employing a real estate broker to assist in the sale. The court allows the broker's fee. Can it be accepted as a priority over the lien?"

Under sec. 296.10 a court may authorize a guardian to sell his ward's real estate under certain circumstances; but under sec. 296.16 no such sale could give the ward "any other or greater interest or estate in the proceeds of such sale than he had in the estate so sold".

It is pointed out in 25 Am. Jur. 85 that even when authorized by a court, a "guardian can sell only the interest which the ward owns". See, also, *Re Guardianship of Hilton's Estate*, (1954) 72 Wyo. 389, 265 P. 2d 747, 43 A.L.R. 2d 1429.

If a real estate broker undertakes to negotiate a sale of property under contract with one who has a limited interest, he does not thus obtain rights against third persons

who are not parties to the contract. He can enforce payment of his commission only against the person with whom he entered the contract. His claim has no priority over the county's lien.

Your third question is:

"3. In order to avoid foreclosure the recipient executes a deed, either in blank or to the county agency, and the agency then proceeds to dispose of the property, employing a real estate broker."

Sec. 49.26 (9) provides in part that the county agency "may accept a conveyance in lieu of foreclosure". In such case, it is further provided:

"Title to property acquired under this section vests in such agency for the purpose of liquidation, and may be sold and title transferred by it without regard to s. 59.07 (1) (c)."

It is said in 10 McQuillin, *Municipal Corporations*, 108-109:

"\* \* \* If no provision is made by statute as to the procedure for disposing of municipal property, and the conditions of the conveyance, such matters are within the reasonable discretion of the appropriate municipal authorities."

The legislature apparently intended by sec. 49.26 (9) to leave to local authorities a considerable amount of discretion as to what methods should be followed to obtain the most advantageous sale. I am of the opinion that where title is vested in the county agency under sec. 49.26 (9), the cost of a broker's commission under a duly executed contract between the broker and the county agency may be paid, even though the sale price is not sufficient to satisfy the county's lien.

Your fourth question is:

"4. To clear title means certain legal work must be done before it is merchantable and the recipient employs an attorney who is also a real estate broker. Would this attorney be eligible for a fee ahead of the lien?"

The answer to the foregoing question is the same as the answer to the first. The recipient of old-age assistance has

no power to release the county's lien nor to contract to give a third party priority over the county's lien.

Your fifth question is:

"5. Can the property be sold for less than a fair sale value with the agreement that the purchaser shall pay all of the expenses which might include costs of sale, real estate broker's fee, and legal expenses in perfecting title, thereby reducing the recovery made on the lien?"

Your question does not specify whether you refer to a sale by the recipient of the old-age assistance lien or by the county agency.

As indicated in the answers to the former questions, the recipient of assistance could not contract to give the claim of any third party priority over the county's lien.

If title is taken by the county agency under sec. 49.26 (9), it can arrange for the sale of the property under the terms it deems will produce the most advantageous liquidation. In such case, the county's recovery may be reduced by such legitimate costs of sale as may be authorized by the county agency, including broker's fees. Legal services, however, present a different question, because sec. 49.26 (3) requires the district attorney to "take the necessary proceedings and represent the county in respect to any matters under this section". I do not believe the agency could contract to pay any other party for legal service incidental to the sale of land under sec. 49.26 (9), Stats.

BL

*University—Land—Sale—*Legality of sale of University Hill Farms under sec. 36.34 for shopping center purposes and problems incidental thereto discussed in light of 46 O.A.G. 83 and 47 O.A.G. 9.

May 29, 1958.

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

You have asked for an opinion of the attorney general on the legality of the sale of lands in the University Hill Farms area under sec. 36.34, Stats., for the development of a shopping center pursuant to a plan which will be discussed in detail later in this opinion.

Reference is made at the outset to two prior opinions of the attorney general dealing with the same general subject but where the plans for the development were substantially different in character when compared to the one which will be discussed here. These opinions to your office were issued on April 1, 1957, and January 15, 1958. See 46 O.A.G. 83 and 47 O.A.G. 9.

The first plan contemplated the development of the center by a private developer under a long-term lease from a non-profit corporation which would first purchase the property from the regents at a consideration deemed to be adequate with the purchase price being donated to the corporation by the regents from gift funds available for that purpose. This proposal was approved in principle in the first of the above-mentioned opinions.

The second proposal was disapproved by the attorney general because it involved the sale of valuable property by the regents for a nominal consideration of \$1, although there was to be a re-purchase option whereby the regents could re-purchase the land subject to outstanding leases and encumbrances.

The present proposal contemplates the sale of 33.83 acres of land at a price of \$6000 per acre to a nonprofit corporation formed by friends of the university. The regents propose to make a gift from the so-called anonymous trust fund to the nonprofit corporation of the purchase price of

the land. As was pointed out in 46 O.A.G. 83 at pp. 89-90, the regents are given the widest possible power as to the use of funds in the anonymous trust fund, and as a matter of fact the donor or donors of this fund have given their specific approval to this proposal. The sale in question is to be submitted to the state building commission for approval as required by sec. 36.34 (3). It might also be mentioned at this point that in the proposed articles of incorporation of the nonprofit corporation there will be a provision that in case of dissolution of the corporation, its assets are to be transferred to the regents.

The next step in the proposal is a lease of the land by the nonprofit corporation to a development corporation for a term of not to exceed 50 years at a minimum annual net rental and also an additional rental based on the gross income of the shopping center. The development corporation would be a regular stock corporation for profit organized by friends of the university. It would pay all street assessments, taxes and other costs incidental to the development of the center. The fee title of the nonprofit corporation would be subordinated to a first mortgage of the development corporation on its leasehold interest and the leases of the operating tenants would be subordinated to the mortgage.

In order to obtain further working capital the development corporation would sell common stock and issue debentures. It is proposed that \$95,000 of the principal of the anonymous trust fund would be invested by the regents in the debentures of the development corporation.

In general the development corporation would construct, operate and manage the shopping center as any other business corporation.

The foregoing proposal raises three legal questions:

1. Is there any objection to the sale of the land by the regents to a nonprofit corporation at a price of \$6000 per acre?

As was pointed out in 46 O.A.G. 83 at p. 85, there is no restriction imposed by sec. 36.34 so far as the identity of the purchaser is concerned, and the price of \$6000 per acre is not *per se* an inadequate price. The regents have wide

discretion under sec. 36.34 and may negotiate sale prices subject to the approval of the state building commission. It is true that the attorney general disapproved of a \$1 price for the entire tract on the grounds that the legislature itself had set a price of \$2750 per acre on some of the lands in this area and that it would be a questionable exercise of prudence for the regents as trustee to sell for such a nominal consideration, amounting to little more than a gift.

The attorney general cannot determine at what point an inadequate price becomes an adequate one (that being a question of fact), and unless the price is on its face so low as to amount to a gift, the judgment of the regents and of the state building commission must control.

2. The second question is whether the regents may make a gift of anonymous trust fund money to the nonprofit corporation to purchase the land.

This has already been answered in the affirmative. Having in mind the ultimate benefits which will flow to the university from the nonprofit corporation's receipt of rentals from the project which are to be turned over to the university for educational purposes, as well as the fact that the nonprofit corporation and possibly the university will own the land with improvements after the expiration of the 50-year lease, the purpose of the gift appears to be in keeping with the directives of the anonymous donors "to manage and dispose of the funds or any part of it as freely as an absolute owner, for the benefit always of the work of the university in whatever way the Regents may deem wise". See 46. O.A.G. 83, 90. In any event all doubts on this point are removed by the fact that the donors of the fund have specifically approved of the proposed use of the money they have given to the regents.

Perhaps at this point some further discussion is in order as to the nature of the anonymous gift to the university. You have furnished us with a copy of the terms. No express trust is created by the instrument, and the name of "Anonymous Trust Fund" seems to have been one created and used by the regents as a matter of convenience when for investment purposes the regents voted: "That the anonymous gift be placed in the university trust funds in a segregated trust subject to revocation or further action by the Board".

The two friends who made the gift stipulated only one limitation,—“We attach only one condition, that this gift remain completely and forever anonymous”.

The attorney general is fully cognizant of the rule that the acceptance by the regents of a bequest in trust for a particular purpose cannot be withdrawn or rescinded. *Estate of Robinson* (1945), 248 Wis. 203, 21 N.W. 2d 391. He is also familiar with his statutory duty under sec. 231.34, to enforce public charitable trusts. However, assuming here that we are dealing with a trust it must also be remembered, as our supreme court held in a leading case, *Harrington, et al v. Pier, et al.* (1900), 105 Wis. 485, 82 N.W. 345, 50 L.R.A. 307, 76 AM. St. Rep. 924, that the courts will resort to liberal rules of construction to determine the intent of the donor, enabling them to go to the limit of the general purpose indicated by the donor and do everything necessary to enforce such purpose, but not to go outside of it into the realms of prerogative authority. The usual difficulty in construing implied trusts is to determine the intent of the donor, but as pointed out above the donors here are fortunately still alive and have indicated that the proposed use of the money was within their intent. If the matter were in litigation the testimony of the donors as to their intent might well be controlling.

Moreover, if this be viewed as a gift rather than a trust, attention is called to the fact that scarcely a month goes by in which the regents do not accept gifts which are in turn parcelled out as gifts by the regents for purposes which only indirectly benefit the university, e.g., scholarships.

Here the proposed gift benefits the university in at least two ways. In the first place it enables the university to receive a price of \$6000 per acre for land in an area where the legislature itself has indicated that \$2750 per acre is a fair price for acquisition by the state for state office building purposes. See sec. 36.34 (6).

In the second place the recipient of the gift is a nonprofit corporation which is to be organized “for the purpose of producing income or proceeds to be used solely for educational purposes” and whose net income will be paid to the university, and whose property on dissolution passes to the regents. The benefit to the university as an arm or agency

of the state of corporations of such a character was emphasized in the tax exemption case of *State ex rel. Wis. Univ. Bldg. Corp. v. Bareis* (1950), 257 Wis. 497, 44 N.W. 2d 259. Whether the nonprofit corporation will receive income from the development corporation in the rather substantial amounts envisaged by those who are planning the project is beside the point, just as it is more or less of a gamble as to whether a student given a scholarship will benefit to the extent hoped by donors of scholarship funds, to say nothing of whether the university itself will be benefited at all by such a scholarship gift.

Education is the function of the university and the ultimate responsibility as to the most effective means of meeting this challenge is in the hands of the regents subject only to abuse of that discretion and violation of applicable statutory provisions. An outsider may question the wisdom of many steps that are taken to meet this end, but where the regents as well as the donors of the funds in question have given their approval of the gift I cannot as attorney general say that the regents have abused their discretionary powers under the law or that violence is being done to the initial language of the gift wherein the donors stated that the money was "to be used for the work of the university in whatever way the Regents may deem wise" or that there is a violation of the spirit of the following language of the donors:

"We desire however to express the hope that this fund may be used to strengthen and enlarge the cultural and artistic undertakings of the University. Even in the midst of war it is well that we remember the total experience of the race, which seems to indicate that our civilization finds its roots, and its greatest potentialities, in those sustaining and continuing forces which minister to human happiness and to the higher and better instincts of man."

3. Lastly, may the regents invest \$95,000 of the anonymous trust fund in the debentures to be issued by the development corporation?

Again the answer is in the affirmative. Among the powers given the regents under the gift is the following: "To invest any part of the fund in stocks, *other securities*, real estate, or any other form of property". (Emphasis supplied.) 46 O.A.G. 83, 89.

It is to be noted that while the nonprofit corporation as well as the development corporation are to be formed by friends of the university, the regents will have no control over these corporations, and the university will in no way be engaging in the shopping center business, even though it will benefit therefrom.

WHR

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*Grain and Warehouse Commission—Rate Schedules—Publication*—The Wisconsin grain and warehouse commission cannot authorize grain warehousemen to publish rate schedules in July where sec. 126.18 (1) requires such publication to be made in September.

June 4, 1958.

BERNARD F. GLONEK, *Secretary,*  
*Wisconsin Grain and Warehouse Commission.*

You state that a certain grain warehouse firm has asked you for permission to publish a schedule of its rates during the first week in July rather than the first week in September as is required by sec. 126.18, Wis. Stats. You indicate that Minnesota law requires a July publication, that most of the Wisconsin grain warehousemen also have storage facilities in Minnesota, and that one publication date would be more convenient for all. It is your opinion that to allow the July publication date in Wisconsin would in no way hamper the Wisconsin grain and warehouse commission in the performance of its duties of regulation and inspection.

You ask whether the Wisconsin grain and warehouse commission has authority to permit the publication of grain warehouse rates in July rather than September.

Sec. 126.18 (1), as amended by ch. 139, Laws 1957, provides:

“Every public warehouseman shall during the first week in each September publish in a daily newspaper of the city in which his warehouse is located a schedule of his rates for the storage of grain during the ensuing year, which rates shall not be increased during the year. Such published

rates, or any published reduction thereof, shall apply to all grain received in his warehouse. No discriminations as to rates shall be made.”

This requirement is mandatory. The warehouseman is required by this statute to publish his rates during the first week of each September. There is no authority for the Wisconsin grain and warehouse commission to change this requirement.

The language of sec. 126.18 (1) is clear and unambiguous. It can have only one meaning and that is that publication of rates is to be made in September. This language cannot be construed to have any other meaning. It is fundamental that statutes are to be construed according to the intent of the legislature and that such intent is to be ascertained from the language employed. If that language is plain and unambiguous a court will not resort to the rules of construction. In *Ogden v. Glidden* (1859) 9 Wis. \*46, \*52, the court said:

“Adopting the cardinal rules, that the acts of the legislature are to be construed according to the intent of the legislature which passed them; that in ascertaining that intent we are first to look to the language in which they have spoken; and if that language is plain and unambiguous, interpretation is not allowable, we do not see how any doubt could have arisen upon this act. \* \* \*” (Emphasis supplied)

In *Rhea Mfg. Co. v. Industrial Comm.* (1939) 231 Wis. 643, 651, 285 N.W. 749, the court said:

“\* \* \* Whether the situation here presented results in an injustice to the employer is a question that can only properly be debated in the legislature. The act is clear and must be given effect according to its terms.”

Sec. 126.18 (1) requiring publication of rates in September must be strictly complied with and the Wisconsin grain and warehouse commission does not have authority to permit such publication in July instead. If September publication causes unnecessary inconvenience to the grain warehousemen involved, it would be appropriate to call this situation to the attention of the legislature.

AH

*Harbor Commissioners—Cities—Membership*—Problems relating to aldermen as members of boards of harbor commissioners and harbor commissions under secs. 62.09 (2) (b), 30.085, 138.01, and 138.02 considered.

June 4, 1958.

EARL SACHSE, *Executive Secretary,*  
*Legislative Council.*

You have raised several questions relating to the membership of city council members on boards of harbor commissioners under sec. 30.085 of the statutes and harbor commissions under ch. 138 of the statutes. These questions arise in connection with a study which the legislative council, through its ports and navigation committee, is making for revision of the laws relating to ports, port authorities and navigation.

The first question reads:

“1. Does § 62.09 (2) (b) authorize a city council to appoint one of its members to a board of harbor commissioners created pursuant to § 30.085? To a harbor commission created pursuant to ch. 138?”

Sec. 62.09 (2) (b) provides:

“Except as otherwise provided by statute, no alderman shall during the term for which he is elected be eligible to any appointive city office but he shall be eligible for any elective city office. *The council may be represented on city boards and commissions where no additional remuneration is paid alderman representatives on such a body, and the governing body may fix the tenure of such representatives notwithstanding any other statutory provision.*”

Sec. 30.085 (1) and (2) (a) and (b) relating to harbor improvement provides:

“(1) CREATION OF BOARD. Any county, except counties having a population of 500,000 or more, and any city, whether organized under general or special charter, situated on a navigable waterway may, by resolution of its common council or county board, create a board of harbor commissioners composed of not less than 3 nor more than 9 persons.

"(2) NUMBER AND TERM OF MEMBERS. (a) Such resolution shall state the number of persons to compose said board and the length of term of each member of the first board to be appointed, so that the term of one or more members of said first board shall expire in one year, one or more in 2 years and one or more in 3 years, and thereafter at the expiration of the term of any member a successor shall be appointed for a 3-year term.

"(b) As soon as possible after the passage of the resolution creating such board, the mayor of such city or chairman of such county board shall, subject to confirmation by the common council or county board, appoint the members of said board and designate the length of term of each member thereof in compliance with said resolution. No person shall be appointed to said board unless he be a qualified elector and a resident for at least 3 years of such city or county. Any vacancy occurring in said board shall be filled for the unexpired term in the same manner as the original appointment. The members shall serve without compensation and until their successors are appointed."

The provisions of sec. 30.085 above quoted do not preclude aldermen from serving on such a board, and sec. 62.09 (2) (b) states that an alderman may represent the council on a city board.

The same observation applies in the case of a harbor commission created under ch. 138. These harbor commissions under sec. 138.01 are created for cities in the state of Wisconsin, located on a harbor which lies partly in this state and partly in another state. With reference to the composition and terms of office of commission members sec. 138.02 provides:

"Such commission shall consist of not less than 3 nor more than 9 members who shall be appointed by the mayor of the city in which the commission is located, and shall be confirmed by the council. All members shall be residents of the city in which the commission is located, and all members shall be appointed with special reference only to ability and fitness for the office. The members shall serve without compensation other than remuneration for expenses. Of the first members, one shall be appointed for a one-year term, one for a 3-year term, one for a 5-year term, and all other members shall be appointed for 6-year terms. All terms of office shall begin on July 1 of the year in which this chapter shall be adopted. After the expiration of these first terms all members shall hold their offices for the terms of 6 years

each or until their successors shall be appointed, confirmed and qualified. Vacancies shall be filled by appointment for unexpired terms. All members shall qualify by taking the oath of office provided for officers of the city."

The only limitations are that the members shall be residents of the city and shall be appointed with special reference to ability and fitness for the office.

The difficulty in giving a definitive answer to your first question arises out of basic considerations relating to the possible incompatibility which may exist in the holding by one person of more than one office at the same time. It is a settled rule of the common law that a public officer cannot hold two incompatible offices at the same time. 42 Am. Jur. "Public Officers" § 59.

It may well be that in the instances here under discussion no incompatibility in fact exists, but I do not deem it advisable to gaze into the crystal ball and attempt to visualize all of the possible situations which might arise in an effort to determine whether or not any of them give rise to incompatibility between the exercise of the duties of an alderman and the duties of a member of a harbor commission or board of harbor commissioners.

Rather, the answer to the question should be based on the broader ground that even though there might be incompatibility, the legislature in the absence of constitutional limitations, of which there appear to be none in the present situation, is at liberty to change the common law rule stated above.

Art. XIV, sec. 13, of the Wisconsin Constitution provides :

"Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature."

This is a specific constitutional recognition of the legislature's power to alter common law rules. Moreover, it has long been recognized that our state constitution is not to be regarded as a grant of power, but rather as a limitation upon the powers of the legislature which is free to exercise all legislative power not forbidden by its own constitution, or that of the United States, or delegated to congress. *Bush-*

*nell v. Beloit* (1860), 10 Wis. \*195. See also *Wis. Central Railroad Co. v. Taylor County, et al.* (1881), 52 Wis. 37, 8 N.W. 833; *State ex rel. Carnation M. P. Co. v. Emery* (1922), 178 Wis. 147, 189 N.W. 564, and 11 Am. Jur. "Constitutional Law" § 18, to the effect that an act of a state legislature is legal when the constitution contains no prohibition against it. Also it is recognized that in the absence of constitutional limitations it is within the legislative province to declare what activities are inconsistent with the proper performance of public duties. See 43 Am. Jur. "Public Officers," § 248.

It is my opinion that by virtue of sec. 62.09 (2) (b) and subject to the limitations therein provided an alderman may serve on a board of harbor commissioners created pursuant to sec. 30.085 or on a harbor commission under sec. 138.02.

Your second question reads:

"2. If the answer to any part of the first question is 'yes', would such council member have full voting privileges as a member of the board or commission?"

The answer is "yes". None of the statutes mentioned above appear to contemplate such a thing as a non-voting member. The implications are all to the contrary. In sec. 62.09 (2) (b) the legislature prescribed the following two limitations for aldermen serving on city boards and commissions,—(1) they may receive no additional remuneration and (2) the governing body may fix their tenure notwithstanding any other statutory provision. If the legislature had intended any further restrictions such as a denial of full voting privileges, it no doubt would have said so. *Expressio unius est exclusio alterius*,—the expression of one thing is the exclusion of another.

The third question reads:

"3. Would the answer to question 1 and 2 be the same if the resolution creating the board or commission provided for 5 members and 5 members had already been appointed?"

This presents a contradiction of terms which the city council has created and which it is free to correct and should correct. It is an incongruous thing at best for a city council to provide for a 5 man board and then to make pro-

vision for more than 5 appointments. If, on the other hand, the city council had provided for a 5 man board, and the mayor has attempted to make additional appointments to the board so as to increase the size of the board without authority it would seem that his action would be a nullity, but I cannot assume that this is the factual situation you are thinking about, and in the absence of a specific set of facts, it is not considered that this presents any problem for the attorney general to decide.

The last question reads:

"4. Would the answer to any of the above questions be different if § 30.085 and ch. 138 were amended to provide that boards of harbor commissioners or harbor commissions shall consist of 3, 5, 7 or 9 members with a further provision to the effect that a member of the city council is not eligible for appointment to the board or commission?"

As previously suggested this entire matter is one within the control of the legislature, and I see no reason why it is not within the legislative province to determine that boards of harbor commissioners or harbor commissions shall consist of 3, 5, 7 or 9 or any other number of members, and to provide further that a member of the city council shall not be eligible for membership thereon.

This should present no conflict with Art. XI, sec. 3, Wis. Const., relating to municipal home rule, since the matter of boards of harbor commissioners and harbor commissions are matters of statewide concern. See *Van Gilder v. City of Madison* (1936), 222 Wis. 58, 267 N.W. 25, 105 A.L.R. 244. See also 1955 Wis. L. Rev. 145 for a discussion of some of the difficulties with which the courts have had to wrestle in applying this constitutional provision. Here, however, we are concerned with harbor improvement, control of harbor facilities, and shipping which are incidents of navigation and which concern citizens of the state at large as distinguished from those of the citizens of the particular city where the harbor happens to be located. On the subject of the incidents of navigation being matters of state-wide concern, note *Muench v. Public Service Comm.* (1952), 261 Wis. 492, 53 N.W. 2d 514, rehearing, 261 Wis. at 515f, 55 N.W. 2d 40, 43, wherein it was held that the state holds the

navigable waters of this state in trust for the public, and such trust extends to the use of such waters for all of the incidents of navigation.

It is true, of course, that the legislature may make a board of harbor commissioners the exclusive agency for maintaining charge and control of the harbor. 46 O.A.G. 49. However, that is because the legislature has seen fit to do so.

WHR

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*Banks and Banking—Trustees—Employe Welfare Funds*  
—National banks which accept appointments as trustees of employe welfare funds are subject to all of the regulatory provisions of ch. 211 including registration, reporting, and penalties. Trustees of the funds include only the person or persons in whom there is vested over-all management of the fund.

June 12, 1958.

PAUL J. ROGAN,  
*Commissioner of Insurance.*

You have informed me that the comptroller of the currency has challenged the application to national banks of ch. 211, Wis. Stats., created by ch. 552, Laws 1957, which regulates employe welfare funds and the trustees of such funds.

You have asked my opinion on the two following questions:

1. Is a national bank acting as trustee of funds of an "employe welfare fund" otherwise covered by ch. 211, Wis. Stats., subject to the requirements of ch. 211 as to registration, reporting, and examination of such fund, and the penalties for failure to comply with such requirements?

2. Who is the "trustee" within the meaning of sec. 211.02 (3)?

The portions of the statutes material to an answer to your questions are as follows:

**"211.01 DECLARATION OF POLICY.** It is declared to be the policy of this state that employe welfare funds are of great benefit to employes and their families and that their growth should be encouraged; that the establishment and management of such funds vitally affect the well-being of millions of people and are in the public interest; and that such funds should be supervised by the state to the extent necessary to protect the rights of employes and their families, without imposing burdens upon such funds which might discourage their orderly growth and without duplicating the supervisory responsibilities presently vested in any state agencies.

**"211.02 DEFINITIONS.** As used in this chapter, unless the context requires otherwise:

"\* \* \*

"(3) 'Trustee' means any person, firm, association, organization, joint stock company or corporation, whether acting individually or jointly and whether designated by that name or any other, who or which is charged with or has the over-all management of any employe welfare fund.

"\* \* \*

**"211.03 REGISTRATION.** The trustees of every employe welfare fund \* \* \* shall register such fund with the commissioner \* \* \*.

**"211.04 EXAMINATIONS; AUTHORIZATION AND REQUIREMENT.** (1) The commissioner may examine into the affairs of any employe welfare fund as often as he deems it necessary, and he shall do so at least once in every 5 years.

"\* \* \*

**"211.08 ANNUAL STATEMENT TO COMMISSIONER.** The trustees of every employe welfare fund shall file in the office of the commissioner, annually on or before June 1 a statement, to be known as the annual statement of such fund, executed in duplicate, verified by the oath of its trustee or, if there is more than one trustee, then by the oaths of at least 2 of such trustees, showing its condition and affairs during such fiscal year. \* \* \*

**"211.09 SPECIAL STATEMENTS TO COMMISSIONER.** In addition to any other statements or reports required by this chapter, the commissioner may also address to the trustees of any employe welfare fund or to their officers, agents or employes any inquiry in relation to the transactions or condition of the fund or any matter connected

therewith. Every person so addressed shall reply in writing to such inquiry promptly and truthfully, and such reply shall be verified, if required by the commissioner, by such individual or individuals as he shall designate.

**"211.10 ANNUAL REPORTS TO EMPLOYERS AND EMPLOYEES.** The trustees of every employe welfare fund shall, annually, on or before March 1, file a report with the commissioner to be known as the annual report of such fund, verified by the oath of its trustee, or if there is more than one trustee, then by the oaths of at least 2 of such trustees, showing its condition on December 31 then next preceding or on such other date in the year next preceding as the commissioner may approve. \* \* \*

**"211.11 ANNUAL STATEMENTS BY INSURANCE COMPANIES, SERVICE PLANS AND CORPORATE TRUSTEES AND AGENTS.** Any \* \* \* corporate trustee or agent holding or administering all or any part of an employe welfare fund as so defined shall, within 4 months after the end of each policy or fiscal year, furnish to the trustees of the fund a statement of account setting forth such information as the trustees of the fund may need from it in order to comply with the requirements of this chapter.

\* \* \*

**"211.14 COMPLIANCE, ENFORCEMENT AND PENALTIES.** (1) The trustees of every employe welfare fund required to register under this chapter shall be responsible in a fiduciary capacity for all money, property, or other assets received, managed or disbursed by them, or under their authority, on behalf of such fund. All payments due to or from every welfare fund subject to the provisions of this chapter shall be by check, bank draft, postal money order or other recognized written method of transmitting money or its equivalent.

\* \* \*

**"(4) (a)** Any person who wilfully violates or fails to comply with any provision of this chapter or the rules or regulations promulgated thereunder or who makes a false statement or representation of a material fact, knowing it to be false, or who knowingly fails to disclose a material fact in any registration, examination, statement or report required under this chapter or the rules or regulations promulgated thereunder, shall be fined not more than \$5,000, or imprisoned not more than 5 years, or both."

## I

In view of the apparent confusion that exists in many quarters over the respective regulatory powers of the state and national governments to regulate and control various

activities of national banks, it appears both necessary and desirable to review the general principles which delineate the boundary between the powers of the respective governments.

In spite of the claims made in certain quarters, most often by federal agencies, that once a national bank has been authorized to engage in a particular activity thereafter the state must keep hands off, that is not the law.

The true rule is that legislation by the state is void only when (1) it conflicts with the paramount law of the United States; (2) it discriminates against the national banks as against state banks; or (3) it impairs the ability of the national bank to discharge the duties for which it was created, including acting as fiscal agent for the national government.

In *Davis v. Elmira Savings Bank*, (1896) 161 U. S. 275, 283, 16 Sup. Ct. 502, 40 L. ed. 700 the court stated:

“National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties, for the performance of which they were created. \* \* \*”

In the case of *First National Bank in St. Louis v. Missouri*, (1923) 263 U. S. 640, 656, 44 Sup. Ct. 213, 68 L. ed. 486 the court held prior to the McFadden Act, 12 U.S.C.A. 36, that Missouri could prevent national banks from having branch offices and stated:

“\* \* \* Nevertheless, national banks are subject to the laws of a state in respect of their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as Federal agencies or conflict with the paramount law of the United States.”

In *McClellan v. Chipman*, (1896) 164 U. S. 347, 17 Sup. Ct. 85, 41 L. ed. 461, the court held that statutes of the state of Massachusetts which prohibited fraudulent prefer-

ences by an insolvent debtor of one creditor over another were applicable to preferential transfers to national banks and stated at p. 357 after quoting *National Bank v. Commonwealth*, (1869) 9 Wall. 353, 362, 19 L. ed. 701 and *Davis v. Elmira*, *supra*:

“These two propositions, which are distinct, yet harmonious, practically contain a rule and an exception, the rule being the operation of general state laws upon the dealings and contracts of national banks, the exception being the cessation of the operation of such laws whenever they *expressly* conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States. \* \* \* \*” (Emphasis added.)

Simul: *Waite v. Dowley*, (1876) 94 U. S. 527, 533, 24 L. ed. 181; *First National Bank in St. Louis v. Missouri*, *supra*.

The following cases among many others support the proposition that a state law is void when it conflicts with a paramount law of the United States. *Farmers and Mechanics National Bank v. Dearing*, (1875) 91 U. S. 29, 23 L. ed. 196; *Pacific National Bank v. Mixter*, (1888) 124 U. S. 721, 8 Sup. Ct. 718, 31 L. ed. 567; *Van Reed v. People's National Bank*, (1905) 198 U. S. 554, 25 Sup. Ct. 775, 49 L. ed. 1161; *Jennings v. U. S. Fidelity and Guaranty Co.*, (1935) 294 U. S. 216, 55 Sup. Ct. 394, 79 L. ed. 869; *Old Company's Lehigh v. Meekor*, (1935) 294 U. S. 227, 55 Sup. Ct. 392, 79 L. ed. 876.

The *Dearing* case held that when a state statute provided that the penalty for usury was the loss of the entire principal while the federal statute provided that the penalty for usury by a national bank was loss of interest only, the federal statute was controlling.

The *Mixter* case held that a federal statute which prohibited attachment of property in a national bank rendered ineffective state attachment procedure.

The *Jennings* and the *Old Company's Lehigh* cases held that the federal statutes which provided for the prorata distribution of assets of a national bank upon its insolvency prevailed over state bankruptcy laws and the state negotiable instrument law.

The second ground stated for voiding or declaring inapplicable state statutes which affect national banks is that the state legislation discriminates against national banks. In *Estate of Stanchfield*, (1920) 171 Wis. 553, 178 N.W. 310, the court had under consideration a statute which prohibited the appointment as administrator or trustee of any corporation unless it was organized under specific Wisconsin statutes. The court held that this statute was ineffective to prohibit the appointment of a national bank as administrator of a decedent's estate. Referring to the case of *First National Bank v. Union Trust Co.*, (1917) 244 U. S. 416, 37 Sup. Ct. 734, 61 L. ed. 1233 the court stated:

"It is there held that if state banks, trust companies, and other rivals or quasi-rivals of national banks are permitted to carry on a business not inherently such as may be conferred by Congress on national banks, such rights possessed by these rivals may make it appropriate to be conferred on national banks to enable them to perform their functions.

"\* \* \*

"It is clear that the powers conferred on corporations in Wisconsin to act as trustees and other fiduciaries make these corporations rivals of the Commercial National Bank of Fond du Lac under the power conferred on it by the federal reserve board and the acts of Congress. Under these circumstances the state must yield to the rights so conferred on national banks. *Hamilton v. State*, (Conn.) 110 Atl. 54."

The decision in the *Stanchfield* case was confirmed in the case of *Missouri ex rel. Burnes National Bank v. Duncan*, (1924) 265 U. S. 17, 44 Sup. Ct. 427, 68 L. ed. 881.

While examples of the third ground for holding state legislation void, that is, that the state law impairs the efficiency of a national bank, may not seem as clear cut as the foregoing, the principle is fundamental and has been often reiterated. In the historic case of *McCulloch v. Maryland*, (1819) 4 Wheat. 316 in which the court first upheld the power of the congress to charter a national bank, the court continued and ruled that, once chartered a national bank could not be taxed by a state and declared "That the power of taxing it by the states may be exercised so as to destroy it, is too obvious to be denied," and after referring to the repugnancy between the power to create and the power to

destroy, stated "3. That where this repugnancy exists that authority which is supreme must control, not yield to that over which it is supreme".

We again refer to the cases quoted above, such as *McClellan v. Chipman* and *Davis v. Elmira*, which state the rule that state legislation may not impair the efficiency of a federal agency to discharge the function for which it was created.

The line between permissible and unpermissible state action is further illustrated by a comparison of the following cases, each of which, of course, must be related to the particular statutes, state and federal, in existence at the time the case was decided.

In the case of *National Bank v. Commonwealth*, (1869) 9 Wall. 353, 19 L. ed. 701, the court held that a state might impose a tax on national banks, shares, or shareholders in banks.

In the case of *Waite v. Dowley*, (1876) 94 U. S. 527, 24 L. ed. 181, the court held that a state statute requiring national banks to submit a list of shareholders and the amounts paid on shares to facilitate the collection of state taxes was valid, and that such a state statute was not in conflict with a federal statute which required national banks to post a list of their stockholders on their premises.

Repeating, in *McClellan v. Chipman*, *supra*, the court held that a state statute which ordered transfers in anticipation of insolvency was valid, and did not conflict with the federal statute which authorized national banks to take land for security.

As indicated in *First National Bank in St. Louis v. Missouri*, *supra*, prior to the McFadden Act, the court held that a state could prohibit the establishment of branches of national banks.

In *Louis v. Fidelity and Deposit Company*, (1953) 292 U. S. 559, 54 Sup. Ct. 848, 78 L. ed. 1425 the court held that a state could require a lien to be contracted for by a national bank as a condition of becoming a state depository, and even in the face of the federal statute requiring a pro-rated distribution of assets upon insolvency, the lien was valid.

In *Colorado National Bank v. Bedford*, (1939) 310 U. S. 41, 60 Sup. Ct. 800, 84 L. ed. 1067, the court held that a state tax on safe deposit boxes measured by bank charges collected and forwarded by the bank was a valid tax on the customer, and did *not* impair the efficiency of a national bank to perform its appropriate functions. In its opinion the court stated at p. 53:

“The tax being a permissible tax on customers of the bank, it is settled by our prior decisions that the statutory provisions requiring collection and remission of the taxes do not impose an unconstitutional burden on a federal instrumentality. \* \* \*”

In the case of *Anderson National Bank v. Lockett*, (1944) 321 U. S. 233, 64 Sup. Ct. 599, 88 L. ed. 692, the court held that a state statute providing for the escheat to the state of abandoned bank accounts was valid, and that the state could validly require a report of dormant accounts from the national banks as an incident thereto. In this case the court stated at pp. 252–253:

“Since Kentucky may enforce its statute requiring the surrender to it of presumptively abandoned accounts in national as well as state banks, it may, as an appropriate incident to this exercise of authority, require the banks to file reports of inactive accounts, as the statute directs. \* \* \*”

By far the most important cases upholding the exercises of state power for the consideration of our present question are those cases which recognize and establish the complete power of state probate courts over national banks when they choose to become fiduciaries by appointment of such courts. In *Ex parte Worchester County National Bank*, (1929) 279 U. S. 347, 49 Sup. Ct. 368, 73 L. ed. 733, Annotated, 85, A.L.R. 864, the court held that a nondiscriminatory state statute which required a probate court appointment of an executor and appropriate qualification after appointment applied to the national bank.

In the case of *Jenckes v. Deitrick*, (1939 D. C. Mass.) 27 Fed. Supp. 408, the court held that a state statute which authorized a probate court to remove a trustee if such a removal was for the best interests of the beneficiaries of the trust, or if the trustee was unsuitable, applied to an insolvent national bank.

On the other hand the courts have held that a state cannot prohibit a national bank from using the word "savings" or the word "trust" in the bank's name. *Franklin National Bank v. New York*, (1954) 347 U. S. 373, 74 Sup. Ct. 550, 98 L. ed. 767; *The Fidelity National Bank and Trust Company v. Enright*, (1920 D. C. Mo.) 264 Fed. 236.

In the case of *Easton v. Iowa*, (1903) 188 U. S. 220, 239, 23 Sup. Ct. 288, 47 L. ed. 452 the court held that a state statute which made it a crime for a bank officer to receive deposits when the bank was insolvent did not apply to a national bank because under the federal statute the comptroller of currency was authorized to operate insolvent banks. In the course of its opinion the court stated:

"Undoubtedly a State has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction. So, likewise, it may declare, by special laws, certain acts to be criminal offenses when committed by officers or agents of its own banks and institutions. But it is without lawful power to make such special laws applicable to banks organized and operating under the laws of the United States."

The cases have held that state statutes cannot bar national banks from the courts of the state as foreign corporations on the grounds that they do not have state permits to do business. *Steward v. Atlantic National Bank*, (1928) (9th Ariz.) 27 Fed. 2d 224; *Bank of America National Trust and Savings Association v. Lima*, (1952, D. C. Mass.) 103 Fed. Supp. 916.

Applying the foregoing principles to the right of a state to regulate a national bank which becomes the trustee of an employe welfare fund, we find the following:

First, there is no paramount law of the United States which either directly or by implication prohibits regulation of a national bank which voluntarily assumes the duties of acting as a trustee of such an employe welfare fund. There are only two federal statutes which appear to touch on the subject at all. These are 12 U.S.C.A. Sec. 248 (k) and 12 U.S.C.A. Sec. 484. These statutes read as follows:

"(k) To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator,

registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

“Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this chapter.

“\* \* \*”

“Sec. 484. Limitation on visitatorial powers

“No bank shall be subject to any visitatorial powers other than such as are authorized by law, or vested in the courts of justice or such as shall be or shall have been exercised or directed by Congress, or by either House thereof or by any committee of Congress or of either House duly authorized. R. S. Sec. 5240; Feb. 19, 1875, c. 89, 18 Stat. 329; Dec. 23, 1913, c. 6, Sec. 21, 38 Stat. 271.”

It is obvious on the face of sec. 248 (k) that it contains no clause or sentence which directly or impliedly prohibits regulation by the state of fiduciary activities of national banks but, on the other hand, it only authorizes a national bank to engage in fiduciary activities on a par with state banks when the national bank receives the appropriate permission from the governors of the federal reserve bank.

The cases cited above establish that when a national bank is appointed as executor of a will or as trustee of a testamentary trust by a state probate court, it must comply with the laws of the state applicable to the administration of estates or trusts. *Ex parte, Worcester County National Bank, supra*. This conclusion is fortified by subsequent provisions of sec. 248 (k) which require national banks to comply with state laws governing the deposit of securities, filing of bonds when required by nondiscriminatory laws of the state, and with provisions governing the taking of oaths or making of affidavits required by state law when a national bank is acting in a fiduciary capacity.

By a parity of reasoning, it would appear that as far as this section, 248 (k) is concerned, the national bank

which becomes a trustee of an employe welfare fund must comply with all applicable state laws governing the trustees of such fund just as much as it would have to comply with state law if it accepted appointment as a trustee of a testamentary trust.

The other section, that is sec. 484, prohibits only the exercise by a state of "visitorial powers" over a bank but says nothing about the records that must be kept and the reports that must be made by a national bank which accepts appointment as a trustee. The term "visitorial power" properly construed refers only to the examination of the internal affairs, management, and assets of a bank such as is commonly made in the case of state banks by a state banking department or commissioner of banks, and in the case of national banks by the comptroller of the currency. This section is consistent with the third paragraph of sec. 248 (k) which concludes :

"\* \* \* but nothing in this chapter shall be construed as authorizing the State banking authorities to examine the books, records, and assets of such bank."

Sec. 484, taken together with the sentence last quoted from sec. 248 (k) means nothing more in the present case than that the appropriate state authorities in the examination of a trust cannot go behind the reports made by the trustee and the records kept of the trust, and inquire into the existence of the assets contributed to the trust or into the solvency or insolvency of the bank. The latter matters can be inquired into only by the comptroller of the currency.

Second, it is obvious that on the face of ch. 211, which regulates employe welfare funds, it does not discriminate in any manner whatsoever either for or against national banks which may become trustees of employe welfare funds. The regulations provided are general in their terms and apply uniformly and without discrimination to all corporate and other trustees.

Finally, no reason has been advanced nor any arguments made which would justify the conclusion that the requirement that a national bank, which accepts the appointment as a trustee of an employe welfare fund, comply with the

provisions of ch. 211 would in any way impair the ability of the national bank to discharge the duties for which it was created. No such impairment is either found or suggested in the cases where the national bank accepts appointment as trustee of a testamentary trust; ergo, no such impairment can even be contended for when it chooses to accept appointment as a trustee of an employe welfare fund.

In my opinion since none of the exceptions to the general rule that the daily course of business of national banks shall be governed by state law is applicable, any national bank which accepts appointment as a trustee of an employe welfare fund as defined in sec. 211.02 (3), is subject to all applicable state regulations as set forth in ch. 211.

## II

The determination of whether or not a particular person or corporation is the "trustee" who is required to register and make the necessary reports under ch. 211 will depend upon the facts of each individual case, the contractual arrangement between the person or corporation concerned and all other parties interested in the employe welfare fund, that is, the employer, the beneficiaries, and any committee or committees appointed by the employer, the beneficiaries, or both, and the degree to which the person or corporation concerned participates in the actual management of the trust.

The statute, that is, sec. 211.02 (3) is clear that it is only intended to apply to that person or corporation who has "the over-all management" of the fund concerned.

For a simple illustration, at one extreme, it would never be contended that a bank which has accepted a deposit in a commercial checking account in the name of an employe welfare fund, and whose only obligation is to honor checks drawn up on that account by the persons who have deposited the money with the bank, would in any sense have any "over-all management" over the fund in its control. Similarly, if the bank in its trust department has only accepted funds transmitted to it by managers of the employe welfare fund for the purpose of investment and management with no other obligation than to return the assets to the managers on demand, it again could not be contended

that the bank or its trust department has in any sense the "over-all management" of the trust.

At the other end of the scale the agreement with the bank might provide a complete plan setting forth the rights of the beneficiaries of the fund, the provision for notification to the bank of the names of the beneficiaries, provision for transmission by the employer to the bank of the moneys necessary to establish the fund, and authority in the bank to invest and manage those moneys for the benefit of the fund. In such a case it would appear clear that the bank has the "over-all management" of the fund and is the trustee who must report under the provisions of ch. 211.

There will undoubtedly be "in between" cases where various management functions are divided between some employer-employee agencies, such as a committee which has been given certain regulatory and controlling functions, and the bank which is required to act as a fiscal agent, and not only manage the assets of the fund, but compute the benefits due to various beneficiaries in accordance with the plan under which the employe welfare fund is established and transmit such payments directly to the beneficiaries.

It is impossible to rule in advance upon the degree of division of responsibility which would establish the bank, operating under the plan last designated, as a co-trustee who would be required to join in the registration and in the making of reports. Each such case would be examined individually and a particular agreement construed in the light of the legislative purpose to insure that your office, commissioner of insurance, is obtaining all the information necessary to determine that the purpose of the statute as set forth in sec. 211.01 is being fully protected in accordance with the laws of this state.

For a general rule on this point, I can only state that the intention of the statute is that the person or persons in whom there is jointly vested the "over-all management" of the administration of the employe welfare fund must join in making the registration and the reports required by ch. 211, but this "over-all management" does not include the single function of investment, administration, and accounting for the assets of the fund to other persons, committees or corporations.

RGT

*University Regents—Appropriations and Expenditures—*  
Under sec. 36.062 the regents have authority to participate in a nonprofit Illinois corporation along with other universities for the purpose of promoting scientific research and making available to students and faculty of the university the opportunities and facilities of such association. Membership dues may be paid from appropriation made by sec. 20.830 (1).

June 16, 1958.

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

You state that at a meeting of the regents of the university of Wisconsin on May 3, 1958, the following resolution was adopted:

“WHEREAS, membership in the Associated Midwest Universities will be of benefit to the instructional and research programs of the University of Wisconsin

“NOW, THEREFORE, BE IT RESOLVED That, subject to the approval of the Attorney General, membership of The Regents of the University of Wisconsin be approved in Associated Midwest Universities, a not for profit corporation organized under the laws of the State of Illinois for the following purpose or purposes:

- (a) To promote, encourage and conduct research and education in all branches of science, including, but not limited to, nuclear science in relation to all other fields of science;
- (b) To establish means for facilitating the use of the Argonne National Laboratory and other laboratories by duly qualified personnel and students from the several cooperating institutions and other research and educational institutions;
- (c) To establish, maintain and operate laboratories and other facilities as necessary for research and education; with the understanding that initial membership dues will not exceed \$1,000.00 per year and that membership may be terminated by the Regents at any time.”

The legality of this proposal was heretofore considered by this office in an informal memorandum, and an official opinion of the attorney general is now requested.

From the by-laws of the corporation it appears that the initial membership of the corporation is to include those institutions, which have been officially known as Participating Institutions of Argonne National Laboratory, who choose to affiliate with the corporation. The Argonne National Laboratory is operated by the university of Chicago at Lemont, Illinois. Some 32 institutions including the university of Wisconsin have been participating institutions.

Apparently there have been heavy demands placed upon the laboratory by the atomic energy commission in the reactor development field, whereas the participating institutions have programs broader and more extensive than that of high energy physics alone and are interested in developing a cooperative program in basic research which will embrace other fields such as chemistry, engineering, biology, medical sciences, etc. A number of them are offering graduate research programs of high quality leading to doctorates, and the research facilities and services of the association are to be made available to qualified scholars, investigators and students regardless of institutional affiliation. It has been pointed out that the association might well take over the graduate program of the laboratory as this is a proper university function which could be handled by faculty members in residence at the laboratory and through selected members of the permanent staff of the laboratory.

It has also been emphasized that there has been a great exodus of scientists, particularly physicists, from the middle West in recent years, and that the problem cannot be solved in the national laboratories alone, since the basic needs are in the universities. It is assumed that the association will set up a program which will be geared to these basic needs of the member universities.

In answering your inquiry reference is made to an opinion issued to you by the attorney general on September 25, 1957, 46 O.A.G. 249. I will not take the space to repeat what was said there but call attention to the conclusion that the regents under secs. 36.062 and 36.065, had authority to participate in an association with other universities for astronomical and related scientific research and become a member of a nonprofit Arizona corporation organized for that purpose. Also it was concluded that gift money avail-

able for that purpose could be utilized to finance the university's share of the costs of such undertaking.

The basic considerations here are not fundamentally different than those discussed in the above opinion, but with this distinction. As we understand it, you now want to know if money, other than gift money can be used for such a purpose.

What I have said in the prior opinion is in effect that the general purpose is a lawful one so far as the regents are concerned. This being so, there was no doubt that gift funds could be used for such purpose either when specifically given for that object or where the use of the fund was unrestricted by the donor.

Now the question is whether or not other appropriations may be used for the purpose in question. Presumably what you have in mind is whether the general operation appropriation, sec. 20.830 (1), Stats. 1957, may be used for this purpose.

The appropriation made by sec. 20.830 (1) is "to be used for administration, instruction, research, scientific investigation, educational extension and such other functions as are authorized". Does payment of a membership fee in the association come under any of the quoted items?

This is by no means a simple question. Obviously the legislature did not intend to spell out every detail relating to how this appropriation is to be used. As was said in *State ex rel Priest v. The Regents of Univ. of Wis.*, (1882) 54 Wis. 159-166, 11 N.W. 472: "It would be altogether impracticable to prescribe by statute the numerous and varying duties of such a board. Much must necessarily be implied from the character and objects of the corporation, the nature of the trust imposed, and the general powers granted. \* \* \*"

Sec. 36.062 provides:

"36.062 Scientific investigation encouraged. The board of regents shall have power and authority to encourage scientific investigation and productive scholarship, and to create conditions tending to that end."

If the regents conclude that *in fact* the graduate program in science at the university will be promoted and furthered, and that its faculty members and students will be afforded

opportunities for research and scientific investigation which would not be available except by virtue of the university's membership in the association, it would seem that such an expenditure could be properly classified as one being made for "instruction, research, and scientific investigation" within the meaning of sec. 20.830 (1).

In other words, the question is primarily one which lies within the factual area and the regents have the responsibility under the statutes of determining whether or not some particular procedure is calculated to assist in the university's program of instruction, research, and scientific investigation within the meaning of sec. 20.830 (1) and sec. 36.062. In the absence of any gross abuse of that discretion the regents' determination of questions of this sort should be accepted by the state auditors and accountants.

I do not believe that I should attempt in any way to pass judgment upon the question of just how membership in the association will fit into the university's program of research and graduate training or whether the university will receive benefits commensurate to or greater than the expenditure involved. That problem is solely one for the regents. It has been so confided in the regents by the legislature.

There is one matter which perhaps deserves further comment and which suggests its own answer.

While the resolution of the regents makes it clear that there is to be no financial commitment beyond the initial membership fee of \$1000 for the first year, and that the regents reserve the right to terminate membership at any time, neither the articles nor the by-laws of the corporation are very specific as to how membership is to be terminated. Article II 4 (f) relating to the council of sponsoring institutions provides that the council shall:

"At its regular meeting, upon the recommendation of the Board of Directors, elect by a majority vote additional institutions to membership in the Association, *and accept resignations submitted by members.*" (Emphasis supplied.)

This would seem to imply and probably does mean that members may resign, but if resignation, to be effective, requires a favorable vote by the council, it would have to be understood that this could not be binding as to continued

membership and payment of dues by the regents of the university of Wisconsin.

The regents can make no valid commitment which would result in an indebtedness on behalf of the state nor extend the credit of the state in aid of any corporation. Art. VIII, secs. 3, 4, 6, and 7, Wis. Const., *State ex rel. Thomson v. Giessel* (1954), 267 Wis. 331, 65 N.W. 2d 529. This, of course, should be made clear to the corporation so that there will be no misunderstanding or attempt to enforce continued membership or liability for dues so far as the regents' obligations in the future may be concerned.

WHR

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*Banks and Banking—Savings and Loan Association—*Solicitation of savings deposits by a savings and loan association not chartered as a bank constitutes banking business as defined by sec. 224.02 and is prohibited by sec. 224.03. Remedies under secs. 224.03, 215.70 (1), and 286.36 mentioned.

June 16, 1958.

G. M. MATTHEWS,  
*Commissioner of Banks.*

You have referred to this office for consideration a recent newspaper advertisement of a savings and loan association and have asked for an opinion as to whether this advertisement conflicts with the provisions of secs. 224.02 or 224.03, Stats., or otherwise conflicts with the laws of this state relating to banking. Also you ask what steps can be taken to require the discontinuance of this advertising material in the event it conflicts with law.

The advertisement in question contains a picture of a man and woman at a mailbox. Since this appears to represent one of these couples where the wife handles the family finances, she is in the act of depositing an envelope in the mailbox.

The material part of the advertisement in addition to the picture mentioned above reads substantially as follows with the name of the institution being omitted.

"Series I No. 10

"It's a  
GREAT MOMENT  
  
in your life!

When you Discover  
How Easy It Is To  
DEPOSIT-BY-  
MAIL  
At  
-----

(PICTURE)

"If you're like many people these days, your daily schedule is so full of planned appointments and unplanned interruptions that you probably aren't depositing your savings as systematically as you should!

"There's an easy remedy for that: DEPOSIT-BY-MAIL! And when ----- is the destination you can be sure that your Savings are insured and earning a top 3½ current rate. And remember, too, ----- pays the postage when you deposit-by-mail!

"So if those P.T.A. meetings and club luncheons and church bazaars are keeping you spinning, or business appointments and civic interests occupy a major part of your time, don't let your heavy schedule interfere with the all-important business of systematic saving! We at ----- always enjoy welcoming you in person, but if you can't come in regularly, remember, you can deposit to your savings account at any one of those red white and blue boxes marked "U. S. MAIL"!

"57 MILLION \$ \$ STRONG \$ \$

3½%  
Current  
Dividend"

Secs. 224.02 and 224.03 to which you refer read as follows:

“224.02 Banking, defined. The soliciting, receiving, or accepting of money or its equivalent on deposit as a regular business by any person, copartnership, association, or corporation, shall be deemed to be doing a banking business, whether such deposit is made subject to check or is evidenced by a certificate of deposit, a pass book, a note, a receipt, or other writing, provided that nothing herein shall apply to or include money left with an agent, pending investment in real estate or securities for or on account of his principal. Provided, however, that if money so left with an agent for investment shall not be kept in a separate trust fund or if the agent receiving such money shall mingle same with his own property, whether with or without the consent of the principal, or shall make an agreement to pay any certain rate of interest thereon or any agreement to pay interest thereon other than an agreement to account for the actual income which may be derived from such money while held pending investment, the person receiving such money shall be deemed to be in the banking business.”

“224.03 Banking, unlawful, without charter; penalty. It shall be unlawful for any person, copartnership, association, or corporation to do a banking business without having been regularly organized and chartered as a national bank, a state bank, a mutual savings bank, or a trust company bank. Any person or persons violating any of the provisions of this section, either individually or as an interested party in any copartnership, association, or corporation shall be guilty of a misdemeanor and on conviction thereof shall be fined in a sum not less than \$300 nor more than \$1,000, or by imprisonment in the county jail not less than 60 days nor more than one year, or by both such fine and imprisonment.”

It is assumed for purposes of this discussion that the savings and loan association in question is not chartered as a bank within the meaning of sec. 224.03 quoted above, and that it is chartered as a savings and loan association under ch. 215.

Without going into any details whatsoever as to how the association handles “deposits” which it receives in response to the foregoing advertisement, it is obvious that the institution is engaged in banking as defined in sec. 224.02, because the advertisement clearly *solicits* the deposit of money as a regular business. Repeated reference is made to the

“deposit” of “savings”. Also it is stated that “savings” are insured and earn a “top 3½ current rate”.

In short there is very little if anything in the advertisement which distinguishes it from a solicitation of savings accounts by a bank, and except for the name of the institution itself there is nothing to indicate that the association is engaged in a savings and loan business whose primary function as defined in sec. 215.01 (39) is to raise money to be loaned to its members.

It is therefore concluded that by virtue of the solicitation in the advertisement in question the association is engaged in the banking business as defined in sec. 224.02 and is subject to the penalties provided by sec. 224.03.

Possibly this violation occurred unwittingly and will be avoided in the future if called to the attention of the officers of the association.

The reputability and excellent standing in the community of this particular savings and loan association is of the very highest. Its officers and directors include some of the most outstanding local citizens and the association has been a leader in the field of financing of homes for many years. No questions whatsoever are raised as to its solvency or the integrity of its personnel. I mention these matters solely for the reason that these factors would seem to indicate the lack of any necessity of resorting to criminal prosecution under sec. 224.03, taking over of the business by the commissioner of savings and loan associations under sec. 215.70 (1), injunctive proceedings, or proceedings to vacate the corporate charter under sec. 286.36, etc.

In all likelihood the problem could be solved by calling the attention of the officers of the association to the fact that while they may legitimately advertise for the investment of funds in the shares of the association as a necessary source of the money required for making home loans, they may not intrude into the banking business by advertising for deposits contrary to sec. 224.02. If this suggested procedure fails, consideration can then be given to the remedies suggested above.

WHR

*Courts—Clerks of Courts*—Where a clerk of court receives a certificate of conviction from another county pursuant to sec. 956.01 (13) (e), he should not report the case to the judicial council as having been disposed of in his court, unless the council pursuant to sec. 251.181 (3) (e) shall direct otherwise. Clerk of courts duties under secs. 59.39 and 956.01 (13) (e) discussed.

June 19, 1958.

BRUCE R. RASMUSSEN,  
*District Attorney,*  
Dodge County.

You have requested an opinion relating to certain problems which have arisen in connection with proceedings under sec. 956.01 (13), Stats., enacted by the 1957 legislature. This statute enables a person who has committed felonies or violations of the worthless check statute in more than one county, to plead guilty to all such offenses in the appropriate court of a county in which he is in custody, and to be sentenced for all such offenses by that court. Par. (e) provides in part:

“\* \* \* The clerk of court where the plea is made shall file a certificate of conviction substantially in the form prescribed in s. 959.03 with the clerk of circuit court in each county where a crime covered by the plea was committed. Upon the filing of this certificate the district attorney shall move to dismiss any charges covered by the plea of guilty, which are pending against the defendant in his county, and the same shall thereupon be dismissed.”

Your first question is whether, for the purpose of the report of the clerk of court to the judicial council, the convictions are to be considered as judgments rendered in the county where the crime was committed or in the county where the plea of guilty was received. The duty to make such report is imposed by sec. 251.181 (3) (e), which provides in part as follows:

“\* \* \* The clerk, judge or justice of each court of the state shall furnish such statistics in such form as the council directs.”

It is clear from the foregoing statute that the judicial council has the authority to determine the answer to your question. We are advised by the executive secretary of the council that it is interested only in the number of cases actually disposed of in each court, not in the number of counts in the information or the number of crimes of which there have been convictions. Therefore, when the case has been reported by the court in which the plea was entered the council has all the information which it desires and if the case were to be reported again by the clerk of the court where a certificate of conviction has been filed it would cause duplication in the statistics and would improperly reflect activity in that court which never in fact occurred.

Therefore until such time as the judicial council may direct otherwise, the clerk of the county in which the plea was received is the only one who will report the case to the council. The clerks of all other courts will omit the case from their reports.

Your next question is whether the clerk, upon receiving a certificate of conviction from another county, shall simply file it or shall set up a regular case file the same as though the prosecution had originated in his court.

In rare instances it may happen that prosecution in the county where the crime was committed had proceeded to the point where the case was bound over for trial, but before being actually tried the defendant was arrested in another county and pleaded guilty there under sec. 956.01 (13). The district attorney would then move to dismiss the charges pending in the county where the crime was committed and it would be proper for the clerk to file the certificate of conviction received from the other county in the case file already established in his office. In such a case he should append a note to his next report to the judicial council stating that the case is no longer pending in his court for the reason that it was disposed of in another county.

However, it seems probable that in a great majority of the cases disposed of under 956.01 (13), if a prosecution had been commenced in the county where the crime was committed it would not have proceeded beyond the magis-

trate court, and therefore there would be no case file in the office of the clerk of the trial court.

The duties of the clerk with reference to filing papers are prescribed by sec. 59.39 (1) and (10), which provide as follows:

“59.39 Clerk of court; to keep court papers, books and records. The clerk of circuit court shall:

“(1) File and keep all papers properly deposited with him in every action or proceeding unless required to transmit such papers. If such papers have been filed for 30 years a microfilm record may be retained in lieu of the original papers and such papers may be destroyed upon compliance with ss. 59.715 and 59.717.

“\* \* \*

“(10) File, docket, record and keep such other papers, books and records as are required by law.”

In my opinion the duty to file the certificate of conviction received from the clerk of another county (when there is no prosecution pending in his own court) is covered by subsec. (10), not (1). It seems a useless procedure for the clerk to start a case file for such out-of-county certificates of conviction, and in my opinion they should merely be placed in a separate file in alphabetical order. Such file might be kept on an annual basis, and if so a card index or other alphabetical listing would be convenient to enable the certificates to be quickly found. The clerk, however, is not required to docket the certificates. It is suggested that the filing might well be handled in the same manner as the filing of justice court judgments in criminal cases under sec. 960.27.

WAP

*Public Welfare—Hospitals—Commitment Papers—*  
Where patients committed to state or county hospitals are transferred to another such hospital, the state department of public welfare has authority under sec. 46.014 (3) to require that copies of commitment papers, including legal settlement, accompany patient.

June 27, 1958.

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

You state that when a patient is committed to a hospital under sec. 51.05, copies of the commitment papers are sent to the person in charge of that institution as required by sec. 51.06 (2). These papers are the evidence of his basic authority for custody and care of the patient. You also point out that pursuant to statutory authority, such a patient is sometimes subsequently transferred to other state or county institutions. You ask whether the statutory plan contemplates that the copies of the commitment papers, including the determination of legal settlement, shall accompany the patient when he is transferred to another institution.

Secs. 51.01 through 51.05 provide the procedure to determine mental condition and to commit a mental patient to an institution.

Sec. 51.06 (2) provides:

“Copies of the application for examination and of the report of the examining physicians and the adjudication and the commitment shall be delivered to the person in charge of the institution to which the patient is committed. Names of applicants shall be omitted from such copies.”

Procedure for admitting voluntary patients is provided in sec. 51.10. Where a patient obtains a re-examination before a court, the court may make a further order regarding his custody under sec. 51.11 (5). At the time of commitment the court also determines legal settlement and pursuant to sec. 46.106 (1) certifies this to the person in charge of the institution.

As you point out, patients are sometimes subsequently transferred from one institution to another pursuant to secs. 51.12, 51.125, 51.21 (2), 51.215, 51.22 (3), and 51.27 (2). Other provisions on transfer of patients are found in secs. 46.11 and 46.115.

Sec. 51.12 provides the authority for the state department of public welfare to transfer patients. Sec. 46.16 (1) provides:

"GENERALLY. The department shall investigate and supervise all the charitable, curative, reformatory and penal institutions, including county infirmaries of every county and municipality (except tuberculosis sanatoriums); all detention homes for children and all industrial schools, hospitals, asylums and institutions, organized for the purpose set forth in section 58.01, and familiarize itself with all the circumstances affecting their management and usefulness."

Sec. 51.20 provides:

"Records of patients. The superintendent of each state hospital shall keep such records and make such reports as the rules and regulations of the department require."

None of the above cited statutes specifically requires that the copies of the commitment papers accompany a patient transferred to another hospital. However, sec. 51.20, above quoted, requires state hospitals to keep such records and make such reports as the department requires. If the department decides that it would be desirable to have the copies of the commitment papers, including those relating to legal settlement, accompany a transferred patient, the department can establish this requirement for state hospitals by rule. Sec. 46.014 (3) authorizes the director of the department, with the approval of the state board of public welfare, to establish rules and regulations for administering the department and performing the duties assigned to it.

Sec. 46.16 (1), above quoted, authorizes the department to supervise county hospitals. The word "supervise" means to oversee, or to have charge of with authority to direct or regulate. See *New York Life Ins. Co. v. Rhodes*, (1908) 4 Ga. App. 25, 60 S.E. 828, 831; *State v. Chicago M. and*

*St. P. Ry. Co.*, (1911) 152 Iowa 317, 130 N.W. 802, 804. This would include authority to supervise the keeping of their records and to require that the copies of the commitment papers, including those relating to legal settlement, accompany patients transferred to and from county hospitals, except tuberculosis sanatoriums.

AH

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*Schools and School Districts—Aids*—Under sec. 40.70 (5) (d) a high school district is entitled to aids but a common school district is not. Under sec. 40.30 (12) after two years of operation on tuition basis, district not entitled to aids without approval of state superintendent.

June 30, 1958.

G. E. WATSON,

*Superintendent of Public Instruction.*

You have described a situation where a common school district secured a certificate of establishment of a high school pursuant to sec. 40.10, Wis. Stats. In the school year 1956–1957 this district operated all of the elementary grades and a high school 9th grade. You have asked my opinion as to whether state aids are payable under sec. 40.70 (5) (b) and sec. 40.70 (5) (d). The answer is “No”.

Sec. 40.70 (5) (b) provides:

“High school aids shall be paid to basic districts operating high schools at the rate of \$35 per pupil in average daily attendance during the previous year in grades 9 through 12 for both resident and nonresident pupils, except as provided in s. 40.71 (6) (c). Aid paid on account of nonresident pupils shall be deducted from the nonresident tuition claims made under s. 40.91 (4) and (5).”

Sec. 40.70 (5) (d) provides:

“When a new *union high school district* is created comprised of territory in which a high school is not in operation, such district may, in its first year of operation, operate classes for ninth and tenth grades and provide for its eleventh and twelfth grade pupils on a tuition basis, and in its second year of operation, operate classes for the ninth,

tenth and eleventh grades and provide for its twelfth grade pupils on a tuition basis, and qualify for receipts of aids on account of such 2 first years of operation at the same rate of aids per pupil in average daily attendance as it would have been eligible to receive if it had operated the ninth, tenth, eleventh and twelfth grades.”

Sec. 40.70 (5) (b) is the general statute authorizing state aids to be paid to districts operating high schools and in this sense the reference is to an operation of grades 9 through 12. However, sec. 40.70 (5) (d) is an exception to the general situation described in 40.70 (5) (b) and makes provision for the payment of state aids to newly created high school districts which are not fully operational in their first 2 years of existence. It is a familiar rule of statutory construction that a general provision must be taken as affecting only such cases within its general language as are not within a specific provision. *Frank Lloyd Wright Foundation v. Town of Wyoming, et al.* (1954), 267 Wis. 599, 66 N.W. 2d 642; 50 Am. Jur. Statutes, page 371, Sec. 367.

The provisions of sec. 40.70 (5) (d) are in harmony with sec. 40.12 dealing with the establishment of high school districts. For example, sec. 40.12 (7) provides:

“(7) The territory comprising a newly created union high school district shall continue to furnish high school opportunity on the same basis and under the same conditions as prevailed prior to the creation of such district until such time as adequate building facilities are provided by the new high school district. The boards of the newly created high school districts shall perform all of the duties pertaining to the negotiation of loans for buildings, letting of contracts for construction of new buildings, noticing and conducting meetings of the district for the purpose of securing authorization of loans for building purposes and all other necessary powers and duties delegated by statute to union high school district boards.”

This statute refers to the furnishing of “high school opportunity” by a newly created high school district even prior to the time that adequate building facilities are provided in the district. The legislature has here safeguarded the interests of the students in the territory of a newly created high school district while under sec. 40.70 (5) (d)

it has provided for increased state aids even before the high school district becomes fully operational in the sense of having all 4 high school grades. It ought to be noted that since sec. 40.70 (5) (d) is a special statute allowing specific state aids based upon the operation of certain high school grades during the first 2 years of operation of a *new* high school district—it is to be distinguished from the general use in ch. 40, Wis. Stats. of the term “high school” which has long been understood and administratively construed to mean operation of all 4 high school grades. See sec. 40.01 (2). Even as used in sec. 40.70 (5) (d), the language “comprised of territory in which a high school is not in operation” can only be construed to refer to a 4 grade high school operation. However, by the very language of sec. 40.70 (5) (d), it refers only to a newly created union *high school district*.

School districts are classed as common school districts, union high school districts and city school districts.

Sec. 40.01 (3). A common school district may establish and maintain a high school but it is still a common school district. Sec. 40.10. It may be argued that sec. 40.70 (5) (d), therefore, gives a preference in terms of state aids to newly created high school districts over common school districts and city school districts. However, this is a policy matter solely within the jurisdiction of the legislature. Had there been an intention on the part of the legislature to provide similar benefits for districts other than high school districts, it could have easily so provided. Inasmuch as your question deals with a common school district and not a high school district, sec. 40.70 (5) (d) does not apply and no state aids are payable under the circumstances you have set forth.

You next relate that a common school district board, acting pursuant to sec. 40.30 (12), provided education on a tuition basis for the enrollment in excess of 30 pupils per teacher for a period of two years. You ask, “If the board continued to provide education for its pupils in excess of 30 per teacher for a third year without approval by the state superintendent, would the district be eligible to receive aids”?

The applicable statute is sec. 40.30 (12) which provides:

“When the enrollment of a district increases to a number in excess of 30 pupils per room, the district board may on its own order provide for the education of a portion of the pupils on a tuition basis. The tuition shall be paid out of school district funds in accordance with s. 40.65 (3). For a period of 2 years after making such order a district shall continue to be entitled to aids on the same basis as though all children of school age included in such order residing in the district had been enrolled in the school of such district; *provided the superintendent of public instruction upon the recommendation of the county superintendent may extend this period, from year to year*, if he is satisfied on the basis of evidence presented to him that the district is unable because of constitutional limitations on debt to provide sufficient funds for the construction of additional school buildings, or that integration of the district with adjoining districts under the provisions of s. 40.30 of the statutes is being contemplated. Thereafter such district shall not be eligible for or receive aids until sufficient school building facilities are provided in the district to properly accommodate all of the resident children eligible to attend the school of such district.”

The language of the statute clearly means that where a district board, acting under sec. 40.30 (12), has provided education on a tuition basis for 2 years, and such 2 year period has not been extended by the state superintendent, then the district is no longer entitled to receive aids. The answer to your second question is “No”.

JEA

*Board of Health—Public Welfare—Hospital Costs*—The rate for cost of care in state tuberculosis sanatoria and camp, under sec. 50.03 and 50.05, 1955 statutes, need not include expenses for preserving such institutions pending transfer to department of public welfare.

July 1, 1958.

CARL N. NEUPERT,  
*Board of Health.*

You ask what items should be included in the charge to be made for cost of maintenance of patients at the state tuberculosis sanatoria and state tuberculosis camp, when such patients were transferred to county institutions on or before September 30, 1957. You indicate that certain expenses were incurred for maintenance of the state sanatoria and camp from September 30 to December 31, 1957, when they were turned over to the state department of public welfare. Such expenses included wages for caretakers, heating, insurance coverage, electric service, and unemployment compensation for employes whose services were terminated September 30. Your question is whether these items of expense, for the last three months of the year, must be included in the cost charged for maintenance of employes transferred to the other institutions on September 30.

Since enactment of ch. 526, Laws 1957, there are no longer provisions in ch. 50 of the statutes for charging cost of maintenance of patients in state institutions, so that your question is governed by provisions of the 1955 statutes, primarily secs. 50.03 and 50.05.

Sec. 50.03 (1) of the statutes of 1955 relating to care in state sanatoria, provided:

“All patients admitted to the said institutions shall pay the cost of their care, except as otherwise provided in this section. Such cost shall be determined by the superintendent and the board of health.”

The subsequent subsections (2) and (2a) relating to patients cared for at public charge similarly refer to the “cost of his care”. Sec. 50.03 (3) provides:

“The support, maintenance and necessary traveling expenses including the expenses for an attendant when such

patient cannot travel alone, and emergency surgical and dental work of every patient supported in said institution at public charge shall be paid by the state; but the state shall charge over, as provided in subsection (2) of section 50.11, to the county in which such patient has his legal settlement one-half the cost of his maintenance in the institution and the entire amount of all other expenses."

Sec. 50.05 (1), relating to care at the state camp, provided:

"Any person who is threatened with or recovering from tuberculosis may be received into this institution and cared for at the rate determined by the superintendent and board of health to be the cost of maintenance."

In either case the cost of the care is to be determined by the superintendent and the board of health, which would indicate an intent to leave a certain amount of leeway for exercise of administrative discretion.

The reference in sec. 50.03 (3) to the state's charging over to the county in which the patient has his legal settlement one-half of the cost of his maintenance "in the institution" implies that the general per capita type of charge to be included in the fixed rate, as distinguished from the other items included in subsec. (3) such as clothing, travel expense, and the like, are to be limited to the ones attributable to the care in the particular institution in which the patient is being maintained during the time for which the charge is made. If a patient is being cared for in a county institution, the cost of his care under sec. 50.03 (3) would presumably not include costs for maintenance of an entirely different institution.

As we understand it, the expenses to which you refer for the period September 30 to December 31, 1957 were attributable not to the care of patients, but rather to the maintenance of physical plants for transfer to the department of public welfare for entirely different purposes.

It is my opinion that the board of health and superintendent of the state sanatoria and camp are not obligated under the above quoted provisions of the 1955 statutes to include in the cost of care given to patients prior to September 30, 1957 any expenses for maintaining the institutions after all of the patients were transferred to other hospitals.

BL

*Motor Vehicle Department—Sheriffs—State Patrol Officers—Fees—Secs. 271.41, 271.45, 20.420 (91), and 110.07 (1) discussed relative to right to fees by sheriff, and state patrol officers and official duty of serving papers.*

July 2, 1958.

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

You inquire whether the sheriff is entitled to fees for service of papers, mileages, court appearances and the like, in state traffic patrol cases where he takes no part either in the service of the papers or participation in the trial. Your questions and my answers are as follows:

"1. Is the sheriff entitled to fees under conditions listed above?"

Answered no.

"2. If the answer to No. 1 is in the negative, are fees to be charged for these services?"

Answered yes, if the officer making service is performing an official duty.

"3. If the answer to No. 2 is in the affirmative, to what fund should these fees be allocated?"

Answered, to the state or municipality if the officer is not on a fee system. To the officer making service if he is on a fee system.

Manifestly, if no service is performed, no fees or mileage allowance may be charged. 23 O.A.G. 302. Section 271.41 (1), (2) and (3), provide as follows:

"(1) ONLY LEGAL FEES TAKEN. No judge, justice, sheriff or other officer or person to whom any fees or compensation shall be allowed by law for any service, shall take or receive any other or greater fee or reward for such service than is allowed by statute.

"(2) NO SERVICE, NO FEES. No fee or compensation shall be demanded or received by any officer or person for any such service unless such service was actually rendered, except when he is allowed by law to require prepayment and except in case of prospective costs allowed by law.

“(3) PENALTY. Every officer or person violating this section shall be liable to the party aggrieved in the sum of twenty-five dollars damages and also for the actual damages sustained.”

Indeed, such conduct is, under some circumstances, a crime. Section 946.12 (4) and (5), provide as follows:

“946.12 Misconduct in public office. Any public officer or public employe who does any of the following may be fined not more than \$500 or imprisoned not more than one year or both:

“\* \* \*

“(4) In his capacity as such officer or employe, makes an entry in an account or record book or return, certificate, report or statement which in a material respect he intentionally falsifies; or

“(5) Under color of his office or employment, intentionally solicits or accepts for the performance of any service or duty anything of value which he knows is greater or less than is fixed by law.”

The officer actually making service may lawfully charge the fee allowed the sheriff, provided he is required or authorized as part of his official duty to make such service. Section 271.45 provides as follows:

“Fees for same service allowed to all. When a fee is allowed to one officer the same fee shall be allowed to other officers for the performance of the same services, when such officers are by law authorized to perform such services.”

In *Zielica v. Worzalla* (1916) 162 Wis. 603, 156 N.W. 623 the court said as follows, in part, at pages 608-609:

“Several objections were made to the proposed bill of costs, which were overruled by the clerk. Upon motion to review the clerk's taxation but one item allowed was complained of, namely, an item of \$9.80 'sheriff's fees.' It appears by the record that the sheriff served no papers in the case; a constable served the summons and complaint on one defendant, a private individual served them on the other two defendants, another constable served a subpoena on four witnesses, and the aggregate fees and mileage for the three services make up the item complained of.

“In justification of these charges the plaintiff relies chiefly on sec. 2959, Stats., which provides in substance that where a fee is allowed to one officer for the performance of a service, other officers who are authorized by law

to perform the same service shall receive the same fee. The difficulty with regard to the charge for service of the summons and complaint is that a constable is not in his official capacity required or authorized to serve them. The circuit court summons is not a writ or process issued out of court, but simply a notice given to defendant by the plaintiff. *Mezchen v. More*, 54 Wis. 214, 11 N.W. 534. The statute makes special provision that the summons and complaint in a circuit court action may be served by the sheriff 'or by any other person not a party to the action' (sec. 2635, Stats.). *The duties of a constable as prescribed by sec. 842, Stats., do not in terms include the service of these papers, and we think that the provisions of sec. 2635 must be held exclusive. Hence in serving them the constable acts simply as a private person, not as an officer, and is not entitled to official fees therefor.* As to the service of the subpoena the situation is different. There is no statute providing for the service of a circuit court subpoena by the sheriff alone, and the section prescribing the duties of a constable (sec. 842) makes it his duty to serve any 'writ, process, order or notice . . . lawfully directed to or required to be executed by him by any court or officer.' This is substantially the same provision as sub. (4) of sec. 725, defining the duties of a sheriff, and we think that a constable in serving and returning a circuit court subpoena acts officially and hence is entitled to charge the fees therefor which the sheriff is entitled to charge." (Emphasis supplied)

See also: 7 O.A.G. 37; 20 O.A.G. 568; *Musback v. Schaefer* (1902) 115 Wis. 357, 360-361, 91 N.W. 966.

Allocation of the fees depends upon who performed the service and upon whether he is on a fee or salary basis. State traffic patrol officers are given the powers of the sheriff to enforce the chapters enumerated in sec. 110.07 (1). They are, therefore, authorized by law to execute a warrant of arrest and perform like services in state cases arising under the laws they are required to enforce, and such acts are, therefore, official acts. Consequently, the state traffic patrol officer may charge the same fee to which the sheriff would be entitled for like service. It is my opinion that such fees represent monies "received in connection with highway operations" and should therefore be deposited in the highway fund pursuant to sec. 20.420 (91). See 45 O.A.G. 211, 212.

JHB

*Indians—Aid to Dependent Children—Sec. 49.19 (4) (d)* discussed as it applies to the granting of aid to dependent Indian children living on a reservation after the transfer of criminal and civil jurisdiction over the reservation to the state. Discussion of tribal laws and customs and Wisconsin marriage and divorce laws.

July 3, 1958.

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

You have asked four questions concerning the granting of aid to dependent children pursuant to sec. 49.19 (4) (d) to Indians who, prior to the enactment of Public Law 280, 83rd Congress, were subject to tribal law while living on a reservation. All of these questions relate to the validity of marriage and divorce under tribal law or custom, and the bearing of status acquired by tribal law or custom on the requirements for the granting of such aid.

Public Law 280, 67 Stats. 588 (August 15, 1953), as originally enacted, applied to all Indian reservations in Wisconsin except the Menominees. However, Public Law 661 (August 24, 1954) extended its provisions to the Menominee reservation as well. This legislation, with certain exceptions which have no bearing on your questions, states that the civil and criminal laws of the states affected thereby (which includes Wisconsin) "shall have the same force and effect within such Indian country as they have elsewhere within the state".

In short, from and after the date these laws went into effect the civil and criminal laws of Wisconsin have the same force and effect with respect to Indians on (or off) a reservation as they have on any other persons in any other part of the state (with the exception of certain hunting and fishing regulations and restrictions on the alienation of tribal lands, none of which have any relation to this problem). Consequently, you should apply the same tests to all applicants for aid, regardless of their tribal relation or residence on a reservation.

It should be noted, however, that prior to the enactment of Public Laws 280 and 661, tribal law and custom governed

marriage and divorce of Indians living in Indian country, —see 37 OAG 213 and Cohen, Felixs, Handbook of Federal Indian Law (1941), p. 5.

Cohen states on page 137:

“The Indian tribes have been accorded the widest possible latitude in regulating the domestic relations of their members . . . Indian custom marriage and divorce have been generally recognized . . . No law of the state controls the domestic relations of Indians living in tribal relationship, even though the Indians concerned are citizens of the state . . .”

It follows therefrom that the marital status of Indians living on the reservation before Wisconsin acquired jurisdiction was determined by the tribal law or custom existing as of the time of the marriage or divorce. Thus, if Indians were married at a time tribal law or custom governed, their marriage was valid if they satisfied the requirements of the tribe, regardless of the fact that the tribal standards were different from Wisconsin standards. The same applies to divorce. At that time the Indian reservations were separate jurisdictions. It is the same as though two persons were validly married or divorced under the laws of another state which may be quite different from the laws of Wisconsin. When they come into the jurisdiction of this state, they keep the status properly acquired in the other state.

Bearing these principles in mind, we proceed to your individual questions:

“1. If the man and woman are living together [under an Indian custom marriage], is this woman without a husband within the meaning of Section 49.19 (4) (d) ?”

If the custom marriage was valid under the tribal law at the time it was entered into and continued so until the time Wisconsin acquired jurisdiction, this state must recognize that status. In such a case the woman in question would have a lawful husband.

“2. If the living together by the man and woman constitutes a marriage pursuant to Indian custom, would we be correct in assuming that their voluntary separation constitutes a divorce and that the woman would be without a husband after they separate?”

Whether or not the voluntary separation constitutes a divorce depends upon the law or custom of the particular tribe at the time the separation took place, if it took place before Wisconsin acquired jurisdiction over this relationship. If, therefore, the separation took place before the enactment of Public Law 280 and the tribe recognized these people as divorced, our state must now recognize that status.

“3. If this voluntary living together does not constitute a marriage at the present time, would it make any difference whether this marital relationship had been entered into prior to the enactment of Public Law 280?”

For the reasons explained above, the same law that applies to other citizens governs the entrance into marriage by tribal Indians since the enactment of Public Law 280; prior to that the customs or laws of the various tribes governed the Indians on the reservations.

“4. If the Indian couple of an Indian marriage have children and the father subsequently abandons the family, is he subject to criminal prosecution at the present time?”

The answer to this is in the affirmative. Assuming the marriage was valid in the light of the principles set forth above, any such failure on his part would put him in exactly the same position as any other citizen who wilfully failed to support his family.

GFS

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*Motor Vehicle—Dairy Products*—A motor vehicle registered under sec. 341.26 (3) (d) may be used to return supplies used in manufacturing cheese from the market or assembly point to a country cheese factory.

July 16, 1958.

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

You request my opinion as to whether or not motor vehicles registered under the special fees provided for in sec. 341.26 (3) (d) may be used to carry or transport back to

a cheese factory from a plant or a warehouse, cheese band-ages, salt, cheese boxes, rennet and all other related supplies used in the manufacture of cheese.

Your problem arises in connection with your interpretation of the above quoted statute, which reads as follows:

“For each motor vehicle used exclusively in the transportation of liquid dairy products, or cheese, butter and powdered milk when such cheese, butter and powdered milk are transported from plant to plant or to warehouses within Wisconsin and are transported by vehicles registered at a gross weight of not more than 20,000 pounds, a fee to be determined in accordance with par. (g) on the basis of maximum gross weight.”

It is a plausible position that since the word “exclusively” is used that a strict interpretation would be in order and that the special license fee would not authorize the carrying or transporting of supplies back to the factory since such activity is not specifically mentioned in the subsection.

In order to understand our problem, it appears appropriate to consider briefly the procedures involved in the production of cheese for market in Wisconsin.

First, the “country” cheese factory owned by groups of farmers or individual cheese-makers is still the dominant type of cheese-producing factory in this state. The common practice is for the farmer-producer to deliver the milk to the factory or to have a factory-operated truck pick up milk at producing farms. The factory then produces a product which may be called “raw cheese”.

The next step in this marketing process is the transporting of the “raw cheese” from the cheese factory to a centrally located assembly warehouse or plant which is located convenient to railroads or major highways. After certain operations, such as curing and packaging, are performed at these assembly points, the finished product is shipped by rail or truck to primary markets throughout the country. See Special Bulletin #66, Wisconsin State Department of Agriculture, December, 1956.

As it relates to the problem presented, sec. 341.26 (3) (d) is applicable to the transporting of the “raw cheese” from the producing factory to the assembly points, and the question is whether trucks used in carrying this “raw

cheese" to the assembly points may transport back to the producing factories cheese boxes and the various supplies which are used in the manufacture of cheese at that factory.

It is my opinion that your question must be answered in the affirmative to avoid the absurdity which would result from strict adherence to the letter of the statute. It is a well-settled rule of law that statutes must be construed to give effect to the intention or purpose of the legislature. To accomplish this it is necessary not only to look at the language of the statute but at the subject matter of the act. See *Danischefsky v. Klein-Watson Co.*, (1932) 209 Wis. 210. Whatever is within the spirit of the statute is within the statute itself although not within the letter thereof. This rule is especially applicable where adherence to the letter would result in absurdity. See 2 Sutherland, *Statutory Construction*, 2d ed., page 730 and 59 *Corpus Juris*, page 964.

Our court said in *Rice and others v. Ashland Co.*, (1900) 108 Wis. 189 at 192:

"\* \* \* We must, in that event, [unreasonable or absurd result] look to the act as a whole, to the subject with which it deals, to the reason and the spirit of the enactment, and thereby, if possible, discover its real purpose; and if such purpose can reasonably be said to be within the scope of the language used, it must be taken to be a part of the law the same as if it were plainly expressed by the literal sense of the words used. \* \* \*"

See also *Connell v. Luck*, (1953) 264 Wis. 282.

A review of the legislative history, administrative interpretations, court decisions and opinions of this office in regard to provisions providing for special consideration in regard to fees and taxes for motor vehicles used in transporting dairy products discloses a clear intention of the legislature to allow such vehicles to transport supplies and materials used in producing these dairy products from the market back to the farm or the place of production. In the case of *Wisconsin Truck Owners Assoc. v. Public Service Comm.*, (1932) 207 Wis. 664, which involved the "ton-mile tax", our supreme court adopted the public service commission's pronouncement of March 26, 1932, which in part related to the commission's interpretation of the word "exclusive" used in that law. Part of the public service

commission's pronouncement was quoted, as follows at page 682:

“ \* \* \* Under these circumstances the commission, in order to give effect to the intention of the legislature to relieve the farmer of the tax on his movement of dairy or other farm products, holds that a farmer shall not be required because he incidentally uses the vehicle in which he hauls his produce to market for the transportation of such articles as he normally requires for use in his household or in his farming operations, to secure a permit for such vehicle and pay a ton-mile tax on its operations.’ ”

The court said at page 683: “This construction of the commission meets with our entire approval and leaves nothing further to be said”.

Your department was advised by this office in 32 O.A.G. 267 (1943) that trucks engaged in transportation of supplies to country cheese factories for use therein were exempt from assessment of taxes under the ton-mile tax under an exemption applying to vehicles engaged in “transportation to farms of materials, supplies or equipment for use thereon”. That opinion pointed out the language used by the court in the *Wisconsin Truck Owners Association* case to the effect that “the present general method of producing butter and cheese is but an extended farm operation so considered by agricultural authorities”. The legal points stressed in the *Wisconsin Truck Owners Association* case and the opinion rendered in 32 O.A.G. 267 have not been overruled by any subsequent decisions of the supreme court and I am unable to find any notes or material on file with the legislative reference library to indicate that any subsequent legislatures have intended to change the liberal interpretation of the exemption provisions applying to transporting agricultural products. On the contrary, it appears that the tendency of the legislature in adopting subsequent statutes has been to broaden exemptions and not to narrow, restrict or reverse the interpretation referred to.

It is interesting to note that sec. 341.26 (3), which provides as follows:

“In recognition of the relationship of the basic economy of the state to agriculture and the production and marketing of milk, there shall be paid to the department for the

annual registration of the following vehicles the fee prescribed in this subsection: \* \* \*

comprises a statement of policy which is a paraphrase of the supreme court language found at page 673 in the *Wisconsin Truck Owners Association* case. This statement of policy would not be served by construing this statute to exclude the returning of supplies to cheese factories which are used in the manufacture of cheese. To place such an interpretation on the statute would bring about the absurd result that trucks used in hauling "raw cheese" from the cheese factory to the assembly points could not return the boxes which were used to carry the cheese to the assembly point. As a practical matter, this would nullify the exemption provided.

I deem this the proper place to apply the rule that whatever is within the spirit of the statute is within the statute itself although not within the letter thereof. Accordingly, you are advised that it is not a violation of this special registration, provided by 341.26 (3) (d), to haul supplies used in the manufacture of cheese from the market or assembly point to a country cheese factory.

LLD

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*License—Driver Training Schools—Sec. 343.60 to 343.73* discussed regarding licensing of instructors, driver training schools, and the use of "Wisconsin" or "state" or name of city in firm name.

July 22, 1958.

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

You request interpretation of provisions of the law pertaining to the licensing of operators of commercial driving schools, in particular, sec. 343.64 (7) and sec. 343.72 (9), (10), and (11).

These statutes read as follows:

"343.64 Denial of driver school license. The commissioner may deny the application of any person for a driver school license if in his discretion he determines that:

“\* \* \*

“(7) The application is not accompanied by a copy of a standard liability insurance policy in the amount of \$50,000 for personal injury to, or death of any one person and subject to said limit for any one person, \$100,000 for personal injury to, or death of any number of persons involved in any one accident, and \$10,000 for property damage in any one accident, suffered or caused by reason of the negligence of the applicant or any agent or employe of the applicant.”

“343.72 Rules for conducting driver schools; prohibited practices.

“\* \* \*

“(9) Except as provided by sub. (8), the use of the word ‘Wisconsin’, ‘State’ or the name of the city in which the school is located, in any sign, firm name or other medium of advertising is prohibited.

“(10) All driver training cars used by the school must be identified by a sign on the rear of the vehicle stating that it is a driver school vehicle.

“(11) All driver training cars must be registered with the commissioner with a brief description of each, including the make, model, registration number and type of transmission.”

Your first question relates to the proper interpretation of sec. 343.72 (9), and it arises in connection with the application for license of two commercial driving schools in the city of Milwaukee which operate under the names of “Milwaukee Driving School” and “State Way Driving School”. You say that each school takes the position that since they have been operating for several years under their trade names that they should be permitted to operate under those names in spite of sec. 343.72 (9) applying a theory that they have “grandfather” rights which permit such operation in violation of the statute.

You have taken an opposite position and have refused to issue licenses to these schools involved.

This provision was enacted by the legislature as ch. 674, Laws 1957. Prior to this time Wisconsin did not license drivers’ schools.

The legislature has made it very plain that the use of the words “Wisconsin”, “state” or the name of the city in which the school is located, in any sign, firm name or other medium of advertising is not to be permitted in this state. The use of such words in the title might lead the public to be-

lieve that they were officially sanctioned driving schools, either directly or indirectly supported by municipal or state government. This would naturally induce people who are seeking instruction in learning how to drive to seek instruction at such places of business, thinking that it would more assuredly guarantee passing the driving test and obtaining drivers' licenses in this state. The school operators have no contractual rights to use the names involved and obviously no rights vest as a result of past use of the names.

The statute is a valid exercise of the police power in which no vested right is impaired and where a "grandfather" clause might well be regarded as a denial of equal protection of the laws. *State ex rel. F. W. Woolworth Co. v. State Board of Health* (1941) 237 Wis. 638, 641, 642, and *Katt v. Sturtevant* (1954) 269 Wis. 638, 641.

The use of the words "Wisconsin", "state" or the name of the city in which the school is located, in any sign, firm name or other medium of advertising in connection with the operation of drivers' schools is a criminal violation under sec. 343.72 (9) and can be punished by both fine or imprisonment even though the school may have operated under a name using such designation prior to the enactment of the statute.

Your second question is in regard to administration of the drivers' school provisions as they apply to individuals who hold themselves out for hire as instructors in driving to individual citizens in the students' own automobiles. These individuals apparently claim they do not come within the law because they do not furnish the vehicle and therefore it would be impossible for them to comply with sec. 343.64 (7) and sec. 343.72 (10) and (11).

You state that it has been your position that such type of instruction is included under the definition of drivers' schools under sec. 343.60 (1) and under the definition of instructor under sec. 343.60 (2).

It was clearly, in my opinion, the intent of the legislature that all activities constituting instruction in driving automobiles be included in the provisions of sec. 343.60 through 343.72. The licensing agency, the motor vehicle department, is charged with the duty of determining the qualifications of persons instructing prospective drivers. This constitutes

a proper delegation of the police power and no exceptions are provided. Any activity falling within the definition found in sec. 343.60 falls within the licensing provisions.

The motor vehicle department, as the administrative agency, will be called upon in numerous situations to determine questions of fact in deciding whether a given applicant furnishes satisfactory evidence of the facts required to grant him a license. I would advise that the department should adhere to all the statutory requirements and refuse to issue licenses where the necessary requirements have not been met.

However, it would appear to be in compliance with the statute if the place of business of such driver school is in the home of the applicant. In the case of a school which does not operate its own vehicle, obviously 343.72 (11) could not be complied with. However, the other provisions, including 343.64 (7) as to insurance coverage could be complied with, and I am of the opinion that the department could license a school so complying.

In conclusion, it is my opinion that any form of instruction, for compensation, in the driving of motor vehicles constitutes a drivers' school and that such school would be required to be licensed under sec. 343.61 and that anyone who gives instruction in the driving of a motor vehicle in connection with such school as an instructor must be licensed under the provisions of sec. 343.62.

LLD

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*Chauffeur Licenses—School Bus—Truck for Hire—Person operating truck for hire must obtain chauffeur's license if he comes within definition and truck does not have a gross weight of 16,000 pounds. School bus driver for private or religious schools must obtain chauffeur's license.*

July 24, 1958.

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

You have asked for my opinion as to whether or not a person operating his own truck for a canning company on a for-hire basis, loading the crop and then hauling it to the

processors, is required to have a chauffeur's license pursuant to sec. 343.125 (1) or (2).

It is my opinion that such a person must have a chauffeur's license, unless the truck he uses has a registered gross weight of 16,000 pounds or less. See sec. 343.01 (2) (e) 4. If he is an employe of the canning company, and not an independent contractor, then he would clearly be employed "for the principal purpose of operating a motor vehicle", and would be a chauffeur under the first of the two statutory definitions of the term. However, should he be an independent contractor he is then a chauffeur only if he comes within the second statutory definition of "chauffeur", that of a "person who operates a motor vehicle while in use as a *public* carrier of persons or property for hire \* \* \*". While the statutes contain no definition of the term "public carrier" as used in sec. 343.01 (2) (e), I believe that "public", as employed therein, connotes that the motor vehicle referred to would be regularly available to the public for the transportation of persons or property on a for-hire basis. The truck owner-operator in question, if an independent contractor, is a chauffeur, then, only if his truck is so available.

You ask if operators of busses transporting people to religious and private schools fall within the definition of "chauffeur" in sec. 343.01 (2) (e) 2., and are therefore required to obtain chauffeurs' licenses under the provisions of sec. 343.125.

In order to answer your question it appears necessary and desirable to review the history of the development of the applicable statute since 1955. Sec. 85.08 (3a), Stats. 1955, reads as follows:

"(3a) SCHOOL BUS OPERATOR'S LICENSE. No person shall operate a school bus without having first applied for and received a school bus operator's license. The department shall not issue a school bus operator's license to any person who: (a) Is less than 21 years of age; (b) does not hold a valid operator's license issued under the provisions of this section; (c) is without the natural use of both hands; (d) is without the natural use of the foot normally employed to operate the foot brake and foot accelerator; or (e) fails to pass the state driving examination."

Sec. 85.08 (1) (c), Stats. 1955, reads as follows:

“(c) ‘School bus’ is any motor vehicle which is owned or operated by a public or governmental agency, or privately owned and operated for compensation, which such vehicle is used to transport children to or from school or to transport school groups engaged in extra curricular activities to or from a school or district.”

Under the provisions of the foregoing statutes it appears clear that all operators of “school busses” were required to obtain a special school bus operator’s license; further, the statute at that time defined “school bus” to include all motor vehicles used to transport to or from school, without regard to the nature of the school as a public or a private school.

The foregoing provisions were incorporated substantially unchanged in a new motor vehicle code as secs. 340.01 (56), and 340.12, by ch. 260, Laws 1957.

By ch. 514, Laws 1957, enacted after the adoption of the new motor vehicle code by ch. 260, Laws 1957, sec. 340.01 (56), Stats. 1957, was repealed and recreated to read as follows:

“(56) ‘School bus’ means a motor vehicle which transports children to or from a *public* school or which transports school groups engaged in extracurricular activities to or from points designated by such public school, even though such vehicle also transports children or school groups to or from private schools or colleges or points designated by them, but does not include:

“(a) A motor vehicle owned or operated by a parent or guardian transporting only his own children, regardless of whether the school has made a contract with or paid compensation to such parent or guardian for such transportation; or

“(b) A vehicle having a seating capacity of fewer than 10 persons, including the operator, and used in casual, occasional or reciprocal transportation of school children and not under contract.”

After the adoption of this amendment, it would appear clear that vehicles transporting children to private or religious schools no longer came within the definition of “school bus” and hence the operators of busses transporting children to or from such schools would no longer need a

special school bus operator's license required by sec. 343.12, Stats. 1957 (formerly sec. 85.08 (3a), Stats. 1955).

Thereafter by ch. 551, Laws 1957, which created secs. 343.01 (2) (e) and 343.125, the legislature defined "chauffeurs" and required them to obtain a special license. The definition section, 343.01 (2) (e) 2, specifically exempted from the definition of "chauffeur" the operator of a "school bus". Hence, by virtue of the amendment in ch. 514, Laws 1957, the term "school bus" no longer included vehicles transporting children to private or religious schools, operators of such vehicles were not exempted from the definition of "chauffeur" and thus by the terms of the statute are required to obtain a chauffeur's license even though they are not required to obtain the special school bus operator's license provided by sec. 343.12.

While no reason is apparent on the face of the legislation or in public policy why a distinction in the type of license should be made between the two classes of operators, the legislature has so declared within its powers.

To repeat, as the law now stands, only operators of vehicles transporting children to or from public schools are required to obtain the special school bus operator's license under sec. 343.12, while operators of vehicles transporting children to or from private and religious schools must obtain the chauffeur's license under sec. 343.125. Of course it is understood that if the operator of a vehicle transporting children to or from a public school also engages in any of the other activities covered by sec. 343.125, then, in addition he will be required to obtain a chauffeur's license.

JHM/RGT

*Insurance Commission—Foreign Company—Licenses—*  
Foreign life insurance company licensed to do business in this state may not enter into a group life insurance plan to cover residents of this state with master policy issued in another state if not authorized under sec. 206.60.

July 28, 1958.

PAUL J. ROGAN,  
*Commissioner of Insurance.*

A foreign life insurance company, authorized to transact life insurance business in Wisconsin, has issued to a national veterans organization, which has its general offices in another state and has members in Wisconsin, a group life insurance master policy under which it is proposed to cover the members of said organization including those resident in Wisconsin. This master policy was entered into in another state between the company and the national headquarters of the veterans organization. The insurance plan set out therein provides for a uniform premium payment by each subscribing member, with the amount of life insurance graduated by age groups based upon the attained age of the member when death occurs. Inclusion of members in the insurance coverage provided in the master policy is not automatic. The company proposes the use of liberal underwriting requirements in determining eligibility of the members who apply for the insurance. Upon application of a member of the veterans organization and payment of the prescribed premium, he will be accorded the life insurance benefits set out in the master policy, if found insurable, and issued a certificate of coverage.

Sec. 206.60 provides :

“No policy of group life insurance shall be delivered in this state unless it conforms to one of the following descriptions:”

and then there follows 6 specified types of group life insurance. The group life insurance plan in the master policy in question is not within any of the types of group life insurance so set forth. You request an opinion as to whether under the Wisconsin statutes a foreign life insurance com-

pany licensed in this state may by such means provide to persons residing in Wisconsin group life insurance of a type that is not authorized under the Wisconsin statutes.

It is proposed that the national headquarters of the veterans organization will mail from its out-of-state headquarters descriptive literature and application blanks to members of the organization residing in Wisconsin, with the suggestion that the completed application and remittance of the required premium for coverage under the plan in the master policy be returned to that office. However, members of said national organization who reside in Wisconsin, and officers of the local subdivisions thereof in Wisconsin, will promote the sale of this group life insurance coverage to members of the organization in Wisconsin and solicit them to make application for inclusion in the group life insurance program. You also ask whether members or officers of the organization who are residents in Wisconsin but are not legally qualified under the Wisconsin life insurance agents' license law, sec. 206.41, as agents of said life insurance company may legally render such assistance in effecting coverage under this group life insurance plan of members of the organization who are residents in Wisconsin.

The several subsections of sec. 201.04 provide the kinds of insurance for which an insurance corporation may be organized in the state. Subsec. (3a) thereof reads:

“Group Life Insurance.—Of the forms described in section 206.60.”

As the proposed group life insurance plan is not any of the types or forms of group life insurance set forth in sec. 206.60, a domestic insurance company cannot effect this type of group life insurance in the state of Wisconsin. Sec. 201.34 (3) specifically says that a licensed foreign insurance corporation may transact in this state only such kinds of business as a domestic insurance corporation is authorized under the laws of Wisconsin to transact in the state. This limits a foreign insurance corporation licensed to do business in this state to effecting in this state only the kinds of insurance which a domestic corporation is authorized to transact. This means that the restrictions relative to a particular kind of insurance that are imposed by the statutes

on domestic corporations likewise limit the authority of a foreign insurance company licensed in the state in effecting that kind of insurance in Wisconsin. The subject life insurance company has obtained a license to transact life insurance business in Wisconsin and is presently the holder of such license. It is therefore limited to effecting in this state group life insurance coverage only of the types or forms thereof which are set out in sec. 206.60.

Sec. 201.32 expressly limits a foreign insurance company to "directly or indirectly" transacting any insurance business in the state except in compliance with Wisconsin laws. The language of subsec. (1) is:

"No foreign insurance company shall *directly or indirectly* transact any insurance business in this state except upon compliance with the requirements of this section."

It is expressly made a condition of the licensing of a foreign insurance company that it comply with all provisions of the Wisconsin statutes. One of the requirements for the licensing of a foreign insurance company as set forth in subsec. (4) is that it file a declaration that it accepts the license to terminate in case it fails to comply with any provision of Wisconsin law. Sec. 201.34 (1) states that the annual license of a foreign company shall be renewed only so long as the company meets "all requirements of law". Sec. 201.34 (2) gives the commissioner of insurance the same supervision over the business and affairs of every licensed foreign insurance company as he has over domestic insurance companies doing the same kind of insurance business.

The above statutory provisions relate to foreign insurance companies generally, but there are other provisions specifically applicable to life insurance companies which support the conclusion. Sec. 206.55 specifically prohibits *any* insurance company from doing *any* life insurance business with any resident of this state except in accordance with the Wisconsin statutes. It reads as follows:

"206.55 Insurers to comply with law. No insurance company shall do any insurance business or make any guaranty, contract or pledge for the payment of annuities or endowments or money to the families or representatives of any

policy or certificate holder, or the like, in this state or with any resident of this state except according to the conditions and restrictions of the statutes of this state."

Also pertinent, are the provisions of sec. 201.44 (1), which prohibit the solicitation, issuance or delivery of a policy of insurance in this state other than through an agent lawfully licensed for the kind of insurance under the agents' licensing provision of the statutes. This provision is applicable to all kinds of insurance. It is equally applicable to a licensed foreign insurance company as it is to a domestic insurance company. It is likewise as well applicable to the effecting of insurance with residents of this state by *indirect* means as by direct operation.

The obvious purpose in the provisions of secs. 201.04 (3a) and 206.60 is to prohibit the effecting of group life insurance coverage of residents of this state unless such group coverage comes within and qualifies as one of the types of group life insurance therein set forth. A domestic corporation could not effect the proposed type of group life insurance in the state. As a foreign insurance corporation licensed to do business in the state is prohibited from effecting either *directly* or *indirectly* any insurance coverage within the state that a domestic company could not effect within the state, a licensed foreign insurance company is prohibited by these statutory provisions from effecting that type of group life insurance coverage within the state, either by direct operation or through indirect means. This group life insurance plan attempts to effect this type of group life insurance coverage for Wisconsin residents by indirect means which the company could not do directly. As such, the plan is prohibited by the above provisions of the Wisconsin statutes. A foreign licensed insurance company cannot use this means to effect group life insurance coverage of Wisconsin residents, and if it does so, it will be in violation of the Wisconsin statutes.

It is suggested that sec. 201.44 (1) is inapplicable to the individual beneficiary certificates issued under a master group policy because such a certificate is not a contract of insurance and the master group policy is the only contract of insurance issued. Sec. 201.01 (3) defines the word "policy", for insurance purposes generally, as including

"\* \* \* every kind and form of contract of insurance". In a prior opinion in 45 O.A.G. 186 the question was considered. Reference was there made to *Riske v. National Casualty Co.*, (1954) 268 Wis. 199, 67 N.W. 2d, 385 where the court, after taking note of *Boseman v. Connecticut General Life Ins. Co.*, (1937) 301 U.S. 196, 57 Sup. Ct. 868, 81 L.ed 1036 and recognizing the existence of a division of authority on the question, found it unnecessary to there pass upon the question. The view was expressed in said prior opinion that sec. 201.44 (1) should be construed, in light of its purpose, as including such certificates within the regulations thereof.

Upon presently reconsidering the question it appears that such conclusion is reinforced by the decision in *Jensen v. John Hancock Mut. Life Ins. Co.*, (1954) 266 Wis. 594, 64 N.W. 2d, 183. In that case the court viewed the certificate as a contract of insurance between the insurer and the employe. It said there was a deliberate agreement between them, effected upon legal consideration between the parties, which was the agreement on the part of the insured employe to pay the premium and the agreement on the part of the insurer to insure the premium-paying employe. The language of the court is as follows:

"We are here necessarily concerned with a contract of insurance existing between the insurer and the employee. We must regard such a contract as a deliberate agreement between competent parties, upon a legal consideration, to pay a premium on the part of one and to insure the premium payer on the part of the other, pursuant to the conditions and limitations of the insurance contract agreed to by the two parties. We must also recognize the concurrence of an intention between the two parties. There would be no existing right in favor of the insured or her beneficiary but for the rights granted her in the certificate." (p. 600)

This reinforces the view expressed in the prior opinion that individual group beneficiary certificates issued under a master policy to cover Wisconsin residents fall within and constitute a policy of insurance within the provisions of sec. 201.44 (1). This appears to be realistic and the proper view, because, as previously noted, insurance coverage to an individual member of the group is not automatic upon issuance of the master policy by the insurance company to the

national organization. It is not until the individual member of the group applies for coverage and pays the premium that any insurance coverage is extended to or operative for that member.

The language of the foregoing statutory provisions is sufficient as applicable to all kinds of insurance. However, there are statutory provisions in the chapter on LIFE INSURANCE which make the conclusions even stronger as respects *life* insurance. In sec. 206.01, the definition of the word "policy" in subsec. (8) is given as "the contract issued by the company to the insured" and the definition in subsec. (6) of the word "insured" is given as "the person upon whose life the contract of insurance is written". It is therefore inescapable that an individual group life beneficiary certificate issued under a master group life policy constitutes a "policy" of insurance under secs. 201.44 (1) and 206.55 so that any solicitation of application for such a certificate, the issuance thereof, or the delivery thereof, within this state, is prohibited except when done by or through an agent in the state lawfully authorized under the statutes to represent the company for the kind of insurance provided by the group plan set forth in the master policy.

The attorney general of Ohio had presented to him the same question as your first inquiry and by an opinion dated June 19, 1950, Opinions of Attorney General No. 1903, advised that it is unlawful for an insurance company authorized to transact life insurance business in Ohio to make a group life insurance contract covering a group in that state unless the group qualifies as one for which group life insurance can be written in Ohio under the Ohio group insurance law, even though the contract was applied for and delivered in another state. The Ohio statute is of the same moment as sec. 206.60 although the language is slightly different. The group life insurance plan provided under the master contract there involved did not fall within any of the authorized groups for which Ohio group life insurance could be written under the Ohio statute. He therefore concluded that the plan was illegal in its application to residents within Ohio unless it could be said that Ohio law cannot affect contracts negotiated, issued and delivered outside of the state, even though they cover persons within the state.

In reaching the conclusion that the provisions of the Ohio statutes applicable to the situation were valid and rendered it unlawful for an insurance company licensed to do business in Ohio to make a group life insurance contract covering persons in that state of a type of group insurance not permitted under the Ohio group insurance law, even though the contract was applied for, issued and delivered in another state, reliance was placed upon several cases. *State ex rel T. European Ins. Co. v. Tomlinson*, 101 O.S. 459; *Palmetto Fire Ins. Co. v. Conn.*, 9 Fed. 2d 202, affirmed 272 U.S. 295, 47 Sup. Ct. 88, 71 L.ed 243; *Osborn v. Ozlin*, 310 U.S. 53, 60 Sup. Ct. 758, 84 L.ed 1074; *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 63 Sup. Ct. 602, 87 L.ed 777. These cases have been reviewed and in our opinion establish the validity of the provisions of the Wisconsin statutes heretofore mentioned as applicable to the situation.

A foreign life insurance company authorized to do business in this state may not use the group life insurance plan of operation to affect life insurance on residents of this state in violation of expressed provisions of our statutes that prohibit the writing of such insurance in the state. It could not directly effect such insurance coverage of such residents within the state. The Wisconsin statutes do not contemplate that a foreign insurance company may accept the benefits of the rights and privileges of a license to do an insurance business in this state and at the same time circumvent and reject the conditions and limitations imposed by applicable regulatory statutes of this state.

You are therefore advised that a foreign life insurance company licensed to do business in this state may not enter into a group life insurance plan to cover residents of this state, which plan is of a type not authorized by sec. 206.60, even though the master group policy was applied for and delivered in another state. You are also advised that a beneficiary certificate issued to a resident in this state pursuant to a master group life insurance agreement is a contract of insurance, or a part of a contract of insurance, for the purposes of secs. 201.44 (1) and 206.55, prohibiting the solicitation, issuance or delivery thereof in this state to effect coverage of a resident of this state under such group insurance plan set forth in the master policy except by or

through an agent duly licensed pursuant to sec. 206.41 to write that kind of insurance in this state for the insurance company issuing the master contract.

HHP

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*Veterans—Aid*—Persons eligible for relief under sec. 45.20 include all persons therein named and are not restricted by the definition of “veteran” in sec. 45.35 (5a). One-year resident requirement applies to be eligible for aid.

July 29, 1958.

JOHN M. POTTER,  
*Corporation Counsel,*  
Wood County.

You ask, (1) whether ch. 190, Laws 1957 restricts eligibility for temporary aid under sec. 45.20 to those persons who comply with the one-year residence requirement of ch. 190; and (2) whether the aid provided for in 45.20 is restricted to soldiers, sailors and marines, who meet the definition of “veteran” as provided in 45.35 (5a).

Sec. 45.20 reads:

“Temporary aid shall be given, granted, furnished and provided, according to ch. 49, to and for any honorably discharged indigent soldier, sailor or marine of any war of the United States or the Korean conflict and the indigent wife, widow or minor child of any such, without requiring the removal of any such person to any county home, but such temporary aid shall not continue longer than 3 months at any one time or in any one year unless the authorities charged with the relief of the poor shall determine otherwise.”

It appears that if all the requirements for relief under ch. 49 apply to veterans under sec. 45.20, there is no need for the separate statute pertaining to veterans. However in 38 O.A.G. 146-147 it is said:

“[Sec. 45.20] was originally adopted at a time when the poorhouse and the poor farms were the customary method of administering general relief, and the statute was in-

tended to spare the indigent soldier or sailor from the indignity of going to the county home; that is its sole present effect."

See 37 O.A.G. 384 for a historical review of the statute.

Besides the limited purpose of the statute, you will note that sec. 45.20 refrains from specifically defining eligibility beyond its reference to soldier, sailor, or marine honorably discharged and to their named dependents. Other facets of eligibility are to be determined "according to ch. 49". For example, sec. 45.20 does not define "indigent soldier, sailor, or marine". However, sec. 49.01 (4) defines "dependent person" and presumably is used to determine when a soldier is "indigent". Also 45.20 does not state what type of temporary aid shall be given under that section. Here, too, 49.01 (1) defines "relief" and enumerates what type of aid is to be given.

There is no evidence that the legislature did not intend sec. 49.01 (7) (ch. 190, Laws 1957), which establishes a one-year residence requirement, to apply to 45.20 as well as the other provisions of eligibility and administration of assistance in ch. 49. Therefore, it is my opinion that the residence requirement of 49.01 (7) applies to sec. 45.20.

I would answer your second question in the negative. Sec. 45.35 (5a) defines the word "veteran". This word is not used in sec. 45.20. Sec. 45.20 contains its own definition of those who are covered by the section:

"\* \* \* honorably discharged \* \* \* soldier, sailor or marine of any war of the United States or the Korean conflict \* \* \*"

Sec. 45.20 clearly does not refer to a "veteran" as defined in 45.35 (5a) because the latter is limited only to veterans of World War II and the Korean conflict while sec. 45.20 includes veterans of "any war of the United States".

The opinion in 41 O.A.G. 132 must be restricted to the specific question to which it was addressed. In that opinion it was stated that a Korean veteran came under the meaning of "soldier \* \* \* of any war of the United States" even though the United States never technically declared war. (The statute subsequently was amended expressly to include the Korean conflict.) In reaching the conclusion that "war"

in sec. 45.20 included the Korean conflict, 45.35 (5a) was referred to as an indication of the legislature's desire to treat a Korean veteran the same as a World War II veteran. The caption on the opinion should not be read as implying that 45.35 (5a) was the controlling definition in sec. 45.20. As stated above, I believe that 45.35 (5a) does not apply to sec. 45.20; sec. 45.20 contains its own definition of the persons eligible for its benefits.

RGT

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*Insurance—Licenses—Words and Phrases*—“Proper exchange of business” permitted by sec. 209.04 (5) does not include solicitation by an insurance agent of insurance in a company for which he is not licensed, but only the negotiation and effecting of such insurance in the occasional situation where insurance desired by a prospect is not placeable with a company for which he is licensed.

August 4, 1958.

PAUL J. ROGAN,  
*Commissioner of Insurance.*

An insurance agent was licensed only as an agent of insurance company A to write casualty insurance, including accident and health insurance, and was engaged exclusively in selling the latter. Each month he regularly produced substantially the same amount of new business. During a period of three months, he wrote no new insurance in company A, but did solicit, take applications for and collect the premiums upon a substantial amount of new accident and health business in company B. An appreciable part thereof was in replacement of accident and health insurance already with company A.

In taking the applications for such insurance, and giving receipts for the premium collected, he signed them as agent of company B. The applications were sent to a so-called corporate “agency”, the XYZ Insurance Service, Inc., the three stockholders of which were licensed agents of company B for that kind of insurance, and it in turn forwarded

them to the insurance company. Company B sent the policies direct to the insureds. He deducted 95% of the commissions being paid by company B and remitted the balance of the premium in most instances to said XYZ Insurance Service, Inc., although in some cases remittance was direct to company B. When remittance was to the corporate "agency", it then deducted the remaining 5% of the commission and accounted to company B for the balance of the premium as a part of its regular "agency" settlements. Where remitted direct to company B, it then credited said corporate "agency" with the 5% of the commission.

You request an opinion whether said transactions come within "exchange of business" that is recognized by sec. 209.04 (5), so as not to be precluded by the agent's licensing provisions of that section.

After defining an "agent" as a natural person authorized thereunder to solicit, negotiate or effect contracts of insurance other than life insurance, sec. 209.04 (1) (a) provides specifically that it is unlawful for any person to act in that fashion unless he holds an agent's license issued under sec. 209.04. Perforce of the provisions in secs. 200.13 (3) and 209.04 (1) (c), any person soliciting, negotiating or effecting contracts of insurance in the state must have a separate license for each kind of insurance for each insurance company he represents.

In absence of sec. 209.04 (5) which provides:

"(5) EXCHANGE OF BUSINESS. Nothing in this section shall be construed to prevent the proper exchange of business between lawfully licensed resident agents of this state."

a licensed agent could not negotiate or effect a policy of insurance of the kind for which he is licensed in some other company than one for which he is licensed, of the kind for which he is licensed, or even participate therein, notwithstanding he did so through or with an agent of such other company who was duly licensed for that kind of insurance. Nor would the provisions in sec. 201.53 (5), which specifically permit division of commissions between agents licensed for the same kind of insurance, as an exception to the otherwise prohibition against splitting of commissions, be operative.

However, there are instances that occur occasionally in which a duly licensed agent solicits a person or concern for insurance but finds that the insurance desired is of a type that the companies he represents do not write, the amount is too large therefor, they impose too onerous conditions thereon, or there is something which stands in the way of placing it with them. In such circumstances, it is a recognized and well established practice, which is known as exchange of business, for such agent to go to an agent licensed for the same kind of business for another company that will write the desired insurance and arrange with him to write it therein. The agent writing it is paid the commission by his company and he gives part of it to the agent for bringing the business to him.

It is the purpose of sec. 209.04 (5) to open up the otherwise all inclusive restrictive provisions of sec. 209.04 only sufficiently to authorize transactions of this nature as "proper exchange of business". The use of the word "proper" shows clearly it is not intended thereby to include everything that might be effected through agents exchanging business. It necessarily restricts what is covered thereby and therefore must be interpreted as including only the exchange of business between agents licensed for the same kind of business where the company or companies represented by the one agent for some reason either will not or do not write the policy or coverage desired but through an agent licensed for the same kind of insurance for some other company he is able to obtain the insurance in said other company. It is only the occasional situations of this nature that are contemplated and permitted by sec. 209.04 (5) as "proper" exchange of business.

Such provisions do not permit the solicitation by an agent of insurance in a company for which he is not licensed. They merely permit him to negotiate and arrange for such insurance when in the course of his normal solicitation of business he runs into a situation where the insurance is of a kind for which he is licensed but the company or companies he represents do not or will not provide the coverage required. Therefore, the recited transactions involved here were not "proper exchange of business" permitted by sec. 209.04 (5).

HHP

*Taxation—Words and Phrases—Exemption—Sec. 70.111 (10) (b) created by ch. 654, Laws 1957, exempting merchandise produced or manufactured in this state for shipment out of state while stored in the original package in a warehouse, considered and construed.*

August 4, 1958.

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

You have requested my opinion on a number of questions involving the application of ch. 654, Laws 1957. That chapter creates paragraph (b) of sec. 70.111 (10) providing a new exemption from the personal property tax for merchandise produced or manufactured in this state for shipment out of the state while stored in the original package in a warehouse.

Your first question is whether or not the exemption from taxation afforded by this statute is available only to the manufacturer or producer in this state. Subdivision 1 of this statute does not expressly limit the exemption to merchandise still owned by the producer or manufacturer, nor is there any language anywhere in the act from which such a limitation may be inferred. It is my conclusion that the exemption is not so limited. Subdivision 5 clearly infers that the exemption is to be extended to others than the manufacturer or producer, since that subdivision limits the exemption so as not to apply to merchandise stored in a warehouse which is owned, leased or operated by a consignor or consignee of the merchandise. Had it been the intent to limit the exemption to merchandise owned by the manufacturer or producer, there would be no occasion for mentioning a consignor or consignee at all.

You next ask:

“If the exemption may be had by a purchaser of a finished product, how will such person be able to swear that such product was ‘produced or manufactured for shipment out of the state’? Such purchaser probably would have only hearsay knowledge of the manufacturer’s or producer’s intended destination, or no knowledge at all. Would an affidavit by the purchaser-owner based upon ‘information and belief’ be adequate? What if the warehoused item had been

manufactured on an open stock basis without reference to any particular order? Does 'produced or manufactured for shipment out of the state' mean that the personal property was made against an order for shipment to a destination outside this state? If so, would not a purchaser-owner claiming exemption have to explain in his affidavit how he happened to get title to property warehoused in this state when the manufacturer made the goods against an order for shipment to a destination outside this state?"

Subdivision 2 of this statute requires an affidavit by the owner of the merchandise stating that the merchandise was "produced or manufactured for shipment out of the state". This requirement would not be satisfied by an affidavit based upon information and belief, since such an affidavit is not a positive statement of the facts set forth. Concern over the basis of the affiant's knowledge would be of moment only if there is reason to doubt the affidavit.

The remainder of your question No. 2 will be discussed in answer to your third question.

Your third question is:

"When goods are warehoused by the manufacturer or producer, will it be possible for such manufacturer or producer to claim exemption when such goods were made on an open stock basis without any particular customer in mind? In such situation, would it be sufficient if the said manufacturer swore that a certain percentage of his produce was always shipped by him outside the state and that the stored product would be applied 100 per cent to out of state shipments?"

There is nothing in the language of the statute limiting the exemption to merchandise produced or manufactured against an order for shipment to a destination outside of Wisconsin. Thus, if a manufacturer customarily ships merchandise manufactured on an open stock basis to destination points within and without the state, and warehouses the items to be shipped out of Wisconsin in a different warehouse from that in which he stores the merchandise to be shipped to Wisconsin points, he would be entitled to the exemption for the merchandise to be shipped out of the state, providing the other requirements of the statute are met. Similarly, if an item is manufactured against a specific order for shipment to a point outside the state, and if

prior to delivery the out-of-state customer changed his order and had the merchandise stored in a commercial warehouse in Wisconsin for shipment at a later date, the exemption still could apply. On the other hand, if a manufacturer had no regular customers outside of the state and stored merchandise which had been produced on open stock basis, he could not properly make out the requisite affidavit even though after storage of the merchandise he received an order for shipping some or all of the items to a point outside the state. Between these two extremes lie a myriad of factual situations which could only be discussed with the specific facts of each case at hand.

As item 4 you ask:

“If merchandise were accorded exemption under this statute in a given year and then the assessor later learns that such merchandise was shipped from the warehouse to a destination in Wisconsin, may such property be assessed in a later year as omitted property under Section 70.44? If so, what about a case in which the property, at the time the affidavit was executed was actually destined for outside Wisconsin but, because of some subsequent event such as cancellation of the order by the purchaser or bankruptcy of the purchaser, a substitute disposition became necessary?”

If the merchandise were entitled to the exemption on May 1st in a given year, but later was shipped to a point in Wisconsin because of some event occurring after May 1st, there is no basis under either secs. 70.44 or 70.111 (10) (b) for the assessor in a subsequent year to tax the property as omitted property. However, if exemption were accorded merchandise in a year in which it was not actually entitled thereto, then in a subsequent year it could be assessed as omitted property under sec. 70.44.

Your fifth question asks:

“Whether merchandise which is exempt under sec. 70.111 (10) (b) 3 in one year and remains in the warehouse for three successive years would be taxable the second year and exempt the third year?”

The plain language of sec. 70.111 (10) (b) 3 requires this result. It excludes from the exemption “\* \* \* any merchandise which was exempt from taxation under this para-

graph for the preceding tax year, \* \* \*." This plain language cannot be ignored.

In a sixth question, you ask what is the Federal Bonded Warehouse Act referred to in sec. 70.111 (10) (b) 5. There is no federal statute officially entitled "Federal Bonded Warehouse Act". There is, however, a federal statute popularly known as the Bonded Warehouse Act, 19 USCA, secs. 1555-1556, which was enacted June 17, 1930. Sec. 100.13, which was enacted by ch. 456, Laws 1933, and originally was numbered sec. 99.32, also refers to the Federal Bonded Warehouse Act.

The federal act referred to in both of these statutes would appear to be the provisions in 19 USCA, secs. 1555-1556, which provide that the secretary of the treasury may designate buildings as "bonded warehouses" for the storage of imported merchandise entered for warehousing, or taken possession of by the collector, or under seizure, or for the manufacture of merchandise in bond, or for repacking, sorting or cleaning of imported merchandise.

Your seventh inquiry is whether warehouses which are not required to be licensed under sec. 100.13 may be licensed under that section in order to comply with sec. 70.111 (10) (b) 5. Sec. 100.13 (7) prohibits any person from acting as a warehouseman without a license. Subsection (1) provides for the issuance of a license and defines warehouseman so as to exclude certain enumerated types of businesses. It is clear that the department of agriculture has no jurisdiction to issue a warehouseman's license under sec. 100.13 to any business falling within one of the enumerated exclusions.

The only provision in sec. 100.13 giving the department of agriculture discretion as to whether or not to license a particular kind of business is contained in subsection (1) (b), which provides that the department *may* exempt from the operation of the section a warehouse if the operator has a license under the Federal Bonded Warehouse Act. This discretionary provision does not affect your problem, since a warehouse licensed under either the federal or the state act would qualify for the exemption under the terms of sec. 70.111 (10) (b).

In your eighth question, you ask what types of warehouses are excluded from the requirements of sec. 100.13. They are those set forth in sec. 100.13 (1) (a) as exclusions from the definition set forth in the section and are: municipal and railroad corporations; those licensed under sec. 99.02 [cold storage warehouses]; those licensed under sec. 126.07 [grain warehouses]; cooperative associations storing farm products and merchandise for members; warehouses used for storage of manufactured dairy products, canned produce, and dairy products manufactured by the owners of the warehouses; and field warehouses.

While the statute contains no definition of "field warehouse", it would appear what is meant is a warehouse owned by the owner of the goods stored therein but which warehouse is operated by a lessee as pledgeholder of the merchandise stored therein. *Walling v. Mutual Wholesale Food & Supply Co.*, (1944), 141 F. 2d 331, at 341.

You next ask how the terms "consignor", "consignee", "affiliate" and "subsidiary" are to be construed as used in sec. 70.111 (10) (b) 5. These words are capable of broad meanings and the particular sense in which used is dependent upon the context of the provision in which they appear. The courts have disagreed even as to the meaning of the words "consignor" and "consignee" as used in the ordinary mercantile sense. In *Johnston-Crews Co. v. Smith*, (1925), 161 Ga. 382, 131 S.E. 65, the court held that the word "consignee" means a person to whom a shipment is addressed. On the other hand, the Iowa court in *West v. Hartford Fire Ins. Co.*, (1957) 248 Iowa 993, 83 N.W. 2d 465, held that while in the usual sense goods shipped to another are consigned to him in the mercantile sense, the word "consigned" implies agency and carries the implication that title to the goods is not in the consignee. Sec. 100.03 (1) (b) defines the words "affiliate" and "subsidiary" as used in the statute governing licensed food processing plants. The definition given there, however, is not directly applicable to the provision of sec. 70.111 (10) (b) here under consideration, but is a guide to the intention of the legislature in using the words therein.

It is the well established rule in this state that provisions creating exemptions from taxation are to be construed

strictly against the granting thereof and exemption is not to be enlarged by implication. *Comet Co. v. Department of Taxation*, (1943), 243 Wis. 117, 9 N.W. 2d 620; *Albion v. Trask*, (1950), 256 Wis. 485, 41 N.W. 2d 627. In view thereof, and considering the overall objective of the provisions in sec. 70.111 (10) (b), it is my opinion that the words "consignor", "consignee", "affiliate" and "subsidiary" are used therein for the purpose of providing that merchandise will not be exempted thereby if stored in a warehouse owned or operated by one having any ownership interest, either direct or indirect, in such merchandise.

The next question concerns the proper construction of the term "original package" as used in this statute.

The doctrine of the original package had its origin in *Brown v. State of Maryland*, (1827), 12 Wheat. 419, 25 U.S. 419, 6 L.ed 678. Like other words of the statute about which you inquire the term "original package" is not capable of precise definition applicable to all cases.

A good statement is that contained in *Haley v. State*, (1894), 42 Neb. 556, 60 N.W. 962 at 963, where the court said:

"\* \* \* The general purpose is to adopt that form and size of package best adapted to the safe and convenient transportation and delivery of the particular class of goods to be moved, because the convenience of the trade will be best subserved thereby. Such packages, put up with a view to the convenience and security of transportation and handling, in the regular course of trade, are the original packages of commerce. \* \* \*"

In *Cook v. Marshall County*, (1903) 119 Iowa 384, 93 N.W. 372, 373, it is said:

"\* \* \* Generally, it is said to be a parcel, bundle, bale, box, or case made up of or 'packed' with some commodity with a view to its safety and convenient handling and transportation. It does not necessarily mean that goods shall be inclosed in a tight or sealed receptacle. It relates wholly to goods as prepared for transportation, and has no necessary reference whatever to the package originally prepared or put up by the manufacturer. Indeed, the idea of the 'original package' may well be made to cover certain forms of property which do not ordinarily admit of being packaged or encased in any other manner than in the car or

vessel in which they are transported, such, for instance, as steel beams, threshing machines, and other bulky articles.”

After considering the purpose and object of this statute, in my opinion, the phrase “original package” refers to that form in which the particular merchandise is prepared by the manufacturer or producer thereof for shipment by it, i.e., the box, carton, barrel, bottle, container, crate, bundle or other similar form customarily utilized by the manufacturer or producer in shipping or transporting such merchandise.

Clearly, the exemption would not be applicable if the merchandise is not in an appropriate warehouse in such original package form on May 1. The criteria of exemption under this provision is that the merchandise has been placed in storage in the original package form in a commercial warehouse and is stored therein in that form on the date as of which the assessment of property is made, i.e., May 1.

Your last question is as to the scope of the words “manufactured or produced” in this state. Again, the words cannot be defined so as to answer all possible questions which may arise. As was said in *Sharpe v. Hasey*, (1908), 134 Wis. 618, at 620, 114 N.W. 1118:

“\* \* \* The common, ordinary, or approved meaning of words in a legislative enactment is to be regarded as the one intended by the law-givers, unless such meaning is inconsistent with the manifest legislative purpose, ‘but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in the law shall be construed and understood according to such peculiar and appropriate meaning.’ ”

On the following page, in discussing the words “trade or manufacture” as used in a statute prohibiting the laying out of public highways through a building used for trade or manufacture when the damage exceeded a specified amount, the court said:

“\* \* \* Such words have common, ordinary meanings which by common knowledge occur to the mind of any one of ordinary intelligence upon their being used. Such meanings are entirely apart from the broad or general or the narrow and particular ones, which, if necessary, might be

attributed thereto. There is no reason which we can perceive why such common, ordinary meanings should not prevail in the situation at hand. \* \* \*

In discussing the word "manufacture", as used in a tax statute, the Maryland court said in *Comptroller of the Treasury of Md. v. American Can Co.*, (1955), 208 Md. 203, 117 Atl. 2d 559, that the word ordinarily means the process of converting some material into a different form adapted to uses to which in its original form it could not so readily be applied. I have found no better definition of the word. What activities would constitute production or manufacture within the language of this statute would depend upon the facts in any given case, and other than the general definition given in the cited case, no categorical answer can be given.

You have asked specifically whether packaging might be construed as manufacturing or producing. The answer is "no". Packaging alone would not be considered "producing" or "manufacturing" in the ordinary sense in which those terms are used.

EWV/HHP

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*Intoxicating Liquors—Minors—Words and Phrases—*  
Sec. 176.30 (1) absolutely prohibits the sale or furnishing of intoxicating liquor to a minor, even though he be lawfully present on the licensed premises under the conditions prescribed by sec. 176.32 (1).

August 13, 1958.

D. H. PRICHARD, *Director,*  
*Division of Beverage & Cigarette Taxes.*

You have requested an opinion on the following two questions:

"1. May intoxicating liquor, including wine, be legally sold to, served to, or procured for a person under the age of 21 on a class 'B' liquor license premises if accompanied by parent, guardian or spouse?

"2. May intoxicating liquor, including wine, be sold to, served to, or procured for a person under the age of 21 on

a class 'B' liquor license premises, unaccompanied by parent, guardian or spouse, such minor being legally on the license premises for the reason that one or more of the following activities are operated in connection with the class 'B' liquor license,—a bowling alley, hotel, restaurant, or grocery store?"

In this opinion I shall use the term "intoxicating liquor" in the sense in which it is defined in sec. 176.01 (2), which includes wine, and I shall use the word "beer" as including all fermented malt beverages as that term is defined in sec. 66.054 (1) (j).

Sec. 176.30 (1), so far as material to this opinion, provides as follows:

"Any keeper of any place of any name whatsoever for the sale of any intoxicating liquors who shall sell, vend or in any way deal or traffic in, or for the purpose of evading any law of this state relating to the sale of liquors, give away any such liquors in any quantity whatsoever to or with a minor, \* \* \* and *any person whatever* who shall procure for, or sell, or give away, to any minor, *whether upon the written order of the parents or guardian of such minor* or in any other manner whatsoever, \* \* \* any such liquors shall be punished \* \* \*."

It will be observed that the foregoing statute contains no exception of the kinds mentioned in your questions. On the contrary, the second clause expressly provides that even the written order of the parent or guardian will not excuse the sale or furnishing of intoxicating liquor to a minor.

The misunderstanding which has arisen in some circles, and which has prompted you to request this opinion, evidently arises out of confusion with the law relating to the presence of minors on licensed premises and the law relating to the sale of beer to certain minors.

Sec. 66.054, the beer law, provides in part as follows:

"(9) CONDITIONS OF LICENSES. Wholesalers' and retailers' licenses shall be issued subject to the following restrictions:

"\* \* \*

"(b) No fermented malt beverages shall be sold, dispensed, given away or furnished to any person under the age of 18 years *unless accompanied by parent or guardian.*

"(20) PROCURING FOR OR FURNISHING TO PERSON UNDER 18; PENALTY. Any person who shall procure for, sell, dis-

if he was lawfully on the premises by reason of being a lodger or boarder or because the place was a hotel, drug store, etc.

To sum up, it is the legislative policy that: (1) minors may be present on premises licensed for the sale of intoxicating liquor under the conditions set forth in sec. 176.32 but may *not* be sold or served with any intoxicating liquor; if accompanied by parent or guardian, or if of the age of 18 or older, they may be sold or served *beer* while so lawfully on the premises; (2) minors under the age of 18 may be present on premises licensed for the sale of beer only, under the conditions prescribed by sec. 66.054, and *if accompanied by parent or guardian* may be served beer.

It follows that the answer to both of your questions is "no".

WAP

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*Public Welfare—Children—Patients*—Children in legal custody of the department of public welfare who have become patients in mental hospitals under ch. 51, or inmates of the diagnostic center under sec. 46.04, are chargeable to the counties of legal settlement as provided in sec. 51.08 and not sec. 48.55.

August 18, 1958.

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

You ask an opinion whether sec. 48.55 or sec. 51.08 is to be applied with respect to charges for care of children in the custody of your department, when the children are transferred or committed to the Wisconsin diagnostic center, the state mental hospitals, or the colonies. Under sec. 48.55, as amended by ch. 616, Laws 1957, the charge is "one half of the average cost, excluding administration, for children placed in foster homes by the department \* \* \*". Under sec. 51.08 the charge for care of "patients" in mental institutions is "average per capita cost of maintenance, care and treatment of such patients. \* \* \*"

The question is related to the one discussed in 46 O.A.G. 101, to the effect that sec. 48.55 governs charges for care of children transferred or committed to penal institutions.

There are involved in this question the same statutory provisions there discussed; but, in addition, there is also involved the last sentence of sec. 48.52 (2) (a), which was not there applicable.

Sec. 48.52 deals with the facilities for care of children in legal custody of the department. The parts of subsection (2) (a) which are pertinent to your inquiry read:

“(2) USE OF OTHER FACILITIES. (a) In addition to the facilities and services described in sub. (1), the department may use other facilities and services under its jurisdiction, \* \* \* *Removals to institutions for the mentally ill or mentally deficient shall be made in accordance with ch. 51.*”

Sec. 48.55, providing that the county of legal settlement shall be charged one-half of the average cost of foster-home care, for care of children in the custody of the department, makes no reference to mentally ill children, or to ch. 51; but it must be read with other provisions of the children's code, and harmonized with them, if possible.

The last sentence of sec. 48.52 (2) (a) was intended to create certain exceptions with respect to mentally ill children, which would be governed by the statutes relating to the mentally ill rather than by other provisions of the children's code.

Two methods of “removal” of children in the department's legal custody to institutions for the mentally ill or mentally deficient are provided by ch. 51:

1. By petition to the juvenile court for commitment pursuant to secs. 51.01 to 51.065. This is the method most generally used.

2. By departmental transfer from the boys' school or the girls' school, after a physician's report to the school superintendent and the superintendent's report to the department, that the child is mentally ill or deficient, pursuant to secs. 51.215 and 51.23.

In either event the admission of the child to the mental institution is accompanied by more formality than an ordinary placement in one of the schools, a penal institution, or

a foster home. The child then becomes a "patient" in the meaning of sec. 51.08 and that section determines his chargeability so long as he remains a patient.

However, ch. 51 makes no provision for admissions to the diagnostic center. For children in the legal custody of the department, sec. 46.04 (2) provides for their admission on "referral by the director" of the department. Nevertheless, the charge for maintenance in the center is also determined under sec. 51.08 for the reasons set out in 44 O.A.G. 274, since the legislature has not enacted any provision which would change the conclusion there expressed.

BL/WAP

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*State Traffic Patrol—Sheriff—Words and Phrases—Discussion relative to duty of state traffic patrol officer to respond to call for aid from various municipal officers and his status thereunder.*

August 28, 1958.

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

You state that on several occasions personnel of the Wisconsin state patrol have been called upon to render assistance to a sheriff, and point out that some of those cases involved activities beyond the authority of the state patrol. You cite as an example a request by radio to assist in apprehending a car of burglars. You also state that there have been many other occasions where the state patrol has been called upon to render assistance to a local law enforcement agency where no motor vehicles are involved. The questions you ask, and my answers, are as follows (I have renumbered them) :

1. Q. Does a deputy sheriff or the undersheriff [as well as the sheriff] have the power to impress state patrol personnel? A. Yes, in a proper case.

2. Q. May the sheriff impress an officer into service without first deputizing him? (At present, this department has ruled that our enforcement personnel may not become deputies, either honorary or active). A. Yes.

3. Q. Must the sheriff or his agent perform any particular ceremony or make any particular statement before the person is legally impressed? A. No.

4. Q. Does the chief officer or any other member of a county traffic patrol not under the jurisdiction of the sheriff have the power to call on citizens for assistance? See discussion.

5. Q. Does the officer retain his status as a [state] patrol officer while under the direction of a sheriff? A. No.

6. Q. Does a request for assistance by radio require compliance by state patrol officers according to sec. 59.24? A. Yes, if the occasion warrants.

7. Q. Where does responsibility lie when:

a. Q. Officer is injured? A. The county or municipality employing the officer who summoned him.

b. Q. Officer causes injury to others? A. May depend upon the specific factual situation.

c. Q. State property is damaged? A. May depend upon the specific factual situation.

d. Q. Are patrol officers under workmen's compensation paid for out of motor vehicle department funds? A. Not if injured while performing services outside the scope of their duties as patrol officers and at the lawful command of the sheriff or other officer.

The law enforcement authority of the state patrol is set forth in sec. 110.07 (1) and (2) (as amended by ch. 260, sec. 25, and ch. 652, sec. 9, Laws 1957) as follows:

"(1) \* \* \* Such traffic officers, in addition to the director of the enforcement division of the department, shall constitute the state traffic patrol, to enforce and assist in the administration of chs. 110, 194 and 341 to 349, or orders or rules issued pursuant thereto. Such traffic officers shall have the powers of sheriff in the enforcing of the above chapters and orders or rules issued pursuant thereto. \* \* \*

"(2) The traffic officers employed pursuant to the provisions of this section shall constitute a state traffic patrol to assist local enforcement officers wherever possible in the regulation of traffic and the prevention of accidents upon the public highways. \* \* \*"

See also sec. 349.02.

A state traffic patrol officer is not authorized to investigate, pursue or arrest for crimes such as burglary or murder, etc. When he steps beyond the four corners of sec. 110.07 (1) and (2) he is no longer clothed with the protection and power accorded by law to state traffic patrol offi-

cers. When he assumes to act beyond his delegated authority he has no greater standing or authority than a private citizen, unless impressed by another officer having authority to do so.

The sheriff has the undoubted power to summon citizens to his aid to enforce the criminal law and execute process. This was his power at common law to summon the *posse comitatus*. *Coyles v. Hurlin* (1813) 10 Johns. (N.Y.) \* 85; *Com. v. Martin et al.* (1898) 7 Pa. Dist. 219; 80 C.J.S. *Sheriffs and Constables*, sec. 34; 1 Lewis, *Blackstone's Commentaries* (1st ed. 1897) 304; 47 Am. Jur., *Sheriffs, Police, and Constables*, sec. 36; 1 Holdsworth, *History of English Law* (3rd ed. 1922) 68; Anderson, *Sheriffs, Coroners and Constables*, sec. 141, p. 137. It is confirmed by statute in this state and is extended to coroners and constables (sec. 59.24), the village marshal (sec 61.28), village police officer (sec. 61.31 (2)), and city policemen (sec. 62.09 (13)). (It is also extended to the state traffic patrol pursuant to the delegation to them of the powers of the sheriff, but only for the purpose of enforcing the enumerated chapters.)

Whether county traffic officers have such power is uncertain. In 45 O.A.G. 152, it was stated that they may commandeer private property when the occasion demands. It was also suggested that they may possess power to commandeer private citizens for aid. 45 O.A.G. 152, 156. For present purposes it is sufficient to point out that the state patrol is required by sec. 110.07 (2) to assist local law enforcement officers in the regulation of traffic and prevention of accidents.

This, of course, does not mean that a county traffic officer or any local law enforcement officer has the authority to govern, to give assignments to or to countermand assignments previously given to state patrol officers by their superiors, in the general regulation of traffic and prevention of accidents. When confronted with an emergency requiring assistance, however, it would be proper for a county traffic officer to call upon a state patrol officer for assistance. In such case a request to a state patrol officer by a county traffic officer should be complied with, at least after consultation with the state officer's headquarters or pursuant to his general orders.

Disobedience of a lawful summons to aid was a crime at common law (*Babbington et al. v. Yellow Taxi Corp.* (1928) 250 N. Y. 14, 164 N.E. 726, 727; 1 Lewis, *Blackstone's Commentaries* (1st ed. 1897) 304), and is a crime under the criminal code, sec. 946.40.

At common law every person over fifteen years of age, except clergymen, women, or persons decrepit, was bound by the call to aid. Binmore, *Sheriffs, Coroners and Constables*, p. 4; 1 Lewis, *Blackstone's Commentaries* (1st ed. 1897) 304; see 1 Holdsworth, *History of English Law* (3rd ed. 1922) 68. In Wisconsin a lawful command to aid must be obeyed unless the person has a "reasonable excuse". Sec. 946.40.

The power conferred by sec. 59.24 to summon the power of the county is an affirmance of the common-law power to summon a *posse comitatus*. *Hooker v. Smith et al.* (1847) 19 Vt. 151, 47 Am. D. 679; 80 C.J.S., *Sheriffs and Constables*, sec. 34; see *Krueger v. State* (1920) 171 Wis. 566, 580, 177 N.W. 917; 47 Am. Jur., *Sheriffs, Police, and Constables*, sec. 36.

Therefore, in a proper case, any person may be summoned to render aid, including a state traffic patrol officer. A state traffic patrol officer may not, however, be commandeered in a labor dispute nor to serve civil process. Sec. 110.07 (2). (This does not mean they may not be commandeered to assist in a case otherwise authorized where the labor dispute or service of civil process is only incidental, *e. g.*, the apprehension of one who has committed a murder or aggravated battery while resisting or hindering service of process.)

If the state traffic patrol officer is lawfully summoned to render assistance in the enforcement of a law not within his jurisdiction pursuant to sec. 110.07 (1), (2) he thereby becomes the employe *pro tem* of the county or municipality of the summoning officer. *Village of West Salem v. Industrial Comm.* (1916) 162 Wis. 57, 155 N.W. 929; *Vilas County v. Industrial Comm.* (1930) 200 Wis. 451, 228 N.W. 591; *Shawano County v. Industrial Comm.* (1935) 219 Wis. 513, 263 N.W. 590; *Monterey County v. Industrial Acc. Com.* (1926) 199 Cal. 221, 248 P. 912; *Anderson v. Bituminous Cas. Co. et al.* (1952) 155 Neb. 590, 52 N.W. 2d 814;

*Gulbrandson v. Town of Midland et al.* (1949) 72 S.D. 461, 36 N.W. 2d 655; compare *Village of Schofield v. Industrial Comm.* (1931) 204 Wis. 84, 235 N.W. 396.

In *Village of Schofield v. Industrial Comm.*, *supra*, the supreme court held that a village marshal assisting law enforcement officers of another municipality in making an arrest beyond the village limits retained his status as a village employe. The men, the court said, were not acting as a *posse comitatus*, but each was performing a duty incumbent upon him by virtue of his office and pursuant to a duty he owed his own municipality. It was his duty and authority as village marshal to participate in the arrest.

In *Village of West Salem v. Industrial Comm.*, *supra*, and *Vilas County v. Industrial Comm.*, *supra*, on the other hand, the supreme court held that a private citizen summoned to aid became an employe of the municipality of the officer who summoned him within the meaning of the workmen's compensation act.

In the latter two cases the persons summoned had no authority to act as peace officers by virtue of their original status. They were clothed with the authority accorded a peace officer by the law only because they were summoned by an officer. Thus, here, in the case assumed, a state traffic patrol officer has no authority to act by virtue of his original status, but acquires authority pursuant to the summons for assistance by a peace officer. He therefore acts for the municipality employing the officer who summoned him and is its employe. Hence he does not retain his original status as a state traffic patrol officer under sec. 110.07 (2). Note that sec. 66.315 (1) and (2), which specifically provides for compensation, wage and other benefits for peace officers of towns, cities, villages and counties when commandeered for service outside their municipality, does not include the state traffic patrol.

(This does not mean that if the state patrol officer goes beyond the scope of his authority but is *not* under the command of the sheriff or other officer so as to be an employe *pro tem* of the county or some municipality, and he is injured, he will be without a remedy in all cases. If he acts in an emergency he may in some cases be entitled to work-

men's compensation from the state. See *Butler v. Industrial Comm.*, (1953) 265 Wis. 380, 61 N.W. 2d 490.)

Sec. 59.24 authorizes sheriffs, coroners, and constables to "call to their aid such persons or powers of *their* county as *they* may deem *necessary*" to "preserve the peace \* \* \* and suppress all affrays, routs, riots, unlawful assemblies and insurrections", to serve criminal and civil process, and to apprehend or secure any person for a felony or breach of the peace. The limits indicated are, of necessity, broad and general. This suggests that the decision whether conditions exist justifying a request for aid is discretionary with the officer. But discretionary authority may be abused.

The statute contemplates *necessity* as the occasion for summoning assistance. See *Eaton v. Bernalillo County*, (1942) 46 N. M. 318, 128 P. 2d 738; *Industrial Comm. v. Turek*, (1935) 129 Ohio St. 545, 196 N.E. 382. The officer must in fact be engaged in the business of arrest, execution of process, or other activity enumerated in the statute, and within his authority, to justify the call for aid. See sec. 59.24, Stats.; 946.40 (2), Stats.; *Coyles v. Hurtin*, *supra*. In Anderson, *Sheriffs, Coroners and Constables*, sec. 145, it is stated as follows in part at page 142:

"It may be stated as a general rule as to when the necessity exists for the calling upon the citizenry for forming a posse comitatus is usually left, in the absence of a controlling statute, to the *sound judgment and reasonable discretion of the officer himself*. And indeed it is a duty, if he has any reason to anticipate resistance to the carrying out or in the discharge of the duties of his office to provide such a force of men as would enable the officer to properly, efficiently, and promptly perform the duties of his office. \* \* \* An emergency does not mean that the officer is to proceed so cautiously that at a time when he is in the extreme necessity for aid no aid can be had. After all, the determination of the *existing of the emergency, or the necessity for immediate aid* are matters that must of necessity be left mainly to the exercise of the sober judgment and sound discretion on the part of the officer." (Emphasis supplied.)

*Eaton v. Bernalillo County*, *supra*, was a case in which one Eaton was riding with a deputy sheriff when they came upon a highway accident in which several persons were injured. The deputy left his light and whistle with Eaton and

asked him to direct traffic while the deputy took the injured to a hospital. Police and tow trucks arrived. Weather, the condition of the highway, the location of vehicles, etc., created a hazard. While directing traffic, Eaton was killed. The question presented was whether his widow was entitled to compensation on the theory that the situation authorized the deputy to commandeer Eaton's services. The court dismissed the claim and stated in part:

"This power of the sheriff, or his deputy, to summon aid in a proper case, in enforcing the criminal laws, is not open to question. \* \* \* In each of the cases relied upon by appellee and cited, *supra*, the court was presented with facts affording justification to the sheriff, or his deputy, in impressing the service of a bystander in arresting, securing or conveying some dangerous character suspected of or charged with a violation of the criminal laws. Under such circumstances, it was logical to hold that the person injured while so assisting occupied the status of a deputy sheriff, and, hence, of an employee, thereby entitling him or his dependents, to compensation.

"Not so, here. The facts disclose no situation warranting a call to the posse comitatus nor even suggesting that any such call was made. \* \* \*"

In *Village of West Salem v. Industrial Comm.*, *supra*, the question was whether the deceased was an employe of the village within the meaning of the workmen's compensation act when assisting the village marshal and a deputy sheriff at the marshal's request. The marshal and deputy had taken one Jones into custody and the latter became angry and threatened a justice of the peace with a gun for refusing to admit him to bail. He made angry threats and broke the glass in the door of the justice's house. Because the deputy was unable to control Jones, the marshal went for help, saw the deceased, and requested his aid. Holding he became a village employe, the supreme court said in part:

"\* \* \* The circuit court concluded that, 'While Jones was technically under arrest by the deputy sheriff, it is apparent that he was not under the control of the deputy and that the deputy sheriff did not have either the courage or the ability to perform his duty as a peace officer. After his arrest Jones was both disturbing the peace and violating the law and the deputy sheriff did not prevent farther continuance of such conduct. Under the circumstances it was the

duty of the marshal to take such action as would prevent further continuance of this lawless conduct on the part of Jones.' The facts and circumstances of the case show that Jones defied Weingarten and the marshal in their efforts to execute the law, and that *an occasion was presented to the village marshal for calling upon citizens to aid them*. It is clearly shown that the marshal called on Voeck for aid and that Voeck responded to the call and proceeded to the place where he was needed. While approaching Jones and Weingarten, Jones shot him." (Emphasis supplied.)

In *Vilas County v. Industrial Comm.*, *supra*, the supreme court affirmed an award of compensation to one who was injured while assisting in a search for two murder suspects and who had been called upon to assist by two of the searchers. The deputy sheriff had told the two searchers to get additional help if necessary.

The determination of whether the circumstances present an exigency requiring aid, then, rests primarily with the officer calling for aid, requiring, of course, careful, sober judgment. And if he does call for aid and the state traffic patrolman or any other person in good faith responds to the call, the latter will become an employe pro tem of the county or municipality whose officer issued the call, even though it may later be determined that the person would not have been punishable under sec. 946.40 if he had refused. See *Krueger v. State*, *supra*, *Vilas County v. Industrial Comm.*, *supra*, compare *Firestone v. Rice*, *supra*.

This assumes, of course, that the service rendered is of the kind for which aid may be commanded under sec. 59.24, referred to above. If not, the citizen is a mere volunteer not entitled to compensation for injuries. *Eaton v. Bernalillo County*, quoted above.

However, the call for assistance need not be addressed to a specific individual and no formality or particular words are required. In *Krueger v. State*, *supra*, the supreme court stated, in part:

"\* \* \* There is no requirement of the law that in order to enjoy the immunity and protection accorded to an officer under such circumstances a citizen must be formally and specifically called to the assistance of the officer, or that he be specially commissioned or sworn in in that capacity. In the very nature of things a call for assistance on the part

of the sheriff or other officer cannot always be addressed with discrimination and to specific individuals. The call generally comes when the sheriff is hard-pressed. It may be in the nature of a cry of despair or a bugle call to arms, calling upon all who may hear it, or be advised of it, to rally to the assistance of the officer endeavoring to serve legal process and thus to maintain the majesty of the law. Under such circumstances there is a duty resting on all citizens who know of the call to go to the relief of the officer, even though failure to perform same does not constitute an offense under sec. 4488, Stats. It is a moral duty incident to citizenship, *even though under the circumstances a conviction for failure to perform the same could not be had* under sec. 4488. In this case Rasmusson was sent to Owen for help. Gans and Marks went to Withee to secure help. They called upon persons indiscriminately, who in turn passed the call along to others, to rally at the Krueger farm, and in response to this a posse of considerable proportion there assembled. We hold that all who were there, constituting the posse, lending assistance to the deputy United States marshal in the apprehension of those for whom he held warrants, were acting under his direction and command, constructively at least, and were entitled to the same protection and immunity extended to the deputy marshal himself." (Emphasis supplied.)

Your letter refers to a request from a sheriff for assistance in apprehending three runaway girls. If by this you mean the sheriff wanted patrol officers to leave their post of duty to search for the girls, that is not a purpose for which the sheriff is authorized to command assistance and anyone responding would be a volunteer. If the sheriff was in the act of arresting them, however, and called for aid, the officers could lawfully respond and thus become county employes even though it should turn out they were not being arrested for a felony or breach of the peace, since members of a posse need not stop to question the sheriff's authority. It is stated as follows in *Firestone v. Rice, supra*, at pages 886-887:

"\* \* \* We do not think that a man called upon by the sheriff is required, at his peril, to ascertain whether the sheriff has a proper warrant, or whether the offense charged against the person to be arrested is a felony, or that he may refuse to act until he is satisfied that the sheriff is acting legally, or within the scope of his office, in a criminal case. If he were allowed to do this, the object of the law

would be defeated, and the statute rendered nugatory in many cases. There is often no time for inquiry, as action must be immediate. The necessity of the case will not permit the person thus summoned to stop to examine papers, or take counsel as to the legality of the process in the officer's hands, or to inquire whether any process is necessary in the particular case where his aid is required. Therefore the person who responds to the call of one whom he knows to be an officer is protected by the call from being sued for rendering the requisite assistance. The officer may not be acting legally, and therefore a trespasser; but the person assisting him, at his request or command, and who relies upon his official character and call, is protected by the law, and must necessarily be, against suits for trespass and false imprisonment, if, in his acts, he confines himself to the order and direction of the sheriff. *McMahan v. Green*, 34 Vt. 69; *Reed v. Rice*, 2 J. J. Marsh. 44."

Your letter also refers to a request received by radio to apprehend a car of burglars. If the sheriff were physically present in pursuit of the car there would surely be no doubt of his authority to impress bystanders *if he could communicate with them*, and a call for aid by radio would be binding upon all who heard it and were in a position to assist. It does not seem that there would be any distinction if the sheriff were not actually present and the call for assistance were addressed generally to all officers who might see the suspects' vehicle and be in a position to apprehend them. The call, if received in the sheriff's county, would be valid and would authorize pursuit across the county line. If the call were received in another county, however, the state officers would not be validly impressed but upon seeing the wanted party should if possible radio its location and await a call for aid from the local sheriff, meanwhile keeping the vehicle in view.

But there must be an actual call for aid. A radio bulletin merely reporting the burglary and a description of the suspects is not such a call, and if the suspects are seen the state patrol officers should notify the sheriff by radio but make no effort to apprehend them unless specifically called upon to do so.

I express no opinion on the question of liability for injury to third persons or state property. Such questions must be left for determination upon a specific state of facts.

Nothing in this opinion is to be construed as passing on the question of liability for expenses or pay for members of a *posse comitatus*. See 22 O.A.G. 339; 22 O.A.G. 781; Compare 12 O.A.G. 339; 11 O.A.G. 829; 9 O.A.G. 316.

WAP/JHB

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*County Boards—Leases—Easements*—An easement and option to lease, with proposed lease annexed, is as legally binding upon a county as a single instrument would be which would include the lease terms and be executed *in praesenti*.

August 29, 1958.

WILLIAM T. BRADY,  
*District Attorney,*  
Juneau County.

You state that Juneau county proposes to enter into an easement with a mining company granting to the mining company the right to explore certain county-owned lands held under the forest crop law, for the purpose of determining the existence of iron ore; the said easement will give to the mining company the option to lease this land from Juneau county at any time within five years from the date of the easement. It is proposed that the county board will approve the easement and the lease, the easement to be executed immediately, but the lease will not be executed until such time as the mining company may exercise its option to enter into such lease.

You ask whether such action by the county board adopting said easement and form of lease and directing the chairman and clerk to execute the easement immediately and to execute the lease at such future time as the mining company may exercise its option to lease the premises, is a legal and binding upon the county as if the lease and easement were combined into one document and executed at this time.

The problem stems from the fact that under the provisions of ch. 77, a use of this land inconsistent with the purpose of the forest crop law necessitates a withdrawal of the

land from under the provisions of the forest crop law and will terminate the attendant state aid to the owner of such lands. See 40 O.A.G. 481. A lease of this land to the mining company would be an inconsistent use of the land requiring immediate withdrawal from the forest crop program.

However, we have ruled in 47 O.A.G. 11 that the present execution of the easement (with option to lease) proposed here does not provide for uses inconsistent with the purpose of the forest crop law, nor is such easement and option with proposed lease annexed, a deed or a lease that would necessitate a withdrawal of the lands from the provisions of the forest crop law. See also 45 O.A.G. 16.

It is my opinion that when the county approves and executes the easement with option to lease the land at a future date, and approves, as a separate document, the lease that would be executed upon exercise of the option by the mining company, the mining company will have the same legal rights after exercise of their option as they would have if the lease were executed along with the easement. The significant difference is that in the meantime, prior to exercise of the option to lease, the county can obtain the benefits of the forest crop law.

RGT

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*Zoning—Referendum—Towns—Procedures for enacting town zoning ordinances and amendments discussed.*

September 2, 1958.

HAROLD J. WOLLENZEN,  
*Corporation Counsel,*  
Waukesha County.

You have asked five questions relating to the enactment of a town zoning ordinance by a town which exercises village powers pursuant to the provisions of sec. 60.18 (12), and which is situated in a county which has enacted a county zoning ordinance pursuant to the provisions of sec. 59.97. Such zoning is enacted pursuant to the provisions of sec. 60.74 (7), which reads as follows:

“Town boards granted village powers by resolution adopted pursuant to section 60.18 (12) shall have power to adopt town zoning ordinances in the manner provided in section 61.35 notwithstanding any provision of this section or section 60.75 provided, however, that in counties which have adopted a zoning ordinance under section 59.97 the exercise of the power to adopt a town zoning ordinance shall be subject to approval by a referendum vote of the electors of the town held at the time of any regular annual town meeting. Any zoning ordinance adopted by a town board and any amendment thereof under this subsection shall be subject to the approval of the county board in counties having a county zoning ordinance.”

Your first question involves a situation where the town zoning ordinance was in effect prior to the adoption of the county zoning ordinance and hence no referendum was required nor held prior to its adoption. Subsequent to the enactment of the county zoning ordinance the town seeks to adopt a new ordinance. You ask whether or not the referendum requirements of sec. 60.74 (7) apply to such a situation.

Zoning is purely statutory and the statutory procedure must be followed. This principle is discussed in 43 O.A.G. 73 in which it was stated that a county board could not enact an ordinance which would modify the county zoning procedure prescribed in sec. 59.97, citing *Spaulding v. Wood County*, (1935) 218 Wis. 224, 260 N. W. 473 and *McDougall v. Racine County*, (1914) 156 Wis. 663, 146 N. W. 794. Since the county and the town are both subdivisions of the state and derive their powers from the state through its statutory enactments, the rule and reasoning of these cases and of the cited opinion of this office apply equally to both town and county zoning.

The applicable statute now in effect expressly requires such a referendum.

Your second question asks: “If the referendum vote is required . . . can it be held at a special town meeting held in accordance with the provisions of sec. 60.12, Stats?”

Sec. 60.12 provides *inter alia* that “special town meetings may be held for the purpose of transacting any lawful business which might be done at the annual meeting . . .”.

Were there no contradictory legislation specifically related to the question, the answer would be in the affirmative.

However, sec. 60.74 (7) specifically provides that such referendum shall be "held at the time of any regular annual town meeting", a requirement which is repeated in the companion subsection (8). It being a general principle of statutory interpretation that when both a general and a specific statute relate to the same subject matter, the specific statute is controlling. *Estate of Miller*, (1952) 261 Wis. 534, 53 N. W. 2d, 172. I conclude that sec. 60.74 (7) and not sec. 60.12 applies; therefore such referendum cannot be held at a special town meeting, but must be held at the regular annual meeting, provided for in sec. 60.07.

Your third question asks whether the referendum vote in such an event may be informally conducted, or, if not, in what manner should it be held.

A search of the statutes discloses no specific directions as to how such referendum shall be held. Therefore, I look to the general statute covering this subject.

Sec. 10.61 provides as follows:

"If any proposition other than the election of officers be voted upon by ballot at any town meeting the ballots cast upon such proposition shall be provided by the town clerk and be deposited in a separate ballot box in the form and manner provided by section 6.23 and a separate poll list kept of the electors voting upon such proposition. The ballots so cast shall be counted and canvassed and the result ascertained, declared and certified in like manner as in the case of ballots cast for officers."

Since such a referendum falls within the category of a "proposition other than the election of officers", the form and manner prescribed in sec. 6.23 must be used. In preparing for this election, the provisions of sec. 10.52, et seq., should be borne in mind.

Your fourth question is stated as follows:

"Can the Town Board amend their Zoning Ordinance by amendments, which would substantially result in the enactment of a new Ordinance without securing the approval of the County Board and the County Planning Commission?"

At this point, it is not necessary to decide whether or not an amendment is or could be of such a nature as to amount to a new ordinance, because the governing statute, sec. 60.74 (7) carries the same requirements in this respect

for an ordinance being adopted or for "any amendment thereof". See sec. 990.01 (1). In both instances, the enactment is subject to the approval of the county board if the county has a county zoning ordinance.

The statute does not in any case provide for approval by a county planning commission. It might be assumed that a county board, before approving or disapproving a town zoning ordinance, would in many instances be likely to seek the advice of its planning commission, if one had been created; but approval of the proposed town ordinance by a planning commission is not required, however desirable that might seem.

Your fifth question relates again to a situation where the town ordinance was first enacted in 1939, at which time neither the approval of the county board nor that of the county planning commission was obtained. You ask whether the town board may legally enact amendments to such an ordinance without county board or county planning commission approval.

Your letter does not state the facts surrounding the enactment of the ordinance. I assume that it was properly and validly enacted and that all requirements existing at that time were duly complied with. Since the town ordinance predated the county ordinance, under the present rule county board approval would not have been required at the time of enactment.

Having eliminated this factor, the only remaining question is whether or not a zoning ordinance amendment enacted by a town after the county has passed a county zoning ordinance pursuant to sec. 59.97 requires (1) county board approval or (2) county planning commission approval. This is answered by the answer to your fourth question, *supra*.

GFS

*Conservation Commission—Appropriation and Expenditures—Locks and Dams*—The state is prohibited by Art. VIII, sec. 10, Wis. const., from maintaining the lock and dam at Eureka for navigation purposes if the payment therefor is to be made from state funds.

September 3, 1958.

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

You have informed me that under the conditions of the presently pending transfer of the upper Fox river system to the state of Wisconsin that navigation by means of pull-over installations at each dam was considered adequate for the system for full utilization of the fish and game facilities. You further state that the conditions of transfer called for the dismantling of all locks for navigation purposes, and state that the presently existing locks at Portage, Montello, and Princeton would be remodeled for water control purposes and would no longer serve as boat locks.

You further state that there is a strong demand for re-conditioning and reopening of the Eureka lock to make more extensive boat navigation through this lock along various portions of the upper Fox river system. Under the conditions of the transfer the Eureka lock would come under the jurisdiction of the state of Wisconsin and more specifically under the jurisdiction of your commission.

You ask whether the state of Wisconsin can maintain and operate the Eureka lock on the upper Fox river system.

Art. VIII, sec. 10, Wis. Const., reads in part as follows:

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

This section of the constitution was construed in the leading case of *State ex rel. Jones v. Froehlich*, (1902) 115 Wis. 32, 91 N. W. 115, which involved levees and other navi-

gational improvements along the Wisconsin river near Portage. In that case the court held that such works were works of internal improvements which could not be paid for out of state funds. The same subject has been considered in several opinions of the attorney general: 36 O.A.G. 264; 44 O.A.G. 148; and 45 O.A.G. 28.

These opinions fully support the conclusion that the state can maintain navigational improvements such as locks and dams on navigable waterways only as an incident to a substantially wholly owned state park and not otherwise. In 44 O.A.G. 148 it was stated that the state could not maintain a dam at the outlet of Thunder lake for the maintenance of lake levels and the improvement of navigation, and in 45 O.A.G. 28 a similar result was reached in the case of Rush lake. The same ruling was followed in an informal memorandum of the attorney general in regard to Mirror lake.

Accordingly, it would appear clear that the state could not undertake maintenance for navigational purposes of the lock and dam at Eureka out of state funds.

I point out to you that the constitutional provision concerned does not apply if grants are made to the state for the purpose of maintaining a specific work of internal improvement concerned. That is, if any private persons or private group should make a donation to the state for this purpose, or if funds should be received from the federal government, possibly from Pittman-Robertson funds or Dingell-Johnson funds, for this purpose, the funds so donated or granted could be used for the purpose of the grant in maintaining the lock and dam.

RGT

*Navigable Waters—Refuse*—Tree tops discarded during lumbering operations are debris or refuse within the meaning of sec. 29.288, and depositing such tree tops upon a navigable waterway of this state is in violation of that section.

September 4, 1958.

BRUCE R. RASMUSSEN,  
*District Attorney,*  
Dodge County.

You have inquired whether the deposit upon ice of a navigable water of tree tops discarded during lumbering operations is a violation of sec. 29.288.

Sec. 29.288 reads as follows:

“Throwing refuse in waters. Whoever deposits, places or throws into any waters within the jurisdiction of the state, or leaves upon the ice thereof, any cans, bottles, debris, refuse or other solid waste material, shall be fined not more than \$100 or imprisoned not more than 30 days, or both. In addition each license issued to any such person under this chapter shall be revoked by the court in which such person is convicted and he shall not again be eligible for a license under this chapter for a period of one year.”

This statute on its face represents one more step in the continuing program of the state to seek a final termination of the abuse of our greatest single natural asset—our navigable waters—by pollution, dumping of refuse, rubbish and waste, and other materials which litter the waters and impair their usefulness for all public purposes including, as of today, particularly, the recreation and enjoyment of scenic beauty. As such it is complementary to the somewhat more limited statute, sec. 29.29 (3), which came into the statutes substantially in its present form, by the enactment of ch. 668, Laws 1917. It is also complementary to, and not in conflict with, statutes having a similar purpose such as secs. 144.51 to 144.57 and 26.12 (6) (d).

As far back as 1880 by ch. 314, Laws 1880, the legislature had prohibited the throwing of waste from the manufacture of lumber into the Wisconsin river or its tributaries. By ch. 134, Laws 1881, the legislature prohibited the dumping of lumber mill waste into any lake or bay of the state con-

nected with the great chain of lakes navigable by vessels or steamers. 38 O.A.G. 127, 128.

The foregoing statutes continued in operation until sec. 29.29 (3) was created in 1917.

When it was found that sec. 29.29 (3) appeared to have a limited application and was ineffective in halting the pollution of a navigable water, the legislature in 1927 created secs. 144.51 to 144.57 to confer extensive powers upon the state board of health in regard to water pollution, and these statutes were strengthened in 1949 by the creation of the state committee on water pollution.

In 38 O.A.G. 127 above referred to it is pointed out that the statutes as they then existed, while they overlapped, did not involve any conflict or inconsistency, and both were operative. Sec. 29.29 (3) has also been construed in opinions of the attorney general, 37 O.A.G. 307 and 38 O.A.G. 404.

With the marked success the state has had in combatting the pollution of waters since 1949, the attention of the legislature has now been directed by intensive state-wide and national campaigns against the litterbugs who befoul not only our lands, parks and highways, but also our scenic and recreational waters.

The distinction between the newly enacted sec. 29.288 and the previously existing sec. 29.29 (3) is that the new section is not restricted to those substances which would cause a pollution of the water or be deleterious to fish life, but to all substances which would be offensive from the scenic or aesthetic standpoint. The statutes should be construed to effect the legislative purpose of penalizing those litterbugs who would use our navigable waterways as a dump for their refuse.

Turning now to a consideration of the specific language of the statutes to see if it is inclusive enough to include tree tops discarded during a lumbering operation, we find that it includes the two all embracing words "debris", and "refuse".

Webster's New International Dictionary, second edition, defines the terms as follows:

Debris: "Rubbish, esp. such as results from the breaking down or destruction of anything";

Rubbish: "Waste or rejected matter; anything worthless or valueless; trash; debris";

Refuse: "That which is refused or rejected as useless; worthless matter; rubbish; scum; dredge; leavings, etc."

It would appear clear that discarded tree tops come within the express definition of "waste or rejected matter", "that which is refused or rejected", or of "leavings". Hence it would appear that tree tops are within the express language of sec. 29.288 and that their deposit upon the navigable waterways of the state at a time when that waterway may be frozen is in violation of the express terms of this statute and should be punished accordingly.

In so ruling I am not unmindful of the provisions of sec. 26.12 (6) (d), which provide for civil penalties for throwing lumbering slash into or upon the navigable waters of the state. Just as sec. 144.53 has been properly construed as supplemental to sec. 29.29 (3), the new and all embracing penal provisions of sec. 29.288 can only be construed properly as supplementing and strengthening sec. 26.12 (6) (d).

In summary, the throwing of rejected tree tops, the leavings from lumbering operations, upon the navigable waters of this state is in violation of sec. 29.288.

RGT

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*Legislature—Lobbying*—Sec. 13.62 (3) (b) defining unprofessional conduct by lobbyists, applies only during sessions of the legislature and the period from the general election to the commencement of the general session, by virtue of sec. 13.66 (3). It has no effect upon the duty of lobbyists to make reports of their expenditures pursuant to sec. 13.67 (1).

September 15, 1958.

ROBERT C. ZIMMERMAN,  
*Secretary of State.*

You have requested an opinion regarding the time during which sec. 13.62 (3) (b), created by ch. 706, Laws 1957, is effective and what if any effect it has upon the requirement

that lobbyists report their expenditures monthly during the sessions of the legislature.

The statutes involved in this opinion are the following :

“13.61 Lobbying regulated; legislative purpose. The purpose of ss. 13.61 to 13.71 is to promote a high standard of ethics in the practice of lobbying, to prevent unfair and unethical lobbying practices and to provide for the licensing of lobbyists and the suspension or revocation of such licenses.

“13.62 Definitions. The following words and phrases shall have the meaning respectively ascribed to them :

“\* \* \*

“(3) UNPROFESSIONAL CONDUCT. (a) \* \* \*

“(b) Directly or indirectly furnishing or being concerned in another’s furnishing to the governor, any legislator, or to any officer or employe of the state, to any candidate for state office or for the legislature, any food, meal, lodging, beverage, transportation, money, campaign contributions or any other thing of pecuniary value. This paragraph does not apply to entertainment by a nonprofit organization at a bona fide social function or meeting of such organization.”

“13.63 \* \* \*

“(2) SUSPENSION OR REVOCATION OF LICENSE. Upon verified complaint in writing to the district attorney of Dane county charging the holder of a license with having been guilty of unprofessional conduct \* \* \*, the district attorney is hereby authorized to bring civil action in the circuit court for Dane county against the holder and in the name of the state as plaintiff to revoke the license. \* \* \* If the court finds for the plaintiff judgment shall be rendered revoking the license and the clerk of the court shall file a certified copy of the judgment with the secretary of state. \* \* \* The licensing authority may commence any such action on his own motion.”

“13.66 Restrictions on practice of lobbying. \* \* \*

“\* \* \*

“(3) *The restrictions upon the practice of lobbying provided by ss. 13.61 to 13.71 shall be effective only during the regular and special sessions of the legislature and for the period between the general election and the commencement of the regular session.*

“13.67 Reports by lobbyists; reports to legislature.

(1) Every lobbyist required to have his name entered upon the docket shall, within 10 days after the end of each calendar month of any regular or special session of the legislature, file with the secretary of state a sworn statement of expenses made and obligations incurred by himself or any agent in connection with or relative to his activities as such

lobbyist for the preceding month or fraction thereof, except that he need not list his own personal living and travel expenses in such statement.

“(2) \* \* \* Any expenditures made or obligations incurred by any lobbyist in behalf of or for the entertainment of any state official or employe concerning pending or proposed legislative matters shall be reported according to this section.”

It will be observed that sec. 13.62 (3) (b) defines the conduct therein described as “unprofessional conduct”. The “unprofessional conduct” referred to in that section is not made a criminal offense, but under sec. 13.63 (2) it constitutes grounds for revocation of the lobbyist’s license by civil action in the circuit court for Dane county.

The answer to your first question is that since the definition of “unprofessional conduct” is a restriction on the practice of lobbying contained within secs. 13.61 to 13.71, therefore by reason of sec. 13.66 (3) it is effective only during sessions of the legislature and between the general election and the commencement of the regular session. In view of the clear language of sec. 13.66 (3), the references must be taken as applying to successful candidates for the legislature and state offices during the time between the election and the time that they are sworn in, and to the practice of making campaign contributions after the election, purportedly to help successful candidates to pay debts incurred during the campaign. The statute must also be taken as including candidates for the legislature at special elections occurring during sessions.

In your letter you point out that by sec. 13.67 (1) the lobbyist is required to make monthly sworn statements of his expenses other than his own personal living and travel expenses and you suggest that “if the lobbyist complies with s. 13.67 (1) by filing a monthly statement of expenses, he is in direct violation of s. 13.62 (3) (b)”.

No doubt this would be true if the statement revealed that the lobbyist had expended moneys for purposes which are defined as unprofessional conduct by sec. 13.62 (3) (b). If the lobbyist has made any such expenditures which are required to be reported, and fails to report them, he is guilty of a criminal violation of sec. 13.67 (1) (since sec. 13.69 (3) establishes a criminal penalty for such violation)

or of false swearing under sec. 946.32 of the criminal code. If he does report the expenditures he creates evidence which may be used against him in an action to revoke his license. Thus the statute has a double edge which should prove very effective in discouraging lobbyists from making the type of expenditures referred to in sec. 13.62 (3) (b).

The constitutional privilege against self-incrimination (Art. I, sec. 8, Wis. Const.) presents no problem, since the violation of sec. 13.62 (3) (b) is not a criminal offense.

A lobbyist may incur reportable expenses under sec. 13.67 (1) which do not constitute unprofessional conduct. He may, for example, have statements typed or printed for distribution to the legislature as authorized by sec. 13.66 (2). He may arrange for the appearance by an expert at a legislative committee hearing, paying the expert's fees and expenses. It follows that not every expense reported to the secretary of state will necessarily jeopardize the license of the lobbyist. If expenses are reported which constitute unprofessional conduct, the matter may be referred to the district attorney of Dane county for investigation and revocation action.

WAP

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*Counties—Children's Boards*—Sec. 48.56 (1) (b) does not permit creation of new county children's boards.

September 17, 1958.

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

You ask whether sec. 48.56 (1) (b), requiring each county to provide county welfare services through the staff of one or more of specified agencies, including a "county children's board organized under s. 48.29 or 59.08 (9a) (Stats. 1953)", permits the creation of county children's boards in counties which do not at the present time have such boards. I believe your question must be answered in the negative.

Sec. 48.29, Stats. of 1953, which authorized the establishment of a county children's board in counties with a population of less than 250,000, was repealed by ch. 575, Laws of 1955, by which sec. 48.56 (1) (b) was created. Sec. 59.08 (9a), Stats. of 1953, was repealed by ch. 651, Laws of 1955. The general rule is pointed out in 50 Am. Jur. 532 to the effect that

"Aside from matters and transactions past and closed, and aside from the use of repealed statutes as an aid in the interpretation of existing statutes, the general rule is that where a statute is repealed without a re-enactment of the repealed law in substantially the same terms, and there is no saving clause or a general statute limiting the effect of the repeal, the repealed statute, in regard to its operative effect, is considered as if it had never existed. \* \* \*"

See, also, *State ex rel. McKenna v. District No. 8*, (1943) 243 Wis. 324, 10 N. W. 2d 155, 147 A.L.R. 290.

The language you have quoted from sec. 48.56 (1) (b) contains no specific authorization for creation of new children's boards. Ch. 575, Laws 1955, was enacted from Bill No. 444, S. which contained in its note to sec. 48.56 the following:

"\* \* \* This provision will require no additional county organization since all counties have a county welfare department. (See s. 46.22.)

"Sub. (1) (b) relating to county children's boards does not contain any of the provisions regarding the organization of those boards. The reference to the statutory provisions on organization in the 1953 statutes is all that is necessary."

Not only the language of the statute, but the note which was before the legislature when the statute was enacted indicates that it was not contemplated that new children's boards would be established.

BL

*Motor Vehicle Department—Operator's License*—Persons holding out-of-state driver's licenses must surrender them to the Wisconsin motor vehicle department when applying for a Wisconsin license. A receipt shall be issued and shall constitute a temporary license for not more than 30 days. Failure to pass examination cancels temporary license.

September 18, 1958.

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

You have requested an interpretation of sec. 343.11 (1) and (2) of the statutes which read as follows:

“(1) The department shall not issue a license to a person previously licensed in another jurisdiction unless such person surrenders to the department all valid operator's licenses in his possession issued to him by any other jurisdiction, which surrender operates as a cancellation of the surrendered licenses insofar as the person's privilege to operate a motor vehicle in this state is concerned. When such applicant surrenders his license to the department, the department shall issue a receipt therefor, which receipt also shall constitute a temporary license to operate a motor vehicle while the application for license is being processed. Such temporary license shall be valid for a period not to exceed 30 days.

“(2) Upon the expiration of 30 days following the application, the department shall return all surrendered licenses to the issuing department together with information that the licensee is now licensed in this state or has been refused a license by this state, whichever the case may be.”

You state that persons who come to your examining stations and complete an application for operator's licenses are asked by the examiner at the time of the application whether or not they hold a valid operator's license issued by any other state. If they do, the examiner asks surrender of the out-of-state license and if the examination is satisfactorily passed, a receipt as authorized by sec. 343.11 is issued to the applicant which constitutes a temporary license for a period of thirty days. If, however, the applicant fails the examination, his out-of-state license is not returned to him nor is he issued any receipt for the out-of-state license. Instead, the applicant is offered a temporary instruction per-

mit under which he may drive, accompanied by a licensed driver to practice driving in an effort to improve and correct the errors present in his examination.

You state that you have received several questions relating to your authority to confiscate the out-of-state licenses and then refuse to return the license or issue a receipt for this license under sec. 343.11. You ask whether you are correct in refusing to restore to the applicant his out-of-state license when he has failed to qualify in an examination for a license in this state.

The fact situation in connection with the problem you present would most often arise when a person has changed his residence to this state. Once a person becomes a resident of this state he is required to secure an operator's license from this state and a foreign license no longer evidences the granting of the privilege by this state under sec. 343.05 (2) (c).

Sec. 343.16 (2) authorizes your department to require any applicant for a license to submit to a special examination to determine his competency to operate a vehicle on the highways of this state and sec. 343.06 (8) prohibits the department from issuing a license "To any person who is required by this chapter to take an examination, unless such person takes and successfully passes such examination. \* \* \*".

A "license" is defined by sec. 343.01 (2) (b) as "any authority to operate a motor vehicle granted pursuant to ch. 343, \* \* \*". This definition obviously includes the temporary license provided for under sec. 343.11 (1). Accordingly, you are precluded from granting any authority to operate a motor vehicle in this state to a person who fails to pass a test of his ability to drive.

Since sec. 343.11 is not a clear and unambiguous provision, it requires statutory interpretation within established legal principles. Thus, a statute must be construed to give effect to the intent and purpose of the legislature and at the same time avoid absurdity. 2 Sutherland, *Statutory Construction*, 2d ed., 730; *Rice and others v. Ashland County*, 108 Wis. 189; and *Connell v. Luck*, 264 Wis. 282.

You are faced with a dilemma created by apparently conflicting dictates of ch. 343. Sec. 343.11 (1) and (2) appar-

ently require that you pick up the out-of-state license of an applicant for a Wisconsin license and return it to the state which issued the license with a report as to whether the person has or has not been licensed by this state, and further that you issue a receipt for the surrendered out-of-state license which shall constitute a temporary license not to exceed thirty days.

On the other hand, you are not to license a person who has failed the examination.

Since the statute specifically prohibits the issuance of a Wisconsin license to a person licensed in another jurisdiction unless such out-of-state license is surrendered, you may require the surrender of the license prior to initiating procedures by your department which might result in the issuance of a license. Upon surrender of the out-of-state license, you should issue the receipt which constitutes a temporary license for a period not to exceed thirty days.

Since the temporary license is good for a period not to exceed thirty days, while the application is being processed, the intention is clear that it may be cancelled at any time it is discovered that the person falls into a class of persons to whom the law prohibits issuance of a license. This may be an hour later when the person fails to pass the examination given by your department or at any later time when disqualifying facts are revealed to the department.

If the applicant fails to pass the examination, the receipt should be stamped in a manner to indicate that it is not a temporary license to drive and an order cancelling the driving privilege should be served on the person at the same time.

LLD

*Legislative Council—Statutes*—Declaration of policy in proposed legislation creating sec. 245.001, and repealing and recreating sec. 245.01 does not change existing law.

September 18, 1958.

JOHN R. DEVITT,  
*Office of Corporation Counsel,*  
Milwaukee County.

As chairman of the subcommittee on public policy of the family law committee of the state legislative council you have submitted drafts of two bills relating to family law. One of these drafts repeals and recreates sec. 245.01 of the statutes to read:

**“245.01 A civil contract, a legal status, and a social institution. Marriage, so far as its validity in law is concerned, is:**

**“(1) A civil contract, to which there are three parties, namely, the husband, the wife and the state, and to which the consent of the parties capable in law of contracting is essential.**

**“(2) The continuing status or relation of a man and woman who have been legally united as husband and wife.**

**“(3) The social institution formed by union of husband and wife for the purpose of establishing the family, which is the basic unit of society.”**

The other creates sec. 245.001 of the statutes to read:

**“245.001 Declaration of policy, and intent and construction of title XXIII, relating to family law. The public policy of the state as to family law, in the furtherance of which this title is enacted, is declared to be as follows:**

**“Marriage is the institution that is the foundation of the family and of society. Its stability is regarded as basic to morality and civilization, and of vital interest to society and the state, greater even than the private interests of the spouses. The consequences of the marriage contract are more significant to the body politic than those of other contracts, and the state never stands indifferent, but is always a party whose interest must be taken into account. It is the intent of this title to promote the best interests of marriage as defined in section 245.01.”**

With reference to the first of the above drafts you have raised two questions.

1. Does the naming of the state as a party to the contract change existing law?
2. Does the describing of marriage as a social institution change existing law?

With reference to the second draft two questions are also raised.

1. What is the effect of the adoption of a statutory declaration of policy?
2. Do the words "greater even than the private interests of the spouses" change existing law?

A.

1. The statutory naming of the state as a party to the marriage contract does not change existing law. Note the following language in *Fricke v. Fricke* (1949), 257 Wis. 124, 126, 42 N.W. 2d, 500:

"There are three parties to a marriage contract—the husband, the wife, and the state. The husband and wife are presumed to have, and the state unquestionably has an interest in the maintenance of the relation which for centuries has been recognized as a bulwark of our civilization. That unusual conditions have caused a marked increase in the divorce rate does not require us to change our attitude toward the marital relation and its obligations, nor should it encourage the growth of a tendency to treat it as a bargain made with as little concern and dignity as is given to the ordinary contract. Consideration of only material matters, as distinguished from those which concern its religious and moral aspects, demands that the state keep its hand upon the obligation of the husband to maintain and support his wife.  
\* \* \*"

2. A statutory statement that marriage is a social institution does not change existing law.

"Marriage is the institution that is the foundation of the family and of society. It is regarded as basic to morality and civilization, and of vital interest to society and the state, greater even than the private interests of the spouses." 35 Am. Jur. "Marriage" § 8.

The first sentence of the above quotation is based in part upon the case of *State v. Duket* (1895), 90 Wis. 272, 63 N.W. 83, 31 L.R.A. 515, 48 Am. St. Rep. 928, a leading case.

## B.

1. Policy declarations are becoming more and more common in legislation. A policy section stating the general objectives of an act is used in order that administrators and courts may know its purposes. This is frequently of significance where the enforcement of the act depends primarily upon administration and the administrative officers have not participated in the preparation of the legislation. See Sutherland, *Statutory Construction* (3d ed.) § 4820.

The policy section is available for the clarification of ambiguous provisions of the statute, but may not be used for the creation of ambiguity. *Ibid.*

Also it is elementary that statutes must be construed with reference to the objects sought to be accomplished. Numerous Wisconsin cases to this effect are cited in Wisconsin Digest "Statutes" § 184. Another way of putting it is that in construing statutes the legislative intent must prevail if reasonably discoverable. See Callaghan's Wisconsin Digest "Statutes" § 199. Naturally a policy declaration can be of great help in disclosing the legislative intent.

2. The words stating that the interest of society and the state are "greater even than the private interests of the spouses" do not change existing law and the statement is supported by the quotation from 35 Am. Jur., *supra*, as well as by the case of *State v. Duket*, *supra*. In the *Duket* case the court upheld the validity of a statute declaring that when either party shall be sentenced to imprisonment for life, the marriage shall be thereby absolutely dissolved and among other things the court held that such a provision did not impair the obligation of contracts nor constitute the granting of divorce by the legislature contrary to Art. IV, sec. 24, Wis. Const. This makes it quite clear that the interests of the parties are subordinated to the policy of the state.

WHR

*Licenses—Words and Phrases—Transient Merchants—* Itinerant photographers who operate temporarily in established business places, delivering photographs for a nominal price or without charge, are transient merchants within the meaning of sec. 129.05 (1).

September 22, 1958.

BRUCE R. RASMUSSEN,  
*District Attorney,*  
Dodge County.

You have requested an opinion whether itinerant photographers operating in Beaver Dam are required to obtain transient merchant licenses under the following circumstances:

“In one situation a photographer operating out of a Minneapolis Studio, apparently under contract by the Hoover Vacuum Company, comes into hardware stores, furniture stores and other places of business where the Hoover Vacuum Cleaner is sold, and takes pictures at nominal cost for people in the community. This service is advertised by the local store in conjunction with the Hoover Vacuum people. The people are given one picture for approximately 45 cents and are subsequently solicited by the home studio in Minneapolis for further additional pictures at, of course, a greater price.

“Another arrangement involves a studio who has some advertising contract with the Kroger Company. They come into the Kroger stores throughout the state, as they did in Beaver Dam, take a picture free of charge for the customer, and the customer is then required to come back to the store at a later date for the picture, at which time they are given the ‘opportunity’ to order additional pictures from the studio representative that is at the store. The photographer is not on the Kroger payroll as an employee. The customers are not solicited by mail, but orders taken for pictures are sent C. O. D. if not paid for at the time of order.”

“Transient merchant” is defined as follows in sec. 129.05 (1):

“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. *For purposes of this section, sale of merchandise includes a sale in which the personal services rendered upon or in connection with such merchandise constitutes the greatest part of value for the price received, but does not include a farm auction sale conducted by or for a resident farmer of his personal property used on the farm or the sale of produce or other perishable products at retail or wholesale by a resident of this state.*"

The words italicized above were added to the statute by ch. 307, Laws 1949. This bill was sponsored by Senator Padrutt, whose drafting request to the legislative reference library gave the subject as "License itinerant photographers", and the instructions were: "Amend 129.05 (1) to include photographers." There is no doubt of the legislative intent to bring photographers within the act.

However, to come within the definition the itinerant merchant must engage in the "sale of merchandise". "Sale" is defined as follows in the Uniform Sales Act, sec. 121.01 (2) :

"A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price."

In *Wausau v. Heideman*, (1903) 119 Wis. 244, 96 N. W. 549, it was held that a person who merely took orders from samples, to be filled by his principal out of a stock located elsewhere, was not a "transient merchant" under a city licensing ordinance. The orders, it may be observed, had to be "accepted" by the principal, and no sale occurred in the city of Wausau nor did the defendant bring into the city any goods which he himself sold.

Here, however, sales take place in the city of Beaver Dam, even if we leave out of account the additional photographs for which "orders" are taken at the Kroger stores.

In the case of the Hoover dealers' promotion, in each instance a single photograph is delivered and paid for at the furniture or hardware store. The property right to the photograph passes to the purchaser at that time. Clearly, the photographer is engaged in the sale of merchandise at that place, and since he "does not intend to become and does not become a permanent merchant of" Beaver Dam, he is within the definition of sec. 129.05 (1).

The Kroger store promotion differs in that there is no money charged for the initial photograph. Is the transaction a sale or a gift? This depends upon whether in return for transfer of the property in the goods, the seller receives "a consideration called the price". Sec. 121.01 (2).

The consideration need not be money. The commissioners on uniform laws deliberately omitted the term "money consideration" found in the English Sales Act. Commissioners' Note, 1 U. L. A. 158. And it has been held that the privilege of dumping a large supply of obsolete greeting cards was sufficient consideration to support a transfer of title in the cards to the salvage firm owning the dump, and that the transaction was a "sale", even though the "seller" paid the "buyer" a small fee for the dumping privilege. *H. S. Crocker Co. v. McFaddin*, (1957) 148 Cal. App. 2d 639, 307 P. 2d 429, 433.

Here the person receiving the picture must first go to the store to be photographed and again to get the picture. On the second occasion he is subjected to the sales pressure designed to procure an order for more pictures, which is the photographer's source of revenue from the business. No doubt the Kroger Company also benefits from the store traffic engendered by the transactions and in return makes the space available to the photographer. That the advantage to the one party and disadvantage to the other which are involved in the attraction of prospective customers into a store are "consideration" was held in *State ex rel. Regez v. Blumer*, (1940) 236 Wis. 129, 131-132, 294 N. W. 491, a lottery case. If it is sufficient consideration for a lottery, it would appear sufficient likewise for a sale. Therefore, it is immaterial that no money is charged for the first picture. The photographer gets the consideration he bargains for, which becomes the "price" of the picture.

The foregoing makes it unnecessary to consider the problems involved in determining whether the photographers are transient merchants for the further reason that additional pictures are sold under the circumstances stated in your letter.

WAP

*Insurance—Warranty—Words and Phrases—Used-car “warranty” plans are insurance.*

September 23, 1958.

PAUL J. ROGAN,

*Commissioner of Insurance.*

You have requested an opinion on whether the operation of so-called “used-car warranty” plans constitutes engaging in the business of insurance. It appears that several business concerns issue so-called “warranties” or “guarantees” of used automobiles that are sold by such organizations in this state to automobile dealers who use them here as an inducement to the purchase of a used automobile from such dealer and either give or sell them to the purchaser of the used-car in connection with sale to him. Some of such organizations are now operating such a plan in the state and information is that others propose to do so. Your inquiry is as to the classification of such transactions.

From information furnished by you and supplied by interested concerns, the following summary of the activities of such concerns is typical:

The organization enters into an agreement with an automobile dealer providing that, for a fixed charge or fee to be paid it by the dealer, the trained inspectors of the organization will inspect a used automobile of the dealer. If the used-car passes the inspection, the organization issues a so-called “warranty” or “guarantee” form covering the named parts of the vehicle. At the time of the sale of the vehicle, the dealer then inserts the purchaser’s name in the space provided in the “warranty” form and delivers it to the purchaser. If the organization rejects the vehicle upon the inspection, the dealer must make the necessary repairs which are designated before the organization will issue its “warranty” form for that automobile.

The so-called “warranty” form recites the organization’s certification that it has inspected the vehicle, giving its make, model, motor number and serial number, and that in its opinion the listed parts are in good working order and condition and will with normal usage require no repairs or replacements for one year from the date of purchase. The

form then contains an agreement by the issuing organization "that if its said certification is in error, it will protect the retail purchaser of this vehicle and the holder of this warranty from any costs of repairs which may arise for one year from the date of purchase" on the listed parts "to the extent of the total reasonable price for repairs, replacement and labor which become necessary in the normal use of" the designated vehicle. Other conditions stated in the form exclude cars registered for commercial use, adjustments and tune-ups, repairs arising out of collisions or caused by neglect or misuse or resulting from major alterations not recommended by the manufacturers.

It is provided therein that the necessity for repairs or replacements thereunder rests in the sole discretion and judgment of the issuing organization and that written authorization must be obtained therefrom before any repairs are made. Also, such "warranty" form contains a statement that it is in force for the one year only if written confirmation of protection thereunder is received by the purchaser from the organization within 10 days from the date of purchase. Upon selling the used-car described in the "warranty" form, the automobile dealer inserts, in the designated spaces provided therein, the name of the purchaser, the date of such sale and the dealer's name, and then delivers it to the purchaser. There is either a perforated portion of the form to be torn off, or a separate form of like import, in which the purchaser's name, the descriptive data identifying the vehicle, the date of the sale, and the dealer's name are inserted at the time of sale, which is to be sent by the dealer to the organization advising it of the sale of the vehicle and the delivery of the "warranty" form thereon.

Extensive study has been given to this problem of whether such plans are to be classified as insurance. In the course thereof, the several cases from various jurisdictions that have dealt with the general problem of what business transactions constitute insurance have been reviewed. Also, we have been furnished with memoranda of law by attorneys for some of such organizations. Also, the opinions of a number of attorneys general from other states on this precise question have been fully considered.

The Wisconsin statutes do not define the business of insurance. Resort therefore must be made to basic concepts to serve as the guidelines in the determination of the question here involved. In *Shakman v. U. S. Credit System*, (1896) 92 Wis. 366, 374, 66 N.W. 528, our supreme court defined an insurance contract as “\* \* \* a contract whereby one party agrees to wholly or partially indemnify another for loss or damage which he may suffer from a specified peril”. This definition has been widely quoted. Many accepted definitions substitute “an unknown or contingent event” for peril. In general, a contract of insurance is said to embody the following elements: (1) an insurable interest owned by the insured; (2) subjection of that interest to a specified risk; (3) assumption of the risk by the insurer; (4) absence of control over the risk by either party; (5) distribution of actual losses among a large group bearing similar risks; and (6) payment of a premium. Vance, on Insurance (1951).

There are cases from other jurisdictions holding that various contracts are not insurance contracts, which it is contended apply in principle here. Among them are: *People v. May*, (1914) 162 App. Div. 215, 147 N.Y.S. 487, aff'd. 212 N. Y. 561, 106 N.E. 1039; *Transportation Guarantee Co. v. Jellins*, (1946) 29 Cal. 2d 242, 174 P. 2d 625; *State v. Standard Oil Co.*, (1941) 138 Ohio St. 376, 35 N.E. 2d 437. On the other hand, there are other cases which appear to be to the opposite effect as applied here, such as *State v. Western Auto Supply Co.*, (1938) 134 Ohio St. 163, 16 N.E. 2d 256; *Physicians' Defense Co. v. Cooper*, (1912) 199 Fed. 576; and *Ollendorf Watch Co. v. Pink*, (1938) 279 N.Y. 32, 17 N.E. 2d 676.

To review in detail all of the cases pro and con, and also review the opinions of the several attorneys general upon this very question, which appear to be about equally divided numerically thereon, would be lengthy and be of little value. Some of the differences in the cases appear to arise out of local statutory provisions and decisions. Others, like some of the opinions of attorneys general that hold such transactions are not insurance, appear to go on the assumption that the inspection by the “warranty” organization is such as to eliminate all but the remotest possibility of there

being any flaw or lack of capacity to last for a year's operation in the specified parts, and therefore, the organization has in effect the same control thereof as would a manufacturer in warranting tangible goods against defects in material or workmanship. In others of the cases and opinions, the conclusion reached is grounded upon a determination of whether the basic purpose of the transaction is the creation of an indemnity contract for sale purposes. In so doing, the entire transaction is viewed as a whole.

The latter view appears to be the sound and realistic approach. It gives full effect to the proposition recited in *State v. Standard Oil Co.*, *supra*, that ours is a system of free enterprise and business and enterprise should not be unduly restricted or interfered with, but should be allowed all the freedom in the conduct and management of its affairs that is consistent with the public interest and welfare. It does this by not treating as insurance those business transactions which are only service or maintenance contracts. Yet, at the same time, it does give full operative effect to the public policy expressed by the legislature in our insurance statutes of the need for protecting the public where business transactions carried on are of an indemnity character.

Such approach is not without precedent in prior opinions of this office. In 15 O.A.G. 368, an agreement to indemnify the owner of machinery against damage caused by breakdown of machinery was concluded to be an insurance contract because the provision which gave the company the option either to repair and replace the serviced machinery or pay any loss in money was viewed as making it an indemnity agreement. On the other hand, in 25 O.A.G. 192, your department was advised that a plan of prepayment at a fixed monthly or yearly rate for future medical services to a clinic was not a contract of indemnity but for services. In 39 O.A.G. 509, plans for the protection of merchants against loss on dishonest checks and money orders cashed by them were considered, and as the plans contained all of the elements of insurance, and particularly a distribution of the risk, they provided indemnity and were said to be insurance.

As indicated in this last mentioned opinion, the determination of whether a transaction is to be classified as insurance is not on the basis of a consideration of each contract,

by whatever label it may be designated, as an isolated transaction. Rather, the determination is to be made upon viewing the entire conduct of the business of issuing such contracts as a whole. When this is done, it is apparent that these plans embrace all of the elements of insurance set out by Vance.

Upon analysis of the entire transaction of issuing these so-called "warranty" contracts, there are a number of considerations that definitely point out that the principle overall intent and effect of these plans is the providing of indemnity to the used-car purchaser. It is urged that these "warranty" contracts are of the nature of service or maintenance contracts. While an inspection is made of the vehicle before the certificate is issued, at most it is merely a condition precedent analogous to a physical examination by a doctor prior to the issuance of a life insurance policy, or by insurance company inspectors before the issuance of steam boiler insurance or the usual fire insurer's inspection of mercantile and business property risks. The object and purpose thereof is to cut down the risk. No further service *is contemplated* for a vehicle which passes the inspection, except by way of protecting the purchaser from the expense of repair or replacement of the covered parts of the vehicle which fail to stand up for the one year after the so-called "warranty" is issued. This certainly is not service but indemnity.

It is also argued that such plans are sold to the automobile dealer to provide him with service. Practicalities require the rejection of any such idea. It is essential to and part of an automobile dealer's business that he maintain and have available adequate mechanical equipment and personnel. Thus, he has no occasion to purchase inspection from others, except for the indemnity aspects thereof to promote his sale of used cars.

A used-car buyer, of course, is desirous of avoiding future repairs and the expense thereof. But, if he obtains protection against this, he is not concerned whether it is through an inspection or not, so long as he gets it. This demonstrates that in the final analysis, the inspection is basically for the protection of the issuer of the "warranty" rather than the purchaser. It is so the "warranty" organi-

zation can refuse to cover a vehicle, and require that whatever the inspection shows is deficient be eliminated before it issues the "warranty". This shows the inspection is merely a part of underwriting or selection of risks which is a part of the writing of insurance.

The most emphatic argument made by these organizations is that the so-called "warranty" is merely a warranty that the inspection is correct, and an agreement to stand behind it if it is erroneous. However, in addition to the fact that this involves looking only at an isolated part of the plan, which is an improper approach, the plan as a whole is not merely the selling of such inspection with a warranty of its sufficiency.

That the plan is not such is shown by reference to the decision in *People v. May, supra*. There a proposed amendment to articles of incorporation was refused on the ground it contemplated an insurance business. It proposed that the company in supplying financial reports and opinions to merchants would be responsible to them for the accuracy thereof in any material respects and pay measured damages thereto in the event that the financial report or opinion is inaccurate. The Court, although holding such transactions were not insurance, said the company merely furnished its financial service, making a charge commensurate with the value in their relation to the responsibility assumed, but that in merely guaranteeing that the report was true as of the date thereof and limiting its liability to that incident, it did not assume to guarantee any credit extended thereon where the report was truthful and accurate. Thus the Court said: "It is one thing to guarantee the accuracy of one's own work, and quite another to assume the risk of future insolvency". Here, under the so-called "used-car warranty" plans, the issuing organization assumes to pay damages notwithstanding that its inspection was truthful and accurate. In effect, it assumes the risk of "future" failure of the parts specified, since the condition of the automobile might be good at the time of the inspection and still something go wrong during the ensuing year. In fact, that does happen, for under such plans as have been in operation, payments totalling a very substantial amount have been made by the issuing organizations for repairs and re-

placements on used-cars sold under such a plan. The tests involved in the inspections do reduce the risk of something going wrong but they do not and cannot eliminate it. Thus, the contract assumes to indemnify against a future risk that is substantial.

Upon considering these plans on an overall basis, it appears quite clearly that their purpose is the providing of indemnity to the used-car buyer against the risk of future expense for the repair or replacement of specified parts thereof, and therefore, such so-called "used-car warranties" are contracts of insurance and the issuance thereof under a plan as outlined is engaging in the business of insurance.  
HHP

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*Insurance—Bonds—Words and Phrases*—Bonds issued by housing authorities, though secured by pledge of U. S. government and qualifying as legal investments under sec. 219.06 (1), are not acceptable as deposits of securities by insurers under sec. 209.01 (3).

September 30, 1958.

PAUL J. ROGAN, *Commissioner,*  
*Wisconsin Insurance Department.*

You ask whether the requirements of sec. 209.01 (3), relating to the deposits of "bonds, notes or other evidence of indebtedness which are *direct obligations of the United States*", may be satisfied by the deposit of bonds of a public housing authority of a city in another state when such bonds are secured by a pledge of the faith of the United States to the payment of annual contributions pursuant to the United States Housing Act of 1937, as amended.

Sec. 209.01 (1) provides:

"The state treasurer shall accept, subject to the approval of the commissioner of insurance, deposits of securities by insurers as follows:

"(a) Deposits in amount as required to be made as prerequisite to a certificate of authority to transact business in this state and other deposits required by the laws of this state.

“(b) Deposits of domestic insurers or insurers of foreign countries in amount as required to be made by the laws of other states as prerequisite for authority to transact insurance in such other states.

“(c) Deposits in amount as resulting from application of the retaliatory provisions of section 76.35.

“(d) Deposits in other additional amounts permitted to be made by the laws of this state.”

Sec. 209.01 (2) provides:

“Each such deposit \* \* \* shall be held by the state treasurer in trust for the protection of all policyholders of the insured making it; \* \* \*”.

Sec. 209.01 (3) provides:

“All such deposits shall consist of bonds, notes or other evidences of indebtedness *which are direct obligations of the United States* \* \* \* with the proceeds to be available to the state treasurer.”

The phrase which requires consideration is “direct obligations of the United States”. As you have indicated, in Volume 41, Opinion No. 24, dated May 15, 1953, the Attorney General of the United States stated:

“A contract to pay annual contributions entered into by the Public Housing Administration in conformance with the provisions of the act is valid and binding upon the United States, and the faith of the United States has been solemnly pledged to the payment of such contributions in the same terms its faith has been pledged to the payment of its interest-bearing obligations.”

It may be concluded, therefore, that the municipal housing authority bonds issued in conformance with the provisions of the United States Housing Act of 1937, as amended, are obligations of the United States in the sense that the United States has pledged its faith to the eventual payment of the same. The question is whether these are “direct” obligations of the United States within the meaning of sec. 209.01 (3).

“Direct” means of a character or relation like that of straightness of course, specifically; free from intervening agencies or conditions; hence, characterized by immediate-

ness of relation or action; not mediate. *Louisville and N. R. Co. v. Fowler*, 197 Tenn. 266; 271 S.W. 2d 188, 194.

There are certain federal statutes which are of some help in this connection.

"The faith of the United States is solemnly pledged to the payment in coin or its equivalent of all the obligations of the United States not bearing interest, known as United States notes, and of all the interest-bearing obligations of the United States, except in cases where the law authorizing the issue of any such obligations has expressly provided that the same may be paid in lawful money or other currency than gold and silver. \* \* \*." Act of Mar. 18, 1869, c. 1, 16 Stat. 1, 31 U.S.C.A. § 731.

"With the approval of the President, the Secretary of the Treasury may purchase gold in any amounts, at home or abroad, with any *direct obligations*, coin, or currency of the United States, authorized by law, or with any funds in the Treasury not otherwise appropriated, at such rates and upon such terms and conditions as he may deem most advantageous to the public interest; \* \* \*." (Italics supplied.) Act of Mar. 17, 1862, c. 45, § 1, 12 Stat. 370, 31 U.S.C.A. § 734.

"Whenever and so long as the proportion of silver in the stocks of gold and silver of the United States is less than one-fourth of the monetary value of such stocks, the Secretary of the Treasury is authorized and directed to purchase silver, at home or abroad, for present or future delivery with any *direct obligations*, coin, or currency of the United States, authorized by law, \* \* \*." (Italics supplied.) Act of June 19, 1934, c. 674, § 3, 48 Stat. 1178, 31 U.S.C.A. § 734a.

"The term 'interest-bearing security of the United States' or 'security', wherever used in this section, means any *direct obligation of the United States* issued pursuant to law for valuable consideration and which by its terms bears interest, or is issued on a discount basis, and includes (but is not limited to) bonds, notes, certificates of indebtedness, and Treasury bills, and interim certificates issued for any such security, and also means any bond issued under section 780 of Title 26." (Italics supplied.) Act of July 8, 1937, c. 444, § 8 (a)-(d), 50 Stat. 481; Aug. 10, 1939, c. 665, §4, 53 Stat. 1359; Nov. 8, 1945, c. 453, § 153, 59 Stat. 574, 31 U.S.C.A. § 738a, (c).

"Whenever any *direct obligation of the United States*, bearing interest or sold on a discount basis, is donated to the United States, is bequeathed by will to the United States, become the property of the United States under the terms of a trust, or is by its terms payable upon the death

of the owner to the United States or any officer thereof in his official capacity, the Treasurer of the United States upon receipt of such obligation shall effect redemption thereof. \* \* \*” (Italics supplied.) Act of Sept. 24, 1917, c. 56, § 24, April 3, 1945, c. 51 § 4, 59 Stat. 48, 31 U.S.C.A. 757e.

“\* \* \* no wholly owned or mixed-ownership Government corporation shall sell or purchase any *direct obligation of the United States* or obligation guaranteed as to principal or interest, or both, \* \* \* without the approval of the Secretary of the Treasury: \* \* \*.” (Italics supplied.) Act of Dec. 6, 1945, c. 557, Title III, § 303, 59 Stat. 601, 31 U.S.C.A. 868, (b).

A study of the foregoing acts of congress which deal with the term “direct obligation of the United States” reveals that these words could only refer to a situation where there is an immediate and primary relationship between the obligor and obligee, free from any intervening factors. This is particularly evident in the language of the statute last above quoted, i.e. “\* \* \* any direct obligation of the United States *or* obligation guaranteed as to principal or interest, or both \* \* \*”

The word “or”, as used in a statute, is a disjunctive particle indicating an alternative. 50 Am. Jur., Statutes, p. 267, sec. 281; *Cross v. Leuenberger* (1953), 267 Wis. 232, 235, 65 N.W. 2d 35. The use of the alternative would, of course, be inconsistent with any theory that the terms were synonymous or that one was included in the other. No cases or other authority have been found to assist in the interpretation of the language of the federal statute. One must conclude, however, that the congress, recognizing that an “obligation guaranteed” was not a direct obligation of the United States, undoubtedly deemed it necessary to use the specific additional language to insure that this type of non-direct obligation was covered by the Act.

It has been urged that sec. 209.01 (3) should be interpreted in the light of sec. 219.06. That statute provides in part:

“The state and all public officers \* \* \* may legally *invest* any sinking funds, moneys or other funds belonging to them or within their control in any bonds \* \* \* issued by \* \* \* any public housing authority or agency in the United States,

when such bonds or other obligations are secured by a pledge of annual contributions to be paid by the United States government or any agency thereof or by the city or county in which operates the housing authority issuing such bonds \* \* \*.”

A study of sec. 219.06 discloses that the entire purpose of the legislation was to qualify these housing authority bonds for “investment” by public officials and other fiduciaries having custody of public funds or other funds in trust; this would be in addition to their previously held authority to make legal investments of these funds in certain limited types of bonds and other obligations. This is different from the situation described in sec. 209.01 (3). Ch. 209 relates to insurance and sec. 209.01 refers to a *deposit* of securities *with* a public official, whereas ch. 219 as a whole deals with *investments* and sec. 219.06 deals with an *investment* of funds *by* a public official or fiduciary. Further, the “public deposit” referred to in sec. 219.06 (1) necessarily alludes not to a deposit *with* a public agency but a deposit *by* a public agency in this state. Even if it were to be assumed that sec. 219.06 related to the same subject matter as sec. 209.01, it would have no application here because of the well-established rule that when both a general statute and a specific statute relate to the same subject matter, the specific statute, i.e., sec. 209.01, is controlling. *Estate of Miller* (1951), 261 Wis. 534; 53 N.W. 2d. 172.

It is my opinion that bonds issued by public housing authorities, even though secured by a pledge of annual contributions by the United States government so as to qualify as legal investments under sec. 219.06 (1), are not acceptable for deposits of securities by insurers under sec. 209.01 (3).

JEA

*Real Estate Broker's Board—Words and Phrases—Cemetery*—Person selling right to entomb human body forever in fixed burial space designated as garden crypt, mausoleum crypt, or sarcophagus for commercial cemetery is selling "grave spaces" and must be licensed as cemetery salesman.

September 30, 1958.

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

You have requested an opinion of whether a person selling burial spaces designated as garden crypts, mausoleum crypts and sarcophagi for a commercial cemetery is required to be licensed as a cemetery salesman.

The brochure furnished indicates that the crypts in the garden mausoleum are placed one above another, six high, and a series of crypts arranged in this manner are situated side by side over a concrete platform and under a protective roof. In the main mausoleum, a building in this instance, crypts are similarly arranged in the various crypt rooms, and sarcophagi also appear to be in fixed position in various rooms.

You advise that it is the position of the commercial cemeteries that no sale of land or of any interest in land is involved and that their salesmen should not be required to be licensed.

Whether the sale of the "right to entomb a human body forever" in the fifth-highest crypt in such a section involves the sale of land or of an interest in land poses an interesting question; however, it is one which, in view of your inquiry, it is not necessary to consider or determine. The statute involved herein is clear and unambiguous.

It is clear from the deed form furnished that said cemetery does purport to "hereby bargain, sell and convey to" a grantee "and his heirs, the right to entomb" a human body *in a specifically designated "space"*.

Sec. 157.12 sets forth certain standards for the construction and maintenance of public mausoleums or columbariums, surface burial chambers, and vaults and tombs wholly or partially above the surface of the ground.

Sec. 157.12 (1) (b) provides in part:

“There shall be established and maintained a fund for the perpetual care and maintenance of said public mausoleum or columbarium in such sum as shall be fixed by the state board of health, but which shall in no case be less than twenty-five per cent of the cost of said structures. *Said fund shall be accumulated and established* by applying thereto at least twenty-five per cent of all *proceeds received from sales of mausoleum rooms or crypts and columbarium niches*, until such perpetual care fund has been accumulated, \* \* \*”.

Sec. 136.011, created by ch. 159, Laws 1957, provides:

“*Cemetery real estate brokers and salesmen.* Any cemetery association or corporation which pays any commission or other compensation to any person, including its officers, members or stockholders, for soliciting the sale of its *lots or grave spaces* on a commercially operated basis, and any salesman employed by it, shall be licensed under this chapter, and the cemetery association or corporation broker’s license shall be issued in its name and be governed by all provisions of this chapter relating to corporate licensees.”

The words “grave spaces” are not defined in ch. 136. Sec. 990.01 (1) provides:

“GENERAL RULE. All words and phrases shall be construed according to common and approved usage; but technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning.”

Both of these words have common and approved usage. Once we have set forth the common and approved usage of “grave”, the word “spaces” as used with it gives us no problem.

“Grave” is defined in Funk & Wagnall’s *New Standard Dictionary*, Medallion Ed. 1941, as:

“a pit or excavation in the earth for the interment of a dead body; *any place of burial; sepulcher; tomb.*” (Emphasis added)

“Grave” is defined in Webster’s *New International Dictionary*, Second Edition, 1950, as:

“1. An excavation in the earth as a place of burial; loosely, *any place of interment; a tomb; a sepulcher* \* \* \*” (Emphasis added)

A person selling the right to entomb a human body forever in a fixed burial space, designated as a garden crypt, mausoleum crypt or sarcophagus, for a commercial cemetery is selling "grave spaces" within the meaning of sec. 136.011, and must be licensed as a cemetery salesman. It is immaterial whether said "grave spaces" are located under the ground, on the surface of the ground or above the ground, or whether they are located in a building or other structure.

RJV

*Veteran—County—County Board*—Under stated conditions, employment of non-veteran as “Administrative Secretary” in office of county service officer does not violate sec. 45.43. County board has power to make employment regulations under sec. 59.15 (2).

October 1, 1958.

HAROLD A. EBERHARDT,  
*District Attorney,*  
Jefferson County.

You have submitted copies of two resolutions adopted by the county board relative to the classification and salaries of county office personnel. One resolution provides, among other things, that an additional classification is created, that of “administrative secretary” with salary at the same rate as department deputies. The other resolution recites that the classification of a certain individual in the office of the county (veteran’s) service officer is changed from secretary to administrative secretary and sets the salary therefor. In a memorandum submitted to use, it is urged that the county board, adopting these resolutions, was endeavoring to promote the individual holding this position by awarding her a higher classification which carried with it a salary increase. We have been informed that the duties of this position include filing claims, completing loan applications, making house calls and transporting veterans to hospitals. Information is not available as to whether or not the new classification of “administrative secretary” carries with it any increased responsibilities as compared to the former classification of “secretary”. We are not permitted to speculate as to possible additional facts. 45 O.A.G. 137, 139.

You have asked for my opinion as to whether the employment of a non-veteran as an “administrative secretary” in the office of the county veteran’s service officer is in violation of sec. 45.43, which provides, in part:

“\* \* \* The county board \* \* \* may appoint such assistant county service officers as are necessary, who shall be honorably discharged veterans who served the United States in time of war. \* \* \*”

That the county board has authority to abolish or create such a position and fix or change the salary of any such employe and establish regulations of employment for such a person is clear beyond question. Sec. 59.15 (2). The county board's action, however, has been attacked on the ground that the newly created position of "administrative secretary" is equivalent to an assistant county veteran's service officer, and that sec. 45.43 is violated unless such position is held by an honorably discharged war veteran.

It is true, of course, that the county board does not have the direct power to hire and fire individual clerks, typists, stenographers, etc., in county departments of government. 44 O.A.G. 262, 265. This, however, does not affect and should be distinguished from the board's previously mentioned authority to make salary changes and other employment regulations.

You have correctly concluded that it must have been the intent of the legislature when enacting sec. 45.43, that the position of county veterans service officer and assistant county veterans service officer be reserved for honorably discharged veterans. This purpose would be thwarted if a county board were permitted to create an "administrative secretary" having responsibilities equivalent to an assistant county veterans service officer. A deputy has been defined as a person appointed to act for another, a delegate who acts specifically for his principal. 43 Am. Jur. 218 Public Officers, Sec. 460. An assistant is one who aids, helps or assists and, in a restricted sense, may act in certain matters in the place or stead of the principal officer. In the present circumstances, it is certain that the so-called administrative secretary has no authority whatsoever to act in the place of the county veterans service officer.

Applicable to this situation is the presumption that a county board acts in good faith and intends to accomplish a valid and lawful result. *State v. City of Eau Claire*, (1876) 40 Wis. 533. If the language of a county board resolution is susceptible of two constructions, one rendering it void and the other valid, that construction which saves it will be adopted. *Nichols v. Halliday*, (1871) 27 Wis. 406, 409. *Ut res magis valeat quam pereat*. *The Attorney General v. City of Eau Claire, et al.*, (1875) 37 Wis. 400, 438. "In the case of

minor deliberative bodies such as county boards, the language of their resolutions will receive a liberal construction in order to effectuate their evident intent." *Burgess v. Dane County*, (1912) 148 Wis. 427, 436.

In view of the strong presumption favoring validity, the only permissible conclusion is that the action of the county board was authorized by law and operated merely to accomplish a change of title or classification of a position with accompanying salary change without affecting the duties or responsibilities involved. On the basis of the facts submitted, it must be presumed that the county board was making authorized salary and employment regulations concerning a position which probably is still essentially that of "secretary" although it may be now known as "administrative secretary" to permit a salary differential as compared with other secretarial positions.

JEA

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*Nominations*—Declination of a nomination under sec. 5.18 must be both signed and acknowledged.

October 14, 1958.

C. STANLEY PERRY

*Corporation Counsel*

Milwaukee County.

You have directed our attention to the attempted declination under sec. 5.18 of the nomination for assemblyman in one of the Milwaukee county assembly districts. It is your opinion that the declination was not in proper form and that it was not filed within the time provided by the above statute.

Sec. 5.18, as far as material here, provides:

"5.18 Declining nominations; vacancies after nomination. Any person nominated to office may decline the nomination by delivering to the officer with whom his certificate of nomination or nomination paper is filed, within one week after the last day on which nomination papers can be filed, or within one week after the primary election, a declination in writing signed and acknowledged by him. \* \* \*"

The notice of declination by the candidate requested the Milwaukee county election commission to remove or omit his name as a candidate, and it was signed by the candidate but was not acknowledged by him.

The statutory language above quoted is clear and express. It provides for "a declination in writing signed *and acknowledged*" by the candidate.

No such declination was filed because of the lack of the acknowledgment.

Sec. 990.01 (1) relating to construction of words and phrases used in the Wisconsin statutes provides in effect that such words and phrases shall be construed according to the common and approved usage; but technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning. "Acknowledgment" in the legal sense means the act of one who has executed an instrument, in going before some competent officer or court, and declaring it to be his act or deed. Cyclopedic Law Dictionary.

Sec. 235.19, the uniform acknowledgment act, sets up in (7) (a) a form of certificate which may be used in acknowledgments. The form reads:

"State of \_\_\_\_\_  
County of \_\_\_\_\_

On this the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_, before me, \_\_\_\_\_, the undersigned officer, personally appeared \_\_\_\_\_, known to me (or satisfactorily proven) to be the person whose name \_\_\_\_\_ subscribed to the within instrument and acknowledged that \_\_\_\_ he \_\_\_\_\_ executed the same for the purposes therein contained.

In witness whereof I hereunto set my hand and official seal.

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Title of Officer."

No doubt the reason for requiring an acknowledgment on a written declination of a nomination under sec. 5.18 was to reduce the possibility of fraud occurring through the filing of false or forged declinations by those desiring to eliminate a candidate from a political race. Since the notary or other officer taking the acknowledgment must certify that he knows the signer or the signer satisfactorily proves his

identity, the possibilities of filing false or forged declinations is greatly reduced.

Because, as indicated above, the form of declination does not meet the requirements of sec. 5.18, the question of whether it was filed on time becomes academic and will not be discussed here, particularly since you have asked for speedy action in resolving the problem.

WHR

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*Insurance—Warranty*—Non-transferable certificate issued by distributor of a brand of lubricants to purchaser of a new automobile for exclusive use of products and repair or replacement of parts due to failure is a warranty and therefore such issuance is not in the business of insurance.

October 14, 1958.

PAUL J. ROGAN,  
*Commissioner of Insurance.*

You request advice as to whether the issuance to automobile owners in this state of certain certificates by the Wisconsin corporate distributor of a nationally known brand of lubricating systems, devices and lubricants, constitutes engaging in the business of insurance.

The certificates in question are issued through automobile dealers to the purchasers of new automobiles and are labeled "Guarantee Certificate". No charge is made therefor. The new car dealer is authorized to issue such certificates because of his use of said brand of lubricants, and the adoption of accepted recommended procedures in the servicing of automobiles. By the terms of the certificate the distributor agrees for a period of 5 years, and to include unlimited mileage, to repair or replace, at no cost to the automobile owner, any of the parts of the automobile specifically set out therein that fail due to faulty or improper lubrication, provided such owner has the automobile lubricated only with said brand of lubricants and motor oils.

Such guarantee is specifically conditioned upon the owner having the complete chassis lubricated every 1,000 miles

or every 30 days, whichever the owner prefers; the motor oil changed every 1,000 miles or at factory recommended intervals, at the owner's option; the transmission and differential checked and replenished if necessary every 1,000 miles; and the other lubrication done in accordance with the recommendations of the car manufacturer. Such required lubrications must be done by the dealer named in the certificate, except that while traveling outside his territory they may be performed by a dealer in that brand of lubricants or by an authorized dealer of the make of car and the guarantee will be preserved by presentation of a copy of the bill therefor to the named dealer. The certificate is not transferable.

Only lubricated parts of the automobile are included in those subject to repair or replacement. It is specifically stated that the "guarantee" does not apply to parts that have no provision for lubrication or sealed bearings or for which the manufacturer insists on the use of special lubricants it provides. Also damage due to permitting oil in the motor, transmission or rear axle housing to fall too low, or caused by collisions, wrecks, abuse, negligence, or original defect in the manufacture of parts, are excluded. Any required repairs or replacements of improperly lubricated parts are to be made by the named dealer. The right is reserved to withdraw the guarantee at any mileage or 30 day driving interval, by notice to the dealer thereof.

As noted in the recent opinion relative to "used-car warranty" plans, our statutes do not contain any definition of insurance, and therefore resort must be made to basic concepts for guidance as to whether engaging in a particular type of transaction constitutes the business of insurance. One of them, alluded to in 39 O.A.G. 509, and well recognized, is that a warranty issued to a purchaser in connection with the sale of a product, containing an agreement to replace the same or pay damages resulting from its insufficiency, is not an insurance contract.

It is stated in 44 C.J.S. 473, Insurance § 1 b: "A warranty promises indemnity against defects in the article sold, while insurance indemnifies against loss or damage resulting from perils outside of, and unrelated to defects in the article itself", citing *State ex rel. Duffy v. Western Auto Supply Co.*, (1938) 134 Ohio St. 163, 16 N.E. 2d 256. In that case

it was conceded by the attorney general of Ohio, the relator, that any agreement in the sale of a product which warrants against defects in materials or workmanship is not insurance. However, because the guaranty there given upon the retail sale of automobile tires applied not only to defects in materials or workmanship without time limit, but also, for a stipulated period, extended to any condition rendering the tire unfit for use whether from defects, ordinary wear and tear or any injury however caused, it was held to be insurance. A subsequent case, *State ex rel Herbert v. Standard Oil Co.*, (1941) 138 Ohio St. 376, 35 N.E. 2d 437, recognized that case but held that a warranty, given upon the retail sale of an automobile tire, that it was of such quality it would render service for one year under usual conditions of wear and tear and agreeing to repair or replace if it failed to do so, but specifically stating that injury from punctures, running flat, fire, wreck, or collision was not covered, was not insurance. In *Evans & Tate v. Premier Refining Co.*, (1923) 31 Ga. App. 303, 120 S.E. 553, although without any discussion of the principles involved, it was held that an agreement in a contract of sale of lubricants to replace the gears of automobiles of persons who used said lubricants therein, was not insurance.

The "Guarantee Certificate", the subject of your inquiry, does no more than agree to indemnify the automobile owner by the replacement of lubricated parts if the lubrication of the automobile is performed by a competent service agency and the named brand of lubricants is used. It is a representation by the seller to the automobile owner as the consumer-purchaser that if that lubricant is used exclusively to lubricate an automobile and it is applied by designated properly instructed service agencies, the lubricant material and the labor involved in its manufacture and application are of such quality that under normal conditions the designated automotive parts will be adequately lubricated and that if any such parts fail because of faulty or improper lubrication, repair or replacement thereof will be made at no cost to such automobile owner.

As such the "Guaranty Certificate" is merely a warranty that is devised to attract prospective users of the product and to stimulate a demand therefor. That the "Guaranty

Certificate" is by the wholesale distributor of the products rather than the manufacturer or retail seller thereof, does not preclude it from being a warranty. A retail seller may expressly adopt as his own the warranty of the manufacturer and be personally liable thereon. *Cannon v. Pulliam Motor Co.*, (1956) 230 S.C. 131, 94 S.E. 2d 397; *Orrison v. Ferrante*, (1950) (Munic. Ct. App. D.C.) 78 Wash. Law Reporter 691, 72 A. 2d 771; *Cochrane v. McDonald*, (1945) 23 Wash. 2d 348, 161 P. 2d 305. A dealer may make a warranty for itself and is alone liable thereon. *Ford v. Willys-Overland*, (1929) 197 N.C. 147, S.E. 822. This last case gives recognition to a warranty by a distributor.

You are therefore advised that the issuance thereof by the Wisconsin distributor of such brand of lubricants, under the conditions and terms mentioned, is not engaging in the business of insurance.

HHP

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*Appropriation—State Parks—Forestation Tax—Proceeds of state forestation tax imposed by sec. 70.58 may not be used to finance state parks.*

October 15, 1958.

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

You have requested an opinion as to whether or not proceeds of the 2-mill state forestation tax imposed by sec. 70.58, Stats., might be used to finance state parks. I have previously advised you that, under existing statutes, the entire revenues from this tax are appropriated for the purpose of acquiring, preserving and developing the forests of the state and may not be used for other purposes, 47 O.A.G. 45. The reasoning followed in that opinion is equally applicable to your present question which must be answered in the negative.

JEA

*License—Corporations—Loan Companies—Sec. 180.67* discussed relative to licensing corporate mergers as compared to regulations affecting small loan and finance companies and the licensing thereof.

October 24, 1958.

G. M. MATTHEWS,  
*Commissioner of Banks.*

You have inquired whether it is necessary for a parent corporation effecting a merger with a subsidiary corporation licensed by the state banking department as a small loan company under sec. 214.03, and as a finance company under sec. 115.09, to pay the investigation and license fees necessary to obtain new licenses to continue operating the offices of the merged subsidiary corporation.

The parent corporation which will be referred to here for purposes of convenience as Corporation A owns all of the common stock of the subsidiary corporation which will be referred to as Corporation B. Corporation B operates 9 offices, 7 of which carry on the small loan business and the other 2 of which carry on a finance business. Under the merger plan all of the common stock of Corporation B will be surrendered and cancelled, and the business will be operated by Corporation A. No change will be made in the corporate articles of Corporation A or in its corporate name, and Corporation B will cease to exist.

Corporation A has returned to your department the licenses of Corporation B covering the 9 offices and has requested that you reissue the licenses in the name of Corporation A.

It is the contention of Corporation A that it succeeds to the privileges and franchises of Corporation B as a matter of law under sec. 180.67 relating to the effect of merger or consolidation of corporations.

Sec. 180.67 (1), (2), (3), and (4) provide:

**“180.67 Effect of merger or consolidation.** When such merger or consolidation has been effected:

“(1) The several corporations parties to the plan of merger or consolidation shall be a single corporation, which, in the case of a merger, shall be that corporation designated

in the plan of merger as the surviving corporation, and, in the case of a consolidation, shall be the new corporation provided for in the plan of consolidation.

“(2) The separate existence of all corporations parties to the plan of merger or consolidation, except the surviving or new corporation, shall cease.

“(3) Such surviving or new corporation shall have all the rights, privileges, immunities and powers and shall be subject to all the duties and liabilities of a corporation organized under this chapter.

“(4) Such surviving or new corporation shall thereupon and thereafter possess all the rights, privileges, immunities, and franchises, as well of a public as of a private nature, of each of the merging or consolidating corporations; and all property, real, personal and mixed, and all debts due on whatever account, including subscriptions to shares, and all other choses in action, and all and every other interest, of or belonging to or due to each of the corporations so merged or consolidated, shall be taken and deemed to be transferred to and vested in such single corporation without further act or deed; and the title to any real estate, or any interest therein, vested in any of such corporations shall not revert or be in any way impaired by reason of such merger or consolidation.”

Sec. 214.02 relating to small loans provides for the making of application for a license at each office and payment of a license and investigation fee as well as furnishing a bond, and sec. 214.05 (1) and (2) provide:

“214.05 Licenses; posting; changes of location; renewal; net assets. (1) Every license issued shall state the address of the office at which the business is to be conducted, the name of the licensee, and if the licensee is a partnership or association, the names of the members thereof, and if a corporation the date and place of its incorporation. Such license shall be kept conspicuously posted in the office of the licensee *and shall not be transferable or assignable.*

“(2) Whenever a licensee shall contemplate a change of his place of business to another location within the same city or village, he shall give written notice thereof to the department, which shall attach to the license its authorization of such removal, specifying the date thereof and the new location. Such authorization shall be authority for the operation of such business under the same license at the specified new location. No change in the place of business of a licensee to a location outside of the original city or village shall be permitted under the same license.”

Sec. 214.03 (1) and (2) relating to the conditions for the issuance of small loan licenses provide:

**"214.03 Conditions of the issuance of licenses.** The department shall issue a license to the applicant to make small loans at the office specified in the application in accordance with the provisions of this chapter, if the department shall find:

"(1) That the applicant has filed the required application and bond and paid the required fees.

"(2) That the financial responsibility, experience, character and general fitness of the applicant, and of the members thereof if the applicant be a partnership, or association, and of the officers and directors thereof if the applicant be a corporation, are such as to command the confidence of the community and to warrant belief that the business will be operated honestly, fairly and efficiently within the purposes of this chapter."

Sec. 115.09 (1) relating to finance companies makes provision for the payment of investigation and license fees. Sub. (2) provides for a bond.

Sec. 115.09 (3) (a) and (c) provide:

"(3) (a) Upon the filing of such application and the payment of such fee, the commissioner shall investigate the relevant facts, and if it shall find that the character and general fitness and the financial responsibility of the applicant, and the members thereof if the applicant is a partnership or association, and the officers and directors thereof if the applicant is a corporation, warrant the belief that the business will be operated in compliance with this section the commissioner shall thereupon issue a license to said applicant to make loans in accordance with the provisions of this section. If the commissioner shall not so find, he shall deny such application.

"\* \* \*

"(c) *Such license shall not be assignable* and shall permit operation under it only at or from the location specified in the license at which location all loans shall be consummated, but this provision shall not prevent the licensee from making loans under this section at an auction sale conducted or clerked by a licensee."

Perhaps, it should be noted at the outset that there are no provisions for surrendering any of the licenses mentioned above and having licenses reissued under other names without payment of fees, nor are there any provisions whereby in such situations the request could be treated as a new appli-

erect and maintain an engine was granted to an electric light company, such license might be transferred to another company to whom the business and property was transferred.

In the present situation, however, it is very clear that the licenses have been issued under provisions imposing special trust and personal confidence in the officers of the merged corporation and that the legislature did not intend that such privileges would pass to the survivor corporation as a matter of law in case of a merger. It might well be (although no such conclusions in the instant case are implied) that the officers of Corporation A could not qualify under sec. 214.03 (2) or 115.09 (3) (a) and that the legislative purpose could be conveniently thwarted at will by employment of the merger device. Fletcher-Cyclopedia Corporations, Vol. 7, § 4722, states:

“It has also been held, in effect that even when a statute confers upon a corporation in general terms ‘all the rights, powers, franchises, and privileges’ of another corporation, it should not be construed as conferring rights and privileges which are detrimental to the public, unless there is something to show the legislature so intended.” (Citing cases)

Hence it should be noted that a statute such as sec. 180.67 does not as a matter of law transfer to the surviving corporation all of the rights which might have been exercised by the merged corporation. For instance, sec. 196.80 (1) relating to merged utility corporations is very similar to sec. 180.67, yet our supreme court held in *Wis. E. P. Co. v. Dept. of Taxation*, (1947) 251 Wis. 346, that such a statute does not provide that the merged corporation shall be continued in the surviving corporation and that therefore the surviving corporation was not entitled to take a deduction for income tax purposes for federal taxes of the merged corporation paid by the surviving corporation after the merger. Similarly, here Corporation B was not continued in the surviving corporation so that such corporation can assert privileges of a nature entirely personal to Corporation B which no longer exists.

It is therefore concluded that the general provisions of sec. 180.67 relating to the legal effects of a corporate merger do not control over the specific provisions of secs. 214.03 (2), 214.05 (1), and 115.09 (3) (a) and (c), and that if Corpo-

ration A, the surviving corporation, desires to continue the activities which Corporation B, the merged and no longer existing corporation, exercised under its licenses, new applications should be made by Corporation A along with the payment of new fees and compliance with all of the other statutory provisions applicable to original applications.

WHR

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*Cities—Counties—Lands*—A city of the fourth class does not possess the power to condemn land owned by a county as a site for construction of a city sewage disposal plant.

October 24, 1958.

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

You have asked whether a city of the fourth class may condemn land owned by a county as a site for construction of a city sewage disposal plant.

While the power of eminent domain is inherent in the sovereign state, and does not depend upon constitutional or legislative sanctions (*U.S. v. Jones*, (1883) 109 U.S. 513, 3 Sup. Ct. 346, 27 L. Ed. 1015; *Muscoda Bridge Co. v. Worden—Allen Co.*, (1928) 196 Wis. 76, 219 N.W. 428), no other political entity has that power unless it has been delegated to such entity by the sovereign. *Lamasco Realty Co. v. Milwaukee*, (1943) 242 Wis. 357, 8 N.W. 2d 372.

In *Chicago & N. W. R. Co. v. Racine*, (1929) 200 Wis. 170, 227 N.W. 859, the court held that a city may not condemn property already in public ownership (in that case, a railroad utility) "unless there be express statutory authority or such authority appears by necessary implication". Also, see *Matson v. Caledonia*, (1929) 200 Wis. 43, 227 N.W. 298.

Sec. 62.22 (1) confers authority upon cities to acquire property for specified public purposes. Included in the enumerated methods of acquisition is "condemnation" or eminent domain in its generic sense. However, ch. 32 is incorporated by reference into sec. 62.22 (1), and accord-

ingly at once constitutes the definition and boundary limits of the power conferred on cities by sec. 62.22 (1). This is so by reason of the last sentence of said subsection which reads: "The power of condemnation for any such purposes shall be as provided by ch. 32".

The legislature has not authorized cities to condemn lands owned by counties for the purpose for which the subject land is needed. Sec. 32.03 (1) provides in substance that the general power of condemnation conferred by ch. 32 does not extend to property owned by the state, a municipality, public board or commission. The term "municipality" as used in this subsection includes a county. (See sec. 32.02).

It is my opinion, therefore, limited to the precise question and facts stated in your request, that a city of the fourth class does not possess the power to condemn land owned by a county as a site for construction of a city sewage disposal plant.

SGH:AJF:WHW

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*Insurance—Associations*—Proposed automobile driver's league constitutes an association eligible for group and accident insurance under 204.32 (2) (a) 2, only if availability of such insurance is not a compulsive force to enrollment and maintenance of membership but is incidental to package program involved.

October 28, 1958.

PAUL J. ROGAN,

*Commissioner of Insurance.*

Along with the request upon which an opinion was given October 14 that the issuance of certain guarantee certificates by a lubricant distributor does not constitute engaging in the business of insurance, you also ask whether the holders of such certificates that are included in an automobile driver's program said distributor proposes, constitute an association which qualifies for group insurance under sec. 204.32 (2) (a) 2, Stats.

It is asserted by said distributor that such guarantee certificate plan has been in use for several years and experience

during that time indicates a lower operating cost per mile and a higher trade-in value for automobiles operated thereunder. Such program has also promoted good relations between the automobile owners and dealers rendering the service. All of this has tended to promote the use of the product and increase the demand therefor.

In furtherance thereof said distributor proposes to regularly mail a publication to all owners, both present and future, of automobiles operated under such guarantee certificates. It will contain information tending to raise the standards and practices of automotive preventive maintenance service and encourage the development of new scientific techniques therein, and also disseminate procedures that will encourage safe driving, observance of the courtesies of the road and regular safety inspections in the interest of minimizing road hazards and lessening the potential cause of many accidents. As a part of such program the distributor proposes to organize an association, to be called "Wisconsin [name of brand of lubricant] Drivers League", in which such of said owners as desire will be enrolled as members at a small charge. They will be issued an identifying insignia for their automobiles, deemed to indicate their interest in safety through careful driving and regular safety inspections. It is proposed that a master group accident insurance policy be issued to such association, under which each member of the association may obtain \$1,000 accidental death insurance, which will be kept in force by his having his automobile regularly inspected at recommended intervals of 4 to 6 weeks or at designated mileage intervals. It is not recited whether the premium of 10¢ per month will be paid by the distributor, paid by the automobile owner at the required inspections, or absorbed in an inspection charge.

Sec. 204.32 (2) (a), so far as here material, provides:

"(2) (a) Group accident and health insurance is hereby declared to be that form of accident and health insurance covering groups of persons as defined below, with or without one or more members of their families or one or more of their dependents, or covering one or more members of the families or one or more dependents of such groups of persons, and issued under a policy issued to:

"1. \* \* \*

"2. An association, including a labor union, which shall have a constitution and bylaws and which has been organized and is maintained in good faith for purposes other than that of obtaining insurance, insuring at least 25 members, employes, or employes of members of the association for the benefit of persons other than the association or its officers or trustees. \* \* \*"

As it is indicated, the requirement of having a constitution and bylaws will be met, the question is whether this type of organization qualifies under the above quoted provisions of sec. 204.32 (2) (a) 2. It is obvious from the language used that not all associations are eligible and that to qualify the dominant attraction to membership in the association must clearly be other than the obtaining of insurance. Not only must this be true when the association is organized but it must continue or exist subsequent thereto. The underlying concept appears to be that the association must constitute a group that is founded upon or exists by reason of a cohesiveness or cementation that is wholly unrelated to and apart from any attraction thereto by availability of insurance. The availability of insurance must be only incidental and in no way the controlling attraction to membership.

In view of the foregoing, in order for this association to meet the requirements of sec. 204.32 (2) (a) 2, so as to be eligible thereunder for the issuance to it of a group accident insurance policy to cover its members, it would be necessary that, considering this package program as a whole, it appears to you: (1) Enrollment in the association as one interested in safe motoring, etc., and eligibility to display an insignia adopted as indicative thereof, would be sufficient, standing alone, to attract or induce eligible persons to become members thereof and pay any substantial amount therefor; (2) Continuance of such membership, standing alone, would be a sufficient compelling force to induce regular inspections or continuance in force of the guarantee certificates; (3) The availability of insurance would not be of any compulsive force that would operate to induce membership in the association and/or continuance thereof; (4) The inclusion of the insurance element in this program was not for any compulsive force it would exert to induce continu-

ance of membership in the association; (5) The availability of extremely low cost group insurance was merely incidental to the program and was not designed to promote the use of the brand lubricant and increase the demand therefor.

You are therefore advised that whether this proposed association meets the requirements of sec. 204.32 (2) (a) 2, Stats., rests upon your determination of the criteria above set forth.

HHP

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*Licenses—Mobile Homes Dealer—*Sec. 218.01 (2) (d) 7 and 8 are applicable to mobile home time sales transactions.

November 7, 1958.

G. M. MATTHEWS, *Commissioner of Banks,*

You have inquired whether a retail seller of mobile homes who originates a time sales transaction on a mobile home requires a license under sec. 218.01 (2) (d) 8. and whether a sales finance company which purchases or discounts retail installment contracts from a retail seller of mobile homes requires a license under sec. 218.01 (2) (d) 7.

Sec. 218.01 (2), Wis. Stats., provides for the licensing of motor vehicle dealers, motor vehicle salesmen and sales finance companies.

Par. (d) regulates the amount of the license fees.

The significant language in 7. reads:

“For sales finance companies on the basis of the gross volume of purchases of retail sales contracts of *motor vehicles* sold in this state for the 12 months immediately preceding October thirty-first of the year in which the application for license is made, as follows: \* \* \*”

Then follows the amounts payable for licenses based on gross volume of business.

8. reads:

“8. For *motor vehicle* dealers, who operate as a sales finance company, and carry or retain time sales contracts for more than 30 days, the same as sales finance companies,

except for the first \$5,000 of gross volume, \$1; on each \$1,000 of gross volume, or part thereof, over \$5,000 and up to \$25,000, \$1."

Thus it will be noted that 7. relates to sales contracts of "motor vehicles" and 8. relates to "motor vehicle" dealers.

Therefore the question to be decided is whether or not a "mobile home" is a "motor vehicle" as that term is used in the above statutes.

The Wisconsin motor vehicle code defines words and phrases as they are used in chs. 340 to 349.

Sec. 340.01 (29) provides:

"(29) 'Mobile home' means a vehicle designed to be drawn upon a highway by a motor vehicle and designed, equipped and used, or intended to be used, primarily for sleeping, eating and living quarters."

Sec. 340.01 (35) provides:

"(35) 'Motor vehicle' means a vehicle which is self-propelled, including a trackless trolley bus."

It should be noted however that sec. 218.01 (1) (k) defines a motor vehicle for purposes of sec. 218.01 as "any motor driven or trailer type vehicle required to be registered under ch. 341".

Sec. 341.01 provides that words and phrases defined in sec. 340.01 are used in the same sense in ch. 341 unless a different definition is specifically provided.

Thus, it will be seen that a motor vehicle for purposes of sec. 218.01 has a more inclusive definition than that provided by sec. 340.01 (35) in that a "motor vehicle" as that term is used in sec. 218.01 includes "trailer type vehicles" which is a much broader definition and not the one commonly used and understood.

There would appear to be no great room for dispute on the proposition that a "mobile home" is a "trailer type vehicle" required to be registered under ch. 341, since that chapter specifically mentions mobile homes in the schedule of registration fees provided by sec. 341.25 (1) (i) and (j) which read:

"341.25 Annual registration fees. (1) Unless a different fee is prescribed for a particular vehicle by s. 341.26, the following registration fees shall be paid to the department

for the annual registration of each motor vehicle, mobile home, trailer or semi-trailer not exempted by s. 341.05 from registration in this state:

“\* \* \*

“(i) For each mobile home 25 feet or less in length, a fee of \$5; for each mobile home more than 25 feet in length, a fee of \$10.

“(j) For each self-propelled mobile home, a fee of \$16. All provisions applicable to the registration of private automobiles also apply to the registration of self-propelled mobile homes.”

From the foregoing it is perfectly clear that “mobile homes” are “motor vehicles” for the purposes of sec. 218.01, even though this definition is not the common and approved one as is pointed out above. Sec. 990.01 (1) provides in effect that while words and phrases used in the statutes are to be construed according to their common and approved usage this is not true of technical words and phrases and others that have a peculiar meaning in the law. Those are to be construed according to such meaning, and here sec. 218.01 (1) (k) has given the term “motor vehicle” a peculiar meaning in that for purposes of this section, although not otherwise, the term includes trailer type vehicles required to be registered under ch. 341.

You have called attention to the fact that mobile home dealers and salesmen are licensed and regulated under secs. 110.09 and 110.095 which are administered by the motor vehicle department. These regulations, however, are not specifically addressed to sales finance transactions as is true of sec. 218.01 (2) which is administered by the commissioner of banks. This does, nevertheless, call attention to the fact that the two departments should coordinate their regulatory activities and administrative rules to the end that there will be no conflicts or over-lapping.

You are accordingly advised in the light of the foregoing discussion:

1. A retail seller of mobile homes who originates a time sale transaction on a mobile home is required to be licensed under sec. 218.01 (2) (d) 8.

2. A sales finance company purchasing or discounting retail installment contracts from a retail seller of mobile homes is required to be licensed under sec. 218.01 (2) (d) 7.

WHR

*Aid—County*—State aid provided in sec. 141.065 for county public health nurses is not required by statute to be applied to reduce a city's share of the cost for a city-county health department under sec. 140.09 (14).

November 7, 1958.

VICTOR O. TRONSDAL,  
*District Attorney,*  
Eau Claire County.

When a county is a member of a city-county health department organized under sec. 140.09, Stats., you ask if money paid to such county as state aid for county health nurses under sec. 141.065 must be allocated to the joint budget so that the city receives a portion of the benefit, or whether it may be used solely toward the county's share.

Sec. 140.09 (14) provides that the board of health of a joint department shall prepare a budget of proposed expenditures "and determine the proportionate cost to each participating county and city on the basis of equalized valuation". The same subsection later provides, however, that the "appropriation to be made by each participating county and municipality shall be determined by the governing body thereof".

It appears that the board of a joint health department has no more power to enforce an appropriation or tax levy than the board of health of a city or county acting separately. Since the city council and county board have the authority to determine their respective appropriations, they could as a practical matter exercise their power, on the basis of a voluntary agreement, how state-aid revenue should affect the division of appropriations.

If no such agreement can be reached, however, I do not believe there is any provision in the statutes under which the city could require that any part of the state aid to the county be applied toward the city's share of the total budget.

If the city and county were operating separate health departments, the city would receive no state aid, but the county would. The fact that the legislature has provided for payment of aid "to the county", under sec. 11.065, and has made no similar provision for aid to a city indicates a

policy that the two types of governmental units shall be on a different basis so far as state aid is concerned. Since the legislature has adopted a general policy that counties shall, and cities shall not, receive aid for health nurses, it seems that it would have given some specific indication if it had intended that the situation should be different in the case of a joint health department.

BL

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*Counties—Welfare Department*—Agreement by which a county furnishes its welfare department facilities to a city for administration of relief would probably be valid, even though the county has not elected to furnish relief under secs. 49.02 or 49.03.

November 7, 1958.

VICTOR O. TRONSDAL,  
*District Attorney,*  
Eau Claire County.

Your question is whether a county, which has not elected to give any form of relief under secs. 49.02 (2) or 49.03, Stats., may contract under sec. 66.30 to furnish the services of its department of public welfare to a city, upon the city's payment of specified amounts to cover the costs of such services.

Sec. 66.30 (1) provides that a city and county may enter into an agreement "for the joint or cooperative exercise of any power or duty required or authorized by statute". Subsec. (2) of the same section provides that a city and county "in the exercise of its powers may contract jointly \* \* \* for any joint project, wherever each portion of the project is within the scope of authority" of the respective city and county.

The reference in subsec. (1) to a power or duty "required or authorized by statute" indicates a legislative intent that the cooperative arrangement shall be permissible only where the power or duty has been independently conferred or imposed upon *each* of the participating governmental units

by some other statute. A similar restriction is contained in subsec. (2) with respect to the carrying out of a "project".

I do not believe that the legislature intended under sec. 66.30 that one municipality might employ another to perform its statutory duty when the latter has no independent statutory power to perform such function. As an extreme example, it would probably not be suggested that a city might hire a county to operate its schools. The use of the terms "joint" and "cooperative" imply that each municipality, and not only one, has an interest in the power or duty to be exercised under the agreement.

A question as to what cooperative arrangement is permissible under sec. 66.30 necessitates, therefore, an examination of other statutory provisions to determine whether the things sought to be done are within the powers of each of the cooperating units.

The subject matter of the proposed agreement in this case is the administration of relief and so the statutes primarily to be consulted are secs. 49.02, 49.03 and 46.22 (5) (b).

A city has both the duty and the power under sec. 49.02 (1) to administer all relief within its boundaries where the county board has made no contrary election under secs. 49.02 (2) or 49.03 (1) (a) or (b). In the absence of such an election, a county has neither the duty nor power to administer relief. In case an election is made by the county board, the county assumes the duty to the extent defined in the statute and the city is correspondingly relieved to the same extent.

Whenever an election is made by a county board to assume part of the relief functions, as under sec. 49.02 (2), both the city and the county have some "power or duty required or authorized by statute" for relief administration. In such a case, there would seem to be little question that they might enter into a cooperative arrangement under sec. 66.30 for administration of their respective functions. The question is more difficult, however, where one or the other has the *sole* duty to administer relief and the proposed "cooperation" amounts to a hiring of the one by the other. Such a case arises where a county board has made no election to assume any of the statutory obligations with respect to relief

but agrees to supply the administrative services of its welfare department to the city at an agreed price. Under sec. 46.22 (5) (b), a county department of public welfare has authority to administer relief under secs. 49.02 and 49.03 only "in the event that the county administers relief under those sections".

There are two significant differences in an agreement by a county to furnish relief administration for a city within its borders, and an agreement by a county to perform some such function as operating the city's schools.

In the first place, the administration of relief has been recognized by the legislature as a function which may properly be exercised by the county, although it is specified that it is to be exercised only upon the basis of specific elections. In the second place, the legislature has specifically referred in the relief statutes to agreements under sec. 66.30, with the apparent purpose of encouraging cooperative arrangements for administration of relief. Sec. 49.02 (4) reads:

"Nothing in this section shall prevent any county or municipality from entering into a joint or co-operative agreement under section 66.30."

While the literal effect of the above quoted provision is limited to "this section", so as not expressly to cancel such limitations as are contained in sec. 49.03 or 46.22 (5) (b), the section may nonetheless be indicative of a legislative purpose so as to throw some light on the interpretation of other statutory sections.

While it was probably not the legislative intent under sec. 66.30 to permit one municipality to hire another to provide a service otherwise wholly beyond the statutory powers of the latter, a different situation is presented, from a practical point of view when the service is closely related to a function which the second unit is already exercising by force of a statutory obligation. The obligatory functions of a county welfare department in administration of various forms of public assistance under ch. 49 are so closely allied to administration of relief as to make joint use of facilities both beneficial and economical from a governmental point of view. This is an objective apparently sought by the legislature under sec. 66.30.

There is no judicial precedent which makes it possible to say categorically that an agreement such as you have described would be held valid if it were challenged in litigation; but it is my belief that the legislature intended that such related duties as administration of social security aids by a county and administration of relief by a city might be performed on a cooperative basis under sec. 66.30.

BL

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*State Treasurer—Appropriation—*Under sec. 20.820 (1) state treasurer not authorized to pay charge incidental to use of draft system in lieu of check system.

November 20, 1958.

VERNON W. THOMSON, *Governor*.

It has been proposed that the state of Wisconsin use a treasurer's draft system for paying all or a substantial part of the state obligations in lieu of the check system currently in use. Certain officials who would be involved in the establishment and operation of such system wish to know whether the handling charges which would be an incidental part of such system can be paid to the bank or banks through which the drafts would be cashed.

Sec. 116.02, Wis. Stats., provides:

"Negotiable instruments; form. An instrument to be negotiable must conform to the following requirements:

"(1) It must be in writing and signed by the maker or drawer.

"(2) Must contain an unconditional promise or order to pay a sum certain in money.

"(3) Must be payable on demand or at a fixed or determinable future time.

"(4) Must be payable to order or to bearer.

"(5) Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty."

A "treasurer's draft" would be an instrument in writing signed by the state treasurer. It would contain an unconditional order to pay a sum certain on demand, would be pay-

able to the order of a named payee for a certain sum and would provide that the instrument was payable "through" a bank which would be named thereon. Therefore it would appear to meet the requirements of a negotiable instrument. It is presumed that the instrument would "flow through the normal banking channels".

The state of Wisconsin might, or might not, have a bank account in the bank through which the instrument was payable, depending upon the arrangements which would exist between the state and the bank. In any event, the state would not have an account in the bank through which the drafts would be payable against which the account bank could charge the amount of the draft. Depending upon the arrangements which would be reached between the state and the bank, one of two systems probably would be used for the redemption of these drafts by the state. If the state had a depository account in the bank sufficient to redeem the drafts, the bank might be authorized to debit this account at the close of each day or other specified period of time for the total amount of drafts which the bank had redeemed up to that time. If the state had no account in such bank which could be debited in this manner, the state, upon notice of the total amount redeemed by the bank, or upon presentation to the state treasurer of the drafts honored by the bank, could transfer to the bank redeeming the drafts a sum of money which would be equal to the total amount of such drafts. This transfer might be made from an account in that bank or in one or more other banks.

Upon the issuance of a check the state treasurer immediately debits the balance in the account of the state by the amount of that check, although it may be several days before that check is presented to the bank upon which it is drawn. Under a draft system the cash balance is not reduced until the draft is redeemed by the state. The use of drafts would entail the creation of a new account called "drafts outstanding". This account would be credited at the time the drafts are released and would reflect the liability which the state had on drafts not redeemed from the banking system. The present "cash account" would be credited, and the "drafts outstanding" account charged as the drafts are redeemed. The balance in the "drafts outstanding" account would rep-

resent the state's liability for unpaid drafts and would correspond to the present difference between actual bank balances and the balance in the cash account as indicated on the books of the state treasurer.

The purpose of the proposed system would be to enable the state to keep invested, and hence receive the interest upon, what is often referred to as the "float", that is, the money represented by drafts which have been issued but not redeemed by the state. The bank through which the drafts are redeemed obviously will have to keep on hand very substantial sums of money which it will advance for the benefit of the state in paying the drafts as they are presented. The bank will not have the opportunity to get the benefit of the "float" as it does under the present check system.

In addition, the bank will be put to considerable expense for the services of personnel and equipment which will be needed to handle the large volume of financial transactions involved. It will of course be necessary to compensate the bank for the service which it will render to the state. The service charge to be made by the bank might be calculated upon different bases, but conceivably it could be a charge of a certain amount for each draft cashed. The question now presented is whether there is any existing appropriation from which this service charge can be paid.

Sec. 14.42 relates to the duties of the state treasurer and provides in part as follows:

**"Duties of treasurer. The treasurer shall:**

**"(1) HAVE CUSTODY OF MONEYS.** Receive and have charge of all money paid into the treasury, and pay out the same as directed by law. \* \* \*

**"\* \* \***

**"(4) PAY ON WARRANTS SUMS AUTHORIZED BY LAW.** Pay out of the treasury on demand, upon the warrants of the director of budget and accounts and not otherwise such sums only as are authorized by law to be so paid, if there be appropriate funds therein to pay the same \* \* \*.

**"\* \* \***

**"(6) KEEP CASH AND FUND ACCOUNTS.** \* \* \* keep also records showing the check number, date, payee and amount of each cash disbursement and classifying said disbursements by state funds; verify at the end of each week the amounts shown by his records to represent total cash bal-

ance and cash balances of individual state funds by comparing said amounts with corresponding balances appearing on records maintained by the department of budget and accounts."

It is claimed that the treasurer's draft system would be a method of disbursement utilized by the state and that the service charge is an inherent part of such a system. It is further contended that the bank service fee could be charged to the appropriation made by sec. 20.820 (1) which appropriates from the general fund to the state treasurer "\* \* \* annually, beginning July 1, 1958, \$69,201 for the execution of his functions".

It is suggested that the reimbursement of the bank for the state drafts cashed by it could "be construed as merely the payment of an invoice for services rendered".

Sec. 20.902 (1) provides:

"(1) It shall be unlawful for any state officer, department, board, commission, committee, institution or other body, or any officer or employe thereof, to contract or create, either directly or indirectly, any debt or liability against the state for or on account of any state officer, department, board, commission, committee, institution or other body, for any purpose whatever, without authority of law therefor, or prior to an appropriation of money by the state to pay the same, or in excess of an appropriation of money by the state to pay the same. It shall also be unlawful for any of the above-mentioned persons or bodies to authorize, direct or approve the diversion, use or expenditure, directly or indirectly, of any funds, money or property belonging to, or appropriated or set aside by law for a specific use, to or for any other purpose or object than that for which the same has been or may be so set apart. \* \* \*"

Sec. 15.14 provides:

"(1) EXPENDITURES. Each department except the legislature and the courts shall prepare and submit to the director of budget and accounts an estimate by quarters of the amount of money which it proposes to expend upon each of its divisions, activities and functions. The director of budget and accounts may waive the submission of estimates of other than administrative expenditures from such funds as he may determine. Estimates shall be prepared in such form and at such time as the director may require. Revised and supplemental estimates may be presented at any time under rules to be prescribed by the director.

"(2) ACTION THEREON BY DIRECTOR. The director of budget and accounts shall examine each such estimate to determine whether appropriations are available therefor and can be made without incurring danger of exhausting such appropriations before the end of the appropriation period and whether there will be sufficient revenue to meet such contemplated expenditures. If satisfied that such estimate meets these tests, he shall approve the same; otherwise he shall disapprove the same, in whole or in part, as the facts may require. \* \* \*

"(3) LIMITATION ON INCREASE OF FORCE AND SALARIES. It shall be unlawful for any department, except the legislature and the courts, to increase the salary of any employe, to employ any additional employes, or to expend money or incur any obligations except in accordance with an estimate submitted to the director of budget and accounts as provided in subsection (1) and which shall have been approved either by such director or by the governor. \* \* \*

"\* \* \*

"(5) DISBURSEMENTS. The director of budget and accounts shall not draw his warrant for payment of any expenditures incurred by any department for which the approval of the director or the governor is necessary under this section, unless such expenditure was made in accordance with an estimate submitted to and approved by the director of budget and accounts or by the governor."

No estimate has been submitted by the state treasurer or approved by the director of budget and accounts pursuant to sec. 15.14 covering expenditures for the bank service charge. It would seem that upon the basis of even a conservative estimate, the number of drafts issued would be such that the cost of the bank service charge therefor and all of the other administrative expenses of operating the state treasurer's office could not be paid from a total annual appropriation of \$69,201.

It appears, therefore, that if the state treasurer undertook to pay the service charge at this time he would do so in violation of both secs. 15.14 and 20.902 of the statutes.

JRW

*Driver's License—Motor Vehicle Department—Revocation*—A combined notice of expiration of financial responsibility and order of revocation notifying licensee that revocation will take effect on a future date if proof is not filed is reasonable and adequate notice. Sec. 344.40 (1) and 344.40 (2) discussed.

November 21, 1958.

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

You have asked for an interpretation of sec. 344.40 (1), Stats., which reads as follows:

“Whenever any person who has furnished proof of financial responsibility fails to maintain such proof at any time during the period when proof of financial responsibility is required, the commissioner shall revoke such person’s operating privilege and registration for a period of time running from the date of revocation until such time as either satisfactory proof of financial responsibility is again furnished or the period during which proof was required to be furnished has expired.”

You point out that thirty days prior to the expiration of a financial responsibility filing you are notified by the insurance carrier of the impending cancellation. You then mail to the licensee a combined notice of expiration of filing and an order of revocation of operating privilege and registration plates to become effective on the date the filing expires unless the licensee furnishes a new financial responsibility certificate. If a renewal filing is not made you deem that a revocation has taken place, even though a late renewal filing is made. The operator must then meet the full requirements for reinstatement of his operator’s license as provided in sec. 343.38.

You present the following questions: First, does the combined notice of expiration and revocation meet the statutory requirements for order of revocation?

It is a general rule of law that where a method of giving notice is prescribed by statute, strict compliance must be had. However, where the statute is silent as to method, “reasonable” notice will suffice. *Thomson v. Tafel*, (1949)

309 Ky. 753, 218 S.W. 2d 977; *Zdunek v. Thomas*, 215 Wis. 11, 254 N.W. 382; *Melms v. Pabst Brewing Co.*, 93 Wis. 153, 66 N.W. 518.

I am of the opinion that your form MVD-8 entitled "Notice of Expiration or Cancellation of Financial Proof and Order of Revocation" adequately notifies the licensee that a revocation will take place in accordance with statutory provisions. True, the licensee has an opportunity to halt such revocation, but this does not lessen the effectiveness of his notice should he fail to comply with the law.

Your second question inquires as to whether delay in confiscation of a revoked operator's license until after proof of financial responsibility is refurnished affects the validity of the revocation.

The delay in confiscation of an operator's license after revocation beyond the date when the order of revocation becomes effective does not invalidate the revocation. The only way in which the order of revocation can become inoperative is to have proof of financial responsibility furnished to the motor vehicle department *prior* to the effective date of the order of revocation. For example, if the licensee provides proof of financial responsibility two days after the order of revocation is effective, his privilege to drive remains revoked until he has fully complied with sec. 343.38 as to reinstatement.

Your third question asks whether the provisions of sec. 344.40 (1) and sec. 344.40 (2) clearly indicate that the legislature recognized two distinct situations as existing and chose to set different requirements for each.

Subsec. (1) is quoted above and subsec. (2) reads as follows:

"Whenever any proof of financial responsibility filed under this chapter no longer fulfills the purposes for which required, the commissioner shall require other proof meeting the requirements of this chapter and shall suspend the operating privilege and registration pending the filing of such other proof."

The distinction between subsecs. (1) and (2) is that under subsec. (1) there is no proof of financial responsibility on file; it has either expired or been withdrawn. Under subsec. (2) the proof of financial responsibility is filed but sub-

sequent events make the filing inadequate, as for example in the case of the purchase of another vehicle. A "suspension" is to take effect in the latter situation which will allow the licensee to regain his operating privilege and registrations upon filing such additional proof as is required by the department.

The distinction between "revocation" and "suspension" in the motor vehicle code is found in the different requirements for reinstatement of operator's license as provided in sec. 343.38. Certain steps must be taken to gain reinstatement after revocation while a suspension is automatically lifted when no longer required by law.

The original vehicle code, ch. 260, Laws 1957, provided in sec. 344.40 (1) that the license should be *suspended* until proof of financial responsibility is furnished or the period in which proof is required has expired.

This was amended by ch. 674, section 29, Laws 1957, to read as it now does, requiring *revocation* instead of suspension. Ch. 674 came from Bill No. 643, S., which was introduced by the committee on legislative procedure by request of the legislative council. The note to section 29, whereby revocation was substituted for suspension in sec. 344.40 (1) reads as follows:

"NOTE: This corrects an error in the original draft of ch. 260, laws of 1957, and makes clear that a long-standing policy of the motor vehicle department is to be continued. Under the vehicle code, a *suspension* means automatic reinstatement of the operating privilege and registration at the end of the period of suspension while *revocation* means that the person whose license was revoked must make a new application, pay the application fee, take an examination and file proof of financial responsibility. It has been the practice of the department to enforce all these requirements in case of a person who lets his proof of financial responsibility lapse."

In view of the foregoing, it is not necessary to speculate about the legislative intent.

LLD

*Counties—Schools*—Sec. 41.01 as amended by ch. 298, Laws 1957, contains no authority for a county to provide county-wide instructional centers or special schools for handicapped children.

November 21, 1958.

ERWIN C. ZASTROW,  
*District Attorney,*  
Walworth County.

Subsec. (1m) of sec. 41.01, Stats., created by ch. 298, Laws 1957, provides for the creation of a handicapped children's education board by each county in which the county board "determines to establish or has already established one or more instructional centers or special schools for handicapped children for all school districts under the jurisdiction of the county superintendent, or provides other services for handicapped children". You inquire whether, as the result of the enactment of such provisions taking the control, direction and operation of county instructional centers or special schools for handicapped children away from the county superintendent and placing it in such board, such instructional centers or special schools that have been established by a county, or are in the future established thereby, are thereafter to be operated for the whole county and the cost thereof borne by the county at large rather than only the territory within the county superintendent's jurisdiction or "district".

Prior to the enactment of subsec. (1m), the only instructional centers or special schools for handicapped children that a county was authorized to establish and operate were centers or schools under the direction and control of the county superintendent of schools and were to furnish instruction for handicapped children residing in the school districts in the county superintendent's "district". Sec. 41.01 (1) contains the only authorization for providing such centers or schools. It provides for application to the state superintendent of public instruction by the district board of any school district, by the board of education of any city operating its schools on the city school plan, or *by the county superintendent*. In each instance the application is by the *operat-*

*ing head* of the school system of the particular unit. The authorization responsive thereto is to establish and operate the same as a part of the school system operated under the direction of such applicant.

That such is the intended pattern of sec. 41.01 is shown by the provisions in subsec. (3) requiring reports to be made to the state superintendent relative to the operation of such schools. The language of the first sentence is that "The *county superintendent* or board of education *maintaining such schools* and classes" shall make the required reports. Also, the last sentence of the subsection requiring annual financial reports provides that "The *county superintendent* or treasurer of each of said several boards \* \* \*" shall make the same.

Compatible with this pattern are the provisions of subsec. (10), the only provisions in the section relative to the payment of the cost of establishing and maintaining the instructional centers or schools authorized by the section. They provide for the inclusion thereof in the county superintendent's budget and expressly state "it shall not be a charge upon any territory in the county which does not come under the jurisdiction of his office".

All that the new provisions in subsec. (1m) do is provide for a board to be elected by the county board or appointed by the chairman thereof, of which the county superintendent shall be the secretary and the county treasurer the treasurer, but neither of them shall be members thereof. Such board is to have charge and control of the operation of such centers or schools in lieu of the county superintendent, which prior to this enactment had the charge and control of such centers or schools. Nothing in subsec. (1m), or in the legislative history thereof, indicates any intention to do any thing other than to substitute such board for the county superintendent as the operating head of such centers or schools as may have been or are in the future established by a county under sec. 41.01 (1). There is no indication of any intention to expand or enlarge the authority of a county to the establishment or maintenance of county-wide centers or schools for handicapped children.

On the contrary, subsec. (1m) by its very language limits the occasions when the board therein provided shall be

elected or appointed to where "the county board \* \* \* determines to establish or has already established one or more instructional centers or special schools for handicapped children for all school districts under the jurisdiction of the county superintendent \* \* \*". This language was specifically added to Bill 178 S. by amendment No. 2A. This was in clear recognition of the limited scope of the centers or schools which a county has the authority to establish or maintain, and was to eliminate any possibility that the enactment would be deemed to expand the authority of the county in this regard. Furthermore, if a county education board were deemed advisable to operate such centers and schools where they were provided only for children of the school districts under the jurisdiction of the county superintendent, it would be equally advisable that such board should also operate any such centers or schools provided by the county that would be county-wide in scope. Clearly the language of subsec. (1m) does not so provide.

You are therefore advised that under sec. 41.01, Stats. 1957, the only instructional centers or special schools for handicapped children that a county is authorized to establish or maintain are centers or schools for handicapped children of the school districts which are under the jurisdiction or within the "district" of the county superintendent and that the cost thereof is to spread only over the territory thereof and no part thereof is to be a charge upon any territory not in the "district" of the county superintendent.  
**HHP**

*Words and Phrases—Ordinance Violations—Procedures*  
—The designated official receiving a penalty pursuant to sec. 345.14 from the person signing a stipulation of guilt is not required to pay it into court.

November 26, 1958.

HAROLD H. EBERHARDT,  
*District Attorney,*  
Jefferson County.

You have asked this office for an interpretation of section 345.14, Stats., which provides for a stipulation of guilt in case of ordinance violation. Your question is whether a municipality may, by ordinance, provide a procedure for stipulation of guilt in traffic ordinance violations followed by a direct deposit in the treasury of a municipality and report to the motor vehicle department without the docketing of the case in any court.

The legislature has made a stipulation of guilt the equivalent of a conviction in court by the definition section of ch. 343.

**“343.01 Words and Phrases Defined. (1) \* \* \***

**“(2) In this chapter the following words and phrases have the designated meanings:**

**“(a) ‘Conviction’ or ‘convicted’ means that the court of original jurisdiction has made an adjudication of guilt, including such an adjudication made on a plea of nolo contendere. It is immaterial that an appeal has been taken. ‘Conviction’ or ‘convicted’ also includes:**

**“\* \* \***

**“2. A stipulation of guilt pursuant to s. 345.14;**

**“\* \* \***

**“(d) ‘Record of conviction’ means the report of conviction furnished to the department as required by this chapter, including a report of a forfeiture of bail, stipulation of guilt, adjudication of ordinance violation or finding of a juvenile court as specified in par. (a) 1 to 4.”**

There is no other definition of conviction in ch. 343 which would indicate that a stipulation of guilt is to be treated any differently from a court adjudication.

Clear evidence that the legislature did not intend to require the docketing of a stipulation of guilt in a court is contained in the following two statutes: sec. 343.28 which

requires courts to report convictions and forward licenses to the motor vehicle department, and sec. 343.29 which requires officials receiving stipulations of guilt to report stipulations and forward licenses to the motor vehicle department. If the legislature intended to require the stipulation to go from the official receiving it to a court, sec. 343.29 would be unnecessary because the court upon receiving the stipulation would forward a copy of the conviction to the department as provided. If the official must go through a court with the stipulation the department will receive two copies of the record of conviction because the official is bound by sec. 343.29 to forward a copy of the stipulation of guilt to the department. Moreover, if the penalty for the offense includes a mandatory revocation of license, the official receiving the stipulation must forward the license; this is also the duty of the court if it convicts the person charged.

When statutes are inconsistent or in conflict they must be construed to avoid the inconsistency or the conflict, and to give effect to each part, if it is reasonably possible to do so. *State v. Berres*, (1954) 270 Wis. 103, 70 N.W. 2d 197; *State v. Hackbarth*, (1938) 228 Wis. 108, 279 N.W. 687.

In this case, if every part of the above statutes are to have effect, it is necessary to construe them as not requiring that the stipulation of guilt be processed through a court. This is the only construction that reasonably reconciles the fact that sec. 343.28 requires the court to forward convictions and licenses while sec. 343.29 imposes the same duties on the official receiving the stipulation.

That this construction is the one which the legislature intended is also shown by the parallel provisions of sec. 343.27. This section consists of three subsections. Each requires that notice be given to a person charged with a violation of the law if the penalty on conviction is either a revocation of license or a charge of demerit points. Subsec. (1) requires the enforcement officer, city or village attorney or district attorney to tell the person that a plea of guilty or nolo contendere or a forfeiture of bail will result in such loss, and obtain from him a signed statement that he has been so informed. Subsec. (2) requires the presiding judge or justice to inform the person charged that a conviction will result in such loss. Subsec. (3) which was added to the stat-

utes in 1957, places upon the officer receiving the stipulation the same duty of informing the person charged as subsections (1) and (2) place upon enforcement officers, etc., as to pleas and forfeitures, and also requires him to have the person signing the stipulation sign a statement that he has been so informed. Although both the official receiving the stipulation and the enforcement officers, city or village attorneys or district attorneys must obtain the statement to the effect that the person charged has been informed, the disposition of that statement is quite different. Subsec. (1) requires that "one copy of such statement shall be given to the defendant and one copy shall be filed with the court"; while subsec. (3) merely states that "such statement shall be a part of or attached to the stipulation of guilt".

If the legislature had wished to require that the stipulation be sent through a court they could have easily provided so by imposing the same duty on the official in subsec. (3) as they imposed on the officers and attorneys in subsec. (1). The fact that they did not indicates that there was no intent to require the official receiving the stipulation to send it through a court.

The legislative history of the stipulation of guilt clearly indicates that the stipulation is to be considered as equivalent to a court conviction and that it need not be docketed in any court.

Ch. 348, Laws 1953, provided the right to stipulate guilt under the newly created sec. 85.831. At this time the definition section provided:

"85.08 (1) (i) 'Conviction' means a final conviction; a forfeiture of bail or collateral deposited to secure a defendant's appearance in court, which forfeiture has not been vacated, shall be equivalent to a conviction; a finding of a juvenile court under chapter 48 shall be equivalent to a conviction.

"\* \* \*

"(k) 'Record of conviction' means a report of conviction furnished on the form supplied by the department."

Under these provisions, particularly when there was no requirement that the stipulation be forwarded to the department, it would seem evident that it was necessary for the official receiving the penalty and stipulation to refer them to a court for the purpose of entering judgment in accordance

with the stipulation. Also at that time the department could act only on a conviction in revoking a license, and by the definition section above a stipulation of guilt was not considered a conviction for purposes of ch. 85.

However the legislature passed ch. 662, Laws 1955, which made extensive changes in the sections regarding the legal status of a stipulation of guilt. The definition section was amended to read:

"85.08 (1) (i) 'Conviction' means a final conviction; a forfeiture of bail or collateral deposited to secure a defendant's appearance in court, which forfeiture has not been vacated, \* \* \* or a stipulation of guilt pursuant to s. 85.831, is equivalent to a conviction; a finding of a juvenile court under ch. 48 of a violation of this chapter or of a county or municipal ordinance enacted in conformity with s. 85.84 \* \* \* is equivalent to a conviction."

The definition of "record of conviction" remained the same.

Sec. 85.08 (24) (b) in 1953 stated:

"Every court, including a juvenile court, having jurisdiction over offenses committed under this section, or any other law of this state, or a county, city or village ordinance which is in conformity with state law regulating the operation of motor vehicles on highways, shall forward to the department a record of the conviction of any person in such court for any moving traffic violation of chapter 85 or any local ordinance which is in conformity therewith."

Ch. 662, sec. 1, Laws 1955, added, "If the offender has stipulated his guilt of such an offense pursuant to s. 85.831 the official receiving the penalty shall forward a certified copy of the stipulation to the department."

In 1953 sec. 85.08 (24) (c) provided:

"It shall be the duty of the clerk of such court or the justice of the peace, judge or magistrate of such court not having a clerk, to comply with the provisions of paragraphs (a) and (b) and the failure of such person whose duty it is to make such entry or to forward such record of conviction to the department within 48 hours thereafter, shall be imputed as a misdemeanor and the commissioner shall cause to be brought such action against such person as the statutes provide."

This section was amended by ch. 662, sec. 2, Laws 1955, to read:

"It \* \* \* is the duty of the clerk of such court or the justice of the peace, judge or magistrate of such court not having a clerk, or the official receiving the penalty under a stipulation of guilt, to comply with \* \* \* pars. (a) and (b) and the failure of such person whose duty it is to make such entry or to forward such a record of conviction or certified copy of the stipulation of guilt to the department within 48 hours thereafter, \* \* \* is a misdemeanor and the commissioner shall cause to be brought \* \* \* against such person such action as the statutes provide."

Chapter 662, sec. 3, Laws 1955, added the following sentence to sec. 85.831, which authorized the use of the stipulation of guilt, "The official receiving the penalty shall comply with s. 85.08 (24) (a) and (b)".

After these amendments became law the motor vehicle department was authorized to act upon a stipulation in revoking the license, or in computing demerit points against the license, of an operator signing that he was guilty of an ordinance violation. The authority of the department has remained the same; that is, it can only act on a conviction. Any doubt as to whether the stipulation is to be treated the same as a conviction was eliminated by the 1957 legislature which, under ch. 260, Laws 1957, amended the definition of "record of conviction" to read:

"343.01 (2) (a) 4 (d) 'Record of conviction' means the report of conviction furnished to the department as required by this chapter, including a report of a forfeiture of bail, stipulation of guilt, adjudication of ordinance violation or finding of a juvenile court as specified in par. (a) 1. to 4."

In another amendment in 1957 sec. 85.08 (24) (a) (b) and (c) were changed into two parallel sections, 343.38 entitled "Courts to report convictions and forward licenses to the department" and sec. 343.29 entitled "Officials receiving stipulations of guilt to report stipulations and forward licenses to the department". Both of these sections impose similar duties on the court and on the official receiving the stipulation. The court is required to forward the record of conviction and the official receiving the penalty is required to forward the stipulation of guilt.

There is therefore abundant evidence that the legislature intended that the stipulation need not go through a court to have effect. If there is no requirement that the stipulation been sent through a court it necessarily follows that there is no requirement that the penalty itself be sent through a court. Therefore an ordinance may provide that the authorized official pay it directly into the county or municipal treasury. This interpretation is substantiated by sec. 345.14, which authorizes the stipulation and does not require the official receiving the penalty to obtain a court order or to pay it into court. This is significant when compared to sec. 345.15, which deals with *bail* forfeitures and states that even though there is a failure to appear there can be no forfeiture without a court order. The statute then adds, "Any officer paying bail money into the county or municipal treasury without such court order is guilty of violating sec. 946.12". It would follow that if the legislature had wanted to have the stipulated penalty sent through a court it could easily have done so by making sec. 345.14 comparable to sec. 345.15. The fact that it was not done can only lead to the conclusion that there was no intent to require the payment of the penalty into a court.

The only remaining question is whether it is proper for the legislature to provide for the payment of the penalty directly into the county or municipal treasury. In Wisconsin the violation of a county or municipal traffic ordinance is not a criminal offense. The violation gives rise only to a civil action under the ordinance for the recovery of a forfeiture. *State ex rel. Keefe v. Schmiede*, (1947) 251 Wis. 79, 28 N.W. 2d 345. Since it is a civil cause of action there is no apparent reason why the claim may not be settled by an out-of-court stipulation. The stipulation is binding on both parties even though it is not a court judgment. No good purpose would be served if the receiving official is required to transfer a signed stipulation of guilt and the penalty to a court for final adjudication since the court would be limited to entering judgment in accordance with the stipulation. The only result would be the taxing of additional costs.

It is my opinion that a municipality may, by ordinance provide a procedure for stipulation of guilt in traffic ordi-

nance violations followed by a direct deposit into the treasury of a municipality and report to the motor vehicle department without the docketing of the case in any court.

WAP:JDW

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*Words and Phrases—Minors—Liquor Stores*—Under sec. 176.32 (1) an unaccompanied minor may not purchase beer, beverage, food in non-exempt Class A retail liquor establishment. Chewing gum is not an “edible” within meaning of statute. Purchase of other articles discussed.

December 12, 1958.

GEORGE J. GREISCH,  
*District Attorney,*  
Outagamie County.

You have requested an opinion regarding the construction of sec. 176.32 (1), Stats., which provides that “every keeper of any place, of any nature or character whatsoever, for the sale of any intoxicating liquor,” who permits persons under the age of 21 not accompanied by parent, guardian or spouse “to enter or be on such licensed premises for any purpose, excepting the transaction of bona fide business other than amusement or the purchase, receiving or consumption of edibles or beverages,” shall be punished as therein provided. Certain establishments such as drug stores, grocery stores, etc., are exempted.

Your questions are as follows:

“1. Is it permissible for a person under the age of 21 years to enter upon any packaged liquor store wherein packaged intoxicating liquor is sold and purchase unopened beer or packaged beer to be consumed at places other than where the beer is purchased?

“2. Is it permissible for any person under the age of 21 years to purchase any kind of edibles in a packaged liquor store wherein packaged intoxicating liquor is sold?

“a. Would ‘edible’ as set forth in the Statute (Sec. 176.32 (1)), include edibles such as gum, candy, cracker jack, in addition to the edibles such as food stuffs that are usually found in packaged liquor stores?

"3. Can any person under the age of 21 years purchase any type of article other than edibles or beverages in any packaged liquor store where packaged intoxicating liquor is sold?

"a. By 'article' I mean such to include any type of sporting equipment, magazines, tobaccos in any form."

The type of establishments referred to in the foregoing questions are known as "Class A" retail licensees. Sec. 176.32 (1) applies to such licensees. 44 O.A.G. 208.

With reference to your first question, it is clear that beer is a (fermented malt) "beverage" and sec. 176.32 in the plainest terms states that the minor may not be permitted to enter "except for the transaction of bona fide business other than \* \* \* the purchase \* \* \* of edibles or beverages". The statute makes no distinction between beverages to be consumed on the premises and those to be consumed off the premises.

In response to your second question, the answer is the same. However, you inquire whether the term "edibles" would include such things as "gum, candy and cracker jack". The word "edible" when used as a noun includes anything which is fit to be eaten as food and obviously covers both candy and cracker jack. Chewing gum, however, is a masticatory, not a food. True, it may be swallowed without causing harm to the alimentary canal, but it has no nourishing quality, or at least very little, and is not intended to be eaten. Therefore, a minor may enter a package liquor store to purchase chewing gum.

The answer to your third question is that the term "bona fide business" is obviously used in a sense which includes the purchase of articles of trade or commerce. This is shown by the fact that it was necessary for the legislature to exclude the purchase of certain articles of trade, namely edibles and beverages. It follows that minors may enter package liquor stores for the purpose of buying any article which may be sold there and which does not come within the forbidden classification of edibles and beverages.

WAP

*Retirement Fund—Eligibility*—Full-time Wisconsin air and army national guard technicians are ineligible to participate in the Wisconsin retirement fund when they are paid from federal funds and not on a state pay roll.

December 15, 1958.

RALPH J. OLSON,  
*Adjutant General.*

From National Guard Regulation No. 51 dated July 8, 1958, of which you have submitted a copy, it appears that the adjutant general of the state of Wisconsin has been delegated authority to employ, fix rates of pay for, establish duties and work hours for, supervise, and discharge civilian employes of the Wisconsin National Guard.

You wish to be advised “\* \* \* whether or not these full-time Wisconsin Air and Army National Guard technicians may properly participate in the Wisconsin State Retirement Fund as State employes”.

It appears that these employes are covered under the federal employees compensation act and for federal unemployment compensation. It further appears that the federal courts which have considered the question of whether these technicians are federal employes under the federal tort claims act have concluded that they are. See *Holly vs. U. S.*, (1951) 192 Fed. 2d 221.

The comptroller general of the United States held in 27 Comp. Dec. 334, that these persons are not federal employes. I understand that this decision has been followed by the judge advocates general of the army and air force. Several states have regarded these employes as state employes and some have accepted them into the state retirement system. However, it appears that in the majority of states the view is that they are not state employes.

The social security act amendments of 1954 expressly provide that for the purpose of that act these National Guard technicians are to be considered state employes and eligible to participate as a separate coverage group in order to obtain the benefits of the social security act. However, the federal government cannot make a binding decision that these persons are state employes nor can this state make a binding

decision that they are federal employes. In my view of the matter it is not necessary to decide whether these civilian employes in the Wisconsin National Guard are employes of the state of Wisconsin in order to answer your question.

These employes are paid from federally appropriated funds by the United States property and disbursing officer for the district in which they are located; their pay rolls are certified by such officer and approved by you or by an officer designated by you.

Sec. 66.901 provides:

“Definitions. The following words and phrases as used in ss. 66.90 to 66.918, unless different meanings are plainly indicated by their context, shall have the following meanings respectively:

“(1) **FUND.** The Wisconsin retirement fund.

“(2) **MUNICIPALITY.** The state \* \* \* .

“(3) **PARTICIPATING MUNICIPALITY.** Any municipality included within the provisions of this fund.

“(4) **EMPLOYEE.** Any person who:

“(a) Receives earnings out of the general funds of any municipality or out of any special fund or funds controlled by any municipality as payment for personal services.

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

Sec. 66.903 provides:

“Employes included; effective dates; contributions by employes. (1) **EMPLOYES INCLUDED AND EFFECTIVE DATES.** (a) All persons subject to sections 66.90 to 66.918 shall be included within, and shall be subject to, the provisions of this fund, beginning upon the dates hereinafter specified:

“1. All such persons who are employes of any municipality on the effective date of participation of such municipality as provided in section 66.902 \* \* \* .

“2. All such persons who become employes of any participating municipality after the effective date of participation of such municipality as provided in s. 66.902 \* \* \* .”

The pay rolls upon which the names of these employes appear are not regular pay rolls of the state of Wisconsin. For this reason these employes are not eligible to participate as members of the Wisconsin retirement fund. It is also at least very doubtful that the federal fund from which they are paid could be said to be a fund controlled by the state of Wisconsin.

JRW

*Counties — Employes — Retirement Fund* — Member of county board is an officer of the city, village, or town in which elected rather than an officer of the county. Eligibility under Wisconsin retirement fund discussed.

December 17, 1958.

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

You have inquired “\* \* \* whether a member of the county board can qualify as a participating employe under the Wisconsin Retirement Fund, assuming that all of the other statutory requirements have been met”. The question has been raised because of the doubt which exists as to whether a supervisor is a county officer rather than an officer of the city, village or town in which he is elected.

Sec. 62.09 (1) (a) provides with respect to cities that “The officers shall be \* \* \* one supervisor from each ward, and such other officers or boards as are created by law or by the council. \* \* \*”

In 1912 O.A.G. 781 at 782–783 it was said :

“\* \* \* it becomes important to determine whether or not the office of supervisor is a county or a city or ward office. In the case of *State ex rel. Gill v. Board of Supervisors of Milwaukee Co.*, 21 Wis. 443, it was held that the office of supervisor was a county office. This was under the provisions of chapter 129 of the laws of 1861. \* \* \*

“\* \* \*

“It will be noted that the provisions of this chapter are very different from the present statutory provision. The fact that, under section 663, it is provided that no county officer shall be eligible to the office of supervisor indicates that this is not a county office. The method provided in section 662 for filling a vacancy also indicates that the office of supervisor, where such supervisor represents a city, is a ward or city office, rather than a county office.”

Subsequent to that opinion this office has held on several occasions that a supervisor elected in a ward of a city is a city officer. 12 O.A.G. 279; 19 O.A.G. 268; 25 O.A.G. 48; 32 O.A.G. 404.

Sec. 61.19 relating to villages provides in part:

“At the annual spring election in each village in odd-numbered years, except as otherwise provided herein, there shall be chosen the following officers, viz.: \* \* \* a supervisor \* \* \*.”

In IV O.A.G. 957 is was said:

“You have suggested that, in view of the decision of our supreme court in the case of *State v. Supervisors*, 21 Wis. 443, a supervisor is not a village officer, but a county officer, and for that reason his election cannot be had under sec. 867, which relates to newly incorporated villages and provides for the election of ‘officers thereof.’

“In the above cited decision of our supreme court it was held that the office of supervisor was a county office under the provisions of ch. 129, Laws of 1861. This would not be the case, however, under the statutes as we find it to-day.

“In an opinion by my predecessor, found in the Opinions of Attorney General for 1912, p. 781, this matter was thoroughly considered, and the conclusion arrived at was that the office of supervisor is a local office and not a county office. I agree with the conclusion there arrived at.”

Sec. 60.19 (1) relating to towns, provides:

“(1) Biennially, in the odd-numbered years, at the annual town meeting there shall be elected in each town the following officers, viz.: 3 supervisors, one of whom shall be designated on the ballots as chairman \* \* \*.”

Sec. 59.03 (2) relating to the composition of the county boards, provides:

“(2) Other Counties. In counties containing less than 500,000 population:

“(a) *Composition*. The chairman of the town boards.

“(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.

“(c) *Same*. A supervisor from every village or part of a village in the county.”

It is noted that the chairman of the town board is ex officio a member of the county board. In view of the foregoing statutes and rulings it is my opinion that a member of the county

board is not by virtue of such membership, a county officer, but is an officer of the city, village or town in which he is elected.

Sec. 66.901 provides in part:

"Definitions. The following words and phrases as used in ss. 66.90 to 66.918, unless different meanings are plainly indicated by their context, shall have the following meanings respectively:

"(1) **FUND.** The Wisconsin retirement fund.

"(2) **MUNICIPALITY.** \* \* \* any county \* \* \* within the state.

"(3) **PARTICIPATING MUNICIPALITY.** Any municipality included within the provisions of this fund.

"(4) **EMPLOYEE.** Any person who:

"(a) Receives earnings out of the general funds of any municipality or out of any special fund or funds controlled by any municipality as payment for personal services.

"(b) Whose name appears on a regular pay roll of such municipality.

"(c) Is employed in a position normally requiring actual performance of duty during not less than 600 hours a year in such municipality, except that a participating employe who is simultaneously employed by another participating municipality shall be included under the fund by such other participating municipality for his service thereto, and

"(d) Has completed at least 6 months' continuous service or 12 months' total service for the municipality by which such person is employed when such person otherwise first becomes eligible for participation in the fund, provided that leave of absence due to service connected disability compensated under ch. 102 shall be considered as continuous service but he shall not become a participating employe until after normal contributions become due.

"(4a) **Participating Employe.** An employe currently in the service of a participating municipality, or an employe who is on a leave of absence, subject to the limitations in section 66.903 (1) (b).

"\* \* \*

"(16) **GOVERNING BODY.** \* \* \* county board in counties \* \* \*"

Sec. 66.902 (2) provides in part:

"(2) Election by a municipality to be included within the provisions of this fund shall be made by a resolution adopted by a majority of all the members of the governing body. \* \* \*"

Sec 66.903 (1) (a) provides in part:

“(1) **Employees Included and Effective Dates.** (a) All persons subject to sections 66.90 to 66.918 shall be included within, and shall be subject to, the provisions of this fund, beginning upon the dates hereinafter specified:

“1. All such persons who are employes of any municipality on the effective date of participation of such municipality as provided in section 66.902, beginning upon such effective date.

“2. All such persons who become employes of any participating municipality after the effective date of participation of such municipality \* \* \*.”

Even though a county had taken proper action to become a participating municipality under the Wisconsin retirement fund, a member of the county board as such could not become a participating employe since he would not be a county officer and hence would not be “an employe currently in the service of a participating municipality”.

Even though the city, village or town in which such individual was elected had taken proper action to become a participating municipality under the Wisconsin retirement fund, he could not become a participating employe thereunder by virtue of his membership on the county board since his compensation as a member of the county board is paid by the county and hence he would not receive “earnings out of the general funds of” the city, village or town, nor would his name appear “on a regular pay roll of such” city, village or town.

You also asked whether a different conclusion would be reached if the individual in question rendered service as a chairman of the county board or a member of the highway committee, independent of services on the board proper, which would be sufficient to qualify him in every other respect as a participating employe of the county. You inquire “Specifically would such be considered to be services as a county official?”

Sec. 59.05 (1) relating to counties, provides:

“(1) The board, at the first meeting after each regular election at which members are elected for full terms, shall elect a member chairman. He shall perform all duties required of the chairman until the board elects his successor. He may administer oaths to persons required to be sworn

concerning any matter submitted to the board or a committee thereof or connected with their powers or duties. He shall countersign all ordinances of the board, and shall preside at meetings when present. When directed by ordinance he shall countersign all county orders, transact all necessary board business with local and county officers, expedite all measures resolved upon by the board and shall take care that all federal, state and local laws, rules and regulations pertaining to county government are enforced."

Other statutes impose specific duties upon the chairman of the county board including sec. 19.015 which directs him to prosecute certain actions in the name of the county, and 67.08 which directs him to execute county bonds in his "official" capacity. The chairmanship of the county board was regarded as an office in 15 O.A.G. 172 and in 20 O.A.G. 85.

Sec. 83.015 provides :

"(1) Election; Compensation: Term. (a) Except as otherwise provided in paragraph (b) each county board at the annual meeting shall by ballot elect a committee of not less than 3 nor more than 5 persons, to serve for one year, beginning either as soon as elected or on January 1 following their election, as designated by the county board, and until their successors are elected. \* \* \* The committee shall be known as the 'county highway committee,' and shall be the only committee representing the county in the expenditure of county funds in constructing or maintaining, or aiding in constructing or maintaining highways. \* \* \*

"\* \* \*

"(2) Powers and Duties. The county highway committee shall purchase and sell county road machinery as authorized by the county board, determine whether each piece of county aid construction shall be let by contract or shall be done by day labor, enter into contracts in the name of the county, and make necessary arrangements for the proper prosecution of the construction and maintenance of highways provided for by the county board, enter private lands with their employes to remove weeds and brush and erect or remove fences that are necessary to keep highways open for travel during the winter, direct the expenditure of highway maintenance funds received from the state or provided by county tax, meet from time to time at the county seat to audit all pay rolls and material claims and vouchers resulting from the construction of highways and perform other duties imposed by law or by the county board."

In 12 O.A.G. 40, 14 O.A.G. 218 and 15 O.A.G. 318 the members of said committee were regarded as holding offices.

It is my opinion that in rendering services as chairman of the county board or as a member of the county highway committee the individual would be rendering services as a county officer and that such individual could become a participating employe under the Wisconsin retirement fund by virtue of such service, if the county were a participating municipality and the individual met the other qualifications prescribed therefor by statute.

JRW

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*Aid—Children—Public Welfare—Sec. 48.58 (2)* does not authorize payment of state aid for periods when children have been removed from a county children's home to a hospital for medical and surgical treatment.

December 19, 1958.

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

You ask whether state aid under sec. 48.58 (2), Stats., as created by sec. 5, ch. 616, Laws 1957, is to be paid to a county for periods when children have been removed from a county children's home to a county hospital for medical and surgical care. Sec. 48.58 (2) reads in part:

"A county shall be reimbursed by the state for 50 percent of the average cost of the care of the children who are in the children's home under sub. (1) (a) and (b)."

Subsecs. (1) (a) and (b), referred to in the above quoted provision, provide that county children's homes may accept legal custody of dependent or neglected children transferred to them by the children's court, and provide care for dependent or neglected children referred by the county welfare department.

It is provided in Art. VIII, sec. 2 of the Wisconsin Constitution that:

"No money shall be paid out of the treasury except in pursuance of an appropriation by law."

The appropriation under sec. 20.670 (22) is limited to the amount necessary for state aid as provided in sec. 48.58 (2) and other designated sections. The amount authorized to be paid from the treasury under the provisions of sec. 48.58 is limited to care of children "who are in the children's home" under secs. 48.58 (1) (a) and (b).

The children who are removed from the home for treatment in a hospital are not "in" the home in a technical sense. It is conceivable that the term "in" might for some purposes be construed more broadly than for others. However, when a statutory provision involves payments from the public treasury, any doubt as to whether it is intended to authorize a payment is ordinarily resolved against such a payment. It is said in 50 Am. Jur. 447:

"\* \* \* Statutory grants are not to be enlarged by construction. Indeed, every reasonable doubt should be so resolved as to limit the powers and rights claimed under the authority of the statute. Whatever is not unequivocally granted is taken to have been withheld."

That sec. 48.58 (2) was not intended to authorize state aid for periods when a child is removed from a home for treatment in a hospital is indicated by the fact that the legislature has made express provision in other statutes for payment of aid under similar circumstances. See sec. 50.04 (7) (c), authorizing state aid where patients have been removed from tuberculosis sanatoria to hospitals for surgery or medical treatment, and similar provisions in sec. 51.08 (1) and 51.24 (2) with respect to mental patients. Provision for state aid in such cases was made by ch. 244, Laws 1945, after the opinions were given in 32 O.A.G. 147 and 154 that state aid might not be given for patients removed to a hospital for medical care under statutes authorizing aid for patients maintained "at" or "in" a designated institution.

Since the legislature has made specific provision when it intended that state aid payments should be made for patients removed from certain designated institutions for surgery or medical care, it would seem that if it had so intended with respect to children removed from a county children's home, it would have made similar provision.

BL

*County Board—Reimbursement—Members*—Under sec. 59.03 (2) (g) county board member is entitled to mileage at the rate established by the board under sec. 59.15 (3) regardless of fact that such board member received free transportation. District attorney may not start civil suit for recovery of money on behalf of county without county board authorization.

December 22, 1958.

JAMES R. SEERING,  
*District Attorney,*  
Sauk County.

You state that some time ago a member of the county board became ill so that he was unable to drive his automobile. Thereafter he was transported to committee meetings and county board sessions by means of county traffic police vehicles. He was paid his regular per diem in addition to mileage and now another county board member is insisting that you institute proceedings to recover the mileage payments.

It is your opinion that under sec. 59.03 (2) (g) a county board member is entitled to his mileage regardless of the manner of transportation used, but that there is a possibility that such supervisor is indebted to the county for the reasonable value of the transportation furnished by the county if it could be established that specific trips were made for the sole purpose of transporting the supervisor in question.

The complaining supervisor now requests that some action be commenced by you to recover whatever moneys the other supervisor may be owing the county. You have advised him that he must do either one of two things: (1) Bring a taxpayer's action against the county, or (2) Present a resolution to the county board requesting the district attorney to institute action in the name of the county to collect any money owing by the supervisor in question.

You have therefore requested our opinion as to the proper procedure to be followed by the individual supervisor and whether the district attorney has any authority to start a suit on behalf of the county unless authorized so to do by the county board.

We will answer the second part of your question first by quoting from 25 O.A.G. 549, 550 :

“(7) This department has consistently held that a district attorney cannot institute civil actions in the name of the county without the consent and authorization of the county board. III Op. Atty. Gen. 688; VI Op. Atty. Gen. 558; XII Op. Atty. Gen. 128; XV Op. Atty. Gen. 219; XVI Op. Atty. Gen. 372; XXI Op. Atty. Gen. 932.”

In the same opinion at the same page it was also stated that this is especially true where there is involved the recovery or collection of money for the county.

So far as any taxpayer's action is concerned we suggest that there is no duty on the part of the district attorney acting in his capacity as such district attorney to advise or represent any individual taxpayer even though he be a supervisor. While your communication does not make clear the basis upon which a taxpayer's suit might lie against the county under the facts stated, the district attorney would be involved in a conflict of interests if he were to represent an individual in a suit against the county. This is so because sec. 59.47 (1) makes it the duty of the district attorney to prosecute or defend all actions in the courts of his county in which the state or county is interested or a party (subject to the qualification noted above as to county board authorization for commencing civil actions).

Since you have no duty to advise the individual supervisor as to the procedure he should follow, we must decline to answer this part of your question.

Turning now to the merits of the controversy so far as the payment of mileage is concerned, we concur in your view that the supervisor was entitled to mileage irrespective of the mode of transportation used.

Sec. 59.03 (2) (g) provides :

“(g) *Mileage.* Each supervisor shall, for each day he attends a meeting of the board, receive mileage for each mile traveled in going to and returning from the meetings by the most usual traveled route at the rate established by the board pursuant to s. 59.15 as the standard mileage allowance for all county employes and officers.”

While there are numerous opinions of the attorney general on mileage for county board members we have found none on the specific point raised here.

It is to be noted that the above statute does two things. First, it provides that the supervisor shall receive mileage for each mile traveled, and secondly, it provides the rate of mileage,—namely the rate established by the board under s. 59.15 as standard mileage allowance for all county employes and officers.

Sec. 59.15 (3) relating to reimbursement for expenses of county officers and employes reads :

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

If the legislature in sec. 59.03 (2) (g) had provided that the mileage of board members would be paid pursuant to the provisions of sec. 59.15 (3) there would be a question as to the propriety of paying mileage to this supervisor since he had been placed to no expense and could not very well justify the “reasonableness” or “necessity” for the claimed reimbursement.

However, the reference in sec. 59.03 (2) (g) to sec. 59.15 (3) is only to “the *rate* established by the board pursuant to sec. 59.15 as the standard mileage allowance”, and not to any of the other provisions of that section relating to reasonableness or necessity.

In other words, sec. 59.03 (2) (g) gives an absolute right to mileage for a county board member regardless of whether he walks, rides a bicycle, or drives his own car or is given a free ride, and sec. 59.15 (3) has relevancy only for purposes of establishing the rate at which the mileage is to be paid.

Hence, there is no basis for any suit to recover from the board member mileage which has been paid to him pursuant to sec. 59.03 (2) (g) at the rate determined by the board under sec. 59.15 (3).

WHR

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*Prisoner—Counties—Appropriations and Expenditures*  
—Sec. 956.01 (13) discussed regarding prisoner who pleads guilty to offense committed in another county and is sentenced for such offense to county jail of county in which he pleaded guilty, and maintenance charges therefor.

December 23, 1958.

JOSEPH W. BLOODGOOD,  
*District Attorney,*  
Dane County.

You have requested an opinion whether, when a person pleads guilty to offenses committed in several counties pursuant to sec. 956.01 (13), Stats., and is sentenced to the county jail of the county in which he so pleads guilty, the cost of his maintenance in the jail may be charged wholly or in part to the other county or counties in which some of the offenses were alleged to have been committed.

The procedure under sec. 956.01 (13) may be summarized as follows:

A prisoner in custody in county A who has committed felonies or has issued worthless checks in counties B, C and D, applies to the district attorney of county A to be charged in that county with the offenses committed in the other counties so that he may plead guilty to them. The district attorney of county A then draws an information charging the offenses committed in counties B, C and D, as well as the offense committed in county A, and submits the information to the district attorneys of counties B, C and D. If those district attorneys execute and send to the district attorney of county A a written consent, the district attorney of county A then files such charges with any court of his county having jurisdiction. Thereupon the prisoner,

after signing a written waiver of his right to be tried in the county where the crime was committed, may plead guilty to the offenses committed in counties B, C and D, as to which the district attorneys of those counties have executed a written consent.

Sec. 956.01 (13) (d) then provides as follows :

“(d) *Sentence.* The court shall thereupon enter such judgment as the law may provide in such cases, *the same as though all the crimes charged were alleged to have been committed in the county where the court is located*, whether or not the court has jurisdiction to try crimes of the grades of those to which the defendant has pleaded guilty under this subsection.”

Sec. 956.01 (13) (e) provides in part as follows :

“(e) *Costs; certificate of conviction.* The county where the plea is made shall pay the costs of prosecution if the defendant does not pay them, and is entitled to retain fees for receiving and paying to the state any fine which may be paid by the defendant. \* \* \*”

Nothing in the foregoing statute remotely suggests a right to charge back to the counties B, C and D, any part of the cost of maintaining the prisoner in the county jail on sentences imposed for crimes committed in those counties. On the contrary, the statute indicates that the disposition of the cases will be the same as if all the offenses had been committed in county A. (Incidentally, since the statute applies only to felonies and the issuance of worthless checks, and only to multiple offenders, it may be assumed that sentences to the county jail rather than to the state prison would be exceptional, and the question you raise would not arise often.)

Therefore, unless some other provision of the statutes authorizes a charging back of the cost of maintenance, it will have to be borne by the county in which the pleas of guilty were made and sentences imposed. I know of no such statute.

Sec. 53.33 provides that the maintenance of the persons in the county jail shall be paid out of the county treasury. Sec. 53.34 provides that if a county has no jail its prisoners may be sentenced to the jail of another county where they

shall be received and kept in all respects as if committed from the county where the jail was located, "but the cost of such keep shall be paid by the county from which the prisoner was sentenced, committed or delivered". Sec. 53.35 provides for emergency removal of prisoners to the jail of another county "where they shall be received and kept as if committed thereto, but at the expense of the county from which they were removed". Neither sec. 53.34 nor sec. 53.35 has any application to the present problem, since both involve maintenance of prisoners committed by a court of another county.

Sec. 956.04 provides that upon a change of venue the costs shall be paid by the county where the crime was committed, but this evidently relates to a change of venue pursuant to sec. 956.03 (3), where a prosecution originally commenced in the county where the crime was committed is changed to an adjoining county by reason of community prejudice. The procedure under sec. 956.01 (13) is not a change of venue.

Sec. 956.05 provides that in case of a change of venue and in default of bail, the prisoner is to be conveyed to the jail of the county where he is to be tried in time for the trial, and there kept until discharged, but no provision is made for payment of his maintenance in such jail. It has been held that under this section and 956.04, there is an obligation on the part of the county in which the crime was committed to pay the expenses of maintaining the prisoner in the county jail of the other county. *Davies v. The State*, (1888) 72 Wis. 54, 58, 38 N.W. 722. This, the court intimates, would be true also if the court of the county to which the venue was changed were to sentence the defendant to imprisonment to the county jail of that county. However, as stated above, these statutes do not apply to proceedings under sec. 956.01 (13).

The fact that no provision similar to sec. 956.04 has been made regarding the maintenance of a prisoner sentenced under sec. 956.01 (13) raises an inference that the legislature did not intend any charging back of such expenses.

WAP

*Appropriation and Expenditures—County Board*—Board of trustees of county hospital has no authority to remodel hospital facilities under sec. 46.18. Such power is in county board under sec. 59.07 (1) (d). Funds accumulated therefor are part of general funds unless segregated as building reserve under sec. 46.18 (13).

December 26, 1958.

KENNETH H. HAYES,  
*District Attorney,*  
St. Croix County.

You state that St. Croix county wishes to do substantial remodeling of the kitchen facilities of its county hospital, established under sec. 51.25, Wis. Stats. The estimated cost is between \$75,000 and \$100,000. Over a period of years, funds have accumulated in a so-called "Treasurer's Cash Fund" from two sources: (1) sale of agricultural products from the county hospital, and (2) grants from the state, under secs. 51.08 and 46.106, which have exceeded the actual cost of operation. Since you do not mention whether this fund is maintained as a segregated cash reserve for the enlargement or replacement of infirmary facilities under sec. 46.18 (13), we assume it is not.

You ask (1) Does the board of trustees of the county hospital have authority to undertake such remodeling?, and (2) May the board of trustees use the funds accumulated in "Treasurer's Cash Fund" for such remodeling?

Your first question is answered by 37 O.A.G. 285 (1948) which you have cited in a memorandum accompanying your opinion request. Under sec. 46.18 the authority of the board of trustees of a county institution is limited to management. Even the management of a county hospital by the trustees is subject to the regulation of the county board. 39 O.A.G. 330 (1950). The authority to engage in construction work, including the proposed remodeling, is in the county board under sec. 59.07 (1) (d). This reasoning was recently followed in 47. O.A.G. 69, 72 (1958). Therefore, your conclusion that the board of trustees lacks authority to do the remodeling is correct.

Your second question deals with the use of funds accumulated in the "Treasurer's Cash Fund".

Sec. 46.18 (6) provides in part:

“\* \* \* All receipts on account of said institutions shall be paid into the county treasury within one week after receipt.”

Although the funds accumulated in the “Treasurer’s Cash Fund” may be in a bank account separate from other county funds, these still are part of the county general fund and available for appropriation for any authorized purpose by the county board unless segregated under the building reserve fund provisions of sec. 46.18 (13).

21 O.A.G. 919 (1932), which you have appropriately quoted in your memorandum, states:

“\* \* \* the asylum trustees may not use for construction and improvement any portion of the funds appropriated for operation and maintenance nor any portion of the funds on the books of the county as asylum receipts. \* \* \*”

The only funds that can be used for the construction or remodeling of county hospital facilities are moneys appropriated by the county board for that purpose. 20 O.A.G. 130 (1931). Inasmuch as the board of trustees is not authorized to perform other than managerial functions, the task of supervising such remodeling, once authorized by the county board accompanied by proper appropriation of funds, would probably be that of the county board building committee or some other duly authorized county board committee. Your second conclusion, then, that only the county board may authorize the use of these funds for remodeling is also correct.

JEA

*Insurance—Licenses—Banks—Statutes* discussed relative to the right of state banks to obtain group credit life insurance and group accident and health insurance for their borrowers.

December 29, 1958.

G. M. MATTHEWS, *Commissioner of Banks*,

You have asked several questions regarding the effect of several 1957 changes in the law relating to the right of state banks to obtain group credit life insurance and group accident and health insurance for their borrowers.

In order to provide a detailed analysis of the problems posed and to provide specific answers to those problems, we have restated your questions as follows :

1. Can a state bank obtain a group credit life insurance policy to cover its borrowers and charge them for coverage?

2. Can a state bank officer or employe obtain a special license from the department of insurance to sell to bank borrowers group credit life insurance only?

3. Can the licensed officer or employe turn over to his employer bank part or all of any commissions received from the insurance company?

4. Can the bank accept such payments of commission proceeds from its licensed officer or employe and retain these payments as income to the bank?

5. Can a state bank which is a policy holder under a group credit life insurance policy issued on the lives of borrowers from the bank accept dividends, loss experience refunds, or other payments such as distribution of savings, earnings or surplus when paid to the bank in accordance with the terms of the policy?

6. If an individual credit life insurance policy plan is used, may the licensed officer or employe turn over to the bank by which he is employed any commissions received from the sale of such insurance and is the bank authorized to accept such payments from him?

The answer to the first question is "yes". Section 206.60 (2) authorizes banks to obtain this type of insurance and 206.60 (2) (b) permits charging the debtor for the premium on the policy. Although ch. 122, Laws 1957, amended sec. 206.60, it did not alter the statute in this respect. Therefore

the answer to this same question in 43 O.A.G. 181, 187 is still correct.

The second question is also answered "yes". Sec. 206.41 (5) provides the requirements for the usual examination for a life insurance agent's license. In ch. 321, Laws 1957, the legislature amended 206.41 (5) (e) so as to exclude from these license requirements:

"\* \* \* officers, members, employes, or agents of banks organized under ch. 221 \* \* \* when such individuals apply for licenses for the sole purpose of soliciting credit life insurance."

and by ch. 624, Laws 1957, substituted in lieu thereof the provisions of sec. 206.41 (5) (e), which reads:

"(e) The examination provided for under this subsection need not be taken by persons licensed under sub. (6) (b)."

A special license for the sale of credit life insurance only is provided for in ch. 624, Laws 1957, which creates sec. 206.41 (6) (b):

"The commissioner may issue licenses permitting the sale of credit life insurance only. Such licenses shall be designed and printed so that they can be clearly distinguished from other licenses issued under this section. For the purposes of this paragraph credit life insurance is nonrenewable, nonconvertible, term insurance. Such insurance may be sold under this paragraph only when:

"1. The insurance is written upon the life of the debtor, and all or a portion of the insurance is payable to the creditor in satisfaction of the debt; and

"2. The term of the insurance does not substantially exceed the term of the obligation; and

"3. The amount of the insurance does not substantially exceed the amount of the original obligation."

The third question is answered affirmatively by the express language of ch. 321, Laws 1957, in amending 206.41 (3) (b): -

"No commission or other valuable consideration for services as a life insurance agent shall be paid directly or indirectly by an insurer or licensed life insurance agent to any person other than a person holding a currently valid license to act as a life insurance agent as required by the laws of this state. Nor shall any person other than a duly licensed

life insurance agent accept any such commission or other valuable consideration, *except that any duly licensed agent may direct that his commissions be paid to any partnership of which he is a member, employe or agent, or to any corporation of which he is an officer, employe or agent, if such corporation or partnership is engaged primarily in the insurance business or to a bank organized under ch. 221, a permittee under s. 115.07 (4), a licensee under s. 115.09 or 218.01, or a national bank, if such duly licensed agent is an officer, member, employe, or agent of any of the aforesaid agencies and the commissions are for the sale of credit life insurance; and except that this section shall not prevent the payment or receipt of renewal or other deferred commissions to or by any person solely because such person has ceased to hold a license to act as a life insurance agent.*"

Note that the amendment includes among the exceptions to the general prohibition against an agent paying a commission to an unlicensed agent, "payments to banks \* \* \* by employes or officers \* \* \* if they are for the sale of credit life insurance".

The answer to the fourth question must also be "yes", although the statute does not explicitly so state. Prior to the enactment of ch. 321, Laws 1957, [amending 206.41 (3) (b)] sec. 206.41 (3) (b) said, in effect, this:

1. No agent can pay commissions to an unlicensed person.
2. No unlicensed person can accept such commissions.
3. *Except* an agent can *pay* a commission to his unlicensed partnership or corporation if it is primarily engaged in the insurance business.

This section does *not* expressly state that the insurance partnership or corporation can *accept* such payments of commissions (as an exception to the prohibition against accepting commissions). However, the obvious conclusion that permission to such agents to pay commissions is intended to permit the insurance company to accept these payments, has uniformly been adhered to in the interpretation and administration of the statute.

When ch. 321 was passed, 206.41 (3) (b) was amended so as to place banks and their agents selling credit life insurance on the same footing as insurance partnerships and corporations and their agents. The conclusion is that banks are authorized to *accept* the clearly authorized payments of com-

missions from their employes just as insurance companies had this authority before the 1957 amendment. Further we find nothing in ch. 321, setting forth the powers of state banks, that should be construed as limiting the power of state banks to accept such payments. The insurance statute authorizing banks to accept these payments is sufficient authority for the banks so to act.

In my opinion, failure of the legislature to pass Bill No. 473, S., session of 1957, which contained a provision specifically authorizing banks to *accept* payments, does not militate against the foregoing conclusion. In the light of the argument herein developed, the legislature could very properly have concluded that Bill No. 473, S., was unnecessary.

The answer to the fifth question is "yes".

There is no express prohibition in the statutes against the receipt of dividends, loss experience refunds or any other payments on a policy in accordance with the terms thereof because the recipient happens to be a bank. However, prior to the amendment of the insurance statutes in 1957 by the passage of chs. 122, 123, 321 and 624, Laws 1957, it was stated in 43 O.A.G. 181, 189 (1954), that such payments could not be made since the result would be that a person not a licensed insurance agent would be receiving a benefit out of the premium as the result of the sale of a policy of insurance which would be in violation of the then existing prohibition against the splitting of commissions received out of the premiums on life insurance. The opinion stated :

"Fifth, continuing the discussion under fourth, *supra*, sec. 206.41 clearly provides in regard to life insurance that the agent must be a natural person, and that the agent cannot split his fees or commission with any firm or corporation other than a firm or corporation principally engaged in the insurance business. This conclusion is confirmed by the fact that the proposed amendment to sec. 206.41 (3) (b) was written for the express purpose of allowing a corporation or partnership to share in premiums on life, accident and health policies, and this provision was defeated by the legislature. Sec. 209.04 provides that agents of insurance companies other than life must be natural persons, and commission splitting is prohibited by sec. 201.53 (5).

"In view of the broad prohibition against splitting the commissions received out of the premiums on life insurance, it would appear that the charges which may be made against

a debtor insured under a group credit life insurance policy must be limited to the net premium, or else a person not a licensed insurance agent would be receiving a benefit out of the premium as a result of the sale of such a policy. Hence, any refund of premium, however named, whether as a loss experience refund or otherwise, could not be retained by the bank creditor but must be refunded to the person who has paid such charge."

In so ruling the opinion followed the principle:

"The law regards the substance and not the form and is not to be cheated by any gloss of words." *Marcus v. Heralds of Liberty*, 241 Pa. 429, 88 A. 678, 680.

The opinion quoted very clearly indicates in the last paragraph that the ruling that any premium refund whether named as a loss experience refund or otherwise could not be retained by the policy holding bank creditor because, but only because, of the broad statutory prohibition against the splitting of commissions received out of the premiums on life insurance.

By the amendments to the insurance laws in 1957 hereinabove discussed the prohibition against the sharing of commissions on the sale of life insurance by a licensed officer or employe with the bank by which he is employed has been repealed and the public policy evidence thereby has effectively been reversed.

Accordingly, there is no longer any reason why a bank which is a policy holder is not entitled to receive dividends or loss experience refunds just like any other policy holder in accordance with the terms of its group credit life insurance policy.

Moreover, in proper cases the governing statutes appear to recognize the propriety of such payments.

Sec. 201.53 reads in part:

"Regulations, limitations, prohibitions. (1) No insurance company shall make any agreement of insurance other than as plainly *expressed in the policy*.

"(2) No insurance company, nor any officer, agent or employe thereof, shall pay, allow or give or offer to pay, allow or give, nor shall any person receive, any rebate of premium, or any special favor or advantage whatever in the dividends or other benefits to accrue, or any valuable

consideration or inducement whatever *not specified in the policy*. Any violation of this subsection that is a violation of section 204.52 shall be subject to the fine provided in section 204.53 in lieu of the penalty imposed by section 201.53 (9).”

Further, sec. 201.54 reads :

“Dividends. Any company may make distribution of savings, earnings or surplus to any class of policyholders, without having specified such dividends or distribution in the policy, where a schedule thereof has been filed with the commissioner.”

No reason has been advanced why a bank shall not be considered a policy holder within the meaning of the statutes.

It may be argued that the legislature had the opinion of 1954 in 43 O.A.G. 181 before it when it contemplated its 1957 amendments and hence, since those amendments by their terms refer only to “commissions”, and do not discuss the subject of loss experience refunds or other payments, the legislature did not intend to affect the attorney general’s ruling in regard thereto. This argument must fail. If it is presumed that the legislature had any portion of the opinion in 43 O.A.G. before it, it must be presumed that it had the entire opinion before it, and that the legislature realized that any inhibition upon the payment of premium refunds was based solely upon the statutory prohibition against the splitting of commissions, and when that prohibition was repealed, any implied prohibition affecting loss experience refunds was likewise repealed.

In view of the foregoing the answer to the sixth question is “yes”.

A properly licensed agent may share commissions with his employer bank upon individual policies of credit life insurance just as much as he may upon policies of group credit life insurance. The same rationale as set forth above in answer to Question 4 authorizes the bank to accept such payments.

RGT

*Counties—County Board—Purchasing Agent—Establishment of county purchasing agency under sec. 59.07 (7) discussed.*

December 29, 1958.

EDWARD A. KRENZKE,  
*Corporation Counsel,*  
Racine County.

You have requested an opinion as to whether a central purchasing agency may be set up under provisions of sec. 59.07 (7), Stats. 1957 to handle all purchases of supplies and equipment for the various departments of the county, including those institutions which are managed by trustees, the county jail, and the highway department.

In the statutes of 1947, sec. 59.07 (7) provided:

“The county board of each county is empowered at any legal meeting to:

“\* \* \*

“(7) PUBLIC RECORDS, FORMS, PURCHASING AGENT. Prescribe the form and manner of keeping the public records of the county in any county office and the accounts of the several county officers; and, except in counties of a population of 125,000 or more, may appoint a person or committee as county purchasing agent, and such person or member of such committee need not be a member of the county board but may be the county clerk, county treasurer or any other county officer, and make appropriations for their services. Such purchasing agent shall provide all books, stationery, blanks, safes, furniture, telephone service, fuel and lights necessary for the discharge of official business in the offices of the county clerk, clerk of the circuit court, register of deeds, treasurer, sheriff and county judge, and the chairman of the county board shall forthwith sign an order in payment therefor. When the cost of such supplies exceeds \$60, the said purchasing agent shall in such manner as he shall deem best to secure the attention of probable bidders, invite proposals of similar standard supplies of equal quantity, and shall purchase from the lowest reliable bidder. *Any county board may by ordinance require that the purchasing for any or all of the offices, boards, departments and commissions of the county shall be made in such manner and by such agency as the county board may determine.* \* \* \*”

This section was construed in 37 O.A.G. 292 wherein it is stated:

“It is our opinion, therefore, that the Amendment effected by ch. 56, Laws 1943, [which changed the last sentence of said section from, ‘In counties having a population of 125,000 or more, purchases shall be made for any or all of the offices, boards, departments and commissions of said county in such manner and by such agency as the county board shall by ordinance provide for.’, to ‘*Any county board may by ordinance require that the purchasing for any or all of the offices, boards, departments and commissions of the county shall be made in such manner and by such agency as the county board may determine.*’] extended the authority of the county board so as to enable it by ordinance to *appoint a purchasing agent to handle all purchasing for all departments and offices.*” (Italics supplied)

Thereafter in 1955, chapter 59 was completely revised, primarily by enactment of Bill 535 S. which became ch. 651, Laws 1955.

The first sentence of old sec. 59.07 (7) was retained and renumbered 59.07 (6), and the new 59.07 (7) was created in the form it retains in the 1957 statutes as follows:

“(7) PURCHASING AGENT. Appoint a person or committee as county purchasing agent, and provide compensation for their services. Any county officer or supervisor may be the agent or a committee member. The purchasing agent shall provide all supplies and equipment for the various county offices and the board chairman shall promptly sign orders in payment therefor. The board may require that all purchases be made in the manner determined by it.”

The following notation appears immediately following said section in the drafting record on file in the legislative reference library:

“NOTE: This is from part of 59.07 (7). The population restriction is removed, and the new wording makes it clear that the board may determine questions of the manner in which purchasing is to be done.”

It is clear that the legislature intended to broaden the board's powers in regards to purchases. The changes in wording, including “the various county offices” in place of “any or all of the offices, boards, departments and commis-

sions of the county” and the use of the words “supplies and equipment”, therefore are not to be viewed in a restrictive sense.

You call our attention to the following language which appears in sec. 83.015 (1) :

“\* \* \* The committee shall be known as the ‘county highway committee’, and *shall be the only committee representing the county in the expenditure of county funds in constructing or maintaining, or aiding in constructing or maintaining highways.* \* \* \*”

This sentence first appeared in ch. 108, sec. 128, Laws 1923, in almost identical language and has been continued as a part of sec. 82.05 or sec. 83.015 since that date. Ch. 108, sec. 128, Laws 1923, consolidated and revised paragraphs (1) (2) and (4) of subsec. 1317 M-5 of the 1921 statutes to be sec. 82.05. The revisor’s note reads “No change in substance is proposed”.

It is my opinion that this special statute is in conflict with the general statute sec. 59.07 (7) and the special statute is controlling. It is possible that the provisions of sec. 83.015 (1) were not fully considered in the opinion at 37 O.A.G. 292 and the conclusion reached in that opinion is subject to modification. I have reviewed the provisions of the other statutes mentioned in your letter and find no material conflict with sec. 59.07 (7).

The provision in sec. 83.015 (1) would not prohibit the county highway committee, if it so desired, from securing the assistance of the purchasing agent in the preparation of specifications and advertising materials for the purchase of supplies and equipment which the highway committee is authorized to make. Sec. 59.08 (2) was created by ch. 539, Laws 1957, and amended by ch. 680, Laws 1957, and grants the county highway committee or civil defense committee power to act in case of certain public emergencies listed in said statute.

I conclude that a central purchasing agency may be set up under the provisions of sec. 59.07 (7) to handle all purchases of supplies and equipment for the various offices and departments of the county with the exception of those purchases involving the expenditure of county funds in the

constructing or maintaining, or aiding in constructing or maintaining highways which the county highway committee may be authorized by statute or resolution of the county board to make, and with the exception of those purchases which the county highway committee or civil defense committee may be authorized to make in time of public emergency as provided by sec. 59.08 (2).

RJV

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*Words and Phrases—Insurance—47 O.A.G. 16* supplemented and meaning of “in the same industry” in sec. 206.60 (4) construed and applied to specific situations.

December 30, 1958.

PAUL J. ROGAN, *Commissioner,*  
*Wisconsin Insurance Department.*

Since the issuance of my opinion, dated January 16, 1958, to you relating to the legality of a group life insurance plan (47 O.A.G. 16) additional information has been obtained which necessitates this supplementary opinion.

The earlier opinion dealt with a group life insurance plan as a “package”, so to speak, wherein it was proposed to issue group policies covering “key personnel” of firms which were classified into eleven “major industries”. Based on the information then available, it was concluded that the “major industries”, identified by name only, constituted a classification outside the intended scope of sec. 206.60 (4). It was also pointed out, however, that “whether a particular set of employers are in the same industry depends in each case upon the activities or business which each carries on in this state”.

Subsequent information has disclosed in considerable detail the proposed structure of five of the eleven “major industries”, viz. (1) Primary Metals, (2) Machinery, Fabricated Metal Products and Instruments, (3) Lumber, Wood Products and By-Products, (4) Textiles, Leather and Other Finished Products and (5) Engineering and other Manufacturers’ Service Organizations. For convenience, these groups will hereinafter be referred to as Group 1, 2, 3, 4, and 5 respectively.

In Volume V, No. 1, Wisconsin Commerce Reports, Bureau of Business Research and Service, Madison, Wisconsin, April 1957 at page 61, the following is quoted from U. S. Bureau of the Census, 1947 Census of Manufacturers:

“An industry consists of a group of establishments primarily engaged in the same line or similar lines of economic activity. In the manufacturing field, the line of activity is generally defined in terms of the products made or the processes of manufacture used . . . it is important that an industry comprise a group of establishments: (a) whose output consists, to a relatively large extent, of the products defining the industry; and (b) whose output of the products defining the industry accounts for a relatively high proportion of the total output of those products by establishments in all industries.

“An establishment is assigned to, or classified in, an industry, generally on the basis of the principal products made. The products made by each establishment are grouped according to the industries to which they ‘belong’ . . . and the group of products accounting for the principal portion of the total value of shipments of the establishment determines its industry classification.”

Although this definition deals chiefly with the manufacturing field industries, it clearly recognizes the existence of non-manufacturing industries. There is difficulty, however, in applying parts of this definition to industries where no “product” in the usual sense is made and similarly the term “shipment” is not easily applied to a non-manufacturing establishment.

Of considerable assistance in this matter is a ‘Standard Industrial Classification Manual’ prepared by the United States Bureau of the Budget, Technical Committee on Industrial Classification, Office of Statistical Standards, 1957, (with supervision and sponsorship also by Bureau of the Budget’s Committee on Criteria for Recognizing an Industry). The introduction to this manual reads:

“The Standard Industrial Classification was developed for use in the classification of establishments by type of activity in which engaged; for purposes of facilitating the collection, tabulation, presentation, and analysis of data relating to establishments; and for promoting uniformity and comparability in the preservation of statistical data collected

by the various agencies of the United States Government, *State agencies, trade associations* and private research organizations." (Italics supplied).

While this manual lists industries under ten "Divisions", it divides them into 99 "Major Groups". The divisions are:

- Division A Agriculture, Forestry and Fisheries
- Division B Mining
- Division C Contract Construction
- Division D Manufacturing
- Division E Transportation, Communication, Electric, Gas, and Sanitary Services
- Division F Wholesale and Retail Trade
- Division G Finance, Insurance and Real Estate
- Division H Services
- Division I Government
- Division J Nonclassifiable Establishments.

The manual states that in preparing the classification, the following general principles served as guides:

- (1) The classification should conform to the existing structure of American Industry.
- (2) The reporting units to be classified are establishments, rather than legal entities or companies.
- (3) Each establishment is to be classified according to its major activity.
- (4) To be recognized as an industry, each group of establishments must have significance from the standpoint of the number of persons employed, volume of business, and other important economic features, such as the number of establishments.

We are advised that the association of employers advocating the plan here being considered, in setting up the proposed separate trusts to meet sec. 206.60 (4), used as its basis the following twenty major industry groups, taken from Volume V, No. 1, Wisconsin Commerce Reports, Bureau of Business Research and Service, Madison, Wisconsin, April 1957:

- (1) FOOD AND KINDRED PRODUCTS includes Meat Products; Dairy Products; Canning, Preserving, and Freezing; Grain Mill Products; Bakery Products; Sugar; Confectionery and Related Products; Beverages; Miscellaneous Food Preparation.

- (2) **TOBACCO MANUFACTURES** includes Cigarettes; Cigars; Chewing and Smoking Tobacco; Tobacco Stemming and Redrying.
- (3) **TEXTILE MILL PRODUCTS** includes Woolen and Worsted Manufactures; Yarn and Thread Mills, Except Wool; Cotton and Rayon Broad-Woven Fabrics; Narrow Fabric Mills; Knitting Mills; Finishing Textiles, Except Wool; Carpets and Rugs; Hats (Except Cloth and Millinery); Miscellaneous Textile Goods.
- (4) **APPAREL AND RELATED PRODUCTS** includes Men's and Boys' Suits and Coats; Men's and Boys' Furnishings; Women's and Misses' Outerwear; Women's and Children's Undergarments; Millinery; Children's Outerwear; Fur Goods; Miscellaneous Apparel and Accessories; Miscellaneous Fabricated Textiles.
- (5) **LUMBER AND WOOD PRODUCTS, EXCEPT FURNITURE** includes Lumber and Timber Basic Products; Millwork and Related Products; Wooden Containers; Miscellaneous Wood Products.
- (6) **FURNITURE AND FIXTURES** includes Household Furniture; Office Furniture; Public and Professional Furniture; Partitions and Fixtures; Screens, Shades, and Blinds; Miscellaneous Furniture and Fixtures.
- (7) **PAPER AND ALLIED PRODUCTS** includes Pulp, Paper and Paperboard; Paper Coating and Glazing; Envelopes, Paper Bags; Paperboard Containers and Boxes; Pulp Goods and Miscellaneous Paper Products.
- (8) **PRINTING AND PUBLISHING** includes Newspapers; Periodicals; Books; Miscellaneous Publishing, Commercial Printing; Lithographing; Greeting Cards; Bookbinding and Related Industries; Printing Trades Service Industries.
- (9) **CHEMICALS AND ALLIED PRODUCTS** includes Industrial Inorganic Chemicals; Industrial Organic Chemicals; Drugs and Medicines; Soap and Related Products; Paints and Allied Products, Gum and Wood Chemicals; Fertilizers; Vegetable and Animal Oils; Miscellaneous Chemical Products.
- (10) **PETROLEUM AND COAL PRODUCTS** includes Petroleum Refining; Coke and Byproducts; Paving and Roofing Materials; Miscellaneous Petroleum and Coal Products.
- (11) **RUBBER PRODUCTS** includes Tires and Inner Tubes; Rubber Footwear; Reclaimed Rubber; Rubber Industries, Not Elsewhere Classified.
- (12) **LEATHER AND LEATHER PRODUCTS** includes Leather Tanning and Finishing; Industrial Leather Belting; Footwear Cut Stock; Footwear (Except Rub-

- ber); Leather Gloves and Mittens; Luggage; Handbags and Small Leather Goods; Miscellaneous Leather Goods.
- (13) **STONE, CLAY, AND GLASS PRODUCTS** includes Flat Glass; Pressed and Blown Glassware; Products of Purchased Glass; Cement, Hydraulic; Structural Clay Products; Pottery and Related Products; Concrete and Plaster Products; Cut-Stone and Stone Products; Miscellaneous Non-metallic Mineral Products.
  - (14) **PRIMARY METAL INDUSTRIES** includes Blast Furnaces and Steel Mills; Iron and Steel Foundries; Primary Nonferrous Metals; Secondary Nonferrous Metals; Nonferrous Metal Rolling and Drawing; Nonferrous Foundries; Miscellaneous Primary Metal Industries.
  - (15) **FABRICATED METAL PRODUCTS** includes Tin Cans and Other Tinware; Cutlery, Hand Tools, and Hardware; Heating and Plumbing Equipment; Structural Metal Products; Metal Stamping and Coating; Lighting Fixtures; Fabricated Wire Products, Miscellaneous Fabricated Metal Products.
  - (16) **MACHINERY (EXCEPT ELECTRICAL)** includes Engines and Turbines; Tractors and Farm Machinery; Construction and Mining Machinery; Metalworking Machinery; Special-Industry Machinery, Not Elsewhere Classified; General Industrial Machinery; Office and Store Machines; Service and Household Machines; Miscellaneous Machinery Parts.
  - (17) **ELECTRICAL MACHINERY** includes Electrical Industrial Apparatus; Electrical Appliances; Insulated Wire and Cable; Engine Electrical Equipment; Electric Lamps; Communication Equipment; Miscellaneous Electrical Products.
  - (18) **TRANSPORTATION EQUIPMENT** includes Motor Vehicles and Equipment; Aircraft and Parts; Ships and Boats; Railroad Equipment; Motorcycles and Bicycles; Transportation Equipment, Not Elsewhere Classified.
  - (19) **INSTRUMENTS AND RELATED PRODUCTS** includes Scientific Instruments; Mechanical Measuring Instruments; Optical Instruments and Lenses; Medical Instruments and Supplies; Ophthalmic Goods; Photographic Equipment; Watches and Clocks.
  - (20) **MISCELLANEOUS MANUFACTURES** includes Jewelry and Silverware; Musical Instruments and Parts; Toys and Sporting Goods; Office Supplies; Costume Jewelry and Notions; Plastic Products, Not Elsewhere Classified; Miscellaneous Manufactures.

Classifications 1 to 19 thereof appear to us to have sufficient particularity so that each constitutes a separate industry which would satisfy the requirements of sec. 206.60 (4). However, it is apparent that classification 20 does not cover a separate industry but rather is a "catch-all" which obviously is intended to include any that does not fall within the other prior classifications. But, as will be indicated, some of the groupings used as the basis for the group life insurance plans here involved do not even conform to those classifications.

In order to consider whether any of the five groups are valid classifications, it becomes necessary to analyze each separately.

*Group 1 (Primary Metals)* The type of establishments to be included under Group 1 are as follows: Manufacturers of iron and steel castings, steel briquets, structural steel, die cast ingots, ductile iron, forgings, malleable castings, non-ferrous castings, and steel cutting. This is the same classification as set out as "Primary Metals Industries" by the U.S. Department of Labor in Monthly Labor Review, October 1957, Vol. 80, No. 10, page 1314. It is also the same category as "Primary Metal Industries" by the Industrial Commission of Wisconsin in "Wisconsin Employment Trends", Issue No. 80, September 27, 1957. Further there is a comparable grouping made in the Standard Industrial Classification Manual, referred to above. It is "Primary Metals Industries" which is Major Group 33, under Division D—Manufacturing. The major group is therein defined as including "establishments engaged in the smelting and refining of ferrous and nonferrous metals from ore, pig, or scrap; in the rolling, drawing and alloying of ferrous and non-ferrous metals; and in the manufacture of nails, spikes, and insulated wire and cable".

Applying the principles of classification discussed above, it is my opinion that Group 1 is limited to employers in the same industry.

*Group 2 (Machinery, Fabricated Metal Products and Instruments)*. This is comparable to a combination of the following classifications set up by the U.S. Department of Labor, supra: (1) Machinery (except electrical); (2) Electrical Machinery; (3) Fabricated Metal Products, and (4)

Instruments and Related Products. It is comparable to the combination of the following classifications used by the Wisconsin Industrial Commission: (1) Machinery (except electrical); (2) Electrical Machinery, Equipment and Supplies; (3) Fabricated Metal Products (except ordnance machinery and transportation equipment); (4) Ordnance and Accessories, and (5) Professional Scientific and Controlling Instruments.

Group 2 is likewise comparable to the combination of the following major groups in the U.S. Standard Industrial Classification Manual: Major Group 35—Machinery, except electrical; Major Group 34—Fabricated Metal Products, except ordnance, machinery and transportation equipment; Major Group 36—Electrical machinery, equipment and supplies, and Major Group 38—Professional, scientific, and controlling instruments; photographic and optical goods; watches and clocks.

Referring to the twenty major industry groups of Wisconsin Commerce Reports, *supra*, it is apparent that Group 2 is not analogous to any *one* of the twenty basic groups, but only to a *combination* of four, viz.: (1) Machinery (except electrical), (2) Electrical machinery, (3) Fabricated metal products, and (4) Instruments and related products.

Among the type of establishments sought to be included under Group 2 is a manufacturer of "steel office furniture and equipment" which, under the twenty major industry classification ought to be classified under the major group "Furniture and Fixtures" which by its own description includes "household furniture, office furniture, etc". Another type sought to be included is a manufacturer of trucks which, by the same system ought to be under the major group "Transportation Equipment" which by definition includes "motor vehicles". Therefore, using the twenty major industry classification as a basis, Group 2 crosses over the lines of 6 out of the 20 major groups. Using the U. S. Standard Industrial Classification Manual, Group 2 covers 6 major groups (Nos. 25, 34, 35, 36, 37 and 38).

We discover no basis for the combining of these major groups, as has obviously been in the case of Group 2. It is, of course, not sufficient only to say that the "output consists, to a relatively large extent, of the products defining the

industry" because this would mean that merely by defining enough products one could combine all major groups into one consolidated industry. It would appear, therefore, that under the present facts, Group 2 fails to meet any common and approved definition of an industry.

*Group 3* (Lumber, wood products and by-products). This group, if it does not include furniture manufacturers, is comparable to the U. S. Department of Labor's "Lumber and Wood Products (except furniture)". It is to be noted that there is separate category of "Furniture and Fixtures" therein. In this connection, the Wisconsin Industrial Commission's classifications are the same as the U. S. Department of Labor. The U. S. Standard Industrial Classification Manual has "Major Group 24—Lumber and Wood Products, except furniture", and the Wisconsin Commerce Reports has the same major group heading, both of which compare favorably with Group 3 as not including furniture manufacturers. There would seem to be little doubt that Group 3 would constitute a proper industry group under generally accepted industrial classification systems, provided it does not include manufacturers of furniture.

*Group 4* (Textiles, Leather and Other Finished Products). This is similar to the U. S. Department of Labor's "Textile-Mill products", "Leather and Leather Products" and "Apparel and Other Finished Textile Products". The Wisconsin Industrial Commission has used these same classifications except the last group is denominated "Apparel and Other Finished Products". Referring to the 20 major industry grouping, Group 4 is comparable to a combination of "Textile Mill Products" and "Leather and Leather Products". Also, comparison can be made between Group 4 and the following major groups of the U. S. Standard Industrial Classification Manual: No. 22 Textile Mill Products, No. 23 Apparel and Other Finished Products, and No. 31 Leather and Leather Products. To the extent that textiles and leather might be linked together, it would be in the field of manufacture of apparel or something of that nature. It could then be maintained that the establishments so grouped were "primarily engaged in the same line or similar lines of economic activity". But, Group 4 as here attempted to be used is not so delineated. If such were the case, the title of Group 4

ought to be made more inclusive and particular in that regard. As it now stands, Group 4 is not in my opinion limited to one industry.

*Group 5* (Engineering and Other Manufacturers' Service Organizations). While it is comparable to the classification of "Service Industries" by the Wisconsin Industrial Commission under the heading "Non-Manufacturing Industries", this commission classification includes security dealers, investment banking, insurance carriers, hotels, laundries, and cleaning and dyeing establishments, which clearly cannot be said to be in the same industry. There is no analogous group under the U. S. Department of Labor's classification system or under the 20 major industry system. Under the U. S. Standard Industrial Classification Manual, there is "Division H—Services" which includes the following major groups of industries :

- Major Group 70.—Hotels, rooming houses, camps, and other lodging places
- Major Group 72.—Personal services
- Major Group 73.—Miscellaneous business services
- Major Group 75.—Automobile repair, automobile services, and garages
- Major Group 76.—Miscellaneous repair services
- Major Group 78.—Motion pictures
- Major Group 79.—Amusement and recreation services, except motion pictures
- Major Group 80.—Medical and other health services
- Major Group 81.—Legal services
- Major Group 82.—Educational services
- Major Group 84.—Museums, art galleries, botanical and zoological gardens
- Major Group 86.—Non profit membership organizations
- Major Group 89.—Miscellaneous services.

Upon examining the various particular establishments which it is sought to have placed under Group 5, it is noted that *generally* these businesses are of such a nature as to offer and perform services to other business establishments, e.g. management consultants, industrial consultants, communications consultants, finish consultants, etc. The only exception is a holding company. It is deemed sufficient to say that the classification of certain non-manufacturing industries attempted by Group 5 is probably within the intended scope

of the statute as being "in the same industry" in the common and approved sense, if holding companies are excluded therefrom.

No consideration is given in this opinion to the validity of any of the other six proposed groupings, as no information has been made available to establish the propriety thereof for purposes of sec. 206.60 (4). As stated previously the sufficiency of each attempted grouping must be judged on its own facts. The foregoing provides an adequate guide for a proper determination by your department should there be any occasion for any further consideration of these matters.

HHP :JEA

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*Governor—Authority—Air Guard*—Governor of Wisconsin has authority to delegate operational command of Wisconsin air guard units to federal military authority prior to their muster into federal service.

December 30, 1958.

RALPH J. OLSON,  
*Adjutant General.*

You have called my attention to the fact that it will be expedient, in case of an air attack upon this country, to have the Air National Guard under immediate operational control of federal military authority, more particularly the "Air Defense Command". Presumably such an attack would occur with little or no warning and that in such an event the several components of our air arm must have a unity of command. You desire to know whether or not the Governor can enter into an agreement with the federal military authorities which would permit immediate employment of the air guard under federal command prior to being mustered into federal service. The air guard would in all probability be used outside of the boundaries of the state.

The Governor of Wisconsin, by constitutional authority, is the Commander in Chief of the National Guard. Article V, Section 4, Wisconsin Constitution. He has authority to call

out the guard into state service in case of war, invasion, and certain other instances. Sec. 21.11 (1). While the President of the United States has authority to call state militia into federal service, individuals do not change their status from state militiamen to national militiamen until they are formally mustered into service. 36 Am. Jur., pp. 211-212.

Sec. 21.11 (1) contains no restrictions on the geographic use of the national guard after the requisite emergency has been declared to exist. This is to be compared to sec. 21.025 which authorizes the adjutant general to organize a force known as the Wisconsin state guard in the event the national guard is called into federal service. Under subsection (4) of that section the force cannot be required to serve outside the state except on two occasions: 1) the governor may order them to assist in the defense of another state being attacked or 2) on the order of the officer in immediate command they may be required to continue in fresh pursuit of the enemy beyond the boundaries of this state. Since sec. 21.11 (1) does not put any limitations on the geographic distribution of the national guard it would appear that the legislature did not intend to restrict the use of the national guard to service within the state. If they had so desired a limiting statute similar to sec. 21.025 (4) could easily have been drafted.

This construction is consistent with the reason for having a state national guard, which, in the final analysis is to preserve the state. It is apparent that if this purpose is to be effected it may be necessary to deploy the national guard beyond the boundaries of the state. This is particularly true in the world of today.

In my opinion the governor has the power of vesting operational command over the air guard in federal authority while they still have the status of state militia. Of course, the actual command of the air guard, until federal muster, remains in the governor. All that would be granted is operational control for such time as the governor sees fit to so deploy the Wisconsin air guard.

SGH:REB

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