OPINIONS

OF THE

ATTORNEY GENERAL

OF THE

STATE OF WISCONSIN

VOLUME 50

January 1, 1961, through December 31, 1961

JOHN W. REYNOLDS
Attorney General

MADISON, WISCONSIN
1961

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
WINIFIELD SMITH, Milwaukee ..... from Oct. 7, 1862, to Jan. 1, 1866
CHARLES R. GILL, Watertown ..... from Jan. 1, 1866, to Jan. 3, 1870
STEPHEN S. BARLOW, Dellona ..... from Jan. 3, 1870, to Jan. 5, 1874
A. SCOTT SLOAN, Beaver Dam from Jan. 5, 1874, to Jan. 7, 1878
ALEXANDER WILSON, Mineral Point ..... from Jan. 7, 1878, to Jan. 2, 1882
LEANDER F. FRISBY, West Bend ..... from Jan. 2, 1882, to Jan. 3, 1887
CHARLES E. ESTABROOK, Manitowoc ..... from Jan. 3, 1887, to Jan. 5, 1891
JAMES L. O'CONNOR, Madison ..... from Jan. 5, 1891, to Jan. 7, 1895
WILLIAM H. MYLREA, Wausau ..... from Jan. 7, 1895, to Jan. 2, 1899
EMMET R. HICKS, Oshkosh .. from Jan. 2, 1899, to Jan. 5, 1903
LAFAYETTE M. STURDEVANT, 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, Richland Center ..... from Jan. 1, 1951, to Jan. 7, 1957
STEWART G. HONECK, Madison ..... from Jan. 7, 1957, to Jan. 5, 1959
JOHN W. REYNOLDS, Green Bay ..... from Jan. 5, 1959, to

ATTORNEY GENERAL'S OFFICE

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

* Appointed March 1, 1961
** Appointed November 1, 1961

OPINIONS

OF THE

ATTORNEY GENERAL

OF

WISCONSIN

Volume 50

Insurance—Words and Phrases—Under secs. 200.03 (2), and 204.31 (3) (g) 3 commissioner of insurance may adopt rules prohibiting issuance or renewal of accident and sickness policies containing restrictive provisions.

January 23, 1961.

CHARLES MANSON,

Commissioner of Insurance.

You ask whether a proposed rule prohibiting the issuance or renewal of accident and sickness insurance policies, containing an exclusion which denies coverage if the insured does not incur an unconditional requirement to pay hospital or other charges, would be valid.

The rule which you propose reads as follows:

"* * * No policy or certificate of insurance shall be issued to or renewed for a resident of Wisconsin after the effective date of this rule if it contains an exclusion which denies coverage if the insured does not incur an unconditional requirement to pay hospital or other charges."

Sec. 200.03 (2) confers upon the commissioner of insurance the following power:

"200.03 (2) SUPERVISION. He shall enforce the laws relating to insurance and shall exercise such supervision and control over insurance companies doing business in this state as the law requires; and to that end, he may make reasonable rules and regulations for their enforcement; * * *"

Sec. 204.31 specifically covers accident and sickness insurance, contains provisions as to the form of accident and sickness policies and requires the inclusion of certain specified provisions. Subsec. (3) (g) provides for the submission of all such policy forms, riders and endorsements for approval by the commissioner before being used.

"204.31 (3) (g) Filing procedure. 1. The commissioner may make such reasonable rules concerning the procedure for the filing or submission of policies subject to this section as are necessary, proper or advisable to the administration of this section. This provision shall not abridge any other authority granted the commissioner by law.

"2. No such policy shall be issued, nor shall any application, rider or endorsement be used in connection therewith until the expiration of 30 days after it has been so filed unless the commissioner shall sooner give his written approval thereto.

"3. The commissioner may within 30 days after the filing of any such form disapprove such form if the benefits provided therein are unreasonable in relation to the premium charged, or if it contains a provision which is unjust, unfair, inequitable, misleading, deceptive or encourages misrepresentation of such policy. If the commissioner notifies the insurer that the form does not comply with this subsection, it is unlawful thereafter for such insurer to issue or use such form. In such notice the commissioner shall specify the reason for his disapproval and state that a hearing will be granted within 20 days after request in writing by the insurer.

"4. The commissioner may at any time, after a hearing on not less than 20 days' written notice to the insurer, withdraw his approval of any such form on any of such

grounds. It is unlawful for the insurer to issue such form or use it after the effective date of such withdrawal of approval."

Under sec. 204.31 (3) (g) 3 the commissioner may disapprove any form "if it contains a provision which is unjust, unfair, inequitable, misleading, deceptive or encourages misrepresentation of such policy." This represents a statement of general policy and constitutes the law of this state, so as to come within the power of the commissioner under sec. 200.03 (2) to make reasonable rules to enforce the insurance laws.

The question then is whether the proposed rule is a proper exercise of such authority. A provision in a policy excluding coverage for hospital and other charges "if the insured does not incur an unconditional requirement to pay therefor" is so indefinite and vague that it is susceptible to different interpretations and misunderstandings as to whether the policy covers the insured and will pay the hospital and other charges if he shall be hospitalized in a state, county or other governmental institution, for which the insured, his relative, or guardian may have to pay.

Under secs. 46.10 and 49.17, patients, their parents, or relatives who have the ability to pay for hospitalization and care received in county or state institutions, are liable therefor unless such expenses are within the exceptions provided in Ch. 50 and secs. 51.27, 58.06 (2). The court in *Derouin v. State Department of Public Welfare* (1952) 262 Wis. 559, 55 N.W. 2d 871, stated that under sec. 46.10 parents are liable for the expense of care and maintenance received by their children in public institutions. Also see: *State Department of Public Welfare v. Sem* (1959) 8 Wis. 2d 46, 98 N.W. 2d 428. In re *Estate of Bartels* (1960) 9 Wis. 2d 147, 100 N.W. 2d 568, the court held that the estate of a deceased wife was liable for the care and maintenance received by her husband while a patient at a county asylum. Also see: *Estate of Cameron* (1946) 249 Wis. 531, 25 N.W. 2d 504.

You state that some insurance companies, which issue

accident and sickness policies containing the aforementioned exclusion, have refused to pay for the care and maintenance received by policyholders in state and county institutions on the ground that they did not incur an unconditional liability to pay therefor.

Such a general provision could easily mislead or deceive the insured, since it would not apprise him that the coverage of the policy does not extend to hospital and other charges incurred in such institutions.

Sec. 204.31 (3) (g) 3 expresses the public policy that forms containing such provisions are to be disapproved. Thus, it is proper and within the rule-making function of the commissioner to promulgate a general rule that would prohibit the inclusion of a specific provision in accident and sickness policies contrary to the public policy of this state. The proposed rule would be supportable on the basis that the provision in question has no definite and clear meaning and would be deceptive and encourage misrepresentation if used in a policy. However, the rule would be limited in its prohibition to the specific exclusion contained in the rule.

Furthermore, such rule is proper as within the legislative admonition of the first sentence of sec. 227.01 (4) that statements of general policy should be issued and filed as a rule so as to give advance information of the existence of such general policy. By the adoption of this proposed rule the commissioner would state that he has adopted and will apply a determination that any policy containing such exclusion is misleading and deceptive and will be disapproved for that reason. As such it carries out the legislative intent of encouragement of the promulgation in rule form of matters of this very nature.

The next question is whether the proposed rule can be made applicable to renewals. There would be no violation of the constitutional provision against the impairment of contracts in applying it to renewals. Such an application would not act retroactively, since each renewal is a new contract. In *Redeman v. Preferred Accident Ins. Co.* (1934)

215 Wis. 321, 327, 254 N.W. 515, the court held that the renewal of a health policy is a new contract. The court in *Frank v. Metropolitan Life Ins. Co.* (1938) 227 Wis. 613, 277 N.W. 643, held that an accident policy, which gave the insured a continuing right of renewal, was a continuing offer that the insurer could revoke prior to acceptance. Health and accident insurance is a species of term insurance renewable upon the consent of the insurer. 29 Am. Jur. Sec. 364, p. 720.

Since the business of insurance is one that affects the public interest, the state in the exercise of its police powers may regulate the relations between insurer and insured in various respects, without violating due process—including the internal affairs of an insurance company. 29 Am. Jur. Sec. 49, pp. 464, 465. The United States Supreme Court held:

"* * * that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise. * * *" *Atlantic Coast Line v. Goldsboro* (1914) 232 U.S. 548, 558, 58 L. Ed. 721.

It would seem that the evil sought to be eliminated would equally exist in the instance of a renewal term as in the initial term of the policy. If protection of the public necessitates prohibiting the inclusion of such a provision in the initial term of the policy, there is an equal requirement as respects to the inclusion of such a provision in a renewal. GBS

Justices—Trustee—Art. VII, sec. 10, Wis. const. does not disqualify a supreme court justice from serving as a

trustee under a will which requires legislative acceptance of its provisions on behalf of the university of Wisconsin.

January 30, 1961.

EARL SACHSE, *Executive Secretary*
Legislative Council.

You have called attention to the fact that under the provisions of the Wm. F. Vilas will which requires acceptance on behalf of the university by legislative action there is a recommendation that one of the trustees to be appointed be a justice of the state supreme court, and you have inquired whether such a justice may serve as trustee by reason of the limitations contained in Art. VII, sec. 10, Wis. Const., to the effect that such justices "* * * shall hold no office of public trust, except a judicial office, during the term for which they are respectively elected, and all votes for either of them for any office, except a judicial office, given by the legislature or the people, shall be void * * *."

The question of whether a particular person is a public officer has occasioned the courts considerable difficulty, although there are a number of general principles which have grown out of the case law on the subject.

As a general rule a position is a public office when it is created by law and the incumbent exercises some portion of the sovereign power. 53 A.L.R. 595 (Anno.); 93 A.L.R. 333 (Anno.); 42 Am. Jur. 883. See also *Martin v. Smith* (1941) 239 Wis. 314, 1 N.W. 2d 163, 140 A.L.R. 1063. In this Wisconsin case the court also pointed to the general rule that a definite term, a requirement to take an oath, and an exercise of some of the functions of sovereignty are usual, if not indispensable, characteristics of an office.

Under the proposed trust set up by the Vilas will the names of 5 trustees will be recommended by the present trustees, and by its acceptance of the trust which the legislature is required to indicate under the terms of the will the legislature will indicate its approval of such choice.

The legislature itself, however, has not been given the power to nominate the trustees under the will, nor their successors. Whenever a vacancy occurs the remaining trustees choose a successor, and in the event of their failure to do so within 60 days, the regents, the president of the university, or any citizen of the state, may apply to the court to appoint a trustee.

The will specifically provides that no bond shall be required of any trustee, unless the legislature shall by law require it. Nor is there any requirement as to an oath. It might be noted also that no supreme court justice is *ex officio* a trustee. It is merely recommended in the will as good policy that at least one trustee be a judge of the supreme court.

Under the general rules relating to public officers mentioned above it would appear that if a supreme court justice were nominated as a trustee by the present trustees of the Vilas Estate in their communication to the legislature and the legislature were to approve such selection, the justice who accepts such appointment would not be in violation of Art. VII, sec. 10, Wis. Const., as holding another office of public trust. Such position is not created by law. It is created under the will and is filled by nomination of other trustees subject only to legislative approval. There is no term of office. The successor is named by the other trustees. There is no bond, and there is no oath of office. The justice acting as such trustee is not in that capacity exercising any portion of the sovereign powers of government, but is merely assisting in the execution of a privately created trust with legislative approval.

Conceivably a situation could arise where a case involving the Vilas Trust might reach the supreme court, and it would become necessary for the justice to refrain from participating in the case, but that situation would be no different in character from those which arise from time to time in which a particular justice finds it necessary to dis-

qualify himself because of personal interest in the litigation or personal participation in the proceedings which precipitated the litigation.
WHR

Insurance—Words and Phrases—Commissioner of insurance may adopt specific rule prohibiting use of word "compensation" in advertisement and solicitation for policies if it would be misleading or encourage misrepresentation.

February 27, 1961.

CHARLES MANSON,

Commissioner of Insurance.

You ask whether you have the power to adopt a rule prohibiting the use of the word "compensation" in the title and body of accident and sickness policies, as well as in the solicitation and advertisement thereof, in view of the possible confusion with those which provide workmen's compensation coverage.

Standing alone, the word "compensation" does not have a unique or restricted meaning. It has many meanings and has been used synonymously with salaries, *Weber v. True* (1947) 304 Ky. 681, 202 S.W. 2d 174, *Milwaukee County v. Halsey* (1912) 149 Wis. 82, 136 N.W. 139; payment in full, *Erie County Supervisors v. Jones* (1890) 119 N. Y. 339, 23 N.E. 742; payment of money, *Teders v. Rothermel* (1939) 205 Minn. 470, 286 N.W. 353; a sum of money to compensate for the taking of property by eminent domain, *Miller v. United States* (1942) 125 F. 2d 75; *Bigelow vs. The West Wisconsin Railway Company* (1871) 27 Wis. 478; and payments under the Workmen's Compensation Act for injury, medical care and hospitalization, *Hanson v. Hayes* (1947) 225 Minn. 48, 29 N.W. 2d 473, *Slauson v. Standard Oil Co.* (1939) 29 F. Supp. 497.

Examples found in the Wisconsin statutes are:

"**102.01 Definitions.** (1) * * *

"(2) 'Act' as used in this chapter means 'chapter'; 'compensation' means workmen's compensation; * * *"

"**204.28 Employers' liability reserves, computation, allocation, definitions.** (1) * * *

"(2) (b) The term 'compensation' relates to all insurance providing compensation to employes for personal injuries, irrespective of fault of the employer. The term 'liability' relates to all insurance except compensation insurance against loss or damage from accident to or injuries suffered by an employe or other person and for which the insured is liable."

"256.45 **Sharing of compensation by attorneys prohibited.** It is unlawful for any person to divide with or receive from, or to agree to divide with or receive from, any attorney or group of attorneys, whether practicing in this state or elsewhere, either before or after action brought, any portion of any fee or *compensation*, * * *"

Under the laws of most, if not all, states, a field in which Wisconsion pioneered, employers generally are required to carry insurance providing benefit payments to employes for injuries sustained in the course of employment, irrespective of fault on the part of the employer. Technically, and correctly, such insurance is denominated "workmen's compensation" insurance. However, because of its widespread use and prominence, such insurance is commonly referred to by laymen, and by many in the insurance industry, as "compensation" insurance. As a result in common parlance the term "compensation", when used in respect to insurance, has come to have the general connotation of "workmen's compensation" insurance.

You indicate that several insurance companies use terms such as "Disability Compensation Policy," "Employer's Compensation Plan," "Employer's Personal Compensation Protection Plan," "Business and Professional Compensation Plan" and "Farmer's Compensation Plan," in the title

and body of accident and sickness policies, as well as in the solicitation and advertisements thereof. You fear such may lead prospective purchasers to believe that the policy concerned is that of workmen's compensation and policyholders to believe that they have such coverage.

In an opinion to you dated January 23, 1961, it was concluded that, under your general rule-making authority of sec. 200.03 (2), and the provisions of sec. 204.31 (3) (g) 3, you have the power to adopt a rule prohibiting the use of a misleading provision in accident and sickness insurance policies. Rule, Ins. 3.08 (3), Wisconsin Administrative Code, contains only general requirements that advertisements of accident and sickness policies shall not be misleading or encourage misrepresentation of the policy. It reads:

"(3) ADVERTISEMENTS IN GENERAL. Advertisements shall be truthful and not misleading in fact or in implication. Words or phrases the meaning of which is clear only by implication or by familiarity with insurance terminology shall not be used."

If you determine that the use of the word "compensation", in accident and sickness insurance policies, would be misleading or encourage misrepresentation of such policy prohibited by sec. 204.31 (3) (g) 3, and Rule, Ins. 3.08 (3), Wisconsin Administrative Code, it would be within your power to adopt a specific rule prohibiting the use of such a word in the title or body, and in the advertisement or solicitation of accident and sickness insurance policies.
GBS:HHP

Towns—Supervisors—Resolution No. 9, S., discussed relative to violation of Art. IV, sec. 23, Wis. Const. and the "uniform as practicable" ruling on number of town supervisors.

March 20, 1961.

THE HONORABLE, THE SENATE.

Resolution No. 9, S. requests my opinion on the following questions, stated in the language of such resolution:

"Do the following proposals violate the uniformity provision of article IV, section 23 of the constitution?

"1. Can the legislature increase town boards from 3 to 5 supervisors?

"2. Can the town be given authority to elect members of the board and other offices on a precinct division or other classes or division of the town?

"3. Can the legislature classify towns by some division based on size or population, so that items 1 and 2 can be enacted into legislation for certain classes of towns?"

Sec. 60.19 (1) (a) reads in part as follows:

"Biennially, in the odd-numbered years, at the annual town meeting there shall be elected in each town the following officers, viz.: 3 supervisors, * * *."

If the first question above-stated merely contemplated that the legislature would change the above-quoted statute to require the election of five town supervisors instead of three, there would clearly be no violation of the uniformity provision of Art. IV, Sec. 23, Wis. Const., since one uniformity would have been substituted for another. However, it is my understanding that such question contemplates enactment of a law which would permit a town, at its option, to elect either three or five supervisors. I will therefore answer that question as if it read: "Can the legislature authorize a town meeting to elect, at its option, either three town supervisors or five such supervisors?" To the question so stated, my answer is No.

Art. IV, Sec. 23, Wis. Const., reads as follows:

"The legislature shall establish but one system of town

and county government, which shall be as nearly uniform as practicable."

The word "practicable" is defined as: "Capable of being put into practice, done or accomplished; feasible." Webster's New International Dictionary, 2d Ed. Unless it is impracticable to retain the uniform feature of town government created by the three-supervisor requirement of sec. 60.19 (1) (a), no valid law can be enacted giving a town meeting the option of electing three supervisors or five. "* * * The terms of this constitutional provision [Art. IV, Sec. 23] expressly inhibit departure from the established uniform system of county government *unless it is manifest that it is not practicable to carry on such uniform system of government in a designated class of counties.*" (Emphasis mine). *State ex rel. Melms v. Young* (1920) 172 Wis. 197, 202. If the three-supervisor system is feasible and workable in all the towns of Wisconsin subject to sec. 60.19 (1) (a), (i.e., all the towns in Wisconsin except one, an exception hereinafter commented upon), then a law destructive of the uniformity of such system would not meet the "uniform as practicable" test of Art. IV Sec. 23, Wis. Const., and for that reason would be unconstitutional.

There are a number of Wisconsin cases dealing with the constitutional test above-mentioned, some decided recently, but it is the earliest of such cases which most strongly supports my negative answer to the first of your questions. In such case, *State ex rel. Peck v. Riordan, and Others* (1869) 24 Wis. 484, the question was one of the constitutionality of a statute which provided for a county board of eight supervisors in a certain county, which, under the general statute relative to county government, would have had only three. Such question was raised by an original action in the supreme court to try the title of the defendants to the office of member of the board of supervisors of the county in question. Defendants demurred to the complaint, and their demurrer was overruled. The court said at p. 486:

"The question arising upon this demurrer is as to the validity of chapter 332, Private and Local Laws of 1868. That act provides, that in one of the assembly districts of

Washington county there should be elected, at the general election in November, 1868, four county supervisors, two for the term of two years, and two for the term of one year; and that in the other assembly district there should, at the same election, be elected three supervisors, one for the term of one year, and two for the term of two years; and *that thereafter two supervisors should be elected annually in each of the assembly districts, for the term of two years.* The obvious purpose of the act is, therefore, to give Washington county, which has only two assembly districts, a county board of supervisors consisting of eight members. By the general statute theretofore and now existing, it is provided, that the county board of each of the organized counties of the state shall consist of three electors, one to be elected in and for each of the supervisor districts by the qualified voters of such district; but in counties which contain three or more assembly districts, a supervisor is chosen for each district; and in counties where there are more than three and there is an even number of assembly districts, it was provided that an additional supervisor, for the county at large, should be elected by the qualified voters of the county. (Chap. 75, General Laws of 1965.) So it will be readily seen that this act of 1868, by providing for a board of supervisors for Washington county, consisting of eight members, departs from the general statute applicable to the other counties of the state, and which would give that county a board of only three members. And the question is, Does this act, which creates a diversity, when compared with the general law, as to the number of supervisors which shall be elected in Washington county, come in conflict with any provision of the constitution? It is insisted that it does, and that it violates section 23, Art. IV of the constitution, which reads as follows:

'The legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable.' " (Emphasis supplied by Court).

Answering the question confronting it in the *Peck* case, and referring to Art. IV, Sec. 23, the court said at p. 488:

"* * * the provision not only requires that the system

established shall be one system — that is, that all the counties organized shall be invested with the same general powers of local government delegated to them, and have the supervisor system of county government, if that is the one adopted — but likewise, that this system shall be as nearly uniform as circumstances will permit. *Now, certainly, the uniformity in the system is broken, when one county, comprising two assembly districts, has a board of supervisors consisting of eight members, and another county, of the same population, has a board of three.* And where there are two or more counties in the state of the same population, if the legislature may create diversity in respect to the number of members which shall constitute the different boards of supervisors, may it not also further provide that the governmental powers with which the boards are invested shall be different? *The uniformity of the system would seem to be as much broken by diversity in the number which should constitute the board in counties of the same population, as by diversity in the distribution of the powers which the board shall execute.* For, in counties composing two assembly districts, one county might have a board consisting of three members, another one of five, another one of eight, and another of ten, and so on; so that no two counties in the state, although having the same population, would have boards of the same number of members. It is true that, in that case, the system might be preserved: it would still be the supervisor system of county government; but no one could say that the system was as uniform as it was practicable to make it. The constitution, then, has regard as well to uniformity in the system as to unity in the system; and *wherever uniformity is practicable, it must be preserved.* Of course, absolute uniformity may be impracticable in all cases; the situation of the different counties, and the convenience of the inhabitants, may require some departure from the principle of rigid uniformity. This departure from absolute uniformity may be found in the general statute, which provides that the county boards, in each of the organized counties, shall consist of three members, whether the county has two assembly districts or less than that number. The important

duties which the board of supervisors has to perform may require that there should be at least three members in every organized county, without regard to its population. So, when there is an even number of assembly districts in a county, it may greatly facilitate the transaction of business wnich comes before the board to have an additional member chosen from the county at large. The general statute so provides; and the departure from uniformity seems to be necessary. These are proper matters of legislative discretion. But there is a very wide distinction between that want of uniformity arising under the provisions of the general statute, and that want of uniformity created by the law in question. Here the board of supervisors of Washington county is made to consist of eight members; while, in other counties comprising two assembly districts, the boards, by the general law, consist of three members. Such diversity, where uniformity is attainable, would seem to be a plain violation of the clause of the constitution above cited."

You will observe that the court in the *Peck* case said, "The uniformity of the system would seem to be as much broken by diversity in the number which would constitute the board in counties of the same population, as by diversity in the distribution of the powers which the board should execute." This is a statement relative to the uniformity of one aspect of county government, but it applies as well to the uniformity of the counterpart aspect of town government, namely, the number of town supervisors. The *Peck* case makes it clear, in my opinion, that a law sanctioning a diversity in the number which would constitute the board in towns of the same population would fail to comply with the "uniform as practicable" test of Art. IV, Sec. 23. The law contemplated by your first question would, of course, sanction just such a diversity, or many such diversities.

The holding of the *Peck* case, relative to unwarranted diversity in the number of county board supervisors, and equally applicable to such diversity in the number of town board supervisors, has never been reversed or qualified by

subsequent decisions. Guided by such holding, and by the principles above-mentioned, it is my opinion that the law contemplated in your first question, granting the option described, would create an unwarranted, unconstitutional diversity in the number of town board supervisors in towns governed by sec. 60.19 (1) (a), unless it is manifest that it is impracticable to carry on town government in those towns in compliance with the present three-supervisor requirement of such statute. Any such manifest impracticability of compliance with that requirement is unmentioned in your letter to me requesting this opinion, and I have no knowledge from any other source of its existence. If it does not exist, then the law contemplated by your first question would clearly be unconstitutional.

Your second question reads: Can the town be given authority to elect members of the board and other offices on a precinct division or other classes of division of a town? This question apparently contemplates an amendment of sec. 60.19 (1) (a), which would give a town meeting an option either to elect town supervisors and other town officers from the town at large, under the method now prescribed by sec. 60.19 (1) (a); or to divide the town into precincts or components bearing another name, and elect members of the board and other officers on the basis of such division, rather than from the town at large. I cannot conceive how a single town officer, such as the clerk, could be elected under the latter system without favoring one precinct over others, but that problem requires no consideration herein. What must be considered, to answer your second question, is whether or not it is practicable for those towns subject to sec. 60.19 (1) (a) to adhere to the uniform feature of town government to which such question pertains, namely, the election of town supervisors and other officers from the town at large. If adherence to this uniform feature of town government is practicable, a law destructive of it, such as the law your second question envisions, would violate Art. IV, Sec. 23, Wis. Const. "* * * wherever uniformity [of town and county government] is practicable, it *must* be preserved." *State ex rel. Peck v.*

Riordan and Others (1869) 24 Wis. 484, 489. Again, your letter apprises me of no manifest impracticability involved in carrying on elections of town officers under sec. 60.19 (1) (a) from the town at large, and from no other source do I have knowledge that such impracticability exists. If it does not exist, then the law contemplated by your second question would be clearly unconstitutional.

Your third question is: Can the legislature classify towns by some division based on size or population, so that items 1 and 2 can be enacted into legislation for certain classes of towns? It is my opinion that such classification for that purpose would be unconstitutional unless it is clear that the three-supervisor requirement of sec. 60.19 (1) (a), and the practice of electing such supervisors, pursuant to that statute, from the town at large, are a requirement and practice demanding adherence to uniform features of town government that are impracticable in a designated class or classes of towns. If three-supervisor government is workable and feasible in a large as well as in a small town, in a populous town as well as in one thinly populated, there is no justification for departure from the uniformity such government provides. If election of town supervisors and officers from the town at large is workable and feasible in a large town as well as in a small town, in a populous town as well as in one thinly populated, no constitutional break may be had with that uniform feature of town government. Our court has frequently made clear what is needful to justify departure through classification from the uniformity of town and county government required by Art. IV, Sec. 23. In *State ex rel. Busacker v. Groth* (1907) 132 Wis. 283, 306 the court said: "* * * A general law applicable to a class of counties may bring about changes in county government in cases where it is not practicable to carry on such government in that particular class of counties in the same manner in which it is carried on in other counties outside of this class * * *." This statement would apply to a general law applicable to a class of towns as well as counties. So, too, would the following statement: "* * * a general law applicable to a class of counties providing for a departure from uniformity in

county government must rest on facts and existing conditions showing that it is not practicable to carry on the county government in such particular class in the manner that the statute provides for carrying on the county governments in counties generally throughout the state." *State ex rel. Melms v. Young* (1920) 172 Wis. 197, 202. In the *Melms* case the court went on to point out that "* * * the generally accepted grounds upon which a legislature may classify subjects for general legislation are not sufficient when it attempts to classify counties within the field relating to the system of county government under the mandate of sec. 23, Art. IV. * * *" The indispensible factor permitting classification of counties (or towns) in this field is the manifest impracticabilty of carrying on the uniform system of town or county government, under the above-mentioned mandate, in a designated class of towns or counties. In answer to your third question then, it is my opinion that, absent a showing of such factor as operative in a given class or classes of towns, there could be no lawful classification of such towns for the purposes referred to in such question. Your letter does not represent that this essential factor exists in any class of towns, and I have no knowledge of its existence there from any other source.

In answering the questions dealt with herein, I have borne in mind the following monition from our Supreme Court:

"Constitutional commands and prohibitions, either distinctly laid down in express words or necessarily implied from general words, must be obeyed, and implicitly obeyed, so long as they remain unamended or unrepealed. * * *" *Borgnis v. Falk Co.* (1911) 147 Wis. 327, 349.

As already noted above, there is one town in Wisconsin which, by virtue of sec. 60.19 (1) (b) and sec. 60.195, enacted in 1959, enjoys a special type of town government, with seven town supervisors, two elected from the town at large, and five from five town precincts. This town is the single town comprising Menominee County. Since these statutes exist, it should be observed that they can in no sense be considered as pertinent to any of my opinions on

the three questions answered herein. This is so because the classification of towns involved in sec. 60.19 (1) (b) is based on the special circumstance of one town comprising one county, and on other considerations also, not appearing on the face of the statute, and having nothing to do with the size or population of towns coming within the class specified in sec. 60.19 (1) (b). The classification contemplated in your third question would be based on size or population of a town, bases of classification which were not involved at all in the enactment of sec. 60.19 (1) (b); while classification of towns, on any basis, is not involved in your first and second questions so as to make sec. 60.19 (1) (b) germane to them.

JHM

Counsel—District Courts—One accused of crime has a constitutional right to be heard by his counsel at a preliminary hearing and it is immaterial how counsel is appointed. District court of Milwaukee county has right to appoint counsel only in felony cases over which it has trial jurisdiction.

March 30, 1961.

WILLIAM J. MCCAULEY,
District Attorney.
Milwaukee County.

You have asked for my opinion whether or not the District Courts of Milwaukee County have the power to appoint counsel for indigent defendants accused of felonies. In your letter you refer to the fact that a voluntary defender system has been initiated in the District Courts of Milwaukee County, under which members of the Milwaukee Junior Bar Association donate their time and services on a regular schedule to represent indigent defendants appearing in district court. In your letter you point out that be-

cause the attorneys participating in the program serve on a rotating basis, it frequently happens that the defendant is represented by different attorneys at different stages of the proceeding. The Court's Committee of the Milwaukee Junior Bar Association has expressed some concern that the voluntary defender system does not provide for a continuity of counsel, and this has prompted the request for my opinion as to whether or not the district court can appoint counsel. Two questions are involved in your request: First, can the District Courts of Milwaukee County appoint counsel who volunteers to donate his time and services to defend indigent defendants accused of felonies? Second, can the District Courts of Milwaukee County require counsel to defend indigent defendants accused of felonies gratuitously or at the cost of the county?

Counsel may appear and represent the accused gratuitously. The accused has the statutory right to be heard and assisted by counsel at the preliminary hearing. Section 954.08 (2). It is my opinion that when an accused appears with counsel at the preliminary hearing, he has a constitutional right to be heard by such counsel, and it is immaterial whether counsel is hired by the accused, appears gratuitously in behalf of the accused, or is appointed by the court from a list of voluntary defenders. See, *Chandler v. Fretag* (1954) 348 U.S. 3.

Milwaukee County District Courts have jurisdiction to conduct the preliminary hearing and trial jurisdiction of a certain limited number of felonies. Accordingly, the question whether the Milwaukee County District Courts may exercise the power of appointment of counsel in felony cases must be considered both with respect to cases in which the jurisdiction of the district court is limited to conducting the preliminary hearing and to cases in which the court has trial jurisdiction. Two issues are presented by this question: (1) Is there a constitutional guarantee of counsel which confers upon the defendant the right to have counsel appointed by the court? (2) Does the court have the authority to appoint counsel irrespective of any constitutional considerations?

Art. I, Sec. 7, Wis. Const., provides, in part, as follows:

"In all criminal *prosecutions* the accused shall enjoy the right to be heard by himself and counsel; * * *"

The constitutional protection thus afforded is limited to criminal prosecutions and guarantees the accused the right to be heard by counsel in a criminal prosecution. (See: *State ex rel. Traister v. Mahoney* (1928), 196 Wis. 113, 219 N.W. 380; *Ailport v. State* (1960), 9 Wis. 2d 409, 417 100 N.W. 2d 812). The precise constitutional question presented therefore is whether in a given case the defendant is being subjected to a "criminal prosecution", or only to some preliminary stage preparatory to a future criminal prosecution.

The constitutional guarantee afforded by Art. I, Sec. 7, exists upon arraignment and prior to plea in a court having jurisdiction of the matter. (See. *La Fave v. State* (1940) 233 Wis. 432, 289 N.W. 670; 29 OAG 449; *State ex rel. Doxtater v. Murphy* (1946) 248 Wis. 593, 22 N.W. 2d 685; *State v. Greco* (1955) 271 Wis. 54, 72 N.W. 2d 661; and *State ex rel. Casper v. Burke* (1959) 7 Wis. 2d 673, 97 N.W. 2d 703).

It is my opinion that the right to counsel guaranteed by the Wisconsin Constitution does not require the Milwaukee County District Court to appoint counsel for indigent defendants at the preliminary hearing. A defendant in a criminal case does not have a constitutional right to a preliminary hearing. *State v. Leicham* (1877) 41 Wis. 565, 572-573; *Goldsby v. U.S.* (1895) 160 U.S. 70, 73; *Clarke v. Huff* (App. D. C. 1941) 119, F 2d 204; *Odell v. Burke* (C. A. 7th Cir. 1960) 281 F. 2d 782. It is a statutory privilege, unknown to the common law, designed to protect the accused from hasty, improvident, or malicious prosecution, and to discover whether there is a substantial basis for bringing prosecution. *Thies v. State* (1922) 178 Wis. 98, 103, 189 N.W. 539.

The preliminary hearing is not a criminal prosecution within the meaning of Art. I, Sec. 7. *Hawk v. State* (1949) 151 Neb. 717, 39 N.W. 2d 561, 567; Cf. *State ex rel. Kennon*

v. Hanley (1946) 249 Wis. 399, 401, 24 N.W. 2d 683. The defendant can not be required to plead. Section 954.04. The doctrines of res adjudicata and double jeopardy are not applicable to the preliminary examination. *State ex rel. Durner v. Huegin* (1901) 110 Wis. 189, 239, 85 N.W. 1046.

From the foregoing it is clear that the state could dispense entirely with the preliminary hearing in a criminal case. Necessarily, therefore, the state may conduct such hearings without providing counsel to an indigent defendant unless the denial of counsel were to so prejudice the defendant as to deprive him of a fundamental right denying him due process of law under the United States Constitution. *Powell v. Alabama* (1932), 287 U.S. 45, 71; *Odell v. Burke, supra.* In *Powell v. Alabama, supra,* at page 71, the United States Supreme Court stated that the duty of the court to appoint counsel "* * * is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case". The right to counsel guaranteed by the requirements of federal due process is not confined to representation during the trial on the merits. *Moore v. Michigan* (1951) 355 U.S. 155, 160; *Reece v. Georgia* (1955) 350 U.S. 85, 90. On the other hand, a defendant in a state noncapital case does not have an absolute federal constitutional right to appointment of cousel to defend him at the trial. *Betts v. Brady* (1942) 316 U.S. 455; *Cash v. Culver* (1959) 358 U.S. 633, 636-637. It has been held that the denial of counsel by the state at a preliminary hearing is not a violation of federal due process. *Hawk v. Olson* (1945) 326 U.S. 271; *State v. Sullivan* (1955) 227 F. 2d 511, 513; *Odell v. Burke* (C. A. 7th Cir. 1960) 281 F. 2d 782. It is therefore my opinion that neither the Wisconsin Constitution nor the due process clause of the Fourteenth Amendment to the United States Constitution requires appointment of counsel at the preliminary hearing.

If authority to appoint counsel exists therefore, it must rest upon common law or statutory power.

Courts of record with criminal jurisdiction have authority to appoint counsel to defend indigent defendants, re-

gardless of statute. *Carpenter v. Dane County* (1859) 9 Wis. *274; *County of Dane v. Smith* (1861) 13 Wis. *585.

The district court is not acting as a court of record at a preliminary examination. When conducting the preliminary examination, the judge is acting as a judge rather than a court. *State ex rel. White v. District Court of Milwaukee County* (1952) 262 Wis. 139, 54 N.W. 2d 189. The judge has only the limited powers of a magistrate during a preliminary hearing. *State v. Friedl* (1951) 259 Wis. 110, 47 N.W. 2d 306.

Section 957.26 (1) reads as follows, in part:

"* * * (1) Courts of record may appoint counsel for defendants charged with felonies and who are without means to employ counsel. Such appointment shall be in time to enable counsel to attend at the taking of any deposition. * * *"

It has been suggested that the foregoing statute authorizes the District Court of Milwaukee County to appoint counsel for an indigent defendant on the ground that the district court is a court of record (Wis. Laws of 1899, ch. 218, sec. 2, as amended) and because depositions are sometimes taken at a preliminary examination. Statutory authority to take a deposition in a criminal case is provided for only after the indictment or information is filed. Section 326.06 (1).

The purpose of the preliminary hearing is merely to determine whether probable cause exists to believe that a crime has been committed and that the defendant committed it (sec. 954.13 (1)) and the information must charge the crime according to the evidence on such examination (sec. 955.17 (1)). No plea may be taken at the preliminary hearing and res adjudicata and double jeopardy do not apply. As pointed out above, the judge hearing a preliminary examination is not acting as a court of record exercising criminal jurisdiction. Furthermore, the Wisconsin Supreme Court has held, in effect, that an attorney who is ordered by the court to defend one accused of crime is entitled to compensation. *County of Dane v. Smith* (1861) 13 Wis.

*585. Since there is no constitutional requirement of counsel at the preliminary, it is within the power of the legislature to limit appointment of counsel as it has done by sec. 957.26 (1). Since a fee is not authorized, the district court may not require counsel to serve at the preliminary hearing.

A recent study indicates that the need for counsel at the preliminary hearing is an imperative for the protection of the accused as it is at the trial itself.

In *"Equal Justice for the Accused"* by a Special Committee of the Association of the Bar of the City of New York and the National Legal Aid and Defender Association (1959), the writers state as follows, in part, at page 35:

"The need of the individual for counsel in a criminal proceeding is apparent to anyone who has ever observed such a proceeding. The procedures of the criminal law are not easily understood nor readily mastered. Most defendants need competent representation soon after arrest, and certainly not later than the preliminary hearing following arrest. At this early point in the criminal proceeding, a lawyer should be available to explain the charge, to investigate the facts, to prevent unreasonable detention and unjustified bail, to probe sympathetically for possible explanations and defenses, and to determine what course of further action the accused should adopt."

The foregoing is persuasive. It has not been considered by the federal courts to be sufficiently persuasive however, to require counsel at the preliminary hearing, in order to satisfy the requirements of due process under the Fourteenth Amendment to the United States Constitution. This indicates that in those cases which have been considered by the courts there has been no showing that the absence of counsel at the preliminary hearing has resulted in abuses or has precluded the accused from obtaining effective aid in the preparation and trial of his case so as to deny him due process.

The conclusion reached here is based on the present state of the law in Wisconsin and raises some serious questions involving the administration of justice.

It is my personal opinion, but not the law of this state, that the accused should be entitled to counsel at the preliminary hearing. It is my sincere hope that the legislature amends the law to make this possible.

Although the district court may not appoint counsel for indigents at the preliminary hearing, the court does have power to appoint counsel for indigents in the felony cases over which it has trial jurisdiction. Section 957.26 (1); 3 OAG 175. At the time of arraignment for trial, the court sits as a court of record (*State v. Hunter* (1940) 235 Wis. 188, 191, 292 N.W. 609) and has power to so act. (44 W.S.A. 199-5)
JHB

Adult and Vocational Education—City—A city having a local board of vocational and adult education is authorized to issue bonds for school purposes within the exception in Art. XI, sec. 3, Wis. Const. providing debt limitations.

March 31, 1961.

GEORGE E. WATSON,

State Superintendent of Public Instruction.

It is provided in Art. XI, sec. 3, Wis. Const. that the debt limitation of cities is five per cent of the value of the taxable property therein ascertained by the last assessment for state and county taxes "* * * except that for any city which is authorized to issue bonds for school purposes the total indebtedness of such city shall not exceed in the aggregate more than eight per centum of the value of such property as equalized for state purposes; * * *." You request an opinion whether the exception in the quoted lang-

uage is applicable to a city which does not operate schools under the city school plan, secs. 40.80 to 40.807, but does operate vocational schools pursuant to sec. 41.15 (1).

It might appear that the board of vocational and adult education of a city is autonomous. Sec. 41.15 (5) provides no money appropriated by a city for schools of vocational and adult education can be spent without the approval of the local board of vocational and adult education. Under sec. 41.16 the local board reports annually to the city clerk the amount of money required for the next fiscal year to support and operate its schools of vocational and adult education, and the city is required to levy and collect a tax which, with other funds provided for the same purpose, will equal the amount so required by the local board, but not exceeding two mills.

However, from other provisions it is clear that a city board of vocational and adult education is not an entity separate from the city. Although the board is, by sec. 41.15 (7), given the power to purchase or lease suitable grounds or buildings and to erect, improve and enlarge buildings for such schools, it is specifically provided that all conveyances, leases and contracts are to be in the name of the city. In sec. 41.15 (10) a city board of vocational and adult education is given exclusive control of the schools established by it and over all property acquired for the use of such schools, except as otherwise provided in the statutes, and it is authorized to enter into contracts for the construction of school buildings and equipping the same; but, it is required that all such contracts are to run in the name of the city.

Sec. 41.16 (3) provides that when the board of vocational and adult education in a city deems it necessary to erect or make additions to buildings or to purchase sites or additions thereto, such local board may inform the city council of the amount of funds needed therefor and request the city council to borrow money or to have school bonds issued "* * * in accordance with the procedure in chapter 67 or elsewhere in the statutes for said purposes, in the same

manner as other bonds are issued or loans are obtained in such city * * *." Sec. 67.04 (2) in setting forth the purposes for which a city may borrow money or issue bonds includes in subdivision (b) the acquisition of sites and the erection or enlargement of buildings, "* * * for parental or schools of vocational and adult education, or for use by the local board of vocational and adult education."

It is thus clear that although a city board of vocational and adult education, under sec. 41.16 (5), has control over the expenditures of funds appropriated to it, and does the contracting for the purchase of sites and the erection of buildings for vocational and adult education schools, any and all borrowing of money or the issuance of bonds to provide funds for the purchase of sites for, or the erection, improvement or enlargement of school buildings is done by the city and such loans or bonds are obligations of the city as a municipality. Accordingly, any city having a city board of vocational and adult education is a city which "is authorized to issue bonds for school purposes" and comes within the exception in Art. XI, sec. 3 of the constitution extending that debt limitation of such a city to eight per cent of the value of its taxable property as equalized for state purposes.

HHP

Taxation—Internal Improvements—Legislature—The legislature has no power to appropriate state moneys raised by taxation for the improvement of navigation on the Upper Fox River.

March 31, 1961.

THE HONORABLE, THE SENATE.

You have requested my opinion on the constitutionality of a bill which would appropriate state moneys to remove

debris from the Upper Fox River in order that it would be navigable. Your request concludes with the following sentence:

"* * * If, in the opinion of the attorney general, such work would be a work of internal improvement within the meaning of Article VIII, section 10 of the constitution, does the fact that the federal government granted jurisdiction over the Fox River to the state constitute an exception within the meaning of that section which would enable the state to expend money for improvement of the course of the river?"

In my opinion an appropriation of state funds raised by state taxation for the improvement of navigation of the Upper Fox River would be unconstitutional under the provision of Art. VIII, sec. 10, which forbids the state to contract debts for, or become a party to, carrying on works of internal improvement.

It is my further opinion, in accordance with the express terms of Art. VIII, sec. 10, that if grants have been made to the state for the purpose of carrying on particular works of internal improvement, the avails of such grants may be expended by the state to carry on such works.

The material provisions of Art. VIII, sec. 10 of the Wisconsin constitution are 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 provision of the constitution was definitely construed in the early case of *State ex rel. Jones v. Froehlich,* (1902) 115 Wis. 32, 91 N.W. 115, which involved the validity of a state appropriation to provide levees along

the Wisconsin River in the vicinity of Portage. The court held the appropriation invalid. In its opinion in defining the term "works of internal improvement," the court stated at page 40:

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

This case contains an express ruling that improvement of navigation on the Fox River is a forbidden work of internal improvement. It has never been reversed or seriously challenged, and must be regarded as controlling.

The fact that the United States government has made grants of certain lands along the Upper Fox River, which we are informed total some 400 acres, to the state of Wisconsin does not alter the result. These lands will be administered by the state conservation commission of Wisconsin under the generalized concept of "parks" established by

our court in the case of *State ex rel. Hammann v. Levitan,* (1929) 200 Wis. 271, 228 N.W. 140 (the Horicon Marsh case). There is nothing in the conditions of transfer of these lands to the state of Wisconsin which would appear to countenance their sale and the use of the proceeds of that sale for the improvement of navigation on the Upper Fox River.

Unless grants of federal, or other, funds are made to the state for the specific purpose of improving navigation upon the Upper Fox River, the state has no funds available which it can devote to that purpose. As I have indicated above, to use the state's own funds for such a purpose would involve the state in a forbidden work of internal improvement.
RGT

Words and Phrases—School District—Discussion of the word "section" in the exception in sec. 40.095 (1) referring to the creation of a unified school district.

March 31, 1961.

GEORGE E. WATSON,
State Superintendent of Public Instruction.

An opinion has been requested relative to the application of sec. 40.095 Stats., which so far as here material reads:

"40.095 **Unified school district.** (1) CREATION. Except as to school districts organized under ch. 38, the county school committee may, under s. 40.03, create or alter a unified school district for the operation of public schools in any territory containing more than 1,000 electors and containing a village, a village and surrounding territory, a city, a city or cities and surrounding territory, a city and village, a city and village and surrounding territory, or any territory containing not less than 1,000 electors, except

that in the case of a city operating under the city school plan, a unified school district may be created under this section, only in accordance with s. 40.807 (1), (4), or by petition and referendum of the electors in a joint city school district, which petition and referendum shall be governed by the procedures set forth in s. 10.43 as far as possible, and the petition submitted to the city clerk and then referred to the body as provided in s. 40.807 (2) in lieu of the city council. The determination of the number of electors shall be governed by s. 40.01 (6). All orders affecting unified school districts shall be made effective as provided in s. 40.025 (4). A reorganization order under this section which is subject to a referendum election shall not become effective until approved at such election by a majority of the electors, voting thereon, residing within each city and incorporated village in the proposed unified school district and a majority of the electors residing within the remainder of such district. An order made or approved under s. 40.807 (1), (2) and (4) affecting a joint city school district containing an incorporated village shall not be effective until approved by the village board.

"(2) REORGANIZATION. Except as to school districts organized under ch. 38, the municipal boards may, under s. 40.06, create or alter a unified school district for the operation of public schools in any territory containing more than 1,000 electors and containing a village, a village and surrounding territory, a city, a city or cities and surrounding territory, a city and village, a city and village and surrounding territory, or any territory containing not less [than] 1,000 electors. Section 40.807 (4a) is applicable to this section but other provisions of s. 40.807 shall not be applicable to unified school districts created pursuant to this subsection. All orders affecting unified school districts shall be made effective as provided in s. 40.025 (4). Failure of the city council, or village board to make an order under this subsection shall not be subject to s. 40.06 (3)."

You first ask whether the word "section" as used in the exception in subsec. (1) relating to a city operating under

the city school plan renders such provision applicable to both subsecs. (1) and (2) or to only subsec. (1). Literally, this word would refer to and include all of sec. 40.095. However, consideration of the setup of the section in light of the background and purpose of the provisions thereof, leads to the conclusion that the word "section" is there used as intended to mean "subsection". Therefore, such use of the word does not render the provisions of the exception applicable to the creation of a unified school district by local municipal board action pursuant to sec. 40.06, which is authorized and covered by the provisions in subsec. (2), but is a limitation only on creation of unified school districts under subsec. (1).

There were two developments which gave rise to the proposal that became sec. 40.095, as enacted by ch. 446, Laws 1959. One was that in the reorganization of school districts that took place in recent years there existed a number of common school districts covering large areas. The holding of the annual meetings, and when occasions arose special meetings of the electors thereof was found to be an unsatisfactory method of transacting the business of such districts because, due to the number of electors participating, such meetings were extremely unwieldy and cumbersome. Interested persons were desirous of meeting the problem by some statutory provision under which the affairs of such large districts could be transacted by a governing board elected at large from the district.

At the same time there developed in a number of cities a dissatisfaction with operation of their schools under the city school plan, secs. 40.80 to 40.827. There was a desire to abandon the city school plan so the schools would be operated entirely independent from the city government. Several cities were favorable thereto, but the only alternative under the then provisions of the statutes was a change over to a common school district with the attendant cumbersome and unwieldy district meetings. In the case of sizeable cities this would be most impractical because of the number of electors involved.

To meet these situations there was evolved the concept of a new type of school district which would be a separate independent entity like a common school district, but in lieu of the annual meeting system applicable to common school districts it would conduct its affairs and operate its schools by a school board elected at large, similar to the board of education in the City of Milwaukee pursuant to ch. 38 Stats. Cities and villages generally were favorable, particularly some cities that were operating under the city school plan, but they did not want to have provision made for any such new system of operation of schools if it could be imposed upon them and include territory within their limits without their consent thereto.

It was in this climate and with a full appreciation of the reluctance of cities and villages to support the program that Bill No. 449, A., which with the amendments thereto became ch. 446, Laws 1959, was designed and prepared for the Wisconsin School Boards Association and introduced at its request. It is in the light of this background of its enactment that sec. 40.095 is to be interpreted and applied.

The overall intent of the bill is consistent with the above. Its objective and design was to provide for the creation of a new type or kind of school district which is a separate autonomous legal entity conducting its affairs and operating its schools through a school board whose members are elected at large, but at the same time give recognition to the position of cities and villages by reserving the power to make the determination that such a school district is created to include territory within their respective boundaries. As initially introduced, substantially what are now the provisions of sec. 40.095 in subsec. (1) [except the last two sentences] and subsec. (2) [without the last sentence], were compressed in Bill No. 449, A. into a single subsec. (2). Subsec. (1) of the bill contained a preamble statement of purpose. The remainder of the bill, as introduced, contained the provsions now in subsecs. (3), (4) and (5) of sec. 40.095.

Such subsec. (2) of the bill provided generally that, except as to school districts organized under ch. 38 (City of

Milwaukee) "* * * the county school committee, municipal board or the electors may, under s. 40.03, 40.06 or 40.07 create or alter a unified school district * * *" including any territory with the same area limitations now in subsecs. (1) and (2) of sec. 40.095. In the exception relating to the case of a city operating under the city school plan the words "under this section" now in subsec. (1) of sec. 40.095 were not included. As so phrased, the provision precluded the creation of a unified school district in the case of a city operating under the city school plan, except by action taken as provided in sec. 40.807 (1) or (4) or by the petition and referendum provision as now contained in subsec. (1). Neither a county school committee under sec. 40.03 nor local municipal boards under sec. 40.06 could create a unified school district that would include the territory of a city operating under the city school plan.

But, substitute amendment No. 2, A. was introduced, and with the additions made thereto by amendments Nos. 1, A. and 1, S., became ch. 446, Laws 1959. It eliminated the previous subsec. (1) of the initial bill and divided the substance of subsec. (2) into two subsections Nos. (1) and (2), which contained respectively what is now subsec. (1) except for the additions made thereto by amendment No. 1, S., and now subsec. (2) except for the additions made thereto by amendments Nos. 1, A., and 1, S. It was in subsec. (1) as proposed by substitute amendment No. 2, A. that the words "under this section" were inserted in the exception relating to a city operating under the city school plan.

The use of the word "section" in the insertion of this phrase must have been intended to mean "subsection" so as to preclude only the creation of a unified school district including the territory of such a city by a county school committee. This must have been the intention, as this prohibitory exception itself has no other objective than to implement the reservation of control by the city over the creation of a unified district including its territory. Were a county school committee to have power to create such a district, the city would possess no control over whether such a district would come into existence. The exception

was aimed at this by precluding a county school committee from taking any such action. Reading the language along with a realization of what is provided in sec. 40.807 (1) and (4) shows this was its intended effect and that it was not intended to preclude creation of such a unified school district by local municipal board action under sec. 40.06 as authorized by subsec. (2) of sec. 40.095.

The provisions in sec. 40.807 (1) by their express terms are operative only when an order of reorganization which involves a city school district has been made under secs. 40.03 or 40.06 and *it has gone into effect.* Then the city council or commission along with the town chairmen and village presidents of the cities, towns and villages whose territory is involved are authorized to *determine* whether to abolish the city school district plan and create therein a common or unified school district or *continue* as a city school district. This presupposes there is a city school district operating under the city school plan already in existence when the reorganization order went into effect. Such provisions, thus, apply only where an order has attached additional outside territory to a city for school purposes only. Then it is the action under sec. 40.807 (1) in which the city council participates that creates the common or unified school district and not the making of the order of reorganization attaching the additional territory to the city which does so. In this situation the city council has and exercises a control over the creation of such a district.

Similarly, the provisions in sec. 40.807 (4) are applicable if a city school district plan of operation is already in existence. They give the city council or commission, along with the town chairman and village presidents the power to abandon such city school plan of operation at the end of any school fiscal year and create a common or unified school district to include the territory in the city school district. Likewise, here it is action in which the city council or commission participates that creates the common or unified district and thus the city has control thereof.

On the other hand, any creation of a unified school district by local municipal board action under sec. 40.06 in such a case would involve concurrence of a majority of the city council or commission. Thus, the city would have control over the creation of a unified district in that situation and therefore there would be no occasion or necessity for providing it with such desired control by limiting creation of a unified school district to action under the provsions of sec. 40.807 (1) and (4).

The obvious purpose in dividing the initial provisions into separate subsections as finally enacted was to provide two different general methods for creation of unified school districts, but have them so designed as to assure to the cities and villages the control over creation thereof when territory thereof was involved. The intention must have been to have subsec. (1) relate only to county school committee action and subsec. (2) relate only to local municipal board action, so that local municipal board power under subsec. (2) was independent from that given to county school committees under subsec. (1). Normal drafting design would include in a separate subsection any provisions or limitations intended to be applicable to both the subsections. There is no evidence of any intent to restrict the local municipal boards themselves in their creation pursuant to subsec. (2) of unified school districts which include their territory. Rather the design of sec. 40.095 is to give them full power and control over the creation of such districts in their territory.

The foregoing dictates the conclusion that the word "section" as used in the exception in subsec. (1) relating to a city operating under the city school plan was intended to make such limitation applicable only in matters coming within subsec. (1) Therefore, a county school committee has no power to create a unified school to include territory of a city operating its schools under the city school plan. But, such provision does not apply to the creation of a unified school district in that situation by local municipal board action under sec. 40.06 and the same is authorized by subsec. (2) of sec. 40.095.

You also ask whether the word "section" as used in the next to the last sentence of subsec. (1) of sec. 40.095 makes the referendum requirements in such sentence applicable to an order of reorganization made by local municipal board action under sec. 40.06 as authorized by subsec. (2) of sec. 40.095. The same basis and consideration previously set forth relative to the previous question dictate that this referendum provision likewise was intended only to apply to county school committee action under subsec. (1).

Under subsec. (1) a county school committee is given authority to take action under sec. 40.03 to create or alter a unified school district composed of territory in cities not operating under the city school plan and in villages generally. Without some provision to give such cities and villages some voice in such creation or alteration they would not have any control except that contained in the general referendum provisions of sec. 40.06 (a), under which the electors of each city or village involved would not have a separate control as to their city or village alone, as there the total vote in the cities and incorporated villages is composited. This special referendum provision was inserted by amendment No. 1, S. to provide the desired control by each city and village individually. Its purpose is comparable to that in the last sentence of subsec. (1) which grants each village a separate control in the application of sec. 40.807 (1), (2) and (4), which otherwise it would not have.

That the intended application to be given these several provisions is no more than implementation of control where none otherwise existed, is also evidenced by the last sentence in subsec. (2). Without this if a petition for local municipal board creation of a unified school district including territory of a city or village were turned down, an appeal could be taken therefrom to the state superintendent and he could make an order of creation of such district. Here would then be an instance in which the cities or villages would not have the desired control. The provision thus "rounds-out" the intended control.

It is, therefore, my opinion that the referendum provisions in subsec. (1) of sec. 40.095 are applicable only to orders of a county school committee or joint county school committee under sec. 40.03 and do not apply to orders of municipal boards creating or alterating unified school districts pursuant to subsec. (2). As to the latter, the referendum provisions of sec. 40.03 (6) are applicable.

Also you ask whether a city school district, the boundaries of which are conterminous with the city, may be changed into a unified school district pursuant to the provisions of sec. 40.095 (2). The discussion and conclusion herein as to your first question supplies an affirmative answer except as respects any question of area. The areas specified in subsec. (2) out of which a unified school district may be created by local municipal board action contain several combinations of territory, but included therein is a "city" standing alone. Thus, the answer to this last question is clearly in the affirmative.
HHP

Savings and Loan—Words and Phrases—A savings and loan association may not have its mortgage loans serviced by another agency than itself.

March 31, 1961.

ROMAN J. WINKOWSKI, *Commissioner,*
Savings and Loan Department.

Your office requested a formal opinion inquiring whether a savings and loan association may have its mortgage loans serviced by some agency other than itself.

It cannot.

The term "agency" of course does not include another savings and loan association, which under the authority in

sec. 215.20 (18) may originate a mortgage, sell it, and retain the servicing. Neither does this opinion cover participation mortgages authorized by ch. 68, Laws 1959, which allows a savings and loan association to purchase an interest in a mortgage originated by the lenders named therein, that is, governmental agencies, insured savings and loan associations, insured banks, or insurance corporations licensed to do business in Wisconsin, who may retain the servicing.

The six closely related questions which you have stated for consideration and analysis follow:

"1. Under existing statutory provisions, does a savings and loan association have the authority to have all or part of its mortgage loans *serviced at* an office of a *private corporation* on a fee basis?

"2. Under existing statutory provisions, does a savings and loan association *have the authority to purchase certain mortgage* loans from a mortgage broker and have such purchased mortgage loans serviced at the office of a mortgage broker on a fee basis?

"3. Under existing statutory provisions, does a savings and loan association have the authority *to appoint as its agent a person or corporation,* on a fee basis, to service all or part of its mortgage loans at the office of such person or corporation?

"4. Under existing statutory provisions, does a savings and loan association have the authority to appoint a person or corporation as its agent, from whom it had *purchased mortgage loans, and have such person* or corporation service such purchased mortgage loans at his office on a fee basis?

"5. Under existing statutory provisions, does a savings and loan association violate the one-office restriction imposed by sec. 215.02 (2), Stats., by having all or part of its mortgage loans serviced by a person or corporation, appointed as agent on a fee basis, said person or corporation

being located in the *same building* which houses the office of the savings and loan association?

"6. Under the exemptions contained in sec. 219.03, Stats., does a savings and loan association have the authority *to appoint* any person or corporation, *as its agent on a fee basis,* to service mortgage loans, guaranteed by the veterans administration under the provisions of the Servicemen's Readjustment Act of 1944, United States Public Law 346, 78th Congress, and mortgage loans, insured by the Federal Housing Administration under the National Housing Act, approved June 27, 1934, which the savings and loan association purchased from said person or corporation?"

The query which is basic to each of these six questions is whether or not statutory authority exists whereby an association may have its mortgage loans serviced by some agency other than itself.

Sec. 215.20 (18) provides as follows:

"(18) * * * Service and repurchase mortgages and other evidences of security sold, assigned or transferred."

This subsection by its terms empowers an association to service mortgages which it may have sold, assigned or transferred. There exists no other grant of authority to an association referring specifically to the servicing of mortgages. It is clearly no grant of authority to have some agency other than itself service its mortgages.

Sec. 215.20 (3) provides as follows:

"(3) * * * Exercise all powers necessary and proper to carry out the purpose of the association."

To determine whether or not this subsection enables an association to contract out its servicing duties to a private corporation or another person, it is necessary to look at the objects and purposes of a savings and loan association, and to ascertain whether those purposes can only be conveniently and reasonably carried out by contracting away the servicing of mortgages. This is the test which was ap-

plied in the case of *North Hudson Mut. Building & Loan Assn. v. First National Bank* (1890) 79 Wis. 31, 47 N.W. 300 (which involved the question whether an association had the implied power to borrow).

Savings and loan associations are not banks, but are quasi-public corporations chartered to encourage thrift and promote ownership of homes and are subject to strict supervision by the state. *State ex rel. Cleary v. Hopkins Street B. & L. Asso.* (1935) 217 Wis. 179, 257 N.W. 684, 56 S. Ct. 235. Small monthly payments are collected from its stockholders and money is loaned to members to enable them to purchase real estate, build homes, and satisfy mortgages. Collection of payments on these mortgages is obviously a necessary and proper function of a savings and loan association; it does not follow at all that farming out the collection of such payments is necessary and proper. Collecting is a function which is vested only in the association by the legislature. In my opinion, no other agency may perform it.

Sec. 215.02 (20) reads as follows:

"* * * No savings and loan association or building and loan association carrying on business in this state shall operate or maintain any branch offices, paying or receiving stations, agencies or branch associations within this state."

The clear purport of this subsection is not only that each association is to have just one office, but also that an association is not to have an agency. In my opinion, the word *agency* as used in this context would include the kind of arrangement between an association and a private person or corporation contemplated in your questions. For these reasons it is my opinion that the first four questions must be answered in the negative.

With respect to question five, inasmuch as both the association and the private agency would maintain separate offices, it would appear that sec. 215.02 (20) which prohibits more than one office would be violated even though such offices were located in the same building.

With respect to question six, sec. 219.03 provides that ordinary restrictions which apply to conventional loans originated or purchased by associations do not apply to GI or FHA mortgages, and that in regard to such mortgages no provisions of the statute limiting the right of an association to buy, sell or assign mortgages shall apply. These exemptions, therefore, are related to restrictions upon loans, security, interest rates and transferability. They do not relate to an association's duties with respect to the administration of such mortgage loans. It is my opinion, then, that the sixth question must also be answered in the negative.

RGT

Plumbing—Platted Areas—That portion of sec. 145.06 (2) prohibiting the installation of plumbing in certain places unless prescribed requirements are met, is not applicable to an area platted under ch. 236, which does not adjoin a city or village having a system of waterworks and sewerage.

April 3, 1961.

JACK STEINHILBER,
District Attorney, Winnebago County.

You have inquired whether sec. 145.06 (2), is applicable to a situation where a general contractor, not a plumber, is performing plumbing work in a platted area which at its nearest point lies approximately 1 1/4 miles from the city of Oshkosh.

Sec. 145.06 (2), so far as material here, reads:

"(2) In such city or village [having a system of waterworks and sewerage], metropolitan sewerage district or in any area platted under ch. 236 *adjacent* to such city or village, no person, firm or corporation shall install plumbing unless at all times a licensed master plumber is in charge, who shall be responsible for proper installation. * * *"

The city of Oshkosh has a system of waterworks and sewerage and the question is whether the word "adjacent" as used in the above statute means "adjoining" or "near to". There is authority to the effect that the word "adjacent" refers to "nearness without actual contact". *United States v. Denver & R. G. R. Co.* (1887) 31 F. 886, 889.

However, it would appear here that the word "adjacent" as used in the above statute should be construed to mean "touching", "adjoining", or "contiguous to", rather than "near to". This is a permissible construction since it has been held that the word "adjacent" is relative and has more than one meaning; it sometimes means near to, or neighboring, and sometimes means adjoining, contiguous or abutting. Its meaning is determined principally by the context in which it is used under the facts or circumstances of each particular situation. *State v. Camper* (1953) (Tex. Civ. App.) 261 S.W. 2d 465, 468.

The first sentence of sec. 145.06 (2), was enacted in its present form by ch. 588, Laws 1949, which amended secs. 145.06 (1) and (2). Bill No. 576 S., which became such chapter, read in part as follows:

"Section 1. 145.06 (1) and (2) of the statutes are amended to read:

"145.06 (1). No person shall engage in or work at plumbing in any city or village * * * or in any metropolitan sewerage district *or in any area plated under chapter 236* * * * unless licensed to do so by the board * * *.

"(2) In such city or village, metropolitan sewerage district or * * * *area platted* * * * no person, firm or corporation shall install plumbing unless at all times a licensed master plumber is in charge, * * *"

Sub. Amdt. 1 S., to this bill was adopted, and it made several changes material here. For the words "nor in any area platted under Chapter 236", appearing in sec. 145.06 (1) as set forth in Bill 576, S., it substituted "or in any area platted under Chapter 236 adjacent to such city or village". For the words "or platted area", appearing in sec. 145.06 (2) as set forth in Bill No. 576, S., it substituted "in any area platted under Chapter 236 adjacent to such city or village".

This seems to indicate a plain legislative intent that the prohibitions of sec. 145.06 (1) and (2), quoted above, should apply to definite readily ascertainable areas platted under ch. 236. Thus the word "adjacent" as applied here means "contiguous to". If the other definition of the word as meaning "near to" were used, the statute might very well fail for uncertainty, since the area covered by words such as "near to" could be highly debatable.

Since the penal provisions of ch. 145 are applicable to violations, the statute should be rather strictly construed against the state and in favor of the person charged with the violation. One should not have to guess as to whether he is in violation of a penal statute. The rule is that such a statute, when open to construction, "is to be limited rather than extended thereby in favor of the person sought to be penalized, so that in case of fair doubt as to which of two reasonable meanings readable out of the law was intended

that one should be adopted most favorable to such person". *Miller v. Chicago & N. W. R. Co.* (1907) 133 Wis. 183, 190-191.

You are therefore advised that the installation of the plumbing in question is not subject to the provision of sec. 145.06 (2).

WHR:JHM

Public Service Commission—Safety—Sec. 192.268 neither specifically requires nor prohibits use of side curtains on track motor cars, but leaves a considerable area for fact-finding by the public service commission as to what constitutes adequate protection.

April 7, 1961.

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

You ask whether sec. 192.268 requires side curtains on any track motor car in addition to a canopy or top, windshield and windshield wiper mentioned in said statute.

You state that a certain railroad takes the position that the use of side curtains is *not permitted,* because they tend to make the men less alert, and that a railroad employees' organization contends that sec. 192.268 *requires* side curtains.

Sec. 192.268 reads:

"Windshield and canopy on track motor cars. It shall be unlawful after July 1, 1955 for any person, firm or corporation operating or controlling any railroad running through or within the state to operate or use in motion any track motor car, without a canopy or top, and a windshield and windshield wiper to adequately protect the occupants thereof from the weather, except that this section shall not apply to track motor cars which operate within the confines of the railroad yards".

You have not specifically stated whether the railroad's

contention, that side curtains are *not permitted,* is based on sec. 192.268 or some other regulation. If it is based on the former, it is unwarranted. Sec. 192.268 outlines specific minimum standards, but does not proscribe greater protection.

It is apparently the contention of the employees' association that the minimum protection extended by sec. 192.268 includes curtains which may be adjusted in inclement weather over the sides of the cars, which would otherwise be open.

The statute requires a windshield and a canopy or top to "adequately protect the occupants * * * from the weather". A canopy is defined in Webster's New International Dictionary, 3d ed., as "an overhanging shelter or shade". While the definition of a canopy would not preclude protection extending to the bottom of the car, neither would it necessarily require it. The history of legislation leading to sec. 192.268 indicates that the legislature did consider side curtains separately from canopies. For example, Subst. Amend. No. 1 A to Bill 456 introduced in the 1951 session referred to "a canopy or top, a windshield and windshield wiper, slide curtain on both sides and a roll curtain in the rear". The amendment was adopted but the bill defeated. The present statute was created at the next session by Bill 239, S, which dealt only with a canopy or top and windshield and windshield wiper.

While the statute does not of itself impose a rigid requirement for side curtains, it leaves a considerable area for fact-finding what is a canopy "to adequately protect the occupants thereof from the weather". When the legislature uses flexible language, instead of spelling out specific requirements, it necessarily contemplates some leeway for fact-finding in application of the general law to a specific situation. The fact-finding may be the function of a court, a jury, or a specialized administrative agency such as the public service commission. The attorney general has no authority to engage in fact-finding in connection with the issuance of opinions upon questions of law under sec. 14.53 (4).

The public service commission, on the other hand, has a considerable authority for finding facts as to what condi-

tions meet statutory standards, under such provisions as secs. 195.03 (2), (18), 195.04, 195.07 (1), 227.014 (2) (a) and 227.06 (1). Sec. 227.014 (2) (a), for example reads:

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

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

It would seem appropriate under the above statute for the expertise of the public service commission to be utilized to determine how much is required for adequate protection of employees on track cars.

BL

Sheriff—Transportation—Under certain circumstances sheriff is required to cooperate and provide transportation to county jail for persons arrested for violation of state law and expense to be borne by municipality whose ordinance was violated. Transportation is not to be provided in arrests without a warrant.

April 10, 1961.

WARREN WINTON,
District Attorney, Washburn County.

You stated that the sheriff of Washburn county is frequently requested by the police department of the city of Spooner to pick up persons arrested by the city police and to transport such persons from the city of Spooner to the county jail at Shell Lake. You ask that I answer the following questions relating to the legality of this practice:

1) Is it the duty of the sheriff to provide transportation to the county jail for persons arrested under a state law?

2) Is it the duty of the sheriff to provide transportation to the county jail for persons arrested for ordinance violations?

3) If the sheriff is legally required to offer such transportation, is the municipality, which authored the ordinance, liable for the cost of transporting these persons to the county jail?

The primary duty of a sheriff is to preserve law and order throughout his county. *Andreski v. Ind. Comm.* (1952) 261 Wis. 234, 52 N. W. 2d 135; cf. secs. 59.23 (7) and 59.24. To a degree, this duty has a constitutional mandate. Sec. 4, Art. VI, Wis. Const.; *State ex rel. Kennedy v. Brunst* (1870) 26 Wis. 412. It is the sheriff's duty to receive prisoners at the county jail, and to confine persons arrested by municipal law enforcement officers when the sheriff has reason to believe that the arrest was properly made. 39 OAG 50. Although the sheriff possesses some discretion as to the manner in which he may carry out his duty to preserve public order, he must respond when called upon to investigate or aid in the apprehension of law breakers and from this duty springs a duty to assist other law enforcement officers in the apprehension and detention of such persons. Failure to perform his duties or willful nonperformance are criminal acts. *State v. Lombardi* (1959) 8 Wis. 2d 421, 99 N.W. 2d 829.

There is no express statutory provision requiring the sheriff to transport persons arrested by municipal officers for a violation of state law to the county jail, nor do I find any case law to that effect. The sheriff's responsibility for law enforcement in regard to the responsibility of municipal enforcement officers for law enforcement is in many respects a matter of mutual cooperation. This is true with respect to the transportation to the county jail of persons arrested by municipal officers under state law. Under some circumstances it may become necessary to call upon the sheriff to provide such transportation. Such would be the case, for example, where the city police officer is by reason of some exigency unable to provide the transportation and the sheriff is available and able to do so. On the other hand, the sheriff is not required to respond to any and every such call and his services may not be commandeered to provide a cartage service to the municipality.

It is my opinion that the sheriff is under no duty to provide transportation for persons arrested without a warrant by municipal officers for ordinance violations. Enforcement of municipal ordinances is not the business of the sheriff and is of no particular concern to him. It is to be observed however, that if the arrest for the ordinance violation were made pursuant to a warrant, the sheriff would have the same duty to provide transportation as he would if the arrest were made for a violation of state law. This is true because such warrants are directed to the sheriff and he has a duty to execute such process. Sec. 59.23 (4) and 301.11.

Your third question is answered by our opinion in 24 OAG 65 which is to the effect that absent an agreement between the county and city, the expense incidental to transportation of one convicted for a violation of a municipal ordinance is to be paid by the city whose ordinance was violated. While the opinion was concerned only with the expense of transportation of one who was convicted of an ordinance violation, there is no logical basis for applying a different rule with respect to the transportation of one who has been arrested for an ordinance violation but not convicted. Sec. 62.24 (2) (b) provides as follows:

"* * * Prisoners confined in the county jail * * * for violation of a city ordinance shall be kept at the expense of the city and such city shall be liable therefor."

The statute reflects a policy to place the financial burden of prosecuting ordinance violations upon the municipality whose ordinance is violated. The municipality receives the financial benefit of any forfeiture which is imposed (sec. 288.14) and logically, therefore, it should bear the cost incident to the enforcement of such ordinance.

It is my opinion that under appropriate circumstances the sheriff is required, as a matter of cooperation, to provide transportation to the county jail for persons arrested by municipal officers for a violation of state law but that his services may not be commandeered for that purpose. The sheriff is not required to provide transportation for

persons arrested for ordinance violations under any circumstances.

JHB

Voting—Legislation—Under Art. III, sec. 1, Wis. Const. the legislature, subject to a referendum, may extend voting franchise by changing state residence qualification from one year to six months, by method adopted in Bill 46, A., 1961.

May 8, 1961.

THE HONORABLE, THE ASSEMBLY.

You have asked for my opinion as to the validity of the method used in Bill No. 46, A., of 1961, to expand the eligibility to exercise the voting franchise. This bill amends secs. 6.01 (1) and 9.045 by changing to six months the one-year residence requirement to become an eligible voter. This bill also provides that these changes shall not become law until approved by a majority vote of the people at the next general election. Essentially your question is whether a change from a one-year to a six-month residence requirement for eligibility for voting can be accomplished by statute, subject to a referendum, or must such a change be accomplished by amending the constitution. It is my opinion that such a change can be accomplished by statute, subject to a referendum, without amending the constitution.

Art. III, sec. 1 of the Wis. Const. in its present form reads as follows:

"Section 1. Every person, of the age of twenty-one years or upwards, belonging to either of the following classes, who shall have resided in the state for one year next preceding any election, and in the election district where he offers to vote such time as may be prescribed by the legislature, not exceeding thirty days, shall be deemed a qualified elector at such election:

"(1) Citizens of the United States.

"(2) Persons of Indian blood, who have once been declared by law of congress to be citizens of the United States, any subsequent law of congress to the contrary notwithstanding.

"(3) The legislature may at any time extend, by law, the right of suffrage to persons not herein enumerated; but no such law shall be in force until the same shall have been submitted to a vote of the people at a general election, and approved by a majority of all the votes cast on that question at such election; and provided further, that the legislature may provide for the registration of electors, and prescribe proper rules and regulations therefor."

The first part of this section provides as qualifications for electors that they must be at least 21 years of age and have resided in the state for one year and in the election district such time as may be prescribed by the legislature not exceeding thirty days. There is also the requirement that they belong to either of the following classes: (1) United States citizens, (2) persons of Indian blood who have once been declared by congress to be United States citizens. In subparagraph (3) it is provided that the legislature may extend the right of suffrage to persons not herein enumerated, subject to a referendum.

A question arises as to the exact meaning of this last provision. Does it mean that the legislature may only add to the two prescribed classes of voters a new class, such as aliens, for example, who would have to have the prescribed qualifications as to age and residence? Or does it mean that the legislature may also change the qualifications as prescribed in the first part of this section and thus create a new class of voters? I conclude that the latter is the correct interpretation. The legislature can, subject to a referendum, reduce the residence requirement for voting from a year to six months, thus extending the right of suffrage to a new class of persons who could not vote before. These people would be those with at least six months' residence, but less than a year's residence.

A brief discussion of the development of the constitution will show how I reach this conclusion. The first Wisconsin Constitution, adopted by the 1846 Constitutional Convention, did not provide for Negro suffrage. However, by a separate resolution, an amendment was proposed to allow

Negro suffrage. Both this constitution and this resolution were rejected by the voters. Thereafter, at the Constitutional Convention of 1847-1848, the matter was again considered at length. There it was first proposed to restrict suffrage to white persons. It was then proposed that the constitution provide that the legislature might submit the question of colored suffrage to a vote of the people. It was also proposed that the legislature should have power to admit colored persons to suffrage, subject to a referendum. It was finally proposed that the legislature may at any time extend by law the right of suffrage to persons not enumerated in the constitution, subject to a referendum. This was a substitute for the previous proposal and was intended to accomplish the same purpose, but direct reference to colored suffrage was taken out because this would be more acceptable to the people. See the official journal of the Constitutional Convention of 1847-1848, at pages 188, 191, 192, and 200-201. This journal is available in the legislative reference library in the capitol building.

The constitution, adopted by the convention of 1847-1848, and accepted by the voters of this state, provided in Art. III, Sec. 1, as follows:

"Section 1. Every male person, of the age of twenty-one years or upwards, belonging to either of the following classes, who shall have resided in the state for one year next preceding any election, shall be deemed a qualified elector at such election:

"1. White citizens of the United States.

"2. White persons of foreign birth, who shall have declared their intention to become citizens, conformably to the laws of the United States on the subject of naturalization.

"3. Persons of Indian blood, who have once been declared by law of congress to be citizens of the United States, any subsequent law of congress to the contrary notwithstanding.

"4. Civilized persons of Indian descent, not members of any tribe. Provided, That the legislature may at any time, extend by law, the right of suffrage to persons not herein enumerated; but no such law shall be in force until the

same shall have been submitted to a vote of the people at a general election, and approved by a majority of all the votes cast at such election."

By Ch. 137, sec. 2, Laws 1849, approved in a subsequent referendum, the legislature extended the right of suffrage to Negroes. The supreme court held this act valid in *Gillespie v. Palmer* (1866) 20 Wis. 544. Thus it is clear that the legislature, acting under the last part of Art. III, sec. 1 Wis. Const., can add, subject to referendum, new classes of voters to those already enumerated in the constitution.

The 1848 constitution provided, as qualifications for voters, that a person must be male, age 21 or over, and have resided in the state at least one year. By Ch 211, Laws 1885, approved by the voters in a referendum, the legislature extended the right of suffrage to women in respect to school matters. The validity of this act was upheld by the supreme court. *Brown v. Phillips* (1888) 71 Wis. 239, 36 N.W. 242; *Gilkey v. McKinley* (1890) 75 Wis. 543, 44 N.W. 762. In the first of these two cases the court, at pages 245-248, specifically held that the legislature, acting under the power to extend the right of suffrage to persons not enumerated in the constitution, was not limited to adding new classes of voters possessed of the qualifications there provided, but could change those qualifications by adding women as a new class of voters.

Even without the power expressly conferred upon the legislation by the last sentence of Art. III, sec. 1, Wis. Const., it is quite possible that the legislature would have the power to extend the right of suffrage to additional persons because our state constitution is not a grant of, but a limitation upon, legislative power. See, for example, *State ex rel. Dudgeon v. Levitan* (1923) 181 Wis. 326, 339, 193 N.W. 499, where it is said:

"* * * Bearing in mind that our constitution is not a grant of, but a limitation upon, legislative power, it is apparent that the legislature may adopt any and all measures which in its judgement will promote the efficiency of the schools and other educational institutions of the state unless prohibited by some express constitutional provision * * *".

Also in *State ex rel. Frederick v. Zimmerman* (1948) 254 Wis. 600, 615, 37 N.W. 2d 473, the court said:

"Where a state constitution, as does the constitution of Wisconsin, vests the legislative power of the state in a senate and assembly, the exercise of such power is subject only to the limitations and restraints imposed by the constitution and the constitution and laws of the United States. If it were not for the constitutional provisions already referred to, the legislature would have unrestricted control over the entire subject of elections."

Thus the question is not whether the constitution confers the power upon the legislature to extend the right of suffrage to persons not already granted that right by the constitution. The question is whether there is any provision of the constitution which prohibits the legislature from extending the right of suffrage. For example, in *Brown v. Phillips*, supra, at pages 247-248, the court said:

"The question is not whether the constitution conferred the power [upon the legislature] to so extend the right of suffrage to women, but whether it anywhere expressly or by *necessary* implication prohibited the exercise of such power. * * * The limitation upon the power to so extend the right of suffrage to women must, therefore, be found in the constitution and laws of this state, or it does not exist at all. It is certainly not to be found there in express terms. Nor do any of us think it can be found there by *necessary* implication. * * *" (Emphasis added)

It is thus clear that the legislature could extend the right of suffrage to new classes of persons, such as Negroes, women, aliens, and persons having less than a year's residence, so long as no specific provision in the constitution can be found which prohibits such extension of suffrage, to remove any possible doubt, such legislation should then be submitted to a vote of the people in a referendum. However, since the constitution specifically grants and guarantees to certain persons the right of suffrage, the legislature could never restrict or take away such right. In *State ex rel. LaFollette v. Kohler* (1930) 200 Wis. 518, 228 N.W. 895, at pages 547, 548, it is said:

"In *State ex rel. McGrael v. Phelps* the court said:

" 'The right to vote is one reserved by the people to members of a class and as so reserved, guaranteed by the declaration of rights and by sec. 1, art. III, of the constitution. It has an element other than that of mere privilege. It is guaranteed both by the bill of rights, and the exclusive entrustment of voting power, contained in sec. 1, art. III, of the constitution; and by the fundamentally declared purpose of government; and the express and implied inhibitions of class legislation, as well. Such declared purpose and the declaration of rights, so far as they go, and the equality clauses, — constitute inhibitions of legislative interference by implication, and with quite as much efficiency as would express limitations, as this court has often held. (Citing cases.)

" 'Thus the right to vote is given a dignity not less than any other of many fundamental rights.'

"Under our constitution the right of suffrage is a constitutional right vested in those who possess the qualifications prescribed by the constitution. Whether it is vested by reservation or grant it is not necessary to inquire at this time. In theory the sovereign political power of the state rests in the people; in practice, however, it is exercised by those individuals within the state who possess the qualifications prescribed by the constitution, who must proceed in the manner indicated by the constitution and statutes to exercise it. The constitution having fixed the qualifications, persons falling within the classification thus established may not be deprived of their right by legislative act and the right is protected by the applicable constitutional guaranties."

In *State ex rel. Wood v. Baker* (1875) 38 Wis. 71, at page 86, the court said:

"The constitution vests every person having certain qualifications at the time of any election with the right of suffrage at such election. * * * And every one having the constitutional qualifications then, may go to the polls, vested with the franchise, of which no statutory condition precedent can deprive him. Because the constitution makes him, by force of his present qualifications, 'a qualified voter at such election.' Art. III, sec. 1. Statutes cannot impair the right, though they may regulate its exercise. * * *"

See, for example, *State ex rel. Knowlton v. Williams* (1856) 5 Wis. 308, 315-316. When this case was decided, the only residence qualification for voting provided in the constitution was one year's residence in the state. The legislature had enacted a statute requiring 30 days' residence in the town where the elector offers to vote. The court said that this adds a qualification for voting not contained in the constitution and held that this cannot be sustained because it deprives a person of a right to vote, although he has every qualification which the constitution requires. A similar result was reached in *State ex rel. Cornish v. Tuttle* (1881) 53 Wis. 45, 9 N.W. 791.

It is clear that while the legislature, subject to a referendum, can add new classes of voters, such as persons with less than one year's residence in the state, it cannot require more than one year's residence in the state, or require more than 30 days' residence in the election district, because this would deprive certain persons of a right of suffrage guaranteed to them by the constitution. The voting franchise can be expanded and extended to new classes of persons by the legislature, subject to a referendum, but it cannot be restricted in this way. Any changes which would restrict the voting franchise would have to be accomplished by constitutional amendment.

AH

Health Officers—Words and Phrases—Discussion of meaning of health department and its officers according to sec. 140.09.

May 16, 1961.

DR. CARL N. NEUPERT,
State Health Officer.

You ask my opinion on this question: What constitutes a full-time health department for a town, village or city which would except such town, village or city from jurisdiction of the county health department under provisions of sec. 140.09?

Sec. 140.09 (2) provides in part: "Any county board may organize a single county department of health, * * *."

Sec. 140.09 (11) provides that the jurisdiction of such a county department of health "shall extend to all towns, villages and cities within the county, *other than those having a full-time health department.*"

Sec. 140.09 (1) (c) reads: " 'Health department' means a full-time health department unless otherwise specified and refers to one whose personnel, *other than consultants and clinicians,* devote their *full time* to health department duties."

It is clear that under the above-quoted statutes a full-time health department for a town, village or city which would place such town, village or city outside the jurisdiction of the health department of its county, pursuant to sec. 140.09 (1), must be a health department whose personnel, other than consultants and clinicians, devote their full time to health department duties. Such "consultants" and "clinicians" are physicians. In the context of sec. 140.09 (1) (c), "consultants" would appear to mean physicians hired to advise a municipal board of health, especially where the local health officer is not a physician. Secs. 141.01 (3) and 141.03 (1) (b) contain provisions contemplating such use of a physician. "Clinicians", in the context of sec. 141.01 (1) (c), obviously means persons versed in clinical medicine or surgery. See Webster's New International Dict. 2d Ed. The services of these consultants and clinicians, on a full-time basis, would obviously be unavailable to most municipal health departments. It is thus readily understandable why the legislature chose to exempt such consultants and clinicians from the full-time employment requirement laid down by sec. 140.09 (1) (c).

You further ask my opinion on this question: Must a health officer in a town, village or city be a full-time employe of its health department in order to make it a full-time health department within the meaning of sec. 140.09 (1) (c)? Answering this question, it must first be pointed out that sec. 141.01 (3) requires that, "* * * The health officer shall devote full time to his duties and shall not engage in the private practice of medicine or in any other conflicting occupation * * *." In context, this re-

quirement would seem to apply only to health officers in cities having a population of 39,000 or more. Assuming such requirement is met in those cities, it is unnecessary to consider whether a health officer in one of them, by working only part time at his duties as such, would deprive his department of full-time status under sec. 140.09 (1) (c). And if this requirement extends to health officers in all our towns, villages and cities (a doubtful but arguable proposition), and is met as to all of them, it would be unnecessary to consider whether a health officer in one of them, by working only part time at such duties, would deprive his department of full-time status under sec. 140.09 (1) (c). Your letter requesting this opinion, however, indicates that the requirement of this statute, if applicable to the health officers of all our towns, villages and cities, is not always fulfilled in some of our smaller cities with less than 39,000 population. Since this is so, it seems practical to consider your second question as if the requirement of full-time service for health officers, laid down by sec. 141.01 (3), did not exist, at least as to our towns, villages and cities with less than 39,000 population. So considered, it is my opinion that the answer thereto must be that the health officer of town, village, or city must be a full-time employe of its health department in order to make it a full-time health department under sec. 140.09 (1) (c). The legislature, had it desired to extend to health officers the exemption from full-time employment granted consultants and clinicians in sec. 140.09 (1) (c) would, I believe, have done so in clear, explicit language. It logically enough did not do so, since the good reason for providing such an exemption for clinicians and consultants mentioned above is not present in the case of health officers. The latter, unlike consultants and clinicians, need not be physicians whose full-time services are so difficult for municipal health departments to procure. Health officers in this state, even in our large cities, need not be physicians. See sec. 141.01 (3).

It should here be observed that the exemption from full-time employment accorded a health department consultant or clinician is in the nature of an exception. As a general rule, exceptions in a statute should be strictly construed. 82 C.J.S. Statutes, sec. 383 (c). Strict construction, applied to the exception here in question, certainly does not per-

mit it to be interpreted as covering any member of a health department other than a consultant or a clinician.

To render you a complete opinion herein, one further question, related to those answered above, should be considered. A consultant or clinician, as already noted, is not required to work full-time, under sec. 140.09 (1) (c), in order to constitute his health department a full-time health department. If he also acts as health officer for such department, does the exemption from full-time employment, which he enjoys as clinician or consultant, also extend to his labors as health officer, etc., thus making it possible for him to be a part-time health officer (as he obviously would be) without denying his health department the full-time status necessary to except his town, village or city from the jurisdiction of the county health department? It is my opinion that such exemption would not be so extended. To except his town, village or city, pursuant to sec. 140.09 (11), from the jurisdiction of the county health department, he must, if he works as health officer of his health department, devote full-time to his duties as such. He cannot devote part-time to such duties, part time to his duties as clinician or consultant of his health department, and part time (in all likelihood) to his private practice of medicine. If he so divides his working hours, or in any other manner devotes less than his full working day to his duties as health officer, he will deny to his health department a full-time status.

In order to devote "full time" to his health department duties, the health officer of a town, village or city should, in my judgement, spend at least five days per week, eight hours per day, in discharging such duties. It is true that the words "full time", unless defined, are, in the absence of any applicable and recognized standard of time, of doubtful meaning. See *Johnson v. Stoughton Wagon Co.* (1903) 118 Wis. 438, 446. See also 32 OAG 65, 68; 42 OAG 212, 213; 48 OAG 106, 108. But resort may be had to an applicable and recognized standard of time to resolve any doubt as to the meaning of the words "full time" as used in the requirement of sec. 140.09 (1) (c) that personnel of a full-time health department, other than clinicians and consultants, must "devote their *full time* to health department duties." In this state, most public servants work the normal forty-hour week, eight hours per day for five days

and since a municipal health officer is a public servant, "full time" required of him in discharging his health department duties would no doubt mean the normal work week for public employes prevailing throughout this state. JHM

County Health Department—Municipalities—Date of resolution creating county health department governs rather than effective date of operation. Municipalities cannot free themselves from such jurisdiction if action is taken after date of resolution.

May 16, 1961.

HAROLD J. WOLLENZIEN,
Corporation Counsel, Waukesha County.

You ask my opinion on this question: Where a county health department was created pursuant to sec. 140.09 (2) of the Wisconsin Statutes on November 29, 1960, said department to become effective and commence operation on July 1, 1961, could a town, village or city form a full-time health department after November 29, 1960, but before July 1, 1961, and then elect to withdraw from said county health department?

It is my opinion that such town, village or city under the circumstances described in your question, would be powerless to form a full-time health department after November 29, 1960, but before July 1, 1961.

This opinion is based on my construction of sub. (10), sec. 140.09, read in conjunction with part of sub. (11), sec. 140.09, Sub. (10) thereof reads:

"Whenever a county board provides for a county department of health, the boards of health and health officers in all towns, cities and villages within such county shall be abolished, except as provided in subsection (11)."

Sub. (11) thereof reads in part as follows:

"The jurisdiction of the county department of health shall extend to all towns, villages and cities within the county, other than those *having* a full-time health department. Towns, cities and villages having full-time health departments may by vote of their governing bodies determine to come under such jurisdiction. * * *"

As I construe these statutes, they mean that whenever a county board "provides for" a county department of health, there shall take place an abolition of the boards of health and health officers in all towns, villages and cities in such county which have no full-time health department. The full-time health department of any town, village or city in such county, which department is in being when the county health department is provided for, shall continue to operate thereafter, and its town, village or city shall be free and outside of the jurisdiction of the county health department, unless the governing body of such town, village or city votes to come under such jurisdiction. Sub. (11) very plainly indicates, in its use of the word "having", that only a town, village or city in possession of a full-time health department *when its county provides for a county health department* can escape the jurisdiction of the latter. The question, then, is when does a county board, under sec. 140.09 (10) "provide for" a county health department? Did the county board of Waukesha County, whose action is here under consideration, "provide for" a county health department, under the circumstances you describe, on November 29, 1960, or will it "provide for" such department only on July 1, 1961, when the department will presumably go into operation on schedule?

It is my opinion that the county board of your county provided for the county health department on November 29, 1960, and that under the governing statutes above-quoted, no town, village or city in Waukesha county, not having a full-time health department on that date, could thereafter create one to escape the jurisdiction, present or impending, of the county health department. If sec. 140.09 (10) had been enacted to read, "Whenever a county board *provides* a county department of health, * * *" my answer would have been otherwise, as such a statute, in my judgment, would manifestly contemplate that a county board would "provide" a county department of health only at such time as the latter commenced actual operation. How-

ever, sec. 140.09 (10) reads, "Whenever a county board *provides for* a county department of health * * *", and in my judgment a county resolution or ordinance, such as that here involved, "provides for" a county health department on the date of its adoption, even though such resolution or ordinance does not create the county health department instanter, but realistically calls for its going into operation at a date some months after adoption of the resolution. It seems plain to me that any legislative or governing body "provides for" a thing when it adopts a statute, resolution or ordinance calling for the creation and operation of such thing *in futuro*. This meaning of "provides for" is well-recognized in the case law. For example, in *State v. MaGuire* (1939) 285 N.W. 921, 923 136 Neb. 365, the court made it clear that a constitutional provision there in question, which authorized creation of municipal courts without specifically mentioning them, "provided for" such courts. The court said:

"By section 1, art. V of the Constitution, all judicial power is vested in 'a supreme court, district courts, county courts, justices of the peace, and such other courts inferior to the supreme court as may be created by law.' While municipal courts are not specifically mentioned, the authority for establishment of the same is clearly contained in the provision 'and such other courts inferior to the supreme court as may be created by law.' * * * Can it be said that the Constitution makes provisions for the creation of a municipal court, but that such court is not 'provided for' by the Constitution? The answer is obvious."

The ordinance or resolution here involved does not, of course, merely authorize creation of a county health department, but specifically provides for its creation and specifically refers to such department. If the constitutional provision in the *MaGuire* case "provides for" municipal courts, without any specific mention of them and by merely authorizing their creation, it is surely clear that the ordinance here in question "provides for" a county health department, despite the fact that in the nature of things a reasonable time must elapse to allow for its creation.

Inasmuch as a town, village or city would be powerless, under the circumstances described in your question, to form a full-time or joint full-time health department after

November 29, 1960, but before July 1, 1961, it is unnecessary to answer your question as to whether a town, village or city, having formed such a department, could then elect to withdraw from the county health department.

You also ask my opinion as to whether or not my answer to Question 1 [the question answered hereinabove] would be the same if the establishment of such full-time health department by a town, village or city took place prior to July 1, 1961, but after the county had hired a full-time health officer? My answer is that it would be, since the hiring of a full-time health officer for the county health department, after November 29, 1960, but before July 1, 1961, would in no way change the fact that on the former date the county board had provided for such department, with the consequences described in my foregoing answer to your Question 1.

Had I answered your Question 1 with an opinion that the county board, under the circumstances therein described, provided for a county health department on July 1, 1961, thus permitting towns, villages and cities in Waukesha county to form full-time health departments at any time prior to such date, such an answer would have remained unchanged even if a health officer for the county health department had been appointed prior to July 1, 1961. It would have remained so because had it been my opinion that only on July 1, 1961, when the county health department would go into operation, would it be "provided for", the mere appointment on an earlier date of a health officer to head such department would clearly not have made such earlier date the time when the county health department was provided for, after which a town, village or city in the county could no longer form a full-time health department.

I am aware that sub. (10) of sec. 140.09, and that portion of sub. (11) thereof above-quoted, might be construed as calling for an *immediate* abolition of the boards of health and health officers in all towns, villages and cities in a county whenever such county provided for a county department of health. Such a construction, applied in the situation here in question, would mean that on November 29, 1960, your county board, by adopting the resolution here involved, abolished all local health departments other than full-time ones. Your county health department, however,

will not come into being until July 1, 1961. There would thus exist, under such a construction, an hiatus in local public health activity in Waukesha county — an hiatus due to last until July 1, 1961, with conceivably harmful results to public health in your county. In my judgment, that hiatus and those results constitute an unreasonable consequence of such construction. The statutes above-mentioned, so construed, would be productive of serious, even though temporary, failures in public health service at local levels, though clearly their intent is to improve such service at those levels. Since such an unreasonable consequence arises out of the above-mentioned construction, another construction of the statutes in question may be adopted in order to avert that consequence, if those statutes are open to such other construction. See *Guse v. Industrial Comm.* (1926) 189 Wis. 471, 476; *Braun v. Wisconsin Electric Power Co.* (1958) 6 Wis. 2d 262, 268. It is my opinion that they are open to such other construction, and that such construction calls for abolition of part-time local health departments, under the above-mentioned statutes, only at such time as a county health department comes into actual being and operation, and not at an earlier date when the ordinance providing for such department is adopted. Under this construction any part-time local health departments in Waukesha county will continue to exist until July 1, 1961.

In support of this construction of the statutes in question it should be observed that part-time local boards of health are lawfully established and subsist under Ch. 141 and it must seem at least doubtful that the legislature would provide for their abolition absent immediate replacement by a public health service at least the equal in efficiency of that abolished.

You ask my opinion on a third question: where a county health department was created pursuant to sec. 140.09 (2) on November 29, 1960, said department to become effective and commence operation on July 1, 1961, could a group of municipalities within the county form a joint full-time health department after November 29, 1960, but before July 1, 1961, and then elect to withdraw from said county health department? For the reasons hereinabove stated in my answer to your Question 1, my answer to this third question is No. Since I am able to ground my opinion on those reasons, it is unnecessary to discuss herein the

question of whether or not a "group of municipalities" has the power to form a joint full-time health department. It may have such power pursuant to the provision of sec. 66.30 (2) that, "Any municipality may contract with another municipality or municipalities * * * for * * * the joint exercise of any power or duty required or authorized by statute". If, by "group of municipalities", you mean a combination of towns, villages and cities, I presently believe that no statute, with the possible exception of sec. 66.30 (2), confers on such group the power to form a joint full-time heatlh department. As above noted, however, there is no necessity for me to provide an opinion herein as to the existence or non-existence of such power, and nothing stated above is to be deemed such an opinion.

You further ask for my opinion on a fourth question, which you state as follows: would your answer to Question 3 be the same if the establishment of such joint full-time health department by a group of municipalities within the county took place prior to July 1, 1961, but after the county had hired a full-time health officer? My answer is that it would be, since the hiring of a full-time health officer for the county health department, after November 29, 1960, but before July 1, 1961, would in no way change the fact that on the former date the county board had provided for such department, with the consequences described in my foregoing answer to your Question 1.

JHM

Counties—Officers—Joint resolution 23, S., 1961, presents two separate amendments which must be submitted to voters by separate questions on ballot.

May 19,1961.

TO THE HONORABLE, THE SENATE:

By Resolution No. 11, S., you have asked my opinion of the proper method of submitting to the people for ratification the Constitutional Amendment proposed by Joint Reso-

lution No. 23, S., of the 1961 legislature, which was initially adopted as Joint Resolution No. 68 by the 1959 legislature.

The proposed amendment appears to be intended to authorize or to confirm the authority of the legislature to establish a chief executive in any county having a population of 500,000 or more, to provide for his election by popular vote of the electors of the county, to provide for a 4-year term rather than the 2-year term prescribed for county officers other than judges by Art. VI, sec. 4, to confer on the executive such *administrative* powers as the legislature shall prescribe, and to create Art. IV, sec. 23a, of the Constitution conferring a veto power on the chief executive over ordinances similar to the power which the governor has over bills passed by the legislature.

The questions presented are whether the proposal outlined constitutes a single amendment or more than one amendment to the constitution, and whether the proposed statement of the question or questions to be placed on the ballot to be voted on as set forth in the original joint resolution No. 23, S., and amendments numbered 1 and 2, are sufficient and valid.

The procedure for amending the constitution is set forth in Art. XII, sec. 1. It provides among other things "that if more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against such amendments separately".

In your resolution No. 11, S., requesting my opinion, you refer to "the constitutional amendments" in the plural, and in my opinion you do so correctly. There are at least two separate questions set forth in the proposal outlined in joint resolution No. 23, S.

First, shall the legislature be authorized to create the office of chief executive officer of the county in counties having a population of 500,000 or more, to be filled by the election at large and for a term of 4 years, to exercise such *administrative* duties as may be prescribed by the legislature?

Second, shall this chief executive officer be given a veto power over county resolutions and ordinances similar to

the power exercised by the governor over bills passed by the legislature?

I do not regard the proposed change in Art. VI, sec. 4, which adds the words, "and chief executive officers" as a separate amendment, since it simply excepts such officers from the restriction in that section to 2-year terms in conformity with the initial authorization which states that the chief executive officer shall be elected every 4 years.

The leading Wisconsin cases interpreting the constitutional requirements in Art. XII, sec. 1, that each amendment must be submitted separately to the voters are *State ex rel. Hudd v. Timme* (1882) 54 Wis. 318, 11 N.W. 785, and *State ex rel. Thomson v. Zimmerman* (1953) 264 Wis. 644, 60 N.W. 2d 416. These cases together with cases from other jurisdictions were extensively reviewed in my opinion of July 8, 1959, reported in 48 O. A. G. 188. After pointing out that our court had held in the *Timme* case that several distinct propositions could be submitted to the people as "one amendment" if they related to the same subject and were all designed to accomplish one purpose, I pointed out further that in the *Zimmerman* case (the second reapportionment case) the court had taken a strict view of the constitutional provisions, and ruled that subjects which were not necessarily connected even though they all related to the election of the legislature should be submitted as separate questions so that the voters could exercise their independent choice on each question. On this basis, I advised you that the proposal to change the terms of state constitutional officers, assemblymen, and county officers from 2 to 4 years should preferably be submitted as separate questions with the exception of the offices of governor and lieutenant governor, which seemed to be so related that a change in terms from 2 years to 4 years could be submitted as a single question.

In the present case, our court has already ruled in the case of *State ex rel. Milwaukee County v. Boos* (1959) 8 Wis. 2d 215, that the legislature under the existing constitution does have power to create the position of county executive for all counties in a given class, but that it cannot confer upon him the executive power of vetoing ordinances or making appointments without the confirmation of the county board.

In my opinion, this case establishes that the question of whether or not the position of a county executive to exercise administrative powers shall be established, and the question of whether this executive can be given true executive powers such as the power of veto or the exclusive power of appointment are substantially dissimilar and that the persons who are willing to have a county administrative officer established to head up all the management functions of the county would not of necessity be willing to confer upon this officer the power to veto county ordinances. Hence, in my opinion, these two questions should be submitted to the voters separately.

In view of the foregoing, none of the proposed questions either in the original joint resolution No. 23, S., or in any of the amendments numbered 1 and 2 are sufficient.

The question stated in joint resolution No. 23, S., asks simply whether the constitution shall be amended to grant the county executive veto power. It does not refer to the fact that the legislature is specifically authorized to create the office of chief executive officer of the county and providing for his election and term of office.

Amendment No. 1, S., is deficient in that it attempts to tie the ratification of one question to the approval of two other questions. This is contrary to the constitutional requirement that the voters shall be allowed to vote separately on each amendment proposed.

The question stated in Amendment No. 2, S., is deficient in that, as indicated above, it covers two subjects. One, shall the office be created, and two, shall the officer have a veto power over resolutions and ordinances.

In view of the foregoing, which suggests that two questions must be submitted separately on the ballot, I point out to you the following:

The proposed amendment to Art. IV, sec. 23, would appear to restrict the legislature to conferring administrative powers upon the proposed chief executive officer. In view of the *Boos* case, *supra*, it is questionable whether a veto power or exclusive appointing power could be considered a power of "administrative" nature.

Art. IV, sec. 23a, which the resolution proposes to create, requires outright that in every county having a population of 500,000 or more, any resolution or ordinance *shall* be presented to the chief executive officer for approval or veto. This section does not contemplate what the situation would be if the legislature should fail to provide a chief executive officer for such counties. It might be that the court would hold that in lieu of any other provision, such as the present sec. 59.031, the chairman of the county board would be regarded as a chief executive officer within the meaning of this section. This problem does not arise as long as a statute like sec. 59.031 is on the books, but it would arise if that section should be repealed and the firm proviso was in the constitution that all resolutions and ordinances must be submitted to a chief executive officer.

If the proposals in joint resolution No. 23, S., are to be submitted to the voters, I suggest that the resolution be amended to state the questions as follows:

1. Shall Article IV, section 23, and Article VI, section 4, be amended to authorize the legislature to provide for the election of a chief executive officer for a 4-year term in counties with a population of 500,000 or more, who shall exercise such administrative powers as the legislature shall prescribe?

2. Shall Article IV, section 23a, be created to require that in counties with a population of 500,000 or more all resolutions and ordinances of the county board must be submitted to a chief executive officer for his approval or veto?

RGT

Architects—Engineers—Words and Phrases—Discussion of interpretation of sec. 101.31 (2) (b) and (d) regarding professional services and advertising.

June 5, 1961.

THE HONORABLE, THE SENATE.

There are now pending before the Senate, Bills No. 103, S. and No. 104, S. which would affect sec. 101.31 (2) (d) which defines the practice of professional engineering. Both bills were introduced at the request of the Wisconsin Chapter, American Institute of Architects, and are intended to limit the practice of professional engineering by definition insofar as planning, design and supervision of construction of buildings are concerned to *industrial* plants and *industrial* buildings and the structural members of other than industrial buildings, or to clarify the practice of professional engineering and to add additional proof of qualification for those professional engineers who wish to engage in planning, design and supervision of construction of buildings other than industrial, or other than the structural members of other than industrial buildings.

Your questions are not directly concerned with the proposed legislation, but are concerned with the meaning of present statutes and with administrative functions of the registration board charged with administering these statutes.

Your first question is as follows:

1. In view of the dfferences in definition and in requirements as set out in sections 101.31 (2) (b) and 101.31 (2) (d) of the statutes, are persons registered by the registration board, either as an architect or as a professional engineer, both authorized to engage in professional service such as *consultation, investigation, evaluation, planning, design, aesthetic and structural design or responsible supervision of construction of buildings?*

The answer to your first question is in the affirmative.

Sec. 101.31 (2) provides in part:

"(2) DEFINITIONS. (a) The term 'architect' as used in this section means a person who is legally qualified to practice the profession of architecture.

"(b) The *practice of architecture* within the meaning and intent of this section includes any professional service,

such as *consultation, investigation, evaluation, planning, aesthetic and structural design,* or *responsible supervision of construction,* in connection with the *construction of any private or public buildings, structures, projects,* or the *equipment* thereof, or addition to or alteration thereof, wherein the safeguarding of life, health or property is concerned or involved.

"(c) The term 'professional engineer' as used in this section means a person who by reason of his knowledge of mathematics, the physical sciences and the principles of engineering, acquired by professional education and practical experience, is qualified to engage in engineering practice as hereinafter defined.

"(d) The *practice of professional engineering* within the meaning and intent of this section includes any professional service, *requiring the application of engineering principles and data,* wherein the public welfare or the safeguarding of life, health or property is concerned and involved, such as *consultation, investigation, evaluation, planning, design,* or *responsible supervision of construction,* alteration, or operation, in connection with *any public or private utilities, structures, projects, bridges, plants and buildings, machines, equipment, processes and works.* A person shall be deemed to offer to practice professional engineering, within the meaning and intent of this section, who by verbal claim, sign, advertisement, letterhead, card, or in any other way represents himself to be a professional engineer; or who through the use of some other title implies that he is a professional engineer; or who holds himself out as able to practice professional engineering."

Sec. 101.31 (2) (d), Stats. 1953 provided:

"(d) The practice of professional engineering within the meaning and intent of this section includes any professional service, requiring the application of engineering principles and data, wherein the public welfare or the safeguarding of life, health or property is concerned and involved, such as consultation, investigation, evaluation, planning, design, or responsible supervision of construction, alteration, or operation, in connection with any public or private utilities, structures, projects, bridges, industrial plants and buildings, machines equipment, processes, works,

and the structural members of other than industrial buildings. A person shall be deemed to offer to practice professional engineering, within the meaning and intent of this section, who by verbal claim, sign, advertisement, letterhead, card, or in any other way represents himself to be a professional engineer; or who through the use of some other title implies that he is a professional engineer; or who holds himself out as able to practice professional engineering."

On June 7, 1955 in an attorney general's opinion reported at 44 OAG 126, the problem was fully treated and it was stated that under the 1953 statute, a professional engineer, not also registered as an architect, was limited under sec. 101.31 (2) (d) (1953), in the preparation of plans for other than industrial plants and buildings, to the structural members thereof.

The Professional Licensing Study Committee of the Legislative Council considered the dispute between the professions, reviewed the existing law, the opinion of the attorney general referred to above, the positions of the industrial commission, the registration board, laws of other states, and the provisions of Bill No. 688, A. 1955, and in its report dated October 3, 1955 stated at page 2:

"Bill No. 688, A., was intended to remove certain provisions which restrict professional engineers to the designing and supervision of construction of industrial buildings only, rather than all types of buildings. A substitute amendment which was offered would provide a new approach in setting up a new category known as structural engineers. * * *"

and at pages 13 and 14:

"Conclusions

"In the opinion of the committee the legislature is faced with three alternatives:

"1. Nonconcurrence by the senate in Bill No. 688, A., leaving the law as it is.

"2. Concurrence in Bill No. 688, A., amending the law so as to remove the portion which prevents engineers from

designing and supervising the construction of non-industrial buildings.

"3. Introduction and passage of a substitute amendment providing for qualification and registration of 'structural engineers', who could engage in design and supervision of construction of all types of buildings. This would be a separate category from 'professional engineers'.

"* * *"

"Recommendations

We are of the opinion that passage of Bill No. 688, A., is in the public interest and that adequate safeguards exist for the protection of the public. We therefore recommend that the senate concur in the bill in its present form."

Your attention is called to the full report which is on file with the legislative council and reference library.

Bill No. 688, A. became Chapter 620, Laws 1955 and in part changed sec. 101.31 (2) (d) by eliminating the underlined words as follows:

"* * * such as consultation, investigation, evaluation, planning, design, or responsible supervision of construction alteration, or operation, in connection with any public or private utilities, structures, projects, bridges, *industrial* plants and buildings, machines, equipment, processes, [and] works, *and the structural members of other than industrial buildings.* * * *"

The legislature not only removed the qualifying adjective "industrial" from the phrase "industrial plants and buildings", but also removed the phrase "and the structural members of other than industrial buildings" which modified the other projects, including "structures", itemized. In the opinion at 44 OAG 126, it was stated at page 127:

"Use of the word 'structures' would, standing alone, encompass both industrial and nonindustrial plants and buildings."

The intent of the legislature to broaden the practice of professional engineering is clearly shown by the above legislative history.

An architect may perform "aesthetic and structural design" in connection with the buildings, structures, etc. listed in sec. 101.31 (2) (b), whereas the professional engineer may "design" in connection with the buildings, structures, etc. listed in sec. 101.31 (2) (d). It is sufficient to state here that the professional engineer's authority to design encompasses "aesthetic and structural design" in connection with the buildings, structures, etc. listed in sec. 101.31 (2) (d), however this does not mean that the professional engineer who is not also registered as an architect can advertise or hold himself out as an "aesthetic designer" or "architect" as the legislature has reserved such titles to the architect. See sec. 101.31 (1) (e), (2) (b).

Your second question is as follows:

2. Does the difference in registration requirements as set forth in section 101.31 (6) (a) 1 and 2 and (b) 1 and the difference in the examination given by the registration board result in different standards and is thus unconstitutional?

It is true that sec. 101.31 (6) (a) and (b) establish different registration requirements for architects and professional engineers and that different examinations are given by the respective sections of the registration board. Even if such standards are different it does not follow that the statutes are unconstitutional. Legislation duly enacted is presumed to be constitutional until successfully challenged by a proper party in the courts. It is also presumed that officials charged with the administration of statutes will carry out their responsibilities in a constitutional manner. We have no reason to believe that their actions are contrary to law in the matters with which we are concerned.

Both divisions of the board are required by statute to examine applicants as to educational attainment, knowledge, work product, character and experience.

Sec. 101.31 (6) (j) provides in part:

"(j) Written or written and oral examinations shall be held at such time and place as the board shall determine. The scope of the examinations and the methods of procedure shall be prescribed by the board with special reference to the applicant's ability to design and supervise architec-

tural or engineering work, which shall insure the safety of life, health and property. * * *"

All examinations cannot be the same and an applicant who passes one architectural examination might not be able to pass another, but each examination given should reasonably cover all of the areas of the practice of architecture as defined in sec. 101.31 (2) (b). The examination given to applicants for registration as a professional engineer should also generally and reasonably cover all of the areas of the practice of professional engineering as defined in sec. 101.31 (2) (d). The statute does not permit the issuance of limited registrations to practice separate fields of civil engineering, mechanical engineering, chemical engineering, atomic engineering, etc. as is the case in some other states. This does not mean, however, that the engineering division of the board cannot, in evaluating experience and other qualifications, examine an applicant in selected fields of engineering in which the applicant claims special ability. It would be physically impossible for an applicant to have extended practical experience in each of the sub-branches of the engineering field.

In *Wall v. Wisconsin Real Estate Brokers' Board* (1958) 4 Wis. 2d 426, 90 N.W. 2d 589, our court considered the function of a licensing board charged with examination of applicants. The court held that such a board has wide discretion in exercising its functions, one of which is to determine the qualifications of applicants aspiring to become licensed and that the court will not interfere unless action of the board is arbitrary, capricious or fraudulent.

A review of the actions of the respective divisions of the board reveals that neither division is lenient in the issuance of registrations.

The members of the board are presumed to act in accordance with the mandate of the statutes granting them authority in the registration field and any claim that their actions are arbitrary, capricious or characterized by fraud can only be resolved in individual cases, in proper actions brought by proper parties.

The legislature has recognized the professions of architecture and professional engineering as separate, although related, professions.

The question of classification in a statute is primarily for the legislature, both as to need and basis and the legislature may, without denial of equal protection of the laws, classify businesses and occupations for purposes of regulation, provide different rules for different classes, limit a regulation to a particular kind of business, extend to some persons privileges denied to others, or impose restrictions on some but not on others where the classification or discrimination is based on real differences in the subject matter and is reasonable and the legislation affects alike all persons pursuing the same business under the same conditions. *Business Brokers Ass'n Inc. v. McCauley* (1949) 255 Wis. 5, 38 N.W. 2d 8; *Madison Metropolitan Sewerage Dist. v. Committee on Water Pollution* (1951) 260 Wis. 229, 50 N.W. 2d 424; *Currency Services Inc. v. Matthew* (1950) 90 F. Supp. 40; *State ex rel. Kellogg v. Currens et al,* (1901) 111 Wis. 431, 87 N.W. 561, 56 L.R.A. 252; *Price v. State* (1919) 168 Wis. 603, 171 N.W. 77.

While the Wisconsin statute does not limit a professional engineer to such practice of architectural work as is incident to his engineering work as is the case in Maine, the recent decision which is hereinafter discussed is noteworthy as it recognizes the power of the legislature to classify these occupations and establish separate standards and examinations for each.

In *State of Maine v. Melvin W. Beck* (1960) 156 Me. 403, 165 A. 2d 433, under a law which permitted a professional engineer to practice architectural work as is incident to his engineering work, the court upheld a conviction of a professional engineer for using the title "architect", who was not also registered as an architect. The court stated at pages 435-438:

"* * *

"(4) Professional engineering and architecture in the Legislative estimation are patently regarded as separate *species* of the engineering *genus* and such a judgment seems objectively valid. While categorically an engineer, the architect—without disparagement toward the professional engineer—is required to demonstrate that he possesses and utilizes a particular talent in his engineering, to wit, art or aesthetics, not only theoretically but practically, also, in

coordination with basic engineering. R.S. c. 81 prescribes that an engineer verify that he has such special talent to a sufficiently cultivated degree before he may publicly solicit patronage as an architect.

"Professional engineering and architecture are not mutually separable and can never be completely disassociated. They are overlapping vocations. Nonetheless the Legislature in reason was justified in not regarding them as coextensive but as occasioning individualized attention for the public weal.

"* * *

"In People v. Babcock, 343 Mich. 671, 73 N.W. 2d 521, 526, it is said:

" 'While it is a fact that the definitions of architects and engineers are somewhat similar, yet there is a distinction. The services of an architect requires the application of the principles of architecture or architectural design, while the services of an engineer requires the application of engineering principles.'

"* * *

"We conclude that, while all architects may be engineers, [not 'Professional Engineers' as that term is used in the Wisconsin Statutes], all engineers are not architects. To restate these truths in one proposition, some engineers are architects. The Legislature confirmed these inferences when in 1945 it made requisite a special and classificational licensing of architects as such and enacted a separate statute for such a purpose in addition to the earlier engineering licensing act of 1935. While the respective functions of an engineer and those of an architect as recited in the two statutes superficially appear parallel and equivalent as predicated for each group they are designedly not so. Notably in the instance of architects studies, plans, specifications, etc., are coupled conjunctively with 'a coordination of structural factors concerning the aesthetic.' That element is absent from the engineering law. And although the architect licensing act states that it regulates as to the performing of:

" '* * * any other service in connection with the designing or supervision of construction of buildings located within

the state, regardless of whether such persons are performing any or all of these duties * * *,'
architecture connotes the fulfillment of such duties—which are fundamentally done very well by engineers—in an ulterior manner and with certain finesse not indispensable to the vocation of basic engineering.

"It is self-evident from mere definition that the practice of both the professional engineer and the architect directly relate to the public health and welfare.

"Architects are commonly engaged to project and supervise the erection of costly residences, schools, hospitals, factories, office and industrial buildings and to plan and contain urban and suburban development. Health, safety, utility, efficiency, stabilization of property values, sociology and psychology are only some of the integrants involved intimately. Banking quarters, commercial office suites, building lobbies, store merchandising salons and display atmospheres, motels, restaurants and hotels eloquently and universally attest the decisive importance in competitive business of architectural science, skill and taste. A synthesis of the utilitarian, the efficient, the ecomonical, the healthful, the alluring and the blandished is often the difference between employment and unemployment, thriving commerce and a low standard of existence. Basic engineering no longer suffices to satisfy many demands of American health, wealth or prosperity.

"R.S. c. 81 is necessary to assure the public in these times of expanding and mobile populations that one who publicly offers himself in the role of an architect may evidence his competence by due registration with the State Board.

"The classification of architects and that of engineers are:

" '* * * based upon an actual difference in the classes bearing some substantial relation to the public purpose sought to be accomplished by the discrimination in rights and burdens * * *'". York Harbor Village Corp v. Libby, 126 Me. 537, 542, 140 A. 382, 387.

"* * *"

Your third question is as follows:

3. Do the requirements of the registration board and the Wisconsin statutes regarding reciprocity adequately determine the qualifications of out-of-state architects and engineers to practice in Wisconsin as defined by both sections, 101.31 (2) (b) and 101.31 (2) (d)?

The legislature in sec. 101.31 (11) has provided for the registration in Wisconsin of persons licensed as architects or professional engineers in other states, has provided standards for such procedures and has delegated to the Wisconsin Registration Board of Architects and Professional Engineers the task of carrying the statute into effect. One of the delegated functions is determining the qualifications of such persons for registration.

The statute is presumed to be constitutional and the officials charged with its administration are presumed to be carrying out their duties in a constitutional manner.

The authority of the legislature to license architects and professional engineers is based upon the police power and statutes providing for such licensing must have a reasonable relationship to the stability of the public health, welfare or safety and cannot be enacted for the sole purpose of granting franchises or special privileges to persons, individually or as groups, seeking to practice desired professions without regard to considerations of the public health, welfare or safety.

RJV

Constitutionality—Schools—Religion—Bill 127, A., granting church use of tax-supported school building would violate constitution.

June 6, 1961.

THE HONORABLE, THE ASSEMBLY:

By Resolution No. 11, A., you have requested my opinion as to the constitutionality of Bill No. 127, A., which pro-

poses to amend sec. 40.30 by adding thereto a new subsec. (5m) providing for the granting of the use of school buildings for the holding of religious services and church meetings.

The new subsec. (5m) would read:

"(5m) The school board or board of education of any school district may, upon written request of at least 10 members of any church, who are also electors of the school district, grant to such church appropriate space in the school building for religious worship and meetings at such times and for such duration as such use shall not in the opinion of the board, interfere with the prime purpose of the buildings or grounds. The request shall satisfactorily show that for reasons therein stated such temporary quarters are sought only while an edifice is being constructed or otherwise acquired by the church. The charge for such grant or use shall be such reasonable sums as the board determines by a majority vote of its members, taken at a regular or special board meeting, and all sums so received shall be accounted for and paid into the school treasury to constitute part of the general fund, and to be used for the benefit of the school. The persons making the request shall be primarily liable to the district for any injury done to any property of the school district in consequence of such use. The terms of such grant shall be in writing signed by the officers of the board, the officers of the church and the persons making the request."

In considering the constitutionality of this proposed amendment, it is to be considered first, whether it violates any provision of the United States constitution, and secondly, whether it violates any provision of the Wisconsin constitution.

The First Amendment of the United States constitution, which by the 14th Amendment is applicable to a state, reads:

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

In *McCollum v. Board of Education* (1948) 333 U. S. 203, 68 S. Ct. 461, 92 L. ed 649, the United States supreme court held a system of "released time" in use in an Illinois public school violative of the provisions of said first amendment relative to "establishment of religion" and the "free exercise" of religion because such religious instruction was carried on in the school building. It there said of said system (658):

"* * * This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted it in Everson v. Board of Education, 330 US 1, 91 L ed 711, 67 S Ct 504, 168 ALR 1392. There we said: 'Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State." '
* * *"

On the other hand, in *Zorach v. Clauson* (1952) 343 U. S. 306, 72 S. Ct. 678, 96 L. ed. 954, the U. S. supreme court dealt with a "released time" program under which public school pupils, upon written request of their parents, would be released for a specified period during regular school hours to attend religious instruction conducted elsewhere, with other students not so released remaining in the classroom. The court there held such program did not violate the provisions of the First Amendment. The distinguishing factual difference between these two cases is that in the *Zorach* case the religious instruction was not given in the

school building so there was no use of school property for religious purposes, whereas in the *McCollum* case the religious instruction was given in the school building. From these cases it appears that the U. S. supreme court would hold the proposal in Bill No. 127, A., contrary to the First Amendment of the United States Constitution.

The applicable provision of the Wisconsin constitution is in Sec. 18, Art. I, as follows:

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

Our supreme court had occasion to consider this provision in an early case, *State ex rel. Weiss v. District Board* (1890) 76 Wis. 177, 44 N.W. 767, where it held that reading of the bible in classes in the public schools violated the provision. In reference to an argument that the word "treasury" in the last clause refers to the state treasury, it said at page 215:

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

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

Furthermore, in a concurring opinion Justice Orton referred to this provision and also to these *inter alia* in secs. 2, 4 and 5 of Art. X, providing respectively that the interest and revenues of the school fund shall be "exclusively applied" to the support and maintenance of common schools and libraries, that each town and city shall raise an annual tax to support common schools, and that provision shall be made for distribution of income of the school fund for the support of common schools, and then said: (217-219)

"These provisions of the constitution are cited together to show how completely this state, as a civil government, and all its civil institutions, are divorced from all possible connection or alliance with any and all religions, religious worship, religious establishments, or modes of worship, and with everything of a religious character or apertaining to religion; and to show how completely all are protected in their religion and rights of conscience, and that no one shall ever be taxed or compelled to support any religion or place of worship, or to attend upon the same, and more especially to show that our *common schools,* as one of the institutions of the state created by the constitution, stand, in all these respects, like any other institution of the state, completely excluded from all possible connection or alliance with religion or religious worship, or with anything of a religious character. * * * As the state can have nothing to do with religion except to protect every one in the enjoyment of his own, so the common schools can have nothing to do with religion in any respect whatever. They are completely *secular* as any of the other institutions of the state, in which all people alike have equal rights and privileges. The people cannot be taxed for religion in schools more than anywhere else. Religious instruction in the common schools is as clearly prohibited by these general clauses of

the constitution as religious instruction or worship in any other department of state supported by the revenues derived from taxation."

The use of a University of Wisconsin building by a student Christian Science Society in holding Christian Science religious services therein was held in an opinion 16 OAG 308 to be contrary to the provisions in sec. 18, Art. I of the constitution. Reliance was placed upon *State ex rel. Weiss v. District Board,* supra, and it was there said that as the Christian Science Services were of a sectarian or religious nature, the use of the university building therefor is within the constitutional prohibition as interpreted in that case. The following statements from the opinion of Justice Cassody in that case were noted: (Pages 213-214)

"We must hold that the stated reading of the Bible in the public schools as a text-book may be 'worship' within the meaning of the clause of the constitution under consideration. If, then, such reading of the Bible is worship, can there be any doubt but what the school-room in which it is so statedly read is a 'place of worship,' within the meaning of the same clause of the constitution?

"Counsel seem to argue that such place of worship should be confined to some church edifice, or place where the members of a church statedly worship. Some of the earlier constitutions, having similar clauses, used the words 'building' and 'church.' Manifestly, the words 'place of worship' were advisedly used, as applicable to any 'place' or structure where worship is statedly held, and which the citizen is 'compelled to attend,' or the taxpayers are compelled to 'erect or support.' The mere fact that only a small fraction of the school hours is devoted to such worship, in no way justifies such use as against an objecting taxpayer. If the right be conceded, then the length of time so devoted becomes a matter of discretion. If such right does not exist, then any length of time, however short, is forbidden. The relators, as tax-payers of the district, were compelled to aid in the erection of the school building in question, and also to aid in the support of the school maintained therein. Secs. 430, 430a, S. & B. Ann. Stats. Being thus compelled to aid in such erection and support, they have a legal right to object to its being used as a 'place of worship.' In fact, it has been held that it can be devoted to

no other use, as against an objecting tax-payer. *School Dist. v. Arnold,* 21 Wis. 657. In that case a temperance society obtained permission from a majority of the electors present at a school meeting, duly called, to hold its meetings in the school-house; but it was held that such electors had no authority to thus divert its use. The present chief justice, speaking for the court, among other things said: 'The statute has not given the board, nor the electors of the district, any authority to permit a school-house to be used for meetings of the Sons of Temperance, or anything of the kind. So the action of the electors of the district . . . was wholly unauthorized, and furnished no defense to the action.' To the same effect are *Spencer v. Joint School Dist.* 15 Kan. 259, 22 Am. Rep. 268; *Dorton v. Hearn,* 67 Mo. 301; *Scofield v. Eighth School Dist.* 27 Conn. 499; *Weir v. Day,* 35 Ohio St. 143. There are cases of a contrary import, but it is very certain that, as against an objecting tax-payer, such school-house cannot be devoted to a use expressly forbidden by the constitution of the state—as, for instance, as a place of worship."

More recently in the case of *Milwaukee County v. Carter* (1950) 258 Wis. 139, 45 N.W. 2d 90, our supreme court referred to *State ex rel. Weiss v. District Board,* supra, with approval and stated as follows at page 143:

"* * * in view of said provision in sec. 18, art. I, Wis. Const., and the decision in *State ex rel. Weiss v. District Board,* 76 Wis. 177, 44 N.W. 967, and consistently thereafter in many cases, no person can be compelled to support any place of worship, nor can any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies or religious or theological seminaries. Thus, it is well-established law in this state that neither tax-supported public-school property nor funds so raised for public-school purposes can be used for sectarian organized religious purposes. * * *"

In view of the foregoing the answer seems unavoidable that the proposal in Bill No. 127, A., is violative of the constitution, even though the proposed use would be short and temporary, and that our supreme court would so hold.

HHP

Residence—Department Public Welfare—Discussion of legal settlement of husband, wife, child, relative to probation and parole and effect on child in foster home.

June 8, 1961.

JOHN D. KAISER,
Assistant District Attorney, Eau Claire County.

You ask several questions involving interpretation of Ch. 102, Laws 1959, which created sec. 49.10 relating to legal settlement.

Specifically, you ask:

(1) Whether a husband's legal settlement can change while his wife is on probation or parole,

(2) Whether a wife's legal settlement can change while a husband is on probation or parole,

(3) Whether a parent's settlement can change while his child is in a foster home, with the parent paying full cost of the child's care, and

(4) Whether the child's settlement can change in such case.

Sec. 49.10 (4) (e) and (4) (f) provide in part:

"* * * Residence by a person within this state under the following circumstances shall not be considered as voluntary and shall be considered as interrupted, and no settlement shall be changed.

"* * *

"(e) While under confinement or on probation or parole under state or federal criminal statutes.

"(f) While supported in whole or in part in any institution or foster home as a public charge."

The foregoing provisions must be read in connection with the remainder of sec. 49.10, as enacted by Ch. 102, Laws 1959, because the section as a whole constitutes the legislative plan governing legal settlement.

The settlements of wives and of minor children are governed by sec. 49.10 (1) and (2), which read:

"(1) A wife has the settlement of her husband, if he has any within the state, but if he has none, she has none. A wife living separate from her husband shall, if criminal proceedings have been instituted under s. 52.05, or support proceedings commenced under s. 52.10, begin to acquire legal settlement in her own right as of the date of instituting the criminal proceedings or commencing the support proceedings.

"(2) (a) Legitimate minor children have the settlement status of their father if living, or of the mother if their father is deceased, or if their mother has acquired settlement in her own right under sub. (1) and has actual custody of the children; if the parents are divorced, the children have the settlement status of the parent who has legal custody awarded by a court of competent jurisdiction. If no award of legal custody is made, the children have the settlement status of the parent having actual custody but if custody is awarded to other than a parent, such children have no settlement."

If subsec. (4) (e) and (f) were interpreted to permit the settlement of a wife or an unemancipated child to be different from that of the husband or father, under conditions where separate settlement is not contemplated in sec. 49.10 (1) and (2), it would result in a conflict between the respective provisions.

It is a basic principle of statutory interpretation that, if the language is capable of meaning which would avoid conflict, that meaning should prevail. Another basic principle is that separate provisions of the same statute should be construed in the light of the dominant purpose of the statute.

The notes printed on Bill 14, A., from which Ch. 102, Laws 1959 was enacted, were before the legislature during its deliberations. The introductory note indicated that the purpose of the bill was to "fix the responsibility for support of a dependent upon the political subdivision which presumably benefited from his productive years".

The note to the first subsection reads:

"Since the family is a unit, the wife generally does not acquire settlement in her own right, but rather she derives the settlement status of her husband.

"The first sentence of this subsection is the present s. 49.10 (1). The last sentence is an addition to the present law. It permits a wife to begin to acquire a settlement in her own right when she is separated from her husband and when he is no longer supporting her. In such instance the family is no longer a unit, and there is no reason for derivative settlement principles to apply."

The note to subsection (2) (a) reads:

"This paragraph is a revision of present 49.10 (2). A new provision permits the children to have the legal settlement of their mother when she has acquired settlement in her own right and has actual custody of them. * * * A further new provision covers the situation where custody has been awarded to a person other than the parents. In such a case no settlement is derived."

The note to subsection (2) (c) reads:

"An unemancipated minor cannot gain a settlement in his own right. Derivative settlement principles should not apply when the family is not a unit. Present statutes do not cover this situation."

The note to subsection (4) reads in part:

"Paragraphs (a) to (f), with the exception of (d) and (e) incorporate the provisions of present s. 49.10 (4) which is not subdivided into paragraphs. * * *

"* * *

"Par. (e) is in conformity with laws relating to domicile. Since the place of residence of prisoners, probationers and paroles is not voluntary, their settlement status should not change. Present statutes do not cover these situations, and case law is in conflict."

The purpose of the law, to fix responsibility for support of dependent individuals upon the subdivision which presumably benefited from the individual's productive years, is carried out in sec. 49.10 (1) and (2) by giving to wives and unemancipated minor children the same settlement as

that of the husband and father who is primarily liable for their support, and who is presumably the primary productive worker in the family unit. Under those subsections, a wife and minor children have no capacity to gain settlements in their own behalf, except under the conditions specified. To construe subsec. (4) so as to permit wives and minor children to obtain settlements separate from that of the husband or father under other conditions than those specified in subsecs. (1) and (2) would not serve the legislative purpose to place responsibility on the political subdivision which presumably benefited from the productive years of the member of the family primarily responsible for their support. Such purpose would be served by construing subsec. (4) to apply only to persons who have a legal capacity to acquire a settlement under subsecs. (1) and (2) in their own behalf.

The latter construction is supported by the provision of the opening paragraph of subsec. (4) to the effect that residence under the designated conditions should not be considered "voluntary". Residence of an unemancipated child would not be deemed voluntary under the enumerated conditions irrespective of statute, since a child's residence is ordinarily chosen by parent or guardian. The reference in subsec. (4) to "voluntary" residence indicates it was intended to apply to persons who would otherwise have the capacity to make a voluntary choice.

The notes to Bill 14, A., 1959 session, indicate that sec. 49.10 (4) (e), which is involved in your first two questions, was adopted to alter the rule fixed by case law, presumably in *Marathon County v. Milwaukee County* (1956) 273 Wis. 541 79 N.W. 2d 233.

1. Your first question is whether a husband's legal settlement can change while his wife is on probation. The answer is yes, unless the wife is receiving some aid which is attributable to the husband under the rule of *Dane County v. Barron County* (1947) 249 Wis. 618 26 N.W. 2d 249. That case holds that aid given to a wife or to children whom a man is under legal obligation to support, is aid to him. The wife's probation, which would prevent her residence from being deemed voluntary, would not of itself affect the husband's settlement, since it does not prevent him from making a voluntary choice of residence.

2. Your second question is whether the wife's settlement could change while she is on probation, if the husband's legal settlement changes.

If any of the conditions prescribed in sec. 49.10 (1) exist, so that the wife has capacity to have a settlement apart from her husband, her probation would prevent her from acquiring a new one. If, however, the relationship of husband and wife is being maintained, it is the husband's productive capacity which the legislature intended to determine the political subdivision responsible for aid to his famly. If a municipality has had the benefit of his productivity for a sufficient time for him to acquire a settlement, that municipality is responsible not only for aid to him personally, but for aid to his family. The fact that the wife's being on probation would prevent her from acquiring a new settlement is based on a voluntary choice of residence, there tion, because she could not acquire a new settlement on her own behalf under provisions of sec. 49.10 (1).

3. Your third question is whether sec. 49.10 (4) (f) prevents the father's settlement from changing when a child is in a foster home with all expenses paid by the parents. As you have pointed out, sec. 49.10 (4) (f) prevents change of settlement only when one is supported "as a public charge". Such subsection carries out the general principle enunciated in the opening paragraph of subsec. (4), that receipt of aid prevents residence from being included in the time necessary to acquire a settlement. Aid to children is attributable under court decisions to the adult liable for their support. See *Milwaukee County v. Waukesha County* (1940) 236 Wis. 233, 294 N.W. 835.

Subsec. (4) (c), to which you refer, prevents change of settlement while "an inmate * * * of any public institution or an inmate of a private institution". You also point out that under sec. 49.10 (12) (f) a private institution includes a foster home. Subsec. (4) (c) was enacted to prevent a municipality which had not had the benefit of any productive years of an individual from becoming liable for his relief merely because of the location of an institution within its boundaries, and it applies only to individuals who would otherwise have capacity to change their settlement by a "voluntary" change of residence. Since the plan for legal settlement under sec. 49.10 (4) (c) does not alter the situa-

would be no need for specific exceptions with respect to persons who have no legal capacity to make such a choice. When a child in a foster home is not a public charge but is fully supported by the father, its legal settlement changes with his.

If a father complies with the conditions necessary to a change of his legal settlement, the municipality in which he establishes a voluntary residence has had the benefit of the productivity which the legislature deems is sufficient to make that municipality responsible for aid to him and to his family.

4. Your fourth question is whether the child's derivative settlement can change with the father's when the child is in a foster home but fully supported by the father. In accordance with the foregoing discussion, the answer is yes.

BL

Counties—Navigable Waters—Counties have specific authority to dredge and improve navigable waterways and to borrow money therefor.

June 8, 1961.

WILLIAM D. BYRNE,
District Attorney, Dane County.

You ask, "Does Dane County have legal authority to dredge the Yahara River between Lakes Waubesa and Kegonsa." The material submitted with your request indicates that the primary purpose of the dredging is to improve the channel of the river for navigation for recreational boating with an added purpose to improve the watershed.

The answer to your question is "yes".

While it is established law that counties, as well as other administrative agencies of the state, have such powers and only such powers as are conferred upon them by the statutes of the state or are reasonably implied therefrom, there

are two specific statutes which by their terms authorize municipalities, including counties, to improve waterways and when necessary to borrow money therefor. These are:

"30.30 **Municipal authority to make harbor improvements.** Every municipality having navigable waters within or adjoining its boundaries may exercise the following powers:

"(1) HARBOR IMPROVEMENT. By proper filling or excavating or dredging and docking, create or improve any inner or outer harbor and such turning basins, slips, canals and other waterways within its boundaries as it determines are necessary."

"67.04 **Purposes and specific limitations of bond issues.** * * *

"(1) By any county:

"* * *

"(j) In counties having a population of less than 500,000: for dredging, docking, and other permanent river or harbor improvements; * * *."

Sec. 30.01 (1) defining the term "municipality" as used in ch. 30, states that it includes any "town, village, city or county in this state."

There is no doubt that the Yahara river is a navigable stream within the controlling decisions and the statutes of the state of Wisconsin. *Olson v. Merrill* (1877) 42 Wis. 203; sec. 30.10 (2), Wis. Stats.

Recreational boating in Wisconsin is a matter of public right as one of the incidents of navigation which is protected by the Northwest Ordinance of 1787, the Enabling Act of 1846, and Art. IX, sec. 1, Wis. Const. *Nekoosa-Edwards Paper Co. v. Railroad Comm.* (1930) 301 Wis. 40, 228 N.W. 144, 229 N.W. 631; *Muench v. Public Service Commission* (1952) 261 Wis. 492, 53 N.W. 2d 514, 55 N.W. 2d 40.

Accordingly, in my opinion since navigation and its incilents including recreational boating is a matter of public right, promotion of such boating by the county would ful-

fill a public purpose and hence would be a proper purpose for the expenditure of public funds raised by taxation.

While it seems clear that improvement of the navigational capacities of a river or lake is a work of internal improvement (see my opinion to the legislature relating to the Fox river dated March 31, 1961), the prohibition in Art. VIII, sec. 10, Wis. Const., against the state engaging in works of internal improvement or becoming a party thereto does not apply to the subordinate municipalities of the state. *State ex rel. Martin v. Giessel* (1948) 252 Wis. 363, 31 N.W. 2d 626; *Bushnell v. Town of Beloit* (1860) 10 Wis. 155; *Clark v. City of Janesville* (1860) 10 Wis. 119.

In view of the specific statutes authorizing a county to dredge navigable waterways and to borrow money therefor, it does not seem necessary to look for support in other sections of the statutes. Nevertheless, I point out to you that under the provisions of sec. 59.07 (1) (d) a county may "Construct, maintain * * * including without limitation * * * recreational facilities * * *" and further, that a county is authorized to improve watersheds under the authority of sec. 59.07 (60).

RGT

Words and Phrases—Real Estate Brokers—Nonresidents —Discussion relative to licensing and hiring nonresidents either licensed or not in state of residence.

June 12, 1961

WISCONSIN REAL ESTATE BROKERS' BOARD.

You have requested my opinion as to the meaning of sec. 136.12 (1), which relates to the licensing of nonresidents.

Your first question is whether a nonresident, licensed as a broker in Wisconsin, may employ a nonresident salesman to work in Wisconsin.

The answer to this question is in the negative.

Sec. 136.12 (1) provides:

"(1) A nonresident of this state may become a real estate or business opportunity broker or salesman by conforming to all the provisions of this chapter, except that a nonresident real estate broker shall maintain an active place of business in the state in which he holds a license and a nonresident business opportunity broker shall maintain an active place of business in this state, *and said nonresident real estate brokers and business opportunity brokers shall not employ real estate or business opportunity salesmen in this state.*"

The provision which prohibits a nonresident real estate or business opportunity broker from employing real estate salesmen or business opportunity salesmen in Wisconsin prohibits said broker from employing either resident or nonresident real estate salesmen or business opportunity salesmen to perform services in Wisconsin.

Your second question is whether a nonresident must be licensed as a real estate broker, business opportunity broker, real estate salesman or business opportunity salesman, respectively, in his state of residence, before he will be entitled to be licensed similarily in Wisconsin?

The answer in each individual instance is in the negative.

We have reviewed OAG 207 wherein it was stated that a nonresident may not obtain a Wisconsin real estate broker's license unless he is licensed in his home state and advise that in our opinion such statement is based upon an incorrect interpretation of controlling statutes.

Sec. 136.12 (1) states that *nonresidents* may become real estate or business opportunity brokers or salesmen. There are no qualifying adjectives modifying the word "nonresident". Such nonresident must conform to all of the provisions of Ch. 136. The balance of sec. 136.12 (1) is concerned with additional practice requirements which apply to *nonresident real estate brokers and nonresident business opportunity brokers.*

Such nonresidents may but need not be licensed or engaged in the real estate business at the time they apply for a Wisconsin license. 19 OAG 71. If they are licensed in their state of residence, sec. 136.12 (2) provides that the

board may accept a certified copy of such license in lieu of the affidavit required to accompany an application.

Sec. 136.12 (1) requires that "a nonresident real estate broker shall maintain an active place of business *in the state in which he holds a license*". A nonresident broker licensed in Wisconsin and another state must maintain an active place of business in at least one of the states. A nonresident residing in a state which does not have a licensing law, licensed as a real estate broker in Wisconsin, may at his option engage in business in the other state, but must maintain an active place of business in Wisconsin. 19 OAG 71. A nonresident of a state having a licensing law, but who is not licensed in the other state, may be licensed in Wisconsin and must maintain an active place of business in Wisconsin.

A nonresident business opportunity broker must maintain a place of business *in this state,* but the statutes do not require that he be licensed or that he maintain an active place of business in his state of residence. We are aware of the rules of the board as set forth in Wis.Adm. Code R.E.B. 2.02 (2) 2 and 3, and 8.01 which purport to require that a nonresident applicant for a real estate broker or salesman's license must present proof that he is licensed and maintains an active place of business in his state of residence and that a nonresident applicant for a Wisconsin business opportunity broker's license must present proof that he is licensed in his state of residence, but advise that such requirements exceed the bounds of correct interpretation of the statutes and are invalid to the extent that they impose substantive requirements not within the statutes. See secs. 227.014, 136.04 (1).

Sec. 136.01 (3) and (5) provides:

"(3) 'Real estate salesman' means one who is *employed by a real estate broker* to perform any act authorized by this chapter to be performed by a real estate broker."

"(5) 'Business opportunity salesman' means anyone who is *employed by a business opportunity broker* to perform any act authorized by this chapter to be performed by a business opportunity broker."

Since nonresident real estate brokers and nonresident business opportunity brokers cannot employ salesmen in this state and we have construed sec. 136.12 (1) to mean that they cannot employ either resident or nonresident salesmen to work in Wisconsin, the sections pertaining to the licensing of nonresidents as real estate or business opportunity salesmen would be meaningless unless such individuals can be employed by resident real estate and business opportunity brokers.

Sec. 136.06 (1) contemplates that an applicant may apply for and be licensed as a salesman at a time he is not employed by a broker. He cannot, however, engage in the business of selling real estate unless and until he is employed by a broker and the fact of such employment must be registered with the board. See secs. 136.01 (3) and (5), 136.06 (4), and Wis. Adm. Code R.E.B. 2.03 (5).

In 19 OAG 175, it was stated that a license once granted entitles the licensee to act as a real estate salesman under employment by *any* real estate broker during the calendar year in which his license was granted, unless such license is suspended or revoked according to law. Since that time the legislature has enacted sec. 136.06 (4) and the board has by rule promulgated R.E.B. 2.03 (5) and it is now clear that with respect to Wisconsin activities, a salesman licensed in Wisconsin may be employed by only one broker licensed in Wisconsin. A broker, however, can also be licensed as a salesman for another broker and could, with the consent of the broker under whom he is acting as a salesman, act as a broker on his own account without subjecting himself to revocation of his license under sec. 136.08 (2) (g), 19 OAG 335, 336.

You also inquire as to procedures to be followed where an individual resident real estate broker moves to another state and establishes residence there.

Sec. 136.07 (1) provides:

"(1) EXPIRATION. A license issued by the board entitles the holder:

"(a) To act as a real estate broker or salesman, as the case may be, up to and including December 31 following issuance of the license.

"(b) For 1960 and subsequent years to act as a business opportunity broker or salesman, as the case may be, up to and including December 31 following issuance of the license."

Once issued a license is valid until the expiration date unless suspended or revoked for cause as provided by sec. 136.08. An applicant for a Wisconsin real estate broker's license under the provisions of secs. 136.05 (1), 136.06 (1), must be a resident at the time of his application. Sec. 136.12 is a specific section relating to licensing of nonresidents who wish to become brokers and who are nonresidents at the time of their application, however certain portions are applicable to licensees who become nonresidents during the period for which their license was granted. There is no specific statute which provides for forfeiture of a license by a licensee who becomes a resident of another state during the period for which his license is issued, nor does such act appear to constitute cause for suspension or revocation. The statutes does not specifically require that a resident broker maintain an active place of business in this state. However, a nonresident broker is required by sec. 136.12 (1) to "maintain an active place of business *in the state in which he holds a license*". In 19 OAG 71, it was stated that a nonresident of Minnesota who was not licensed in his home state because said state did not require a license, might be licensed in Wisconsin but that he would have to maintain an active place of business in Wisconsin because this was the state *"in which he holds a license"* and that failure to maintain an active place of business would be cause for revocation. What constitutes an active place of business is a question of fact which cannot be determined here. Failure to maintain an active place of business in Wisconsin, by a licensee who becomes a resident of another state and is not licensed in the second state, or failure, by such licensee who becomes a resident of another state and is licensed in the second state, to maintain an active place of business in the second state would be a violation of the terms of sec. 136.12 (1), and would, depending upon circumstances in each individual case, justify institution of proceedings to revoke or suspend the license pursuant to sec. 136.08 (2) (1). Whether a reviewing court would deem such violation sufficient for revocation or suspension of a license is an open question.

In many cases where a Wisconsin licensee moves to another state, the board would have no knowledge of the fact that residency had been established elsewhere. Where knowledge does come to the board it may proceed to investigate and proceed to hearing or it may permit the license to expire. If an application for renewal is made, the fact of residency should be apparent and a nonresident must comply with the provisions of sec. 136.12, as well as the other provisions of the chapter. Failure to disclose actual residency would be a material misstatement in an application and cause for revocation under sec. 136.08 (2) (a). Such nonresident could be required to prove that he maintained an active place of business in the state of residence or in Wisconsin. The application by the nonresident, who at the time held a Wisconsin license as a real estate broker, would be an application of a nonresident for renewal of a broker's license to be processed pursuant to the provisions of sec. 136.07 (5) and R.E.B. 2.04 and not as an application for a new license. The board could, pursuant to sec. 136.06 (6), dispense with the necessity of such matters contained in sec. 136.05 (1), as it deems unnecessary in view of prior applications.

RJV

Snow Removal—Counties—Towns—Discussion of constitutionality of legislation allowing counties and towns to do snow removal and related work on private driveways.

June 13, 1961.

THE HONORABLE, THE ASSEMBLY.

By Resolution No. 15, A., you ask my opinion as to the constitutionality of Bill No. 152, A., or Bill No. 63, S., if enacted into law.

Sec. 1 of both such bills would renumber sec. 86.105 to 86.105 (1). Sec. 86.105 reads:

"The governing body of any county, town, city or village

may enter into contracts to remove snow from private roads and driveways."

Sec. 2 of both such bills would create sec. 86.105 (2) and (3). Sec. 2 of Bill No. 152, A., reads as follows:

"86.105 (2) and (3) of the statutes are created to read:

"86.105 (2) A county or town may enter into contracts in amounts not to exceed $300 for each project for such repairs, maintenance and construction of a private driveway as may be required to make it suitable for ingress and egress of snow removal equipment when:

"(a) Such construction, maintenance or repair is necessary to provide ingress and egress to the public highway from the building site;

"(b) Such machinery or similar machinery required to do the necessary work is not available in the vicinity from other sources;

"(c) The required maintenance and construction work on the public highways of the county or town is not prejudiced thereby; and

"(d) The contract therefor provides for rates of compensation equal to those charged or chargeable to the state for like services or usage and requires advancement of funds and funds are actually advanced sufficient to cover the total compensation to become due for such service and usage of machinery on the basis of such rates of compensation.

"(e) Repairs, maintenance and construction have not been performed pursuant to this section on the same private driveway for a period of 3 years.

"(3) In no case shall the county or town directly or indirectly expend public funds, give credit or extend the county's or town's credit for or in connection with services performed under this section."

Sec. 2 of Bill No. 63, S., is identical with the above-quoted Sec. 2 with the following exceptions:

(1) It does not contain subparagraph (e) of proposed sec. 86.105 (2).

(2) The first paragraph of proposed sec. 86.105 (2) therein reads as follows:

"A county or town may enter into contracts in amounts not to exceed $300 *in any calendar year* for each project for such repairs, maintenance and construction of a private driveway as may be required to make it suitable for ingress and egress of snow removal equipment when: * * *"

The net effect of the above-noted differences in these two bills is that the assembly bill permits a county or town to undertake the project referred to in sec. 86.105 (2) of such bill only when such project has not been performed pursuant to sec. 86.105 (2) "on the same private driveway for a period of 3 years"; while the senate bill would permit such a project to be undertaken on any private driveway in successive calendar years.

These bills have as a common ancestor Bill No. 431, A., and substitute amendment No. 1, A., which failed to achieve enactment by the 1953 legislature. Like the bills considered herein, they connected snow removal under sec. 86.105 with a power to maintain, repair, and construct private driveways which was ostensibly designed to expedite such snow removal. In 42 OAG 88-90, one of my predecessors, giving his opinion on the constitutionality of Bill No. 431, A., and substitute amendment No. 1, A., concluded that "it is not possible to predict with the desired certainty what the fate of the bill in question will be if enacted into law and challenged in the courts." Page 90. The reasoning behind such conclusion is set forth in the opinion, and appeals to me as cogent and persuasive. On the basis of such reasoning, it is my opinion that "it is not possible to predict with the desired certainty" what the fate of the bills herein considered will be if enacted. To this opinion, however, I think it advisable to add comments expressing the pronounced doubt as to their constitutionality which the nature and contents of the bills in question compel me to entertain.

The ostensible purpose of these bills is to expedite the exercise by counties and towns of the power conferred on them by sec. 86.105, to enter into contracts to remove snow from private roads and driveways. The real purpose of such bills, however, or certainly their chief effect if enacted, would in my judgment be this: that counties and towns, subject only to the limitations imposed by the terms of such

bills, could and doubtless would engage in the business of repairing, maintaining and constructing private driveways. Moreover, the bills do not limit a county or town to doing such work only within its own boundaries, so that apparently a county or town might undertake it outside its boundaries.

With this effect of the bills under consideration in mind, can it be said that if enacted into law they would be constitutional? In my opinion, it is highly doubtful that they would be. True, their provisions are such that they would probably meet the specific objections to legislation of this sort laid down in *Heimerl v. Ozaukee County* (1949) 256 Wis. 151, 160, 161. True, it might be said that the repair, maintenance and construction of private roads contemplated by these bills is, in the language of the *Heimerl* case "allied with a public purpose", in the sense that such work would expedite snow removal under sec. 86.105. That statute, as noted above, authorizes the governing body of any county, town, city or village to enter into contracts to remove snow from private roads and driveways. *Obiter dicta* found in the *Heimerl* case, at page 156, would indicate that this statute might survive a constitutional test in our supreme court; yet the same statute has many of those defects which led the court, in the *Heimerl* case, to declare sec. 86.106, "too broad in its powers". See pages 160, 161. It permits snow removal by the governing bodies therein mentioned without regard to any connection between such removal and the necessity of getting to and from the public road; it sets up no structure for charges and disbursements so that all taxpayers may be equally protected; and it makes no restriction as to those counties or towns where private road builders are equipped to operate. Assuming, nevertheless, that sec. 86.105 would be deemed constitutional by our supreme court, does it follow that statutes designed to expedite the exercise of the power conferred thereby are necessarily constitutional? In my opinion, no. If the cloak of constitutionality covers sec. 86.105, it does not perforce cover proposed statutes such as those here considered. That they would, if enacted, be ancillary to sec. 86.105 does not remedy their constitutional defects, if any. They must be judged on their own merits. It seems a fair and reasonable assumption that under these proposed statutes, if adopted, counties and towns would, year in and year out, do a great

deal of work in the maintenance, repair and construction of private driveways. Unless prevented from doing so by an amendment not now contemplated, counties and towns could do such work outside their own areas as well as within them. It also seems a fair assumption that such work on private driveways would annually match or exceed, in dollar volume, the snow removal work done by counties and towns under sec. 86.105. In the light of these assumptions, the need to judge on their own merits the proposed statutes here in question seems amply evidenced. So judging them, it is my opinion that while it is not possible "to predict with the desired certainty" what the fate of the bills here considered will be if enacted into law and challenged in the courts, it is my further opinion that the constitutionality of such bills, if enacted, would not be free from doubt. In my judgment, a serious constitutional attack might be mounted against them were they enacted. My thoughts in this connection have been well expressed in an opinion of one of my predecessors, wherein he took the position that a proposed statute met the specific constitutional objections of the *Heimerl* case set forth hereinabove. Having reached that conclusion, he stated:

"* * * However, as I pointed out in my opinion to the assembly above referred to [40 O.A.G. 59] there is nothing in the opinion in the *Heimerl* case to indicate that a statute which specifically met all of the objections would be held constitutional. *There remains a distinct possibility that the proposed law might still be declared unconstitutional upon the grounds that the power granted is not local, legislative and administrative in character, that there is no direct advantage to the health, safety and welfare of the community as a whole, and that it authorizes the county to engage in private business.* The language of the court in the *Heimerl* case is quite broad in this regard, and therefore it cannot be said that the constitutionality of the proposed statute is free from doubt." 40 OAG 151, 153. (Emphasis added)

See also 42 OAG 88, 89 (1953).

JHM

Words and Phrases—State Bar—Members of the state bar engaged in teaching law may be classified as active rather than inactive members according to its rules and by-laws.

June 14, 1961.

PHILLIP S. HABERMANN, *Executive Director,*
State Bar of Wisconsin.

The executive committee of the state bar has requested an opinion from this office on the question of whether a member of the state bar who is engaged solely in the teaching of law is to be classified as an active or an inactive member. Active members pay annual dues of $15 and inactive members pay annual dues of $5.

No question is raised as to the right of law schools to employ such faculty members as may be selected by their governing bodies entirely without regard to the fact that the teacher selected is or is not a member of the state bar. Membership in the state bar is not a prerequisite to the right to teach in a law school in this state. No question on this point is raised by the state bar. The question relates solely to the active or inactive status of a law teacher who is already a member of the State Bar of Wisconsin.

In Wisconsin the supreme court announced on June 22, 1956, that the state bar would be integrated when proper rules and procedure were adopted. *In re Integration of Bar* (1956) 273 Wis. 281, 77 NW 2d 602. Proposed rules and by-laws were then drafted and were adopted by order of the court on December 7, 1956, to be effective January 1, 1957. 273 Wis. vii to xxxvii inclusive.

Rule 2, sec. 1, relating to persons included in membership provides that the membership of the state bar initially consists of all those persons who on the effective date of the rules are licensed to practice law in this state and thereafter includes all persons who become licensed from time to time to practice law in this state. Under sec. 2 those then licensed to practice were given 60 days to enroll in the state bar by registering with the secretary. Those licensed after the effective date of the rules are given 10 days in which to enroll.

Rule 2, sec. 3 provides for classes of membership as follows:

"Section 3. Classes of membership. The members of the State Bar shall be divided into two classes known respectively as 'active' members and 'inactive' members. The class of active members shall include all members of the State Bar except the 'inactive' members. The class of inactive members shall be limited to those persons who are eligible for active membership but *are not engaged in the practice of law in this state and have filed with the secretary of the association written notice requesting enrollment in the class of inactive members.* Judges of courts of record not engaged in the practice of law shall be inactive members. Any inactive member in good standing, except a judge of a court of record, may become an active member by filing with the secretary a written request for transfer to the class of active members and by paying the dues required of active members. No inactive member shall be entitled to practice law in this state or to hold office or vote in any election conducted by the State Bar. *No person* engaged in the practice of law in this state in his own behalf or as an assistant or employee of an active member of the State Bar, or *occupying a position the duties of which require the giving of legal advice or service in this state shall be eligible for enrollment as an active member.*" (Emphasis added)

The original draft of this section does not provide for the classification of judges as inactive members. This was inserted for the sole reason of making sure that judges would not be eligible to hold office in the state bar and not because it was concluded that their work was not of a legal nature.

A check of the records in your office revealed that some law teachers without having filed with the secretary written notice requesting enrollment as an inactive member have been remitting their dues for some time as inactive members and that when this was discovered the executive committee on January 21, 1961 adopted the following resolution:

"WHEREAS, the question has been raised whether law school faculty members should under the rules of the State Bar pay active or inactive dues, and

"WHEREAS, it was intended by the drafters of the Rules and the Court that all lawyers be active members, except judges who were classed as inactive members so that they could not hold office, and except other persons who, although admitted to the Bar of this state, are either retired or not in any way engaged in the practice of law or in giving legal advice or service, and

"WHEREAS, Rule 2, Section 3 has consistently been interpreted to require all lawyers employed in state, federal, or private employment, as well as law faculty members to be classed as active members, now therefore, be it

"RESOLVED, that the determination that lawyers licensed to practice law in Wisconsin and employed as law faculty members and engaged in teaching law in Wisconsin are properly classified as active members of the State Bar of Wisconsin is hereby confirmed."

The teaching of law by one not a member of the state bar is not the practice of law. This may be conceded without being determinative of the status of a member of the state bar as an active or inactive member. The classification of "inactive" member is as broad or as narrow as the court has made it. It is apparent from some of the qualifying language in sec. 3 that the class of "active" membership was intended to be very board and the class of "inactive" membership was intended to be very narrow. Note particularly the last sentence of the subsection which provides in part that no person "occupying a position the duties of which require the giving of legal advice or service in this state shall be eligible for enrollment as an inactive member". This language is broad and includes those members of the state bar who give legal advice or service even though they might not be engaged in the "active practice of law."

The import of the last sentence of rule 2, sec. 3, is that it sets up two groups who are not entitled to inactive membership:

1. Members engaged in the practice of law in their own behalf or as an assistant or employee of another practitioner.

2. Members who while not in the active practice of law

occupy a position the duties of which require the giving of legal advice or service, — in other words, members engaged in work of a legal nature as distinguished from those engaged in activities of a non-legal character.

It was not unreasonable for the executive committee to conclude that a member who teaches law gives some legal advice or service. A student goes to law school to get the very best legal advice possible as a part of the professional preparation essential for the effective practice of law. As a matter of history legal education in the Anglo-American tradition was an integral part of the activities of the bar. Henry III in 1235 prohibited the study of law in any other place in London than the Inns of Court which originated as companies or quasi-corporations of lawyers who owned and resided in the four Inns of Court. See 15 Cornell Law Quarterly 390, footnote 4 at p. 392-393.

This has had its counterpart in the United States under the old and well-established practice of preparing for the bar by "reading law" in the office of some practicing attorney.

In other words the adequate teaching of law is just a part of the over-all responsibility of the profession to the public, and the law teacher whether in his office or in the classroom is an essential member of the team. This is increasingly true with the bar's expanding program of postgraduate education for the profession.

Another point which should be considered in this connection is the provision in supreme court rule 65a [See 251.651, Stats.] which provides, among other things, that teaching law in an approved law school shall be deemed to be active practice of law for the purposes of that section which relates to admission to the bar by reciprocity under sec. 256.28 (3) where the applicant has been engaged in the actual practice of law in some other state for five years within the eight years prior to the filing of the application.

The supreme court has the inherent and exclusive power: (1) to determine what is the practice of law, (2) to establish the qualifications of persons entitled to engage in such practice, (3) to license those persons who have qualified themselves by education, training, experience and charac-

ter to exercise such practices, and (4) to exercise supervisory and disciplinary control over such licensees.

See: *In re Cannon* (1932) 206 Wis. 374, 240 NW 441 *Integration of Bar Case* (1943) 244 Wis. 8, 11 NW 2d 604

In re Integration of Bar (1946) 249 Wis. 523, 25 NW 2d 500

In re Integration of Bar (1956) 273 Wis. 281, 77 NW 2d 602

In re Integration of Bar (1958) 5 Wis. 2d 618, 93 NW 2d 601

Lathrop v. Donohue (1960) 10 Wis. 2d 230, 102 NW 2d 404

It is my opinion that the resolution of the executive committee is a reasonable interpretation of rule 2, sec. 3, and therefore law teachers in this state who are members of the state bar of Wisconsin may be classified as active rather than inactive members.

WHR

Taxation—Constitutionality—Enactment of Bills No. 470, S., and No. 474, S., 1961 providing for simplification of income tax law by reference to internal revenue code would result in invalid law. Incorporation of future federal statutes would be unconstitutional.

June 14, 1961.

THE HONORABLE, THE SENATE.

By Resolution No. 16, S., you request my opinion as to the validity of Bills No. 470, S., and 474, S., which seek to establish a simplified state income tax by reference to federal law.

Bills No. 470, S., and 474, S., are substantially similar. Sec. *conform and correlate Wisconsin income tax law, returns,* 71.013 and 71.02 (2), Bill No. 474, S., provide:

"71.013 PURPOSE. It is the purpose of this chapter *to conform and correlate Wisconsin income tax law, returns, procedures and accounting as closely as may be with the law, procedures, returns and accounting under the internal revenue code in* order that the filing of returns may be simplified and the taxpayers accounting burdens reduced. All provisions of this chapter shall be administered to effect this purpose."

"71.02 (2) 'Internal revenue code' or 'I. R. C.' mean the internal revenue code *as effective with respect to the taxable year except that for any taxpayer who so elects they shall mean the internal revenue code as in effect on July 1, 1961,* and in such case *'federal taxable income'* and *'federal adjusted gross income' means taxable income and adjusted gross income as defined by such code.* Such election for any taxable year shall be made within the time prescribed by law (excluding any extensions thereof) for filing the return for such taxable year and shall be made in such manner as the department may by rule prescribe. *Any reference herein to particular provisions of the internal revenue code of 1945 shall be deemed to include subsequent amendments thereto."*

Both bills attempt to incorporate the federal internal revenue code in effect with respect to the taxable year for which the taxpayer is filing. Existing legislation enacted by a legislative body of another government together with subsequent amendments which might be made thereto by a legislative body of another government are sought to be incorporated by reference into Wisconsin law. In order to allay challenge as to incorporation of subsequent amendments of the federal legislation, an option is provided whereby the taxpayer can elect to use the code in effect on July 1, 1961.

In adidtion to attempted incorporation of present and future federal statutes by reference Bill No. 474, S., would also make prospective administrative decisions of certain federal agencies binding on the Wisconsin tax department. Sec. 71.11 (7) (b), provides in part:

"(b) 'Determined under the internal revenue code' means in the first instance the amount or number shown by the taxpayer upon his corresponding federal income tax return

and thereafter any redetermination of such amount or number on the basis of which any deficiency is assessed or repayment made with respect to the taxpayer's federal income tax. The determination by a taxpayer of his federal taxable income or federal adjusted gross income may nevertheless be audited and corrected by the department under sub. (16) or (20), except *that the department shall make no adjustment*:

"1. *Which is inconsistent with any determination (as defined in section 1313, I. R. C.) of the federal income tax liability of the taxpayer or a related taxpayer (as defined in section 1313 (c), I. R. C.) for any year, or*

"2. Which is inconsistent with the treatment accorded to any item of income or deduction as the result of an *office audit or field audit of the taxpayer's federal income tax return for any year, or*

"* * *"

In considering the problem of legislation by reference we must consider delegation of power, whether the incorporation is express and clear, and constitutional and statutory requirements for publishing laws enacted by the legislature.

I have reviewed a report of the Legislative Reference Library, Informational Bulletin 200, December, 1960, several reports of the Constitutional Subcommittee of the Wisconsin State Bar Income Tax Simplification Committee, (1957) and the majority and minority reports of the Governor's Committee on Income Tax Simplification, December, 1958, legislative Reference File No. 336.245 W7N, all dealing with the reference problem. These reports do not indicate whether the individuals preparing them gave any consideration to the constitutional and statutory requirements for publishing laws enacted by the legislature.

The first Wisconsin constitutional provision we are concerned with is Art. IV, sec. 1, which provides:

"Section 1. The legislative power shall be vested in a senate and assembly."

None of the provisions of the Internal Revenue Code, the federal statute sought to be incorporated by reference into Bill No. 474, S., are set out in detail in the bill and it is a

question of fact which cannot be determined here, whether the provisions sought to be incorporated are sufficiently identified. It is not proposed that the provisions sought to be incorporated be printed or published by the state under legislative authority. Tax laws should be specific and free from ambiguity since criminal penalties are provided for. Laws which are clear and simple are conducive to efficient administration and enforcement and promote timely economical collection of tax revenues.

The general rule is that a "state legislature has no power to delegate any of its legislative powers to any outside agency such as the Congress of the United States. * * * A state legislature does not invalidly delegate its legislative authority by adopting the law or rule of Congress, if such law is already in existence or operative." 11 Am. Jur. 930, 931, 16 C.J.S. 563. "It is generally held that the adoption by or under authority of a state statute of prospective Federal legislation, or Federal administrative rules thereafter to be passed, constitutes an unconstitutional delegation of legislative power. In some cases, however, it has been held that there was no unconstitutional delegation of authority by a state statute which provided that prospective Federal legislation should control." 11 Am. Jur. Sec. 219, 1961 supplement p. 141, 16 C.J.S. 564.

Permissible limits of delegation of legislative power are set forth in *Milwaukee v. Sewerage Comm.* (1954) 268 Wis. 342, 350, 67 N.W. 2d 624, where it is stated:

"Except as authorized by the constitution, the legislature cannot delegate power to make a law. *State ex rel. Van Alstine v. Frear* (1910), 142 Wis. 320, 324, 125 N.W. 961. It is well settled, however, that while the legislature cannot delegate its power either to declare whether there shall be a law,—or to determine the general purpose or policy to be achieved by the law,—or to fix the limits within which the law shall operate, —nevertheless, it can make a law to become operative on the happening of a certain contingency or on the ascertainment of a fact upon which the law makes or intends to make its own action depend. *State ex rel. Zilisch v. Auer* (1928), 197 Wis. 284, 221 N.W. 860. It has been held that when the legislature has laid down the fundamentals of a law, it may delegate to administrative agencies authority to exercise such legislative power as is necessary

to carry into effect the general legislative purpose. *Olson v. State Conservation Comm.* (1940), 235 Wis. 473, 293 N.W. 262; *Clintonville Transfer Line v. Public Service Comm.* (1945), 248 Wis. 59, 21 N.W. 2d 5."

See also *State ex rel. Wis. Inspection Bureau v. Whitman* (1928) 196 Wis. 472, 220 N.W. 929 and *Gibson Auto Co. v. Finnegan* (1935) 217 Wis. 401, 259 N.W. 420.

Wisconsin has had a number of cases dealing with legislation by reference, however, with the exception of the *Wakeen case,* discussed later, the reference in a given statute enacted by the Wisconsin legislature has been to another statute enacted by the same or a previous Wisconsin legislature.

In *George Williams College v. Williams Bay* (1943) 242 Wis. 311, 316, 7 N.W. 2d 891, it is stated:

"* * * By this doctrine [legislation by reference] when a statute adopts the general law on a given subject, the reference is construed to mean that the law is as it reads thereafter at any given time including amendments subsequent to the time of adoption. This is to be contrasted with adoption by reference of limited and particular provisions of another statute, in which case the reference does not include subsequent amendments. * * *"

See, also, *Gilson Bros. Co. v. Worden-Allen Co.* (1936) 220 Wis. 347, 265 N.W. 217; *Mueller v. Milwaukee* (1949) 254 Wis. 625, 37 N.W. 2d 464 and *Will of Yates* (1950) 259 Wis. 263, 48 N.W. 2d 601.

There was no delegation of powers problem or publishing problem involved in the four cases last cited above which dealt with legislation by reference.

In *State v. Wakeen* (1953) 263 Wis. 401, 57 N.W. 2d 364, our court held that there was no delegation of legislative power where the legislature defined a drug by reference to the United States Pharmacopoeia, however, that case and other therein cited are concerned with the establishment of standards by reference.

In 2 *Sutherland Statutory Construction,* 547-551, it is stated:

"S. 5207. A statute may refer to another statute and incorporate part of it by reference. * * *

"There are two general types of reference statutes: statutes of specific reference and statutes of general reference. A statute of specific reference, as its name implies, refers specifically to a particular statute by its title or section number. A general reference state refers to the law on the subject generally. * * *

"S. 5208. A statute of specific reference incorporates the provisions referred to from the statute as of the time of adoption without subsequent amendments, unless the legislature has expressly or by strong implication shown its intention to incorporate subsequent amendments with the statute. * * *

"A statute which refers to the law of a subject generally adopts the law on the subject as of the time the law is invoked. * * *

"State statutes have been passed which adopted federal statutes with the administrative rulings to be made under them. These acts have been received badly, most of them being declared unconstitutional for delegating legislative power to the administrative board."

In 10 OAG 648, it was stated that existing acts of congress and regulations made thereunder may be adopted by reference as laws of Wisconsin, but must be published in full by legislative authority in order to comply with sec. 21, Art. VII, Wis. Const. The opinion further stated that the legislature cannot constitutionally provide that laws passed by congress in the future to enforce the 18th Amendment shall automatically become state law in Wisconsin. That opinion was directed to the legislature with regard to proposed legislation.

Sec. 21, Art. VII, Wis. Const., provides:

"The legislature shall provide by law for the speedy publication of all statute laws, and of such judicial decisions, made within the state, as may be deemed expedient. And no general law shall be in force until published."

The purpose of the constitutional provision was stated by our court in *Clark v. Janesville* (1859) 10 Wis. *135, *183:

"* * * Courts and people are bound to take notice of general laws; and that upon which their operation depends should be capable of being readily ascertained with the highest certainty. * * *"

The constitution requires the legislature to provide for the publication of the laws, and, as our supreme court pointed out in *Clark v. Janesville,* supra, publication by any other authority than that of the legislature does not satisfy the requirements of the constitution.

Also, see secs. 35.63, 35.64.

The option feature of Bills No. 470, S., and 474, S., is of questionable merit. The provision was included to eliminate the possibility of constitutional attack based upon delegation of legislative powers through incorporation by reference of future federal statutes. I am not convinced that such a provision would close the door to successful challenge to the constitutionality of an enacted law based on these grounds. In addition, inclusion of an option might result in a dual type of law which would be difficult to administer and which would result in confusion to taxpayers and inequities as between taxpayers.

Even if we assume that the existing federal statutes, sought to be incorporated into Bills No. 470, S., and 474, S., are sufficiently identified, I am of the opinion that, since the specific provisions sought to be incorporated are not set out in detail in the proposed legislation and are not to be published by the state under legislative authority, any legislation resulting therefrom would be invalid as not in compliance with the provisions of sec. 21, Art. VII, Wis. Const.

I am of the further opinion that the attempted incorporation by reference of future federal statutes would constitute an unlawful delegation of legislative power. See sec. 1, Art. IV, Wis. Const.

RJV

Census—Words and Phrases—Term, "last federal census", referred to in sec. 86.31 for allotment of highway aid, means the last decennial federal census, the term being controlled by sec. 20.420 (83) (b) 5 (d).

June 30, 1961.

HARVEY GRASSE, *Chairman,*
State Highway Commission.

You call our attention to the highway aid laws of the state, which provide for certain appropriations for the improvement of public roads and streets and the manner of dividing tax monies among the cities, villages and towns.

Sec. 86.31 sets up a table for allotments based on population. The initial allotments are made on a per mile basis of streets within the municipality opened and used for travel. The allotments among cities are made on the following population table:

Sec. 86.31 (1) (b) provides:

"(b) Each city shall receive for each mile of such road or street, based on its population (according to the last federal census), a sum as follows:

"Population	
not more than 10,000	$130
10,001 to 35,000	$260
35,001 to 150,000	$390
150,001 or more	$520"

One of the cities of the state, has, subsequent to the last decennial census, caused a further census to be taken under the direction of the census bureau of the department of commerce and now claims to be within a higher population bracket so that its road and street allotments would be increased, provided the new figure is "the last federal census" within the meaning of sec. 86.31.

Your question is whether or not the last enumeration, above referred to, constitutes the last federal census within the meaning of sec. 86.31.

There are several decisions from other states which hold that such a census would be the last federal census. See

In re Cleveland's Claim (1919) 72 Okl. 279, 180 P. 852, 855; *State ex rel. Brubaker v. Brown* (1955) 163 Ohio St. 241, 126 N.E. 2d 439; *City of Bisbee v. Williams* (1957) 83 Ariz. 141, 317 P. 2d 567. The reasoning behind these cases is that, had the legislature intended to mean the last decennial census, it would have so stated.

We are, however, here dealing with particular statutes of this state and these must govern this opinion.

Sec. 20.420 (83) (b) 5 (d) reads as follows:

"(d) When, in any year following the year in which the taking of a federal census is begun, the allotments pursuant to s. 20.49 (8) (a) (statutes of 1951) and s. 86.31 (1) (statutes of 1953) are not based on population figures from the official federal report issued by the director of census as his complete tabulation because such report was not available, the commission shall, when the report is available, review such allotments, and when not in accordance with the population figures as given in the report, compute the differences between the amounts that each municipality would have received pursuant to s. 20.49 (8) (a) (statutes of 1951) and s. 86.31 (1) (statutes of 1953) and 20.420 (83) (b) on the basis of such report and the amounts they did receive. The amounts thus determined as underpayments and overpayments on the basis of such report shall respectively be deducted from and added to the amounts to be apportioned pursuant to s. 20.420 (83) (a) and (b) 1, 2, 3 and 4 for the year in which the adjustment is made, in accordance with the gain or loss which was experienced in each such allotment in the previous year by reason of such underpayments and overpayments, and shall be respectively added to and deducted from the allotments for such year to be made to such municipalities under s. 20.420 (83) (b)."

This is a statute *in pari materia* with sec. 86.31, and, in my opinion, controls the proper interpretation of sec. 86.31. This statute unmistakably refers to the decennial census. It was passed after the 1950 census when it was revealed that two of the cities of the state showed a variance between the so-called preliminary report of the 1950 decennial census and the complete report which placed these cities in a higher bracket.

It should also be noted that sec. 990.01 (29), a definition statute, reads as follows:

"POPULATION. 'Population', when used in connection with a classification of municipal corporations for the exercise of their corporate powers or for convenience of legislation, means the population according to the last national census."

In my opinion, this means the last decennial census and does not mean, or infer, a census of a particular unit of government which happened to have a census conducted under the supervision of the federal census bureau. In my opinion, it was the intent of the legislature, in using the term "last federal census" in sec. 86.31, to mean the last federal decennial census.

The legislature could hardly have intended that each city in the state could have a special census each year or that those cities which could persuade the census bureau to make a special count for them should be treated differently and use a different standard for measuring population than do the cities which either did not or could not get the federal census bureau to make a special count for them.

REB

Savings and Loan—Constitutionality—Until validity of sec. 215.20 (21) has been established by the courts, savings and loan commissioner should not promulgate rules and regulations granting supervised savings and loan associations authority to purchase interest in mortgage loan more than fifty miles from association office.

July 7, 1961.

R. J. WINKOWSKI,
Commissioner, Savings and Loan Department.

You inquire whether a state-chartered savings and loan association may purchase a participating interest in a mortgage loan originated by an authorized lender on real estate located in Wisconsin, but more than 50 miles distant from the office of the purchasing association.

Ch. 68, Laws 1959, effective June 7, 1959, created sec. 215.22 (11) which provides:

"215.22 (11) PARTICIPATION LOANS. Any association may participate up to a 50 per cent interest with other lenders *in mortgage loans on Wisconsin real estate of any type such association may otherwise make,* if the other participants are instrumentalities of or corporations owned wholly or in part by this state or the United States or are associations or corporations insured by the federal savings and loan insurance corporation or the federal deposit insurance corporation, or are insurance companies licensed to do business in this state."

The statute does not distinguish between the originating participant and the purchasing participant. In each instance, however, lenders are limited to participation "in mortgage loans on Wisconsin real estate of any type such association may otherwise make". The words "on Wisconsin real estate" are words of limitation and do not authorize a purchasing participant to purchase an interest in a mortgage loan on any real estate in Wisconsin. The words "of any type such association may otherwise *make*" are also words of limitation and modify and relate back to "mortgage loans". Under this statute the mortgage loan made by the originating lender must therefore be on Wisconsin real estate, and it must be a type of mortgage loan such

association may otherwise make. Both restrictions apply with equal force to the purchasing participant. Such restrictions would prohibit an association from purchasing a participating interest in a mortgage loan originated by an authorized lender on real estate more than 50 miles distant from the office of the purchasing association unless there is some other statute which would dispense with the restrictions contained in secs. 215.22 (11) and 215.22 (1). Sec. 215.20 (21), discussed later in this opinion, is such a statute.

After Ch. 68, Laws 1959, became effective on June 7, 1959, the legislature amended sec. 215.22 (1) by enacting Ch. 119, Laws 1959, effective June 26, 1959, removing the requirement of former sec. 215.22 (1), that loans be made only on Wisconsin real estate, but did not remove the requirement that the real estate involved must be within a radius not to exceed 50 miles distant from the office of the association.

Sec. 215.20 (21) was created by Ch. 419, Laws 1959, and became effective September 13, 1959. This law was sponsored by the Wisconsin Savings and Loan League and was intended to keep state-chartered associations at a level of activity with their chief competitors, the federal-chartered associations.

Sec. 215.20 (21) provides:

"(21) LOANS AND INVESTMENTS UNDER HOME OWNERS LOAN ACT. Make any loans and any investments of such kind and nature, in such manner and to the extent that a federal-chartered savings and loan association has the power to make loans or investments under the home owners loan act of 1933, as now or in the future may be amended and as interpreted by rules and regulations of the federal home loan bank board for federal savings and loan associations. The powers granted by this subsection are in addition to all other powers granted to or conferred on savings and loan associations under this chapter."

At the time sec. 215.20 (21) became effective, federal-chartered associations were permitted to participate in loans beyond the association's regular lending area, (which is a 50 mile radius from the association's main office), and were permitted, with limitations, to purchase insured loans

on homes outside their regular lending area. Secs. 545.6 — 4a, 545.6 — 5, Rules and Regulations for the Federal Savings and Loan System promulgated by the Federal Home Loan Bank Board under the provisions of the Home Owners' Loan Act of 1933, as amended.

If sec. 215.20 (21) is valid, a purchasing participant would be able to participate in first lien home mortgage loans on real estate more than 50 miles from the office of the participant even though such real estate were located in some distant state.

A statute is presumed to be constitutional and will be held unconstitutional only when it so appears beyond a reasonable doubt. *White House Milk Co. v. Reynolds* (1960) 12 Wis. 2d 143, 106 N.W. 2d 441.

"An unconstitutional act of the legislature is not a law; it confers no rights, it imposes no penalties, it affords no protection, and is not operative, and in legal contemplation it has no existence." *State ex rel. Kleist v. Donald* (1917) 164 Wis. 545, 552, 553, 160 N.W. 1067. "An act of the legislature which is not authorized by the constitution is no more a law than an act which has not been properly adopted because the necessary procedural steps have not been followed. In either event no effective law results." *State ex rel. Martin v. Zimmerman* (1939) 233 Wis. 16, 21, 288 N.W. 454. A ministerial officer of one department, however, cannot in the absence of legislative authority, assume to exercise the power to pass upon the validity and constitutionalty of the acts of officers or coordinate departments of government. *State ex rel. Martin v. Zimmerman,* supra pp. 20, 21. Public officials may not, on the other hand, waive constitutional objections to a statute, have a duty to raise the objections when the jurisdiction of a court has been properly invoked, and when they fail to raise the objections the court should do so when necessary to a proper disposition of the case. *State ex rel. Joint School Dist. No. 4 v. Becker* (1928) 194 Wis. 464, 468, 215 N.W. 902.

Sec. 215.20 (21) attempts to incorporate by reference federal law now in force and federal law to be enacted in the future, and federal agency rules and regulations now in force and to be promulgated in the future. Neither the federal laws or rules in force at the time subsection (21) was created are set out in detail in the statute, nor are they

specifically identified. The federal laws and agency rules and regulations have not been printed or published by the state.

The general rule is that a "* * * * state legislature has no power to delegate any of its legislative powers to any outside agency such as the Congress of the United States. * * * A state legislature does not invalidly delegate its legislative authority by adopting the law or rule of Congress, if such law is already in existence or operative * * *." 11 Am. Jur. 930, 931, 16 C.J.S. 563. "It is generally held that the adoption by or under authority of a state statute of prospective Federal legislation, or Federal administrative rules thereafter to be passed, constitutes an unconstitutional delegation of legislative power. In some cases, however, it has been held that there was no unconstitutional delegation of authority by a state statute which provided that prospective Federal legislation should control." 11 Am. Jur. Sec. 219, 1959 supplement p. 138, 16 C.J.S. 564.

In *State v. Wakeen* (1953) 263 Wis. 401, 57 N.W. 2d 364, our court held that there was no delegation of legislative power where the legislature defined a drug by reference to the United States Pharmacopoeia, however that case and others therein cited are concerned with the establishment of standards by reference.

In 10 OAG 648, it was stated that existing acts of congress and regulations made thereunder may be adopted by reference as laws of Wisconsin, but must be published in full by legislative authority in order to comply with sec. 21, Art. VII, Wis. Const. The opinion further stated that the legislature cannot constitutionally provide that laws passed by congress in the future to enforce the 18th Amendment shall automatically become state law in Wisconsin. That opinion was directed to the legislature with regard to proposed legislation.

Sec. 21, Art. VII, Wis. Const. provides:

"The legislature shall provide by law for the speedy publication of all statute laws, and of such judicial decisions, made within the state, as may be deemed expedient. And no general law shall be in force until published."

The purpose of the constitutional provision was stated by our court in *Clark v. Janesville* (1859) 10 Wis. *135, *183:

"* * * Courts and people are bound to take notice of general laws; and that upon which their operation depends should be capable of being readily ascertained with the highest certainity. * * *"

The constitution requires the legislature to provide for the publication of the laws, and, as our supreme court pointed out in *Clark v. Janesville,* supra, publication by any other authority than that of the legislature does not satisfy the requirements of the constitution.

Also see secs. 35.63, 35.64, Wis. Stats.

In *Milwaukee v. Sewerage Comm.* (1954) 268 Wis. 342, 350, 67 N.W. 2d 624, it is stated:

"Except as authorized by the constitution, the legislature cannot delegate power to make a law. *State ex rel. Van Alstine v. Frear* (1910), 142 Wis. 320, 324, 125 N.W. 961. It is well settled, however, that while the legislature cannot delegate its power either to declare whether there shall be a law, — or to determine the general purpose or policy to be achieved by the law, — or to fix the limits within which the law shall operate, — nevertheless, it can make a law to become operative on the happening of a certain contingency or on the ascertainment of a fact upon which the law makes or intends to make its own action depend. *State ex rel. Zilisch v. Auer* (1928), 197 Wis. 284, 221 N.W. 860. It has been held that when the legislature has laid down the fundamentals of a law, it may delegate to administrative agencies authority to exercise such legislative power as is necessary to carry into effect the general legislative purpose. *Olson v. State Conservation Comm.* (1940), 235 Wis. 473, 293 N.W. 262; *Clintonville Transfer Line v. Public Service Comm.* (1945), 248 Wis. 59, 21 N.W. (2d) 5."

See also *State ex rel. Wis. Inspection Bureau v. Whitman* (1928) 196 Wis. 472, 220 N.W. 929, and *Gibson Auto Co. v. Finnegan* (1935) 217 Wis. 401, 259 N.W. 420.

It can be argued that the attempted incorporation in sec. 215.20 (21) of federal laws and regulations in force at the date of passage of Ch. 419, Laws 1959, is invalid as the federal laws or rules in force at that time are not set

out in detail in the law, are not specifically or sufficiently identified and have not been published by the state.

It can also be argued that the attempted incorporation of future federal laws and regulations into sec. 215.20 (21) constitutes an unlawful delegation of legislative power.

In view of the above questions, there is grave doubt as to the constitutionality of sec. 215.20 (21), and you are advised that you should not promulgate any rules or grant any authority to supervised savings and loan associations in reliance upon sec. 215.20 (21) until such time as the validity of the statute has been established in the courts.

RJV

County School Committee—School Districts—Petition to detach from union high school district and create a new common school district is contrary to sec. 40.025 (1) (e) and is null and void.

July 7, 1961.

HAROLD J. WOLLENZIEN,
Corporation Counsel, Waukesha County.

You request an opinion as to the legal effectiveness of a school district reorganization petition filed with the county school committee of your county for detachment of territory from Union High School District Joint No. 1 of the City of Brookfield, Village of Elm Grove, Town of Brookfield and City of New Berlin. Such district, which operates high school grades, is superimposed upon and includes all of and only the territory of five underlying common school districts that operate only elementary grades. Said districts are all entirely within your county. The petition requests that action be taken to detach the territory comprising School District No. 8 of the City of Brookfield, one of the underlying common school districts, from said Union High School District and "create a common school district comprising such detached territory to operate both elementary and high school grades."

Of first importance is the provision in the next to the last sentence in sec. 40.025 (1) (e), which reads:

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

The prohibition in this provision is couched in the present tense. Under the stated facts it is clear that School District No. 8, which is a common school district, has not heretofore operated, is not now operating, and is not authorized to operate high school grades. Under sec. 40.10 a common school district may not establish a high school until it obtains a certificate of approval thereof from the state superintendent. 46 OAG 118, 120. It has no such certificate. Even if such common school district were to be dissolved and a new common school district recreated out of its territory, assuming solely for the purposes of this point that this would be possible inasmuch as the territory already constitutes an existing and functioning common school district and the newly created district would be in no way any different therefrom, such new district would not be one that is "operating high school grades." It cannot operate high school grades until it has obtained the necessary authorization under sec. 40.10. In 23 OAG 393, it was said that the statutory requirements for conducting a high school cannot be avoided by the subterfuge of adopting a 12-grade course of study and not using the name high school.

Thus, the petition involved clearly asks that the county committee make an order which detaches the territory of School District No. 8 from the Union High School District without, in the same order, attaching such detached territory to another district which has operated high school grades and is presently authorized to operate such grades so as to be a district which presently "operates" high school grades. This the statute specifically prohibits and, therefore, the committee has no power or authority to do it. As such, the petition clearly asks that the county school committee do something which it has now power to do. The request by the petition thus seeks something which is beyond the jurisdiction of the committee. Therefore, it did not invoke any jurisdiction which the committee possesses and is of no legal effect.

Furthermore, the petition is of no effect from another

aspect. In the first place, it does not ask that School District No. 8 of the City of Brookfield, which is an existing common school district, be dissolved, but merely asks that the territory comprising it be detached from the Union High School District and that a common school district "to operate both elementary grades and high school grades" be created out of such "detached territory." As there is only one variety or kind of common school district, as will be pointed out, no new common school district could be created out of only the territory of this existing common school district unless the district first is dissolved. This the petition does not request. As such, it asks something the county school committee cannot do.

However, taking the petition as implying that the request is that the existing common school district, School District No. 8 of the City of Brookfield, be dissolved and then a new common school district be created, comprising the same territory, the petition still seeks something that is beyond the jurisdiction of the county committee. The petition does not ask that the existing common school district be dissolved and replaced by a newly created common school district. If that were all it did, there would be no point to the petition. It is to be seriously questioned whether either a county school committee acting under sec. 40.03, or municipal boards acting under sec. 40.06, have any power to grant a petition asking merely that an existing common school district be dissolved and a new common school district created to supersede it. Such a petition not only would be pointless as accomplishing nothing, but would be outside the intended functioning of these school district reorganization statutes. These statutory enactments are to delegate to the county school committees and to local municipal boards the legislative power to alter the composition of school districts. Obliteration of a school district and replacement of it by a new district of the same character and territory would not fall within the intended scope of such delegation, as it would in no way effect any change in the territory or the character of the school district.

Sec. 40.01 (3) provides:

"(3) DISTRICTS. The territorial unit for school administration is the school district. School districts are classed as common school districts, union high school districts, uni-

fied school districts, city school districts and school systems organized pursuant to ch. 38. A joint school district is a school district whose territory is not wholly in one municipality. Board means school district boards or boards of education in charge of the schools of any district. Basic aid district and integrated aid district mean districts which meet the requirements set forth in s. 40.67 and refer to classification for aid purposes only."

There are no provisions here or elsewhere in the statutes for more than one kind of common school district. In the style of Gertrude Stein, "A common school district is a common school district is a common school district." Whenever a common school district exists or is created, it has the same character and powers as every other common school district. There are no varieties of common school districts. Common districts are creatures of the legislature and possess the character and powers given to them by the statutes.

Such districts historically, to a large measure, have confined their operation to the conducting of schools offering only the elementary grades. However, under the statutes a common school district meeting certain requirements may establish and operate a school offering high school grades. Sec. 40.10. It may do so only if and when it has the required approval of the state superintendent. Should it later lose its authorization, and sec. 40.10 (8) provides therefor, thereafter its operations could not include a high school. Its authority to conduct high school grades is not because of any change in the organic structure or character of the district. It is merely a legislative authorization to extend the scope of its activities to include furnishing instruction in the high school grades. Neither the granting by the state superintendent of his approval or his withdrawal thereof in any way makes any change in the nature of the district. Prior to, during and after the cessation of its conducting of high school grades the nature and character of the school district as a legal entity remains the same. When it operated the high school grades, it did so as a common school district having authorization to do so. As noted in 42 OAG 70, common school districts upon whose territories a union high school district is superimposed exist independent of each other and of the high school district and the existence of any one of the districts is in no way affected by the existence of any other.

The foregoing is pertinent to the correction of a misconception that there is more than one kind of common school district which appears to be involved in this petition. The petition after requesting detachment of territory from the union high school district asks that there be created out of the detached territory a common school district "to operate both elementary and high school grades." By this last part apparently the petitioners seek to have the committee create a new common school district with characteristics that are different from those of the common school district which now exists covering that territory. This must be grounded upon the misconception that a specific common school district can be created with the inherent quality or characteristic of being one that will and must operate grades 1 through 12 or kindergarten through 12, whereas if just a common school district is created, it will be one that only operates the elementary grades.

As previously stated, there is no statutory provision for anything except a single kind of common school district. When a common school district exists or is created, it has those qualities and powers which under the statutory provisions are inherent in that kind of school district. Anything in a reorganization order which attempts either to restrict a common school district to the operation of only elementary grades or provide that it is to operate both elementary and high school grades is unauthorized by any statutory provision. Any language therein to that effect would be surplusage and without operative effect. An order creating a common school district which contained any such wording would merely create a common school district and what powers and duties the district would have are what the statutes provide relative to a common school district. Unless that would be the effect of such order, then the order would be wholly void as made without statutory authority and, therefore, beyond the jurisdiction of the reorganization authority.

Thus, the petition in question asks that the county school committee do something which is beyond its power to do. First, it asks that it detach territory from Union High School District No. 1 without in the same order attaching that same territory to some other school district which is operating high school grades. This is directly contrary to sec. 40.025 (1) (c), and therefore, outside the jurisdic-

tion of the committee. Second, it requests the committee to create out of the detached territory a common school district where one already exists or a common school district with the specific character of one that shall operate both elementary and high school grades, for neither of which there exists any statutory authorization. In so doing the petition likewise asks the committee to do something which it has no power to do and, therefore, is outside its jurisdiction.

As the petition thus asks the committee to make an order which it is powerless to make, it does not invoke the jurisdiction of the committee because the committee has no jurisdiction to do what it asks. The petition is, therefore, null and void. Before the jurisdiction of the committee is invoked so that under sec. 40.025 it acquires jurisdiction which excludes other contemporaneous proceedings there must be filed with it a valid petition. To be valid it must request committee action that is within its jurisdiction in the sense that it has power to take such action. This the petition in question does not do. It is to be disregarded by the committee as of no operative effect of any kind. In *State ex rel. Diarmed v. Knight* (1920) 172 Wis. 138, 178 N.W. 253, the court held that a county school committee reorganization order was void because there was no statutory authority for the committee to make it. The court said in effect that the whole proceedings, which were commenced by the filing of a petition, were null and void and of no effect. It said that "Though the order was void for want of jurisdiction and *therefore harmless;* it may nevertheless be reversed on certiorari. * * *" (Emphasis supplied)

HHP

Public Welfare—Insurance—Per capita cost in county mental institutions may include liability insurance when such insurance is authorized by county board according to the statutes. Department of public welfare may procure malpractice insurance for state mental hospitals and employes.

July 10, 1961.

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

You submit the following questions about expense for malpractice insurance for county and state mental institutions:

"In view of the *Kojis* decision, 107 NW 2d 131, and the comments therein in relation to *Carlson v. Marinette County,* 264 Wis. 423, we request your opinion as to whether the State grants-in-aid to Community Mental Health Clinics authorized by sec. 51.36 (8) (a), Stats., and state aid to county hospitals under sections 51.08, 51.24, and 51.27 may include expenditures for malpractice insurance procured by such clinics and hospitals as governmental units, as well as for employes of such clinics.

"We also request your opinion as to whether the state may procure malpractice insurance for state mental hospitals and their employes."

The Wisconsin supreme court held in *Kojis v. Doctors Hospital* (1961) 12 Wis. 2d 367, 372, 107 N.W. 2d 131, that it would "no longer recognize the defense of charitable immunity in cases where a paying patient is seeking recovery from a charitable hospital for the negligent acts of the hospital, its agents, servants, or employees."

The case dealt with a privately owned hospital, but, as you noted, the opinion included among the decisions in which the doctrine of immunity had previously been applied one involving a hospital operated by a county. (*Carlson v. Marinette County* (1953) 264 Wis. 423, 59 N.W. 2d 486)

The extent of the liability to which a county may be subject under the ruling can be determined only in case-by-case tests, since doctrines of governmental immunity, as well as immunity of charities, may be involved. See, for example, *Pohland v. Sheboygan* (1947) 251 Wis. 20, 271 N.W. 2d 736. Your questions, however, relate to the problems of safeguarding state and county institutions against whatever liability may accrue.

One of the bases expressed by the supreme court for the change in the doctrine of immunity for charitable institutions is that: (loc. cit. 12 Wis. 2d 367).

"Insurance covering their liability is available and prudent management would dictate that such protection be purchased."

Your first question is whether the state grants for county mental clinics and hospitals may encompass expenditures for malpractice insurance procured by the clinics and hospitals as governmental units, as well as for their employees.

Under secs. 51.08, 51.24, 51.27 and 51.36 (8) (a) reimbursement for care in county institutions is based on a computation of the "actual average per capita cost of maintenance, care and treatment." The supreme court ruled in *State v. Schmidt* (1959) 7 Wis. 2d 528, 97 N.W. 2d 493, that average per capita cost is to be determined by totaling the operating costs of county hospitals and dividing by the total number of patient weeks, but the court had there no occasion to determine what items should be included in operating costs.

In 40 OAG 356, the opinion was given that cost of care in a tuberculosis sanitarium includes contributions to the state retirement fund based on salaries of employees of the institution. A number of authorities were there cited indicating that cost of maintenance includes those expenses necessary to efficient operation, as distinguished from items which might be classified as capital expenditures. See, also, 44 OAG 234. Cost of insurance attributable to operation of the institution is a proper item for inclusion in the cost of maintenance, to the extent that insurance is permissible under applicable statutes.

Under sec. 59.07 (2) (a) a county board may provide public liability insurance covering, among other things, malfeasance of professional employees.

Under sec. 59.07 (2) (d), which was enacted by ch. 173, Laws 1959, a county board may provide for "the protection of the county and the public resulting from loss or damage resulting from the act, neglect or default of county * * * employes and to contract for and procure * * * contracts of insurance to accomplish that purpose."

The foregoing authorizations are in addition to those contained in sec. 66.18, the latter covering both the state and municipalities. The foregoing provisions unquestionably authorize a county to insure against its own liability for malpractice of employees.

Whether collection could be effected from an insurance company in any given case cannot be predicted with certainty, because that may depend upon the terms of the insurance contract or upon other conditions of liability.

Your question relative to county expenditures for malpractice insurance "for its employees" refers, I assume, to insuring employees against their personal liability, irrespective whether the county may be legally liable for their acts.

In *Pohland v. Sheboygan, supra,* it was held that sec. 66.095, which authorizes the state and its municipalities "to procure liability insurance covering both the state or municipal corporation and their officers, agents and employes," does not create any liability on the part of the municipality other than would exist independently of the statute. The insurance policy in that case, however, obligated the insurer to pay only by reason of "liability" imposed on the city. The court did not have occasion to consider coverage under any policy other than the one before it which it said "plainly applies to protect the city." (loc. cit. 251 Wis. 26) As to whether the city might have insured against liability of employees, the court commented only that "we perceive no authority for making a contract to indemnify anyone but the city *or its employees when the latter is authorized by statute.*" (loc. cit. 251 Wis. 26)

Sec. 59.07 (2) (d) provides both for "protection of the county and the public." Insurance against the *county's* liability for malpractice by its employees would be primarily for protection of the county. The provision for protection of "the public" implies authority to provide protection beyond the traditional legal liability of the county.

The protection of employees against liability may become a substantial consideration in recruitment of personnel for institutions where malpractice suits are a possibility. Irrespective of liability, the defense of such suits may be burdensome.

It seems probable that the legislature intended in authorizing insurance for protection of the county *and* the public to include in the latter class both employees and claimants.

As the court pointed out in *Wisconsin River Imp. Co. v. Pier* (1908) 137 Wis. 325, 337-338, the public does not necessarily mean the whole population, but may refer to those persons who avail themselves of a particular public service.

Although the provision of insurance against liability of employees is a benefit to the employees additional to other forms of reimbursement, that would not make it invalid when duly authorized by a county board under state law.

Assuming that insurance for liability of a county and its employees for malpractice in a county mental institution is duly authorized by the county board, I believe the cost of insurance attributable to such institution is a proper item for your department to consider in determining the *per capita* cost.

Your second question is whether the state may procure malpractice insurance for its mental hospitals and their employees. What liability may be incurred by the state for malpractice of hospital employees is primarily for judicial determination.

The recent *Kojis* case, supra, did not overrule the principle of immunity of the state from tort claims for negligence of its employees, as announced in such cases as *Holzworth v. State* (1941) 238 Wis. 63, 298 N.W. 163.

However, the authority to insure against such liability as might accrue is subject to legislative determination. Sec. 66.18 provides:

"The state, and municipalities as defined in s. 345.05, are empowered to procure liability insurance covering both the state or municipal corporation and their officers, agents and employes."

The foregoing statute does not authorize insurance for the protection of "the public" as does sec. 59.07 (2) (d). It authorizes the state to insure against such liability as might accrue against itself, but whether the provision authorizes insurance of employees against personal liability

for which the state would not be legally responsible is a separate question.

In *Pohland v. Sheboygan, supra,* the court had no need to decide that question because the insurance contract covered only the city's liability. In connection with the discussion of sec. 66.18, the court commented that it perceived "no authority for making a contract to indemnify anyone but the city or its employees," and commented that "the statute only authorizes procuring insurance to protect the governmental agency involved and its officers, agents, and employees from liability" (loc. cit. 251 Wis. 25).

It seems significant that sec. 66.18 is placed in a sequence of statutory provisions relating to benefits to public employees. Such benefits, when provided according to law, become a part of the reimbursement for the employment and a substantial consideration in recruitment and retention of employees.

It is my opinion that, while sec. 66.18 may not authorize exactly the same insurance coverage as sec. 59.07 (2), relating to counties, it does authorize the state to insure against its own liability and that of employees in state mental hospitals.

BL

(*Following opinion issued by deputy attorney general during absence of attorney general.*)

Legislation—Transportation—Discussion of Bill No. 588, A., relative to transportation of grade and high school pupils to private schools at public expense, and its constitutionality.

August 1, 1961.

TO THE HONORABLE, THE SENATE.

You have requested my opinion regarding the constitutionality of Bill No. 588, A., which, in the form it was passed by the assembly, would permit school boards to provide transportation to and from school for pupils attending a private school within the district on the same terms as

transportation is provided for pupils attending public schools. The bill also provides for state aids to school districts and municipalities furnishing such transportation at the same rate as is paid in the case of transportation for public school pupils. Under sec. 20.650 (12) such aids would be paid from the general fund appropriation to the state superintendent of public instruction.

The constitutional provisions involved, which provide for separation of church and state, are the following:

The first amendment to the United States Constitution is Article I, and reads as follows:

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

(This provision applies to the states by reason of the due process clause of the fourteenth amendment.)

Art. I, sec. 18, Wis. Const., reads as follows:

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

Art. X, sec. 3, Wis. Const., reads as follows:

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

Because the question of constitutionality of such legislation as this has been previously discussed in an opinion of one of my predecessors, and because of the necessity of

a prompt answer to your question, I shall not give an extensive opinion at this time. It will be sufficient, I believe, to state my conclusions in a general way.

On May 11, 1945, Attorney General (now Chief Justice) John E. Martin in a carefully prepared and reasoned opinion advised the assembly that a bill which would have authorized certain school districts to provide transportation for children attending private schools was in conflict with Art. I, sec. 18, and possibly also Art. X, sec. 3, of the state constitution, both quoted above. 34 OAG 127. It was the attorney general's opinion, based upon earlier decisions of the Wisconsin supreme court and other state supreme courts, that the cost of transporting parochial school pupils would be a drawing of money from the treasury for the benefit of religious societies or religious or theological seminaries. The view was adopted, based on the great weight of authority, that the transportation is for the benefit of the school, not of the child.

In 1946 there was submitted to the electors a proposal to amend Art. X, sec. 3, Wis. Const., and the question on the ballot read as follows:

"Shall section 3 of article X of the constitution be amended so as to authorize the legislature to provide for the transportation of children to and from any parochial or private school or institution of learning?"

At the election of November 5, 1946, this proposal was defeated by a vote of 545,475 to 437,817.

While the defeat of this proposal may not be significant in construing the existing constitutional provisions, it does indicate that at that time a majority of the electorate were opposed to authorizing the transportation of parochial and private school pupils at public expense.

Since Mr. Martin's opinion, two significant court decisions have been reported bearing on this general subject.

In *Nichols v. Henry* (1945) 301 Ky. 434, 191 S.W. 2d 930, 168 A.L.R. 1385, it was held that a Kentucky statute authorizing counties to provide from their general funds, transportation supplemental to existing school bus transportation, to pupils attending schools other than common schools in compliance with the compulsory school attend-

ance laws, did not violate a provision of the Kentucky constitution, reading as follows:

"No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; and the civil rights, privileges or capacities of no person shall be taken away, or in any wise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience."

The court held, contrary to Mr. Martin's opinion, that the statute was "an exercise of police power for the protection of childhood against the inclemency of the weather and from the hazards of present-day highway traffic." The court was not obliged to decide whether it constituted a drawing of money from the treasury "for the benefit of religious societies or religious or theological seminaries" (Art. I, sec. 18, Wis. Const.), for no such provision was included in the Kentucky constitutional provision above quoted.

Then in *Everson v. Board of Education* (1947) 330 U.S. 1, 67 S. Ct. 504, 91 L ed. 711, 168 A.L.R. 1392, the United States supreme court by a 5 to 4 decision held that a New Jersey statute providing for the reimbursement of parents for the cost of transportation of children attending Catholic parochial schools did not violate the first amendment of the Constitution of the United States, which the fourteenth amendment made applicable to the states, and did not constitute a use of tax-raised funds for a non-public purpose.

On the first amendment issue, the court held that the New Jersey law did not compel inhabitants to pay taxes to help support and maintain schools dedicated to, and which regularly teach, the Catholic faith, thus constituting a "law respecting the establishment of religion." Recognizing that some children might not be sent to church schools if the parents were compelled to pay their childrens' bus fares when transportation to a public school would have been

paid for by the state, the court equated the furnishing of transportation with such other benefits as (a) requiring a local transit company to provide reduced fares to school children including those attending parochial schools; (b) detailing policemen to protect children going to and from church schools from the hazards of traffic; and (c) such other general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks.

On the issue of using tax money for a private purpose, the court pointed out that the power to strike down a law on that ground must be exercised with extreme caution and that it was too late to argue "that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose."

As pointed out above, this was a 5 to 4 decision of the supreme court. The dissents were vigorous and well reasoned and it would be speculative to assume that the case would be decided the same way today, considering the changed membership of the court (only two members of the majority and one of the dissenters are still in office).

From what has been said it will be observed that the issue based on the constitutional provisions relating to the separation of church and state depends upon whether the transportation furnished is deemed to be for the benefit of the child or for the benefit of the school or the religious society maintaining the school. When Mr. Martin's opinion referred to above was written, the weight of authority and the more recent cases had held that it was for the benefit of the school. Indeed, it had been held that the only constitutional authority for furnishing transportation of public school children was "as the exercise of a governmental function furthering the maintenance and development of the common school system." *Mitchell v. Consolidated School Dist.* (1943) 17 Wash. 2d 61, 135 p. 2d 79, 146 A.L.R. 612, 616. In support of this ruling the Washington court cited, among others, *State ex rel. Van Straten v. Milquet* (1923) 180 Wis. 109, 192 N.W. 392. However, as pointed out in Mr. Martin's opinion, the decision in that case was based on a lack of *statutory* authority to transport parochial school pupils, no constitutional issue being involved. In the later case of *Costigan v. Hall* (1946) 249 Wis. 94, 23 N.W. 2d

495, the court reaffirmed this ruling and expressly refused to decide the constitutional issue.

The Washington court was also of the opinion that if the transportation were considered to be for the benefit of the pupils and their parents it would run afoul of a constitutional inhibition prohibiting counties and municipalities from giving any money or property to, or in aid of, any individual except for the support of the poor or infirm, a provision which might be equated with the rule of law that public funds may not be expended except for a public purpose. See the cases collected in Callaghan, *Wis. Dig.*, State § § 61-63.

It is my view that if the proposed statute does not violate the Wisconsin constitutional provisions relating to separation of church and state, it is not invalid on the ground that it would authorize expenditure of public funds for a private purpose. If it is a public purpose to transport children to public schools, it is equally a public purpose to transport them to private schools. In this connection, the language of the supreme court in *State ex rel. Thomson v. Giessel* (1953) 265 Wis. 207, 216, 60 N.W. 2d 763 is pertinent:

"Thus, as in the case of taxation, the question of whether an expenditure of public funds constitutes a public purpose is largely within the discretion of the legislature. The courts cannot interfere with the legislative determination upon either subject unless there is a very clear abuse of discretion. * * *"

A recent Maine decision held that there was no statutory authority to transport parochial school pupils but in an *obiter dictum* the court said such a statute would be valid if passed, on the ground that the Maine constitutional provisions were no more stringent than the first amendment as construed and applied by the United States supreme court in the *Everson* case. *Squires v. Augusta* (1959) 155 Me. 151, 153 A. 2d 80.

There is now a clear divergence of authority in other states and the United States supreme court on the question whether the furnishing of transportation is for the benefit of the child and the parents or for the benefit of the school. Although it is very clear that the decision of the United States supreme court is not binding on the interpretation of the Wisconsin constitutional provisions—which have

been held to be the most complete of all state constitutional provisions guaranteeing the separation of all religions, religious establishments, modes of worship, and everything of religious character or appertaining to religion, from the state as a civil government, and all its civil institutions, *State ex rel. Weiss v. District Board* (1890) 76 Wis. 177, 44 N.W. 967—nevertheless the conclusion of that court in the *Everson* case cannot be overlooked.

It is true as pointed out in the opinion of Attorney General John W. Reynolds to the assembly dated June 24, 1959, that even though a system of "released time" has been held by the United States supreme court not to violate the first amendment, it nevertheless does violate the Wisconsin constitution. 48 OAG 121.

Possibly the Wisconsin supreme court would also hold that the transportation of parochial school pupils violates the Wisconsin constitution. In view of the constitutional history of the State of Wisconsin and the court's strict adherence to the rule of separation of church and state, it would appear that there is a greater likelihood for this legislation to be found unconstitutional here than elsewhere. But this cannot be said with the same assurance as in the case of the "released time" question.

The question whether the transportation of parochial school pupils is for the benefit of the children, and therefore not in violation of the constitution, or is for the benefit of the parochial schools and the religious societies which maintain them, and therefore unconstitutional, is an open one in this state. *Costigan v. Hall* (1946) 249 Wis. 94, 100, 23 N.W. 2d 495.

However, the *Costigan* case was prior to the *Everson* case, and it appears that the *Everson* case clearly settled the "public purpose" question raised in Attorney General Martin's opinion of 1945. The *Everson* case held that the public transportation of parochial school pupils was a public purpose. It would appear likely that our court, despite the constitutional history referred to above, would give great weight to this opinion of the United States supreme court and could find this proposed legislation constitutional. However, since the Wisconsin court in the *Costigan* case refused to rule on the question, the point remains an open one here.

In summary, then, it can be said by virtue of the *Everson* case, some of the factors previously relied upon in the Martin opinion are now of doubtful validity and that opinion can no longer be cited in support of the unconstitutionality of this bill. I am of the opinion that it can no longer be said with certainty that this legislation is unconstitutional. In view of our constitutional history, however, some doubt in regard to constitutionality remains. Therefore, I must advise you that I cannot say that this proposed law is either constitutional or unconstitutional. This is a question which must be resolved ultimately by the Wisconsin supreme court.

NSH

(Following opinion issued by deputy attorney general during absence of attorney general.)

Taxes—Legislation—Provisions in sub. amend. 1, S., to Bill No. 707, S., and in 733, S., relating to mutual savings banks' taxable income, are not within scope of Art. XI, sec. 4, Wis. const. regarding votes for passage.

August 2, 1961.

THE HONORABLE, THE SENATE.

By Resolution No. 22, an opinion has been requested regarding the vote necessary for the passage of Bill No. 707, S., in the form shown by Substitute Amendment No. 1, S., and for the passage of Bill No. 733, S., in view of the provisions in Art. XI, sec. 4 of our constitution.

Said Art. XI, sec. 4 provides:

"The legislature shall have power to enact a general banking law for the creation of banks, and for the regulation and supervision of the banking business, provided that the vote of two-thirds of all the members elected to each house, to be taken by yeas and nays, be in favor of the passage of such law."

Bill No. 707, S., in the form shown by Substitute Amendment No. 1, S., among its several provisions constituting a comprehensive reformation of certain general tax laws,

contains proposed provisions relating to deductions of mutual savings banks in the computation of their income taxes and specifically reducing the deductions which state and national banks may take in computing their net taxable income for Wisconsin income tax purposes, by a part of the total deductions deemed related to the exempt interest income received from obligations of the United States or its instrumentalities. Bill No. 733, S., is a separate bill which contains only such mentioned provisions.

The inquiry, thus, is whether Bill No. 707, S., in such form, because it contains these provisions applicable to state and national banks, must be passed by the two-thirds vote required by said Art. XI, sec. 4, in order to be valid, and whether Bill No. 733, S., containing only such provisions and standing alone, to be valid must be passed by such required vote.

The basic question is whether such mentioned special provisions constitute provisions "for the regulation and supervision of the banking business" as used in said Art. XI, sec. 4. If they come within that language, then this constitutional provision would require that Bill No. 707, S., in the form of Substitute Amendment No. 1, S., be passed by a two-thirds vote in each house of all of the members elected thereto, to be taken by yeas and nays. Similarly, if such provisions are of this nature, Bill No. 733, S., in order to be valid would require passage by such vote.

The present provisions in sec. 4 of Art. XI of the constitution, by an amendment in 1902, were substituted for and superseded old secs. 4 and 5 of said Art. XI. There are no decisions of the supreme court since then that furnish any criteria for determining when a law is "for the regulation and supervision of the banking business" as used in the present constitutional provision. Old secs. 4 and 5 were quite different and provided that the legislature should "not have the power to create, authorize or incorporate, by general or special law, any bank or banking power or privilege" without first submitting to the vote at any general election the question of whether there shall be or shall not be banks; and that if the vote at such election was in favor of banks, then the legislature "shall have power to grant bank charters, or to pass a general banking law, with such restrictions, and under such regulations as they may determine

expedient," but that such grant or law shall be of no effect until it has been submitted to a vote of the electors at a general election and approved by a majority of the votes cast at such election. Prior to 1902, while such old sections existed, there were some early cases in the supreme court relative to the application thereof that furnish the only assistance in resolving the basic question.

The case of *State ex rel. Reedsburg Bank v. Hastings* (1860) 12 Wis. *47, offhand might be taken as establishing that an enactment of a statute specifically taxing banks or specifically providing in respect to the taxation of banks would constitute the enactment of a banking law or be a provision regulating and supervising the banking business and, therefore, would require compliance with the voting requirements of Art. XI, sec. 4, to be valid. However, full review of that case shows that it does not necessarily follow from that decision that a statutory provision specifically taxing banks or specifically providing in respect to the taxation thereof, which is not enacted as a part of a general banking law enactment, is a statute regulating or supervising banks.

There the tax provision under attack imposed upon banks a semi-annual tax of three-fourths of 1% of the amount of its capital stock. But it was a part of a general banking law enacted by ch. 479, Laws 1852, and was not a statute enacted separately from the enactment of a general banking law. It was included as a part thereof which was enacted in full compliance with the provisions of old secs. 4 and 5 of Art. XI, in that it provided for, was submitted to, and received a favorable vote of the electors at the November 1852 general election. The attack on such taxing provisions was that they violated the uniformity rule of taxation in Art. VIII, sec. 1, of the constitution. The court disposed of this objection by holding that the tax uniformity provision is applicable only as a limitation on the general power of the legislature and enactments made pursuant to old secs. 4 and 5 were not an exercise thereof, but an exercise by the electors of the power reserved to them by old secs. 4 and 5 in respect to general banking laws. Having been enacted as a part of the general banking law in full compliance with the requirements of old secs. 4 and 5, the court held the uniformity provision inapplicable thereto and therefore the tax was valid.

In *Van Steenwyck v. Sackett* (1864) 17 Wis. *645, the supreme court held invalid a provision enacted in 1855 making changes in the statute relating to maintaining adequate security deposits with the state treasurer to guarantee a bank's circulating notes, on the ground it was never submitted to the vote of the people required by said old secs. 4 and 5 of Art. XI. The court said that its opinion therein was not to be taken as deciding that it was not possible for the legislature to impose new duties on banks in common with those incidental to the exercising of other recognized powers of the legislature, and then said that, if such legislation were upheld, it would be on the basis that it was not an amendment to the banking law, but an exercise of the power "outside of the scope and object of" a banking law that did not in any way affect the provisions of the general banking law.

In holding that the general usury law was applicable to loans made by banks, the court in *Brower v. Haight* (1864) 18 Wis. *102 said that while the consequence of the *Reedsburg Bank* case was that because of the existence of secs. 4 and 5 requiring submission to and approval by a vote of the electors, a mere act of the legislature was not capable of changing or amending the banking law, it did not follow that a bank existing under the general banking law cannot be affected by or be subject to any other law.

It said:

"* * * and it by no means follows that because that law cannot be amended by the legislature, the banks existing under it cannot be affected by or subject to any other law. On the contrary it is very obvious that they may be and are. Thus the mode and measure of redress for most wrongs that may be committed by banks in common with other persons, are not provided for in the banking law, but are to be looked for in the general legislation concerning remedies. And they are changed, as against banks, whenever that general legislation is changed. Thus, if a bank leases premises, and refuses to deliver possession on the expiration of the lease, it is not in the banking law that the remedy is to be found, but in the statute concerning unlawful detainer. And if that statute should be changed and rendered more stringent, imposing new penalties on the lessee for the wrong, banks would be subjected to the new statute, like

all other persons. And it would not do for them to say that no such liabilities were imposed by the banking law, and the legislature could not amend that law, and therefore they were not subject to the new statute. The obvious answer would be that such a statute was no attempt to amend the banking law; no attempt to change or impair any of its provisions or interfere with any rights conferred by it; no attempt to legislate upon a matter which that law had undertaken to regulate. That law provided the terms and conditions on which the business of banking might be carried on. It did not attempt—and it would have been exceedingly unreasonable for it to have done so—to provide a special, separate system of remedies against banks for wrongs which they might commit against others. It is designed to leave them subject, like all other persons, to the general laws upon those questions."

A statute subjecting to a fine or imprisonment any officer or agent of a bank receiving a deposit knowing the bank is insolvent was held in *In re Koetting* (1895) 90 Wis. 166, not to be an amendment to the banking law, but a general law applicable to banks and natural persons. It did not impair or affect any banking power or privilege conferred by the banking law and therefore it was not necessary that it be submitted to and approved by the people as required by old secs. 4 and 5. The court reviewed prior cases and said at P. 169:

"* * * The result of these decisions, so far as necessary to the present discussion, seems to be the establishment of two general propositions, which may be briefly stated as follows: First, the general banking act cannot be materially amended except by a law submitted to and approved by the people; second, banks organized under that law are subject to general statutes and rules of law which apply to them alike with other corporations and persons, provided there be no impairment of the powers and privileges given them by the banking law."

In this last case it was said that in determining whether the statute there involved took from banks any rights or privileges conferred upon them by the general banking law the real question was whether the general banking law authorized the carrying on of banking business by an insolvent bank. The court noted that there had been in exis-

tence in the general banking law, prior to the enactment of the statute in question, provisions for the summary winding up of the business of an insolvent bank, which contemplated the forfeiture of the charter in such situation.

It then went on to say at P. 172:

"* * * Clearly, it must result that an insolvent bank has no franchise to do business. If it has no such franchise or privilege, then it is deprived of no right or privilege by the passage of a law punishing an officer thereof for receiving a deposit when it is insolvent to his knowledge. This law deprives the bank of nothing which it had before, and affects no right guaranteed to it by the general banking law. * * *"

In *Northwestern National Bank v. City of Superior* (1899) 103 Wis. 43, it was held that a general statute fixing the preference and priority of claims in the liquidation of insolvent corporations, which was enacted by the legislature and not a part of a general banking law, or an amendment thereto, submitted to a vote of the people as required by old secs. 4 and 5, was applicable in a proceeding liquidating an insolvent bank. After reviewing its several prior decisions, the court said at PP. 51-52:

"It thus appears that the court has uniformly taken the view, which must result from a thoughtful examination of the act itself, that the banking act was not an attempt to codify all laws which should in any way affect, control, or regulate a banking corporation. It is apparent that the scheme of that act was to provide for the creation of corporations with certain peculiar powers, and to enact a body of special provisions required for some of the peculiar and distinguishing business of such corporations and of individuals similarly engaged, leaving the corporation so created, as a member of the business and commercial community, to be regulated by the laws governing other individuals and corporations therein, except so far as the very act itself had defined the differences. * * * An attempt to exhaust the illustrations of this view would be but needless extension of this opinion. Suffice it to say that it is perfectly clear that many of the rights, duties, obligations, and more especially remedies, applicable to corporations and individuals having or exercising banking powers, are to be found outside of the banking act, and therefore within legislative

control. It therefore becomes a question in each instance whether the subject covered by an act of legislature or by a rule of common law is fairly within the purview or scope of the banking act, so that we must find the regulation of that subject within that act or may look to the more general law."

In 20 OAG 1127 in referring to the provisions in sec. 4, Art. XI, and the decisions under its antecedent, old secs. 4 and 5, it was said that the constitutional requirements there all apply to substantive changes in the laws governing the creation of banks and the regulation and supervision of banking business; that general laws apply to banks as well as others which do not materially affect the creation of banks and the regulation and supervision of the banking business; and that such general laws do not require enactment by the two-thirds vote; but that if an enactment does materially affect the creation of banks or the regulation and supervision of the banking business, the two-thirds vote requirement is applicable therein, whether it is general in application or applicable only to banks.

It is not possible to conclude with any certainty that the court would view the mentioned provisions contained in Bill No. 707, S., in the form of Substitute Amendment No. 1, S., or as set out separately in Bill No. 733, S., as not within the category of banking laws or laws regulating or supervising banks and therefore not subject to the necessity of passage of the particular bill by the two-thirds vote required in sec. 4, Art. XI. However, upon the basis of what was said in the above mentioned court decisions, it is my opinion that neither of said bills are of that nature and subject to passage by the two-thirds vote requirement of sec. 4, Art. XI.

The provisions involved do not amend or change any provision in the general banking laws set out as Chs. 221 to 224, Stats., providing for banks and their regulation and supervision. The enactment thereof would not be in exercise of the legislative power to regulate or supervise the business of banking. It would be an application of the general taxing power of the legislature. There is nothing in said general banking laws relative to the taxation of banks. Nothing in these proposed provisions in any way says how, when or where a bank shall conduct its banking

operations or that prohibits or restricts the exercise of any authority to carry on banking activities. They do not take away or cut down any right or privilege accorded to banks by any provision in said banking laws. Such provisions are proposed as a part of the general scheme of taxation as applied to banks as a particular class of taxpayers coming thereunder.

However, an uncertainty exists and if it were to be held that such provisions do come within the vote requirements of sec. 4, Art. XI, then unless Bill No. 707, S., containing these provisions was passed by the required two-thirds vote, that would jeopardize the validity of the entire bill and probably result in it being declared invalid. This is particularly pertinent in view of the nonseverability provision in sec. 26 of Substitute Amendment No. 1, S. This possibility would be avoided by deletion of these provisions from Bill No. 707, S., and enactment thereof by separate bill, such as is proposed by Bill No. 733, S. Then, although it is my view that such Bill No. 733, S., would likewise not need the two-thirds vote requirement to be valid, if it were not passed by such a vote and the court should hold that the provisions come within sec. 4, Art. XI, only such provisions of such separate bill would be invalidated.

It is my opinion, however, that a simple majority vote is all that is required for the passage of either of these bills.

HHP

Legislation—Statutes—Failure to incorporate in ch. 355, Laws 1961, the additions to sec. 67.03 (1) made by ch. 114, Laws 1961, was an oversight, and both amendments stand and should be incorporated in the subsection in the 1961 statutes.

September 28, 1961.

JAMES J. BURKE,
Revisor of Statutes.

You ask whether both the amendments made by chs. 114 and 355, Laws 1961, or only the amendment made by ch. 355, which was passed after ch. 114 was published and

omitted the amendment made by ch. 114, should be incorporated in printing sec. 67.03 (1) in the 1961 statutes.

Both chapters amended sec. 67.03 (1) and neither included the amendment made by the other in the recital of the subsection therein. If both amendments are incorporated, the subsection will read as follows, with the words added by ch. 114 indicated by parentheses and the amendment by ch. 355 in brackets:

"67.03 (1) Every municipality may borrow money and issue muncipal obligations therefor for the purposes specified and by the procedure provided in this chapter, and for no other purpose and in no other manner, except as provided otherwise in s. 67.01 (7) and (8). Every municipality is forbidden to become indebted in any manner or for any purpose to any amount, including existing indebtedness, which in the aggregate exceeds the following: As to cities which are authorized to issue bonds for school purposes, 8 per cent, (as to any school district offering no less than grades 1 to 12 and which is at the time of incurring the indebtedness eligible for the highest level of school aids, 10 per cent,) and as to (other) school districts, 5 per cent, of the value of the taxable property therein as equalized for state purposes, [and as to counties having a population of 500,000 or more, 5 per cent of the last equalized assessment of said county for state taxes made by the department of taxation under s. 70.57,] and as to other municipalities, 5 per cent of the value of the taxable property therein, to be ascertained by the last local assessment for general tax purposes, and the principal indebtedness of any county is further limited to not exceeding 5 per cent of the last equalized assessment thereof for state taxes made by the department of taxation under 70.57."

At the November, 1960, general election an amendment to Art. XI, sec. 3 of the Wisconsin constitution was approved which changed, for counties having 500,000 or more population, the base of the 5 per cent debt limitation from the assessed value to the equalized value, leaving assessed value as the base for all other counties. Bill No. 273, A., which became ch. 355, was drafted to expand the borrowing authorization in sec. 67.03 (1) to reflect this constitutional increase in the debt limit of counties of 500,000 or over in population, by adding the above bracketed language. It was

introduced on February 23, 1961, passed by the assembly on March 30, concurred in by the senate on June 22, 1961, signed by the governor on August 4, 1961, and on August 12, 1961, was published as ch. 355, Laws 1961.

At the April, 1961, election another amendment to said Art. XI, sec. 3, of the constitution was approved, which increased the debt limitation for those school districts that offer no less than grades 1 to 12 and are eligible for the highest level of state aid from 5 per cent to 10 per cent of equalized value. The impetus for such amendment was the increasing need of many school districts for additional school facilities and the financial inability of such districts to provide them within the previous limitation on borrowings. In numerous instances the situation was extremely acute and the district was anxious to commence construction of new buildings or additions to existing structures, but the amount which it could borrow in addition to its existing indebtedness would be insufficient therefor. For school districts meeting the qualifications to take advantage of the increase in their borrowing power by such amendment, it was necessary to make their statutory authorization to borrow correspond. It was imperative that this be done at once so that construction programs could get under way so as to have the additional facilities available as soon as possible. Accordingly, Bill No. 658, A., was introduced on May 25, passed by the assembly on June 2, concurred in by the senate on June 5, signed by the governor on June 8, and published on June 10, 1961, as ch. 114, Laws 1961, all within less than three weeks. It provided for insertion in sec. 67.01 (3) of the language in parentheses in the above quotation of this statute, and also for some changes in other statutes to implement such change.

Bill No. 273, A., contained the wording of sec. 67.03 (1) as it was when the bill was drafted and introduced, which was before Bill No. 658, A., was drafted. Thus, Bill No. 273, A., in setting out sec. 67.03 (1) did not include therein the language inserted by Bill No. 658, A., which became ch. 114. Likewise Bill No. 658, A., contained the wording of sec. 67.03 (1) as it was at the time that bill was drafted and introduced. It did not include the additional language inserted by ch. 355, as Bill No. 273, A., which became ch. 355, had not been passed when Bill No. 658, A., was published as ch. 114 on June 10, 1961. Bill No. 273, A., was not

changed to correspond to the additions made to sec. 67.03 (1) by said ch. 114 and was published as ch. 355 without inclusion in the text of sec. 67.03 (1) as set out therein in ch. 114 amendment.

Comparable situations have arisen in the past under similar circumstances and in every instance it has been resolved that, if the amendments are not inconsistent, the amendments made by both chapters are effective. The guiding principle is that the legislative intent is to be ascertained from the enactments and the surrounding circumstances, and such intent is controlling.

Here the amendment made by ch. 355 related to the debt limitation of counties and only to those having 500,000 or more in population. Its obvious purpose was to make only such change in sec. 67.03 (1) as would increase the borrowing authorization for counties of that character up to the raised debt limitation resulting from the recent constitutional amendment. It did not purport to amend anything in sec. 67.03 (1) relating to the borrowing authorization of school districts.

The reason that ch. 355 did not contain the bracketed language is obvious. That language was not the law when Bill No. 273, A., was drafted and introduced. The bill was drawn even before the approval at the April, 1961, election of said second amendment to the constitutional debt limitation provision. It was not known when it was drafted whether such amendment would be so approved. Until such approval, any inclusion in Bill No. 273, A., of language such as was added to sec. 67.03 (1) by ch. 114 would have been subject to the objection that it was contrary to the constitution.

On the other hand, Bill No. 658, A., which became ch. 114, did not purport to make any change in that part of sec. 67.03 (1) which relates to the borrowing authorization of counties. Its content shows that it was confined solely to matters concerned with making available to qualifying school districts the additional borrowing power which resulted from the constitutional amendment approved at the April, 1961 election. Its legislative history, and particularly its passage and approval within two weeks of introduction, clearly indicates that it was enacted for the purpose of mak-

ing such additional borrowing power available with all possible dispatch. Ch. 114 could not have included the language added to sec. 67.03 (1) by ch. 355, as the latter had not as yet become the law. That Bill No. 273, A., was not changed after ch. 114 became the law by its publication a relatively short time before Bill No. 273, A., was passed by the senate, was clearly an oversight.

From this history of these measures it is abundantly clear that the legislature, in passing ch. 355 after ch. 114 had been passed and published so as to become law, had no intention of repealing what it had done in passing ch. 114. In view of the content of ch. 114 and the present interest in providing needed additional educational facilities, something positive would be necessary to establish a legislative intent to repeal its provisions. It is a well-established rule that repeals by implications are not favored.

There is nothing in ch. 355, or its history, that either evidences any intent to repeal ch. 114 or implies any such intent. It, therefore, must be concluded that both amendments were intended by the legislature. There is ample precedence that impels such conclusion.

In an early case, *Custin v. City of Viroqua* (1886) 67 Wis. 314, 30 N.W. 515, the bill first recited that the words "twenty-five nor more than one hundred and fifty dollars" should be stricken from a statute fixing the fee for a license and "seventy-five nor more than two hundred dollars" substituted therefor. In the setting out of the section as it would read after the amendment, the bill read "not less than seventy-five dollars" and did not include the top limitation of $200 as it had previously recited. Relying on the statute as being amended to the form in which it was set out in full in the bill, the city had fixed and charged a fee of $500, and contended this was proper as the statute fixed only a minimum and left the municipality free to charge whatever fee in excess thereof it wished. The court held that this misconstrued the legislation and said at P. 319:

"* * * It is true the latter part of the section is in conflict with the alleged purpose of the legislature as declared in the first part; but we cannot conceive that if the legislature had intended to leave the maximum price of such licenses to the discretion of the town, city, and village authorities, it would have limited such maximum in de-

claring how the then existing law should be amended. The legislature first declares what the amendments to the existing section on the subject shall be, and then undertakes to recite how the section will read when so amended. In this recital there is evidently a mistake, and we think it the duty of the courts to carry out the clear intent of the legislature, and hold that the recital in the amendatory act of the statute as amended should be so contrued as not to defeat the intent of the legislature, clearly expressed in that part of it which declares what the amendments to the existing law shall be. So construed, the village board was mistaken in supposing that it had, under the existing law, a legal right to fix the price of the license at $500."

State v. Stillman (1892) 81 Wis. 124, 51 N.W. 260, is another instance where the obvious legislative intent was controlling. There the legislative act, after specifying the changes to be made in the statute, recited the section as amended and contained therein a change in addition to the changes specified. It was held that this added change was to be disregarded as a clerical error and the statute was amended only by the change specified, that being what the legislature obviously intended. The court there said at P. 126:

"* * * The rewriting and re-enactment of the whole section with the amendment or amendments engrossed, is a mere rule of the legislature to secure a clearer and readier understanding of the place and effect of the amendment. It is no part of the legislative act. *The act consists of the amendment alone* * * *." (Emphasis supplied)

A situation very close to the present one was considered in *Svennes v. West Salem* (1902) 114 Wis. 650, 91 N.W. 12. The statute there involved, sec. 3187a, dealt with the laying out, extending, vacating, etc., of public ways. In the fourth and last sentence it was provided that, when taken without an application being filed therefor, until "A certified copy of any" such action was recorded it should not be effective against a subsequent purchaser or mortgagee. By ch. 351, Laws 1899, the words "certified copy of any" were stricken. Two years later the 1901 legislature enacted ch. 121, Laws 1901, amending the same section, first stating that it should be amended by striking out the words "or town board" in the first sentence, and then reciting the section as it was to read after the amendment. The recital of the

statute contained the four words stricken in 1899 just as though they had never been deleted. The court held that such recital did not have the effect of re-enacting these four stricken words. It said at P. 653:

"* * * Such amendment by its terms was expressly limited to the third line of the section, whereas the sentence in question commenced in the sixteenth line of the section. There was manifestly no intention of changing the last sentence of the section in any manner. By inadvertence, there was a failure to recognize the fact that the four words mentioned had been stricken out two years before. This court has repeatedly held that such 'a mistake or omission in such recital will not defeat the intention of the legislature.' *Custin v. Viroqua,* 67 Wis. 314, 30 N.W. 515; *State v. Stillman* 81 Wis. 124, 51 N.W. 260. Such clerical error in the recital of the section as amended must therefore 'be disregarded, and effect given only to the amendment specified.' * * *"

Still stronger support for the position that both the amendments made by chs. 114 and 355, Laws 1961, to sec. 67.03 (1) are operative and a part of this section, is found in a later case, *State ex rel. Board of Regents v. Donald* (1916) 163 Wis. 145, 157 N.W. 782. Among the provisions of the 1913 Statutes making appropriations for normal schools (later called teachers colleges and now state colleges), subsec. 30 of sec. 172-54 made appropriations of $4,000 on July 1, 1913, $4,000 on July 1, 1914 and $50,000 on July 1, 1915 to the board of regents for the purchase of property and permanent improvements at the school at Whitewater. By a bill introduced August 2, 1915, approved on August 24, and published on August 27, 1915 as ch. 633, Laws 1915, this subsec. 30 was "amended to read" so that instead it appropriated $9,775 on July 1, 1915 and $4,475 on July 1, 1916 for the purchase of property and permanent improvements at the Whitewater school. The court held that the 1915 amendment did not repeal the July 1, 1915 unexpended balance of the $50,000 March 1, 1915 appropriation made by the subsection prior to the amendment. Upon examination of the circumstances in that case the court found that the legislature had no intention of repealing or revoking said unexpended balance. In its opinion at page 147 the court said:

"Undoubtedly, also, the general rule of construction is that, where a statute rewrites a former statute and states that the same 'is amended so as to read as follows,' all provisions in the original statute not found in the amending statute are repealed. *Ashland W. Co. v. Ashland Co.* 87 Wis. 209, 58 N.W. 235, and cases cited.

"This is because the inference is necessarily strong that such was the legislative intention. The rule, however, is not ironclad. The idea of all such rules is to carry out the legislative intention, and if it appear that the legislative intention was otherwise the rule must go and the intention prevail. The rule is not sacred, but the intention is. The intention 'is to be determined from the nature and language of the amendment, from other acts passed at or about the same time, and from all the circumstances of the case.' *Bank of Metropolis v. Faber,* 150 N. Y. 200, 44 N.E. 779.

"Under the circumstances before us in the present case we think it quite certain that the amendment of 1915 shows no intention to repeal or revoke the unexpended balances of the appropriations carried by the original sub. 30, but rather the reverse. * * *"

This last case is particularly significant because the form of the bill was the same as presently used pursuant to legislative rules. Instead of a narration of the change or changes followed by a recital of the statute as it will read after such amendment, the bill merely sets out the statute as it was to read as amended, with deletions indicated by being stricken through and additions by italics. This shows that the controlling element is the legislative intent which is determined from the bill itself, its history and the surrounding circumstances, and what form of bill is used makes no difference. It dispels any argument that the cases previously cited herein are authoritative only where the form of the bill is that used in those instances.

Also the case is exceptionally strong as there the subsequent amendment, which the court found was not intended to and did not operate to revoke the unexpended balance of the March 1, 1915 appropriation that remained on July 1, 1915, specifically changed the very language of the statute which made the appropriation for March 1, 1915. Here the later amendment by ch. 355 did not even touch the

portion of sec. 67.03 (1) that was amended by ch. 114 and dealt with an entirely different subject.

In 20 OAG 558 an identical situation was involved. Bill No. 184, A., which was introduced February 6, 1931 and became ch. 55, Laws 1931, amended the provisions in sec. 6.14 (1) requiring registration of voters in every city, village and town, having a population of 5,000 or more. It added language in the first sentence to require registration in every city, village or town in a county of 300,000 or more even though of less than 5,000 population. Then Bill No. 619, A., which was introduced March 18, 1931, and became ch. 253, Laws 1931, added at the end of sec. 6.14 (1), a new sentence providing the subsection should not apply to any city, village or town of less than 5,000 population if inmates of state penal institutions or hospitals are not counted. In setting out the subsection as it was to read, the words added by ch. 55 were not included but there were no stars or asterisks therein at the point where the words added by ch. 55 appeared in the subsection.

The bills were pending in the legislature concurrently and it was obvious from the failure in ch. 253 to indicate, either in the bill or the enrolled act, any omission of the addition made by ch. 55, that in the passage of ch. 253 the legislature overlooked ch. 55 and there was no intention to repeal ch. 55. Reliance was placed upon the previously mentioned *Svennes v. West Salem* (1902) 114 Wis. 650, 91 N.W. 121, and the part of the opinion there was quoted at length. It was noted that similar situations occur at almost every session of the legislature and the practice is to correct such oversights in a revisor's correction bill at the end of session by re-enacting the statute to include both chapters, but that this was overlooked and no such correction was made in the 1931 session. However, it was stated that the failure to do so could not affect the legislative intent in the passage of both bills, and that the existence of such practice evidences that such oversights are mere inadvertences and no repeal is intended. It was, therefore, concluded that said sec. 6.14 (1) read as amended by both of the chapters.

In another opinion shortly thereafter, 20 OAG 716, the same type of situation was involved. There three chapters were involved, none of which indicated by stars or asterisks that it was omitting what had been added by the others,

but dealt with the content of the statute as it read in the 1929 statutes. Relying on the prior opinion in 20 OAG 558 it concluded that the statutory provision involved read as amended by all three acts.

Another situation of this nature was the subject of an opinion in 25 OAG 179. Bill No. 36, A., was introduced January 23, 1935 and was published as ch. 89 on May 21, 1935. It amended sec. 70.62 (2) by striking "preceding" and inserting "current" in place thereof so that the county tax limitation would be at a percentage of the total valuation of property therein for the current year. Bill No. 409., A., was introduced on March 6, 1935, which was after Bill No. 36, A., was introduced but before it was published. Bill No. 409, A., amended the same subsection by adding a proviso at the end, but its recital of the subsection contained the wording of the statute as it was when the bill was drafted and introduced, and although Bill No. 36, A., had been published it was not changed to correspond thereto and when it was published, retained the words "preceding year." It was concluded that county tax maximum should be computed on the valuation of the current year as that was the obvious legislative intent.

A very similar situation was the subject of an opinion in 30 OAG 394. There ch. 333, Laws 1941, was introduced the same day that ch. 187, Laws 1941, was published. Both amended the introductory paragraph of sec. 20.49, but ch. 333 in reciting how the paragraph should read as amended by it failed to include the language added thereto by said ch. 187. Relying upon the previously mentioned *State ex rel. Board of Regents v. Donald* (1916) 163 Wis. 145, 157 N.W. 782, and the prior opinions in 25 OAG 179 and 20 OAG 558, Chief Justice Martin, then Attorney General, advised that ch. 333 did not repeal ch. 187 and that the amendments made by both became a part of the paragraph.

More recently another oversight of this same nature was the subject of an opinion in 40 OAG 262. In a previous opinion in 38 OAG 611, sec. 20.49 (5a) Stats., 1949, was construed as not providing that the appropriation made thereby was available for use on roads at Stoute Institute since it was not a part of the "University" or of the "State Teachers Colleges" nor a "state charitable institution." To make it so available Bill No. 229, S., was intro-

duced to amend such subsection by adding the words "Stout Institute" to follow the words "state teachers' colleges" in the several places where they appeared. It was passed in that form, approved on May 4, and took effect as ch. 202, Laws 1951, by publication on May 9, 1951. However, in the meantime Bill No. 283, S., which became ch. 456, Laws 1951, by approval on June 27 and publication June 29, 1951, had been introduced. It amended the subsection by changing the amount of the appropriation for improving highways at the mentioned state agencies from $25,000 to $50,000. Having been drafted before ch. 202 had gone into effect, Bill No. 283, S., did not include the insertions made by ch. 202. It was apparent from the history and surrounding circumstances of the two enactments that the failure to incorporate in ch. 456 the changes made by ch. 202 was a mere oversight and it was considered that both amendments were intended by the legislature and, therefore, were incorporated in sec. 20.49 (5a).

In 40 OAG 268 is another opinion dealing with an inadvertent failure to conform one bill to the changes made by another. Bill No. 382, S., which became ch. 725, Laws 1951, was a comprehensive revision of numerous statutes relating to public assistance and was introduced quite some time prior to the introduction of Bill No. 696, A. All that Bill No. 696, A., did was delete the words "and less than 65" from the one sentence provision in sec. 49.61 (2) (a), which previously read "Who is more than 17 and less than 65 years of age." It was approved July 6, 1951 and published as ch. 595, Laws 1951, on August 2, 1951. However. in Bill No. 382, S., the only amendment of sec. 49.61 (2) (a) was the change of "17" to "18" and the language deleted by ch. 595 was not omitted. Bill No. 382, S., was approved on August 3 and published as ch. 725, Laws 1951, on August 16, 1951, with the recitation of the subsection including the words deleted by ch. 595 and only changing "17" and "18." Upon consideration of the circumstances relating to both bills and the *Svennes v. West Salem* and *State v. Stillman cases, supra,* it was concluded that the legislature did not intend to nullify the amendment by ch. 595 by the repetition of the deleted words in ch. 725.

An almost identical situation was also passed upon two months later in 40 OAG 390. There, again, it was concluded that the repetition in said ch. 725, Laws 1951, of words

that were deleted from sec. 49.18 (1) by ch. 432, Laws 1951, which was published before Bill No. 382, S., was adopted and published as ch. 725, was not intended to nullify the deletion of such words by said ch. 432 and, therefore, both amendments stand. In 41 OAG 296 is another opinion to a like effect that recitation in a subsequently published legislative enactment of words deleted by a prior current enactment does not reinstate such words where it is obviously a mere oversight and there is no basis for concluding that the legislature intended to undo by the latter one what it had done by the earlier one.

In view of the circumstances relating to the enactment of chs. 114 and 355, Laws of 1961, the conclusion is inescapable that the legislature clearly intended to make both amendments to sec. 67.03 (1), and therefore, under the above precedents in the printing of the subsection in the 1961 statutes both amendments should be incorporated.

HHP

Forest Crop Land—Counties—Ch. 195, Laws 1959, providing that county forest crop lands can be withdrawn only for purposes of sale under sec. 28.12, is a valid enactment.

September 28, 1961.

CALVIN A. BURTON,
District Attorney, Vilas County.

Your office has inquired whether under the laws of 1959 Vilas county may withdraw land which it has registered with the conservation commission under the forest crop law, ch. 77, Wis. Stats., without making the reimbursement to the state required by sec. 28.12 (4), in the event the conservation commission did not waive reimbursement under sec. 28.12 (5).

The question raised hinges upon the validity of ch. 195, (a) the following sentence: "A county may withdraw county-owned lands from this chapter under s. 28.12."
Laws 1959, which added to the provisions of sec. 77.10 (2)

Under the provisions of sec. 28.12 it is clear that county forest crop lands can be withdrawn only for sale, and if they are sold to any purchaser other than the state or a local unit of government the county must reimburse the state for sums paid out to the county under the provisions of sec. 20.280 (80) to (85).

The bill which became ch. 195, Laws 1959, was apparently sponsored by the conservation department because of our opinion in 46 OAG 16 (1957), in which we pointed out that under a strict construction of sec. 77.10 (2) (a) as it existed in the laws of 1957, it appeared possible for a county to withdraw lands not for the purpose of sale without becoming subject to the provisions of sec. 28.12, and hence without any liability for making any reimbursement whatsoever as contemplated by the initial agreement between the county and the state.

In the successive enactments and amendments of the forest crop law as it applies to counties, which have a history dating back to 1927, the original principle, that taxes were to be deferred on privately owned lands and counties were to be compensated for the development of county forest lands upon condition of later reimbursement to the state, was not always strictly borne in mind by the draftsmen of the statutes. The provision of law which is now found in sec. 28.10 *et seq.*, which authorizes the county board to establish a county forest and provides for its administration, was initially adopted by ch. 57, Laws 1927, as sec. 59.98. This statute, which was comparatively brief, included among the powers of the county in sec. 59.98 (2) (b) the power "To sell any or all such reserve to the state." There was no power to sell such lands to any other person. Neither was there any provision in the statutes for state aid for county forests, nor any provision for reimbursing the state for contributions made for such aid.

Provision for such aid was first made by ch. 455, Laws 1931, which were the laws in effect in 1933 at the time you state that the Vilas county lands were registered as county forest crop land. This chapter created two new subsections of sec. 59.98, that is, (5) and (6). Subsec. (5) provided for the payment by the state of an amount equal to 10 cents per acre for land within the forest reserve to be used for the purchase, development, preservation and main-

tenance of the forest reserve, and subsec. (6) provided that no timber should be cut from such county forest land except with the consent of the county board, the conservation commission and the governor. It further provided that the state should receive 75 per cent of the revenue from timber cut from county forest land on which the state has paid contributions under the forest crop law.

If the agreement between Vilas county and the state is considered a contract, it would have to be viewed in the light of the statutes as they existed in 1933 at the time the alleged contract was entered into.

If the claim is advanced because of conflicting provisions of the statutes, either then in existence or later adopted, the county was able to withdraw from the agreement without any reimbursement whatsoever to the state, then the sums paid by the state to the county would be mere gratuities and there would be no binding contract which would militate against the state's right to adopt a statute such as ch. 195, Laws 1959.

Moreover, if the foregoing was not suffiicent answer, the law appears to be established that subordinate agencies of this state, such as its counties and municipalities, have no right or privileges protected by the federal constitution as against the state itself, neither do they have protection under the due process and equal protection clauses of the state constitution, except in extremely limited circumstances which are not involved in the present case. *State ex rel. Martin v. Juneau* (1941) 238 Wis. 564, 570; *Town of Bell v. Bayfield County* (1931) 206 Wis. 297; *Richland County v. Richland Center* (1884) 59 Wis. 591, 594, 18 N.W. 197; *Will of Heineman* (1930) 201 Wis. 484; *School District v. Callahan* (1941) 237 Wis. 560; *Hunter v. Pittsburgh* (1907) 207 U. S. 161, 52 L. ed 151.

In the case of *State ex rel. Martin v. Juneau, supra,* the court stated at page 570:

"* * * A municipal corporation has no privileges or immunities under the federal constitution which it may invoke against state legislation affecting it. *Williams v. Baltimore* (1933) 289 U.S. 36, 53 Sup. Ct. 431, 77 L. Ed. 1015. The authority of the legislature over a municipal corporation is supreme, subject, however, to such limitations as may be prescribed by the state constitution. * * *"

In the case of *School District v. Callahan, supra,* at page 570, the court quoted with approval the following statement from *Hunter v. Pittsburgh*:

" 'Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. . . . The state, therefore, at its pleasure, may . . . expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the federal constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it.' "

In the instant case any right of the county, if it existed, to withdraw county forest crop lands from registration without reimbursement to the state under a statement that the withdrawal is not for purposes of sale, would not appear to be a property right protected under the state constitution which the legislature cannot alter, particularly when the alteration is consistent with the policy and purpose of the law as it existed at the time the lands were entered under the county forest crop law.

RGT

Insurance—Policy—Statutes do not provide for any form of group fire insurance or use of memorandum of insurance referring to or attempting to incorporate provisions of a master policy by reference. Discussion of secs. 215.22 (9), 203.01, and 203.06.

October 4, 1961.

R. J. WINKOWSKI,
Commissioner, Savings and Loan Department.

You state that it has been proposed that a state chartered savings and loan association enter into an agreement with an insurance company operating in the fire and extended coverage field, whereby the insurance company would issue one master policy to the association and would thereafter issue a memorandum of insurance to individual borrowers of the association who elected such coverage. The insurance company would furnish a duplicate copy of such memorandum of insurance to the association for filing in the borrower's mortgage loan document file.

You inquire whether such a plan meets the requirements of sec. 215.22 (9), which provides:

"(9) INSURANCE COVERAGE OF MORTGAGED PREMISES BY BORROWER; DEPOSITING OF INSURANCE POLICIES WITH THE ASSOCIATION. (a) *The borrower shall cause the* buildings and improvements on any property on which an association has a mortgage *to be insured* and kept insured in a designated amount during the life of the loan, *for the benefit of the association,* against loss by fire, windstorm and such other hazards as the association requires, *in companies selected or approved by the association.*

"(b) *The insurance policies shall remain on deposit with the association until the loan is paid.*"

It is difficult to give an answer to a generalized question such as yours which does not include detailed facts as to the plan and circumstances under which it is promoted.

Who is to be the named insured in the master policy? Is it to be the association alone? Names of future borrowers and parcels covered could not, of course, be specified by name and description. Is there to be a monetary amount applicable to the master policy? What is its purpose? Is it for the benefit of the association or for the benefit of the insurance company or agency which desires to tie up the underwriting of policies on properties on which the association makes loans?

It is difficult to see how there could be a "master policy" in a contract sense at the inception of the plan as at that time the association would have no insurable interest. The plan must contemplate a conditional agreement to insure, in accordance with a master policy on file with the association, the interest of the association and the interest of the unknown owner of property to be specified at a later date in amounts to be ascertained at a later date. The master policy would have to conform with the standard policy which is compulsory by reason of sec. 203.06. The memorandum of insurance would be a substitute for a policy of insurance and would of necessity have to refer to or incorporate by reference the provisions of the master policy.

"A mortagagee of real or personal property has an insurable interest to the extent of the mortgage debt, * * *." 29 Am. Jur. 792; *Manson and another vs. The Phoenix Ins. Co.* (1885) 64 Wis. 26.

"The mortgagor or owner of property encumbered by a mortgage or deed of trust has an insurable interest to the extent of its full value, * * *." 29 Am. Jur. 792.

Sec. 203.06 provides in part:

"Standard policy compulsory; permissible variations. (1) No person or company, except town mutual insurance companies, shall issue, use or deliver for use any fire insurance policy on property in this state, unless it shall conform as to all provisions, agreements and conditions of the standard policy as set forth in s. 203.01. Appropriate forms of other contracts or endorsements, whereby the interest in the

property described in such policy shall be insured against one or more of the perils which one or more of the insurers issuing the policy is empowered to assume, may be used in connection with the standard policy. Such forms of other contracts or endorsements attached or printed thereon may contain provisions and stipulations inconsistent with the standard policy, provided that the fire and lightning portions thereof shall be in accord substantially with such standard policy. Subject to the approval of the commissioner, the provisions of the standard policy may be so arranged in the policy as to provide for convenience in its preparation and issuance, provided that the insuring provisions and contract conditions of the standard policy shall not be altered or amended in any manner. * * *

"(2) (a) There may be inserted in the space indicated therefor or added to the policy by agreement in writing thereon or by indorsement thereto, the following:

"1. Descriptions and specifications by schedule or otherwise of the property covered by the policy.

"2. Any matter stating the extent of the application of the insurance under policy.

"3. Any matter stating the extent of the contribution to be made under the policy in case of loss or damage.

"4. Any matter necessary to express all the facts and conditions relating to insurance on any particular risk.

"5. In case of a mortgage or other person holding an interest in property by way of security, who is not named in the policy as an assured, a rider or indorsement, relating to the interest of such mortgagee or other person may be added to such policy. Provided, however, if the insurance covers real property, any loss not exceeding $100 shall be paid solely to the assured mortgagor.

"* * *"

The prescribed statutory details as to form and content of standard fire insurance policies are mandatory. *Wojtzak*

v. Hartland F. Mut. F. Ins. Co. (1929) 200 Wis. 118, 227 N.W. 255.

The statutes do not provide for any form of group fire insurance or of use of a memorandum of insurance referring to or incorporating provisions of a master policy by reference.

Sec. 215.22 (9) contemplates that there be an original policy, in a form authorized by law, on deposit with the association until the loan is paid. One or more of such policies must be on deposit as to each specific borrower, loan and property. Under sec. 215.22 (9) the policy could be in the name of the association, however the insurable interest of the association is only to the extent of its loan. It is possible to have separate policies, one in the name of the association and one in the name of the owner, but it is more common to have a single policy for the full value of the premises or in an amount satisfactory to the association, naming both the association and the borrower as insureds. The most common practice is to have the borrower as the named insured with a rider or endorsement attached relating to the interest of the mortgagee.

We have been furnished with a copy of the proposed form of "Memorandum of Insurance" to be used under the plan, which is a multi-copy form designed so that the first copy can go to the insured and association, the copies being for home office, bureau, agent and statistic division of the company. Promoters of the plan state that "The sole purpose of the * * * plan * * * is merely to permit the lending institution to hold master policies of insurance which contain all the required provisions of fire insurance contracts, with explanatory language by reference to a certificate or 'face of the policy' which is attached to the master policy and of which a copy is placed in the mortgage folder and another copy delivered to the named insured."

The certificate or "face of the policy" identifies the name and address of the insured, the mortgage holder, the policy term, location and type of buildings, premium amounts, types of coverage, class of building and other items neces-

sary to permit the company to underwrite the risk, but contains few if any of the provisions set forth in sec. 203.01 required to be included in a policy of insurance. The "Memorandum of Insurance" states at the top of said form: "This certifies, that policy numbered as above has been issued."

At the bottom of said form there appears:

"This memorandum is for information only; it is not a contract of insurance but attests that a policy as numbered herein, and as it stands at the date of this certificate, has been issued by the Company. Said policy is subject to change by endorsement and to assignment and cancellation in accordance with its terms."

If the memorandum is not the contract of insurance between the insured owner, and the company, what is the contract? The insured owner was not a party to the agreement between the insurance company and association nor was he covered by name by the master policy on file.

The reasons for the standarized policy are apparent. In *Bourgeois vs. Northwestern National Ins. Co.* (1893) 86 Wis. 606, 609-610, 57 N.W. 347, it is stated:

"This act is broad and sweeping in its terms and scope. It aims to bring order out of chaos. Prior to its passage there were as many different contracts of insurance as there were companies. The variations and differences between the conditions of the policies issued by the various insurance companies were almost infinite in number; new clauses and conditions were being constantly inserted, generally ingeniously worded and obscurely printed; and, singularly enough, these new conditions were always in the interest of the insurer, and not of the insured. To meet this condition, the act under consideration was passed. That it is a long step in the right direction cannot be doubted. Under it there can be practically but one form of policy. When a man contracts for insurance, he knows that he is contracting for a standard policy and for nothing else, and he knows that he will get that and nothing else. As the law becomes

better known, and the terms of the standard policy better understood, it is manifest that it will be more valuable to the business world.

"Thus much as to the purpose and probable effects of this law is apparent to the most superficial observer. More critical examination reveals the undoubted fact that the law was not passed solely for the protection of the insured. It provides, in clear and distinct terms, that other conditions may be printed or written upon or attached to the policy, but that they shall *not be inconsistent with nor a waiver of any of the provisions or conditions of the standard policy.* In thus providing that other conditions may be incorporated in the policy by writing or printing, other methods are plainly excluded under familiar legal principles. The intent plainly was and is that, so far as the conditions and provisions of the standard policy go, they shall govern, and that they shall not be omitted, changed, or waived in any manner. Other provisions not conflicting with them may be added in writing or printing, but the conditions of the standard policy itself must remain unimpaired."

Sec. 203.06 (1) uses the words "shall issue, use or deliver for use." While a contract of insurance may be consumated without delivery of a policy, the legislature intended that where delivery of evidence of insurance is made, the purchaser of insurance should be furnished with a full and complete contract listing all of the respective duties and obligations of the interested parties. The legislature did not intend that the insured would have to go to the office of the mortgagee, the office of the insurance commissioner or the office of the insurance company to view the policy. Nor did it intend that he resort to the statutes to ascertain the provisions of a standard policy or that he would have to request a copy of the policy from the insurance company.

While it may be argued that under the plan the association would have the master policy at hand and should know its rights thereunder, it is in the best interests of the association if the borrower also has a complete copy of the insurance contract at hand as the borrower is most likely to

have earliest knowledge of any loss for which a claim should be submitted and is in the best position to make timely claim or to notify the association of the necessity for doing so.

You are advised that the memorandum of insurance specified in your question, standing alone or attached to a "master policy" would not be a policy within the meaning of sec. 215.22 (9) (b) required to be on deposit with the association until the loan is paid nor does it constitute a policy in compliance with the provisions of secs. 203.01 and 203.06.

While the memorandum states that it is not a contract of insurance, but is merely a certificate that a policy has been issued, it is clear that it is intended to be used as a policy or at least as a part of a policy as the master policy to be used in connection therewith provides in part:

"The described premises covered hereunder are located at the addresses set forth in the certificates hereto attached and title to said premises is in the names of the parties designated as Named Insured in said certificates. Insurance is provided for the parties above named and to the parties named in the certificates hereto attached in the manner and under the conditions as set forth, as is evidenced by this policy and the certificate hereto with respect to those coverages which are indicated by a specific limit of liability applicable thereto."

Under sec. 215.22 (9) (a) *the borrower shall cause* the improvements on the property to be insured in an amount at least as high as designated by the association. The amount to be designated by the association can be in excess of the association's loan within reasonable limits. The insuring company is to be selected or approved by the association, however, such right of selection is grounded upon the right of the mortgagee to have the insurance placed with a sound company and it is questionable whether the association can arbitrarily compel a borrower to purchase insurance from a single company.

It is not clear from your letter as to whether commissions for the placement of such insurance would go to association,

an outside insurance agency, or to an employee, officer, or director of the association acting as agent in an individual capacity or as a participant in an insurance agency.

Granting of a loan cannot be conditioned upon requiring a borrower to purchase insurance through a particular insurance agent or broker or involving a transaction wherein an officer, director, employe or agent of an association directly or indirectly receives a commission or consideration.

Sec. 215.39 (1) provides:

"(1) Every officer, director, employe or agent of any association who shall accept or receive, or offer or agree to accept or receive any thing of value in consideration of his loaning any money to any person; or any person who shall offer, give, present or agree to give or present any thing of value to any officer, director, employe or agent of any association in consideration of its loaning any money to him, shall be punished by fine not exceeding $1,000 or by imprisonment not exceeding 6 months, or by both such fine and imprisonment."

Sec. 207.04 (3) (a), (b) provides:

"(a) No person, firm or corporation engaged in the business of financing the purchase of real or personal property or of lending money on the security of real or personal property and no trustee, director, officer, agent or other employe of any such person, firm or corporation, shall require, as a condition precedent to financing the purchase of such property or to loaning money upon the security of a mortgage thereon, or, as a condition prerequisite for the renewal or extension of any such loan or mortgage or for the performance of any other act in connection therewith, that the person, firm or corporation for whom such purchase is to be financed or to whom the money is to be loaned or for whom such extension, renewal or other act is to be granted or performed, negotiate any policy of insurance or renewal thereof covering such property through a particular insurance agent or broker.

"(b) This subsection shall not prevent the reasonable exercise by any such person, firm, corporation, trustee, director, officer, agent or employe of his right to approve or disapprove the insurer selected to underwrite the insurance or to determine the adequacy of the insurance offered."

RJV

Cosmetologist—Words and Phrases—A cosmetologist licensed under Ch. 159 may cut hair irrespective of the sex of the customer.

October 9, 1961.

DR. CARL N. NEUPERT,
State Health Officer.

You ask whether any provisions of Chs. 158 and 159, Stats., prevent a licensed cosmetologist from cutting the hair of men or boys in a licensed beauty salon.

Ch. 158 deals with barbers, and Ch. 159 with cosmetologists.

Subsecs. (1), (2), and (3), of sec. 159.01 read in part:

"(1) 'Cosmetology' means any one or combination of practices generally performed by beauty culturists, cosmeticians, cosmetologists or hairdressers and shall include but not be limited to: Arranging, dressing, curling, waving, cleansing, cutting, bleaching, coloring or similar work upon the hair of any person by any means, * * *.

"(2) 'Cosmetologist' is any person who, for compensation, either directly or indirectly or in the expectation thereof practices cosmetology. * * *

"(3) 'Beauty salon' embraces and includes any establishment or place of business wherein cosmetology is practiced. * * *"

Sec. 159.15 prohibits practice of cosmetology without the appropriate license and provides penalties for violating any provisions of ch. 159 or any rules of the board made pursuant thereto.

Sec. 158.15 prohibits practice of barbering without the appropriate license; but sec. 158.01 (14) (d) provides that persons "licensed to practice cosmetic art" shall not be deemed barbers and shall not be required to be licensed as such.

Sec. 158.01 (14) (f) provides further:

"(f) But this subsection shall not be construed to authorize any of the persons exempted to shave or trim the beard or cut the hair of any person for cosmetic purposes, excepting, however, that persons licensed pursuant to ch. 159 may bob, shape, thin, singe, and shampoo hair in addition to the rights and privileges conferred in ch. 159."

As you have pointed out, the attorney general issued an opinion in 1936 (25 OAG 75) that under the statutes as they then existed a cosmetician might not cut the hair of men and boys. At that time, the definition of cosmetic art in sec. 159.01 (1) was:

" 'Cosmetic art' is the systematic massaging with the hands or mechanical apparatus of the scalp, face, neck, shoulders and hands, the use of cosmetic preparations and antiseptics; manicuring, bobbing, dyeing, cleansing, arranging, waving, curling and marcelling of the hair and the use of electricity for stimulating and for the removal of superfluous hair."

The attorney general's opinion in 1936 was based in part upon the use of the term "bobbing" in the above definition, as well as upon the reference to bobbing in sec. 158.01 (14) (f). The opinion included the following excerpt:

"Apparently this provision was intended to draw a distinction between cutting hair and bobbing hair, and it seems to have been the legislative intent that a cosmetician

may bob hair, but not cut hair. It may not be easy to draw the dividing line between these two operations in all cases, but we do believe that the two terms have come to have fairly common and approved meanings. No man or boy of any size would speak of having his hair 'bobbed'. After the childhood curls have once been removed and the hair has once been cut short, the boy or man speaks of having his hair 'cut' — never 'bobbed'. On the other hand, when the women, a few years back, decided to forego a part of their crowning glory, the operation was referred to as 'bobbing', and today the word 'bobbing' has been restricted pretty much to the cutting of women's and girls' hair, and perhaps, also, the hair of boy babies whose mothers sometimes prolong the period of baby curls to the advanced age of four or five, unless the boy's masculinity rebels at such treatment at an earlier age." (pp. 77, 78).

Assuming that the opinion was entirely correct under the statutes as they then existed, it is necessary to consider whether the legislature superseded it by the changes effected by ch. 723, Laws 1951, by which the present definition of "cosmetology" in sec. 159.01 (1) was substituted for that on which the earlier opinion was based.

It seems to me significant that the legislature not only substituted the word "cutting" for "bobbing", but added the inclusive phrase "or similar work upon the hair of *any person* by any means".

Had the legislature intended cosmetology to be limited to serving women, it would have been simple to say "any women" instead of "any person".

It is true that the present definition refers to practices "generally performed by beauty culturists", and that beauty culturists may not generally have men for customers. The term "generally" in the phrase, however, refers to "practices" rather than to the persons upon whom the practices are performed. Beauty culturists may rarely serve customers over 100 years of age, or customers who are residents of Tahiti. The fact that a particular kind of customer is a

rarity, however, does not of itself make the service given to him a rarity, provided it is otherwise "generally performed".

The legislature apparently sought to phrase a definition to comprehend all types of practices which need supervision from the standpoint of public health. Exclusions which have no basis in considerations of public health should not be presumed without language clearly indicating such a legislative intent, merely because such exclusions might be deemed desirable on grounds unrelated to public health.

Sec. 158.01 (14) (f) was not amended by ch. 723, Laws 1951; but since it excepts licensees under Ch. 159 in the exercise of *any rights and privileges conferred in ch. 159,* it requires reference to Ch. 159 in any event, so that its scope is necessarily affected by a material revision of the definitions in Ch. 159.

BL

Constitutionality—Schools—Provision in Bill No. 2, S., inserting into sec. 40.46 (10) a requirement that the pledge of allegiance be recited by all pupils once a week in all public and private schools would be in violation of the First and Fourteenth Amendments to the Constitution of the United States.

October 24, 1961.

HONORABLE GAYLORD A. NELSON,
Governor of Wisconsin.

You have requested my opinion on the constitutionality of Bill No. 2, A., relating to school curriculum requirements. The constitutional question arises out of an amendment to sec. 40.46 (10), the material part of which reads as follows:

"(10) Each public and private school shall * * * *require that the pledge of allegiance be recited by all pupils in*

*grades one to 8 at the beginning of school at least one day per week * * *."*

This language was inserted into the bill by Amendment No. 2, S., and by Amendment No. 3, S., to Amendment No. 2, S. The words proposed in the original Amendment No. 2, S., were as follows: "and require that the pledge of allegiance be recited in each class in grades one to 8 at the beginning of such class each morning," Amendment No. 3, S., to Amendment No. 2, S., struck out the words "in each class" and inserted in lieu thereof "by all pupils" and also struck out "such class each morning" and inserted in lieu thereof the words "school at least one day per week".

The original language contained in Amendment No. 2, S., might have been construed in such a way as to make it optional with each pupil whether to recite the pledge or to remain silent. However, Amendment No. 3, S., to Amendment No. 2, S., by inserting the words "by all pupils", makes clear the legislative intent that the reciting of the pledge is not to be optional, but is to be required of each and every pupil, regardless of his conscientious scruples or religious beliefs. In this form, the requirement is clearly unconstitutional.

The form of the pledge of allegiance is prescribed by federal law, 36 U.S.C.A. § 172, which provides as follows:

"The following is designated as the pledge of allegiance to the flag: 'I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all'. Such pledge should be rendered by standing with the right hand over the heart. However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress. Persons in uniform shall render the military salute."

Formerly the pledge did not contain the words "under God," which were inserted in 1954, 68 Stat. 249. The pledge in its present form requires not only an affirmance of al-

legiance to the flag and to the nation, but also an affirmance of a belief in God.

The United States Supreme Court in *West Virginia State Board of Education v. Barnette* (1943) 319 U. S. 624, 642, 87 L ed. 1628, 1639-1640, 63 S. Ct. 1178, 1187, 147 A. L. R. 674, held that a regulation of the state board of education requiring pupils in the public schools to participate in a ceremony saluting the flag and reciting the pledge of allegiance, which at that time of course did not contain the words "under God", violated the First and Fourteenth Amendments to the Constitution of the United States. The attack on the regulation came from members of the sect of Jehovah's Witnesses and was based upon their religious objection to the ceremony on the basis of the Second Commandment relating to graven images. In holding that the regulation (accompanied as it was by the sanction of expulsion from school and consequent prosecution of the parents for violation of the compulsory school attendance law and a finding of delinquency on the part of the expelled children) violated the Constitution, the court overruled its earlier decision in *Minersville School Distrct v. Gobitis* (1940) 310 U. S. 586, 84 L ed. 1375, 60 S. Ct. 1010, 127 A. L. R. 1493. The court did not limit its ruling to the enforcement of the regulation against the class of persons who were attacking it in that action, but held it invalid as to any pupil who did not wish to participate. The concluding language of the majority opinion has been much quoted since that time:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

"We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment

to our Constitution to reserve from all official control."

What has been said so far is perhaps sufficient to demonstrate that the bill as passed by the legislature violates the constitutional guaranties of the First and Fourteenth Amendments. However, it should be pointed out that the addition of the words "under God" make the compulsory recitation of the pledge of allegiance even more violative of constitutional freedoms as interpreted by the Supreme Court of the United States. In a case decided this year, the Court struck down a provision in the Constitution of Maryland requiring a declaration of belief in the existence of God as a prerequisite to holding office in that state. *Torcaso v. Watkins* (1961) 367 U. S. 488, 495, 6 L ed. 2d 982, 987, 81 S. Ct. 1680, 1683. The court there stated in part as follows:

"We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws nor impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."

It may be that a statute providing for a ceremonial recital of the pledge of allegiance on an optional basis, with each pupil free to participate or not as he saw fit, could be sustained. See *Application of Lewis* (1960) 11 App. Div. 2d 147, 207 N. Y. S. 2d 862. But it is clear from the legislative history that the requirement in Bill No. 2, S., is intended to be compulsory and not optional or voluntary.

WAP

Courts—Attorneys' Fee—Trial court authorized to order payment of compensation to court appointed attorney under sec. 957.26 (1), as amended, and the amount is to be determined pursuant to sec. 256.49.

November 3, 1961.

ROBERT P. RUSSELL,
Corporation Counsel, Milwaukee County.

You have requested my opinion on the question whether ch. 500, Laws 1961, which amends sec. 957.26 (1), repeals the authority previously granted by the legislature to the courts, to order the payment of compensation by the county to attorneys appointed by the court to defend indigent defendants. It is your opinion that since sec. 957.26 (1), as amended, requires that the court order the payment of compensation pursuant to sec. 256.49, and because sec. 256.49 provides, in part, that in cases "* * * where the statutes fix a fee * * *", the court shall order certain sums to be paid as compensation, that there no longer exists any authority for the court to order compensation to be paid because sec. 957.26 (1) does not "fix a fee".

Prior to the enactment of ch. 500, Laws 1961, the pertinent statutes provided:

"256.49 Compensation of attorneys appointed by court. Notwithstanding any other provision of the statutes, in all cases where the statutes fix a fee and provide for the payment of expenses of an attorney to be appointed by the court to perform certain designated duties, the court appointing the attorney shall, after the services of the attorney have been performed and the disbursements incurred, fix the amount of his compensation for the services and provide for the repayment of disbursements in such sum as the court shall deem proper, and which compensation shall be such as is customarily charged by attorneys in this state for comparable services."

"957.26 Counsel for indigent defendants charged with felony; advice by court. (1) Courts of record may appoint

counsel for defendants charged with felonies and who are without means to employ counsel. Such appointment shall be in time to enable counsel to attend at the taking of any deposition. The county shall pay the attorney so appointed such sum as the court shall order as compensation and expenses, not exceeding $25 for each half day in court, $15 for each half day of preparation not exceeding 5 days, $15 for each half day attending at the taking of depositions, and his actual disbursements for necessary travel and other expense, automobile travel to be compensated at not over 7 cents a mile. The certificate of the clerk of court shall be sufficient warrant to the county treasurer to make such payment."

Section 256.49 was enacted in 1957 (ch. 118, Laws 1957), several years following the effective date of sec. 957.26 (1) quoted above. The legislative history of that statute indicates that the purpose of the 1957 enactment was to authorize the court to fix the compensation of the attorney appointed by the court in such amount as is customarily charged by attorneys in Wisconsin for comparable services.

In considering the effect of ch. 500, Laws 1961, it is necessary to consider the purpose sought to be accomplished by the legislation. The amendment to sec. 957.26 (1) by ch. 500, Laws 1961, is indicated by underscoring and asterisks as follows:

"957.26 (1) Courts of record may appoint counsel for defendants charged with felonies and who are without means to employ counsel. Such appointment shall be in time to enable counsel to attend at the taking of any deposition. The county shall pay the attorney so appointed such sum as the court shall order, *pursuant to s. 256.49,* as compensation * * * and his actual disbursements for necessary travel and other expense, automobile travel to be compensated at not over 7 cents a mile. The certificate of the clerk of court shall be sufficient warrant to the county treasurer to make such payment."

There is evidence that prior to this amendment the provisions of secs. 256.49 and 957.26 (1) were not uniformly

interpreted by the courts throughout the state. Some courts interpreted these provisions to authorize the payment of the fixed fee set forth in sec. 957.26 (1) while others interpreted the statutes to authorize the payment of compensation under the broader provisions of sec. 256.49. The drafting record to ch. 500, Laws 1961, positively shows that the purpose of the 1961 amendment to sec. 957.26 (1) was to require that counsel appointed by the court to defend an indigent defendant be paid such compensation as is customarily charged by attorneys for comparable services. This is the standard provided by sec. 256.49.

While sec. 957.26 (1), as amended, must be construed from its own language, (*Estate of Matzke* (1947) 250 Wis. 204, 208, 26 N.W. 2d 659; *Estate of Ries* (1951) 259 Wis. 453, 459, 49 N.W. 2d 483), the legislative record may be considered as an aid to discover legislative purpose and intent. *Matczak v. Mathews* (1953) 265 Wis. 1, 3-4, 60 N.W. 2d 352; *Nekoosa-Edwards Paper Co. v. Public Service Comm.* (1959) 8 Wis. 2d 582, 590-591, 99 N.W. 2d 821.

In *Nekoosa-Edwards Paper Co. v. Public Service Comm.*, supra, the supreme court, in construing a statute, made use of materials in the legislative reference library and of a Law Review article written by one of the drafters of the statute in question and stated, in part:

"It is argued that such background material is not a proper aid to statutory construction, relying on *Moorman Mfg. Co. v. Industrial Comm.* (1942) 241 Wis. 200, 5 N.W. (2d) 743, and *Papke v. American Automobile Ins. Co.* (1946) 248 Wis. 347, 21 N.W. (2d) 724. These cases are to the effect that what the framer of an act meant by the language used cannot be shown by testimony or his statements. The meaning of a legislative act must be determined from the language used. This language may or may not express accurately what the framer of the act intended to say or what he thought he was saying. In determining the meaning of the language, the court can take judicial notice of the legislative history of acts which are public records. Such material is not determinative, but is sometimes helpful in construing legislative acts. Since the *Moorman* and

Papke Cases were decided, this court has several times made use of such material to substantiate a construction of the language of an act or to aid in choosing one of two or several reasonable constructions in order to adopt that construction consistent with the purpose of the act. See *Larson v. Lester* (1951) 259 Wis. 440, 49 N.W. (2d) 414; *Matczak v. Mathews* (1953), 265 Wis. 1, 60 N.W. (2d) 352 (documents); *Nolan v. Wisconsin R. E. Brokers' Board* (1958), 3 Wis. (2d) 510, 543, 89 N.W. (2d) 317 (correspondence); *Wisconsin Valley Improvement Co. v. Public Service Comm.* (1959), 7 Wis. (2d) 120, 124, 95 N.W. (2d) 767; and *Muench v. Public Service Comm.* (1952), 261 Wis. 492, 510, 53 N.W. (2d) 514, 55 N.W. (2d) 40 (law-review articles by the chairman of the drafting committee which were not a part of the legislative history file)."

The drafting instructions to the legislative reference library state:

"Amend and repeal part of 957.26 so that 256.49 shall apply in determining compensation etc. of attorneys under s 957.26."

In considering the effect of ch. 500, Laws 1961, certain well-established rules of statutory construction must be observed. First, effect must be given to the legislative intent. *Safe Way Motor Coach Co. v. Two Rivers* (1949) 256 Wis. 35, 40, 39 N.W. 2d 847; *Heidersdorf v. State* (1958) 5 Wis. 2d 120, 123, 92 N.W. 2d 217. The statute must be construed to accomplish its purpose. *Chilovi v. Industrial Comm.* (1945) 246 Wis. 482, 486, 17 N.W. 2d 575; *Alan Realty Co. v. Fair Deal Investment Co.* (1955) 271 Wis. 336, 340, 73 N.W. 2d 517; *Schaal v. Great Lakes Mutual Fire & Marine Insurance Co.* (1959) 6 Wis. 2d 350, 353, 94 N.W. 2d 646.

It is well established that if literal construction of a statute produces an absurd, unreasonable or unjust result, a construction not subject to such infirmities must be adopted. *State v. Retail Gasoline Dealers Association of Milwaukee, Inc.* (1950) 256 Wis. 537, 41 N.W. 2d 637; *Worachek v. Stephenson Town School District* (1955) 270 Wis. 116, 124, 70 N.W. 2d 657; *Braun v. Wisconsin Electric*

Power Co. (1959) 6 Wis. 2d 262, 268, 94 N.W. 2d 593; *Wisconsin Valley Improvement Co. v. Public Service Comm.* (1960) 9 Wis. 2d 606, 615, 101 N.W. 2d 798. Furthermore, it is a cardinal principle of statutory construction that a statute must be contrued so as to sustain its validity, (*Town of Madison v. City of Madison* (1955) 269 Wis. 609, 70 N.W. 2d 249), and it is the duty of the court to construe a statute so as to uphold its constitutionality if this can be done consistent with accepted rules of statutory construction. *Lewis Realty, Inc., v. Wisconsin Real Estate Brokers' Board* (1959) 6 Wis. 2d 99, 108, 94 N.W. 2d 238. Indeed, if necessary to accomplish the legislative purpose, it is proper to reject words or to read words in place which seem to be there by necessary or reasonable inference (*Pfingsten v. Pfingsten* (1916) 164 Wis. 308, 159 N.W. 921). In the *Pfingsten Case,* supra, at page 313, the supreme court stated, in part:

"A statute may be plain and unambiguous in its letter, and yet, giving it the meaning thus suggested, it may be so unreasonable or absurd as to involve the legislative purpose in obscurity. *Rice v. Ashland Co.* 108 Wis. 189, 84 N.W. 189. In such case, or when obscurity otherwise exists, the court may look to the history of the statute, to all the circumstances intended to be dealt with, to the evils to be remedied, to its reason and spirit, to every part of the enactment, and may reject words, or read words in place which seem to be there by necessary or reasonable inference, and substitute the right word for one clearly wrong, and so find the real legislative intent, though it be out of harmony with, or even contradict, the letter of the enactment. A thing which is within the intention of the lawmakers and by rules for construction can be read out of it, 'is as much within the statute as if it were within the letter.'* * *"

See, also:

Foster v. Sawyer County (1928) 197 Wis. 218, 223, 221 N.W. 768;

Connell v. Luck (1953) 264 Wis. 282, 285, 58 N.W. 2d 633.

To construe ch. 500, Laws 1961, as a repeal of the authority of the court appointing counsel to defend an indigent defendant to order payment of compensation to the attorney for such defense at county expense would work an absurd and unreasonable result and would defeat the legislative purpose of the act. Indeed such construction would make the statute unconstitutional. *County of Dane v. Smith* (1861) 13 Wis. *585 (654). In your request it is conceded, as it must be, that "* * * there is ample authority to continue to appoint counsel for indigent defendants, * * *", and you only question whether corresponding authority exists for the county to pay for the services. In *County of Dane v. Smith,* supra, at pages 658-659, the supreme court held unconstitutional a statute which provided for the appointment of counsel to defend an indigent defendant but which expressly declared that the county should not be liable to pay for such services, and stated, in part:

"Nor do we think that the legislature can leave with the courts the authority to order and employ, and at the same time destroy the implied promise to pay. The latter arises immediately out of the former, and is, in the law, so inseparably connected with it, that where the former exists the latter exists also. Unless the services are rendered gratuitously, which, under such circumstances, cannot be presumed, the promise of payment follows as of course. The statute, therefore, is so inconsistent with itself, that no effect can be given to it. It is for that reason void."

Section 957.26 (1), as amended by ch. 500, Laws 1961, provides, in part, that the "* * * county *shall pay* the attorney so appointed *such sum as the court shall order, pursuant to s. 256.49,* as compensation * * *." To say that the court may not order the county to pay the attorney's fees is to disregard not only the legislative purpose, but to destroy the very words of the statute which say that the county shall pay a sum fixed by court order as compensation. This would violate the well-established rule of statutory construction that when consistent with the legislative purpose, every word of the statute must be given effect.

Safe Way Motor Coach Co. v. Two Rivers (1949) 256 Wis. 35, 39 N.W. 2d 847.

On the other hand, effect can be given to the legislative purpose and to every word of sec. 957.26 (1) and the legislative intent carried out, by construing the reference in said sec. 957.26 (1) to sec. 256.49 as authorizing the court to order payment of compensation to an attorney appointed by the court to defend an indigent defendant according to the standard established by sec. 256.49, to wit:

"* * * such sum as the court shall deem proper, and which compensation shall be such as is customarily charged by attorneys in this state for comparable services."

Further evidence of the legislative intent that the purpose of ch. 500, Laws 1961, is to authorize the court to order payment of such compensation as is customarily charged by attorneys in the state for like services, is the fact that efforts to restore a fixed fee to sec. 957.26 (1) were defeated in both the assembly and the senate when Bill 457-S (ch. 500, Laws 1961) was being considered [*Bulletin of the Proceedings of the Wisconsin Legislature,* Senate, August 19, 1961, pp. 289-290].

It is therefore my opinion that the court is authorized to order the payment of compensation to an attorney appointed by the court to defend an indigent defendant under sec. 957.26 (1), and that the amount is to be determined pursuant to sec. 256.49.

JHB

Fees—Clerk of Courts—Discussion of ch. 315, Laws 1959, regarding court reorganization and its affect on fees and compensation of clerk of circuit court.

November 17, 1961.

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

You state that pursuant to sec. 59.15 the county board of Dunn county has established the compensation for the clerk of circuit court on a part salary and part fee basis.

The Dunn county court act, ch. 14, Laws 1943, provides in sec. 7 that the clerk of the circuit court of Dunn county shall be clerk of the county court without additional compensation therefor. Presently the clerk receives as part of his compensation all fees in circuit court matters except suit tax, but he receives no fees in actions filed in county court.

The effect of ch. 315, Laws 1959, the court reorganization act, is to make the jurisdiction of the respective county courts uniform with certain exceptions not material here. In other words, ch. 14, Laws 1943, relating specifically to the extra jurisdiction of the county court of Dunn county has been superseded by ch. 315, Laws 1959, effective on the first Monday in January, 1962.

Sec. 253.30 was created by ch. 315, Laws 1959, and provides that the clerk of circuit court shall keep the books and records under sec. 59.39 and perform the duties under sec. 59.395 for all matters in the county court except those under Ch. 48 (Children's Code) and Title XXIX (probate).

Thus with respect to duties the clerk of the circuit court for Dunn county will have substantially the same duties as he had before so far as the county court is concerned.

Under the court reorganization act several questions have been raised by the clerk of the circuit court with respect to his compensation. They are set forth in your request as follows:

"Question 1: Under Title XXV, procedure whereby attorneys file Civil Actions or papers in COUNTY COURT and pay the filing fee, is the Clerk of Circuit Court of Dunn County entitled to the Clerk's fee as set out in 59.42 (2) of the Wisconsin Statutes?

"Question 2: If the District Attorney files a criminal, misdemeanor or felony action in County Court, is the Clerk of Circuit Court for Dunn County entitled to the Clerk's fee as set out in 59.42 (1) of the Wisconsin Statutes?

"Question 3: In small claims procedure, Bill No. 123, S of 1961 as proposed, Section 299.25 (2) on Page 16, as Clerk of Courts, will I be entitled to retain the two ($2.00) Dollars Clerk's fee?

"Question 4: I have been informed that traffic cases are under small claims procedure and the two ($2.00) Dollar fee in Bill No. 236, A, Section 345.46 (a) on Page 29, as amended in Amendment No. 5, A, to bill 236, A, is a Clerk's fee. Is this true? If so, am I entitled to retain such fee?

"Question 5: Section 62.24 (4) of the Wisconsin Statutes for 1959, gives the power to a municipality to abolish a Police Justice Court and 62.24 (4) (b) authorizes the municipality to compensate other officers to handle ordinance cases. Presently I receive compensation from the City of Menomonie, pursuant to 62.24 (4) (b). Chapter 315, Laws of 1959, repeals Section 62.24 (4) (b). Will I lose this compensation?"

I.

Sec. 253.02 (6) (a) of the statutes as amended by ch. 495, Laws 1961, provides that the cost of operation of the county court, except for the salaries of the judge and court reporter provided to be paid by the state, shall be paid by the county. Sec. 59.42 relates to the fees of the clerk of circuit court and the clerk of any other court of record, and it provides that the clerk "shall collect the following fees:". Subsection (1) which follows sets up the fees in criminal cases and subsection (2) sets up the fees for civil action.

Presumably the statutory fees provided by sec. 59.42 are designed to provide the counties with some revenue for meeting the cost of operating the courts, and the county board may require the fees to be paid into the county treasury and place the clerk on a straight salary basis under sec. 59.15 (1) (a) or he may be paid the fees, or part salary and part fees, "and if the compensation established is a salary, or part salary and part fees, it shall be in lieu of all fees, including per diem and other forms of compensation for services rendered, expect those specifically reserved to the officer in such resolution or ordinance."

The provisions of sec. 59.15 are in no way changed by the court reorganization act. In other words, it is still up to the county board to determnie whether the fees collected by the clerk under sec. 59.42 for circuit court and county court are to be paid to the clerk as salary or whether he will be paid a salary exclusively or part salary and part fees. This has always been the case. See: (1906) OAG 103, 26 OAG 394, 40 OAG 460, and 44 OAG 1.

II.

The answer to this question has already been indicated above. Note also 44 OAG 1 to the effect that a clerk of the circuit court on a salary basis is not entitled to retain the fees provided by sec. 59.42 (1) in criminal cases.

III.

This question is likewise covered by the preceding discussion. No fees are retained by the clerk except as authorized by the county board under sec. 59.15 (1) (a).

IV.

Again no fees are retained by the clerk other than as provided by the county board. Moreover, Bill No. 236, A, has been vetoed, and the question relating to this bill is now moot.

V.

Sec. 62.24 (4) (b) (1959 Stats.), provides that in cities having no police justice court the council may fix the fees

or compensation of officers and magistrates for services in actions for violation of city ordinances. This provision is repealed effective as of January 1, 1962, by virtue of the provisions of ch. 315, Laws 1959. Hence, the clerk of the circuit court will lose any compensation which he has been receiving under the old section.

While the question has not been asked specifically we understand from telephone conversations with you that there is the problem of what can be done to adjust the compensation of the clerk of circuit court to offset the loss in fees discussed under question 5 above. This requires reference to sec. 59.15 (1) (a) insofar as it provides that a county officer's compensation shall not be increased nor decreased during his term and sec. 66.195 as amended by ch. 575, Laws 1961, and which permits increases to be granted as an emergency salary adjustment provision during the period February 27, 1951, to December 31, 1963, notwithstanding any other provision of the law to the contrary except that the power must be exercised pursuant to sec. 65.90 (5).

See 45 OAG 116, 45 OAG 166 and 45 OAG 256.

It would appear that the county board acting pursuant to sec. 66.195 could provide for an increase in the salary of the circuit court clerk so that he will not be out of pocket by reason of court reorganization.
WHR

Compensation—County Board—Secs. 40.02 (4), 59.03 (2) (f), and 59.06 (2) do not authorize county board member to collect two per diems on same day; one as board member and one as school committee member.

November 17, 1961.

E. STEPHAN,
District Attorney, Door County.

You have called attention to a problem that has arisen with respect to the per diem compensation of a county board member who is also a member of the county school committee. The state auditors have questioned the right of such an officer to collect two per diems on the same day, one for services as a county board member and one for services as a county school committee member where services are rendered to the county in both capacities on the same day.

In 42 OAG 326 the opinion was expressed that under secs. 59.03 (2) (f) and 59.06 (2) a county board member is limited to one per diem each day even though he meets as a member of one committee in the afternoon and as a member of a different committee in the evening or as a member of the county board in the afternoon and as a committee member in the evening.

There the services rendered were in the same capacity, that of a county board member. Should the result be any different where the services are rendered to the county in two separate capacities, one as a county board member and the other as a member of the county school committee?

Apparently the legal result is the same regardless of the fact that the services are rendered to the county in different capacities.

Mechem "On Public Officers" states in sec. 859:

"An officer who holds two or more separate and distinct offices, not incompatible with each other, to each of which compensation is attached, may receive the compensation

provided by law for each office. He cannot, however, receive a *per diem* from each of two or more sources for the same day's service."

Throop "Public Officers" at sec. 496 says substantially the same thing:

"* * * But it has been said, that where the compensation is a *per diem* allowance, the officer cannot have such an allowance for the same day's service, in each of two or more offices held by him."

Both texts cite the case of *Montgomery County v. Bromley* (1886) 108 Ind. 158. In that case a township trustee was entitled to $2 per day for services rendered in the ordinary business of the township, payable out of township funds. He also claimed $2 per day for services as overseer of the poor. This was paid out of county funds. The court held that he was not entitled to receive $2 from each source for the same day's service, the decision being based on grounds of public policy. A different view, however, has been expressed as to federal service. See *U. S. v. McCandles* (1893) 147 U. S. 692.

While no doubt provision for double per diems could be made by statute there is nothing in sec. 40.02 (4) relating to the per diem compensation of members of the county school committee or sec. 59.03 (2) (f) relating to the per diem compensation of county board members or sec. 59.06 (2) relating to the per diem compensation of county board committee members which indicates any legislative intent to depart from what appears to be the generally accepted rule of public policy in such matters. It must be remembered that compensation statutes are to be strictly construed in favor of the government. See 43 Am. Jur. "Public Officers" secs. 340 and 341; 67 C.J.S. 338.

It should perhaps be added for purposes of clarification that nothing stated in this opinion should be construed as a ruling to the effect that a county board member compensated on an annual salary basis under sec. 59.03 (2) (f) is barred from receiving a per diem as a member of the

county school committee on days when he is serving on the county board or a committee thereof. See *Powers v. City of Oshkosh* (1883) 56 Wis. 660, 14 N.W. 826, where it was held that a city clerk on a fixed salary was entitled to a per diem when acting as clerk of the board of review in the absence of any statute or ordinance depriving him of such compensation. However, note also 40 OAG 224 at 227 where some doubts are expressed on the question of whether a county board member on an annual salary is entitled to additional compensation as a member of the county school committee.
WHR

Licenses—Dental Hygienists—Sec. 152.08 (2) (b) requires state board of dental examiners to examine applicants for licenses as dental hygienists, and it may not delegate this responsibility to the national board of dental examiners.

November 20, 1961.

DR. A. H. CLARK,
Secretary-Treasurer, State Board of Dental Examiners.

You have inquired whether the state board of dental examiners may accept in whole or in part examinations of dental hygienists by the National Board of Dental Examiners as meeting the examination requirements of sec. 152.08 (2) (b) for applicants seeking licenses as dental hygienists in Wisconsin.

Sec. 152.08 (2) (b) was formerly sec. 152.07 (2) (b) but was repealed and recreated by ch. 400, Laws 1961, without change in substance and with but one very minor change in grammar.

It now reads:

"(b) Applicants who qualify under par. (a) shall be examined in writing in such subjects usually taught in

reputable schools for the training of dental hygienists as the board deems necessary. In addition, the applicants shall submit to such practical examination as is prescribed by the board."

It seems obvious that the examination intended is one by the state board of dental examiners which has always examined applicants for dental hygienists' licenses.

The above provision should be compared with sec. 152.04 (1) as it appears in ch. 400, Laws 1961. This relates to the examination to be given to applicants for licenses to practice dentistry, and the last sentence provides:

"In lieu of its own examination, the board may accept, in whole or in part, the certificate of the national board of dental examiners."

If the legislature had intended the same provision to apply to the examination of dental hygienists, it could easily have included similar language in sec. 152.08 (2) (b).

The fact that the legislature included such provision in the one statute and not in the other makes applicable the doctrine of construction known as *expressio unius est exclusio alterius,* —the expression of the one is the exclusion of the other.

It should be noted also that 25 years ago in 25 OAG 459 the attorney general concluded that the state board of medical examiners could not delegate its powers of examining applicants to a national board of medical examiners. This, however, does not preclude a state examining board from making use of examination questions and papers of a national board under proper safeguards. 27 OAG 412.

Thus it is clear that a state examining board may not delegate to some other agency its responsibility of examining applicants for licenses in the absence of specific statutory authorization to that effect.
WHR

Licenses—Real Estate Brokers' Board—Words and Phrases—A director of a business corporation is an officer of the corporation within the meaning of secs. 136.05 (1) (d) and (e) and 136.07 (2), and may be designated to act as a broker by a corporation otherwise qualifying for a real estate broker's license.

November 30, 1961.

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

You state that the board has received applications for corporate brokers' licenses in which the only individual designated as broker is the chairman of the board of directors. In at least one instance the by-laws of a corporation designate the chairman of the board as an officer of the corporation and charge him with duties normally assigned to the president of a corporation.

You inquire whether a chairman of the board of directors, not otherwise designated as an officer of the corporation, can be considered a broker-officer of the corporation so as to permit a license to be issued to the corporation under sec. 136.07 (2).

This inquiry is answered in the affirmative.

Your second question is whether a chairman of the board of directors, designated by the by-laws of the corporation as chief executive officer, can be considered a broker-officer of the corporation, so as to permit a license to be issued to the corporation under sec. 136.07 (2).

This question is answered in the affirmative, however it is not necessary that he be designated in the by-laws as chief executive officer of the corporation. The individual designated by the corporation to act as broker may be *any officer* of the corporation.

Sec. 136.07 (2) provides in part:

"(2) CORPORATIONS; PARTNERSHIPS. If the licensee is a corporation, the license issued to it entitles the

president thereof or such other officer as may be designated by such corporation to act as a broker. For each other officer who desires to act as a broker in behalf of such corporation, an additional license shall be obtained, the annual fee for which shall be $1 for a real estate broker's license and $10 for a business opportunity broker's license. No license as a real estate or business opportunity salesman shall be issued to any officer of a corporation or member of a partnership to which a license was issued as a broker. * * *"

When a corporate application is received, your inquiry should be whether the individual designated by the corporation to act as broker is an officer of the corporation. You are not primarily concerned with the assigned duties of the officer within the corporation, or his comparative rank within such organization.

It should be pointed out, however, that before a corporate license can issue, the board should determine that the "* * * applicant, as a corporation, and each of its officers, individually, are trustworthy and competent * * *". The board may not limit its inquiry to only that officer designated by the corporation to act as a real estate broker. 38 OAG 68, 70, and sec. 136.05 (1) (d) and (e).

It has been the policy of the board to examine the officers of a corporate applicant for trustworthiness, but has required only the officer designated to act as broker to pass the written test for competency. Such administrative interpretation of these statutes, secs. 136.05 (1) (d) and (e) and 136.07 (2), may be binding on the board. *Frankenthal v. Wisconsin R. E. Brokers' Board* (1958) 3 Wis. 2d 249, 88 N.W. 2d 352, 89 N.W. 2d 825.

In 46 OAG 1, 3-4, it was stated:

"Under the provisions of the Wisconsin corporation law, ch. 180, Stats. 1955, it appears that a clear distinction is made between the directors of a corporation and the officers of a corporation, and that the terms as far as the Wisconsin statutes are concerned are mutually exclusive. * * *"

I am of the opinion that this statement is in error. The new business corporation law was created by ch. 399, Laws

1953, and at that date there was an applicable construction statute, sec. 370.01 (25), created by ch. 261, Laws 1951, and presently numbered sec. 990.01 (25) which provided and provides:

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

"* * *

"(25) OFFICERS. 'Officers' when applied to corporations include directors and trustees.

"* * *"

In *State ex rel Matre v. Bergs* (1928) 195 Wis. 73, 76, 77, 217 N.W. 736, it is stated:

"The directors of a corporation constitute its managing body and are popularly and technically its officers. The following cases found in 6 Words and Phrases, page 4949, all hold the term 'officer of' a corporation as used in the statutes or elsewhere includes a director thereof. *Torbett v. Eaton,* 49 Hun, 209, 1 N. Y. Supp. 614, 616. See, also, *Brand v. Godwin,* 15 Daly, 456, 460, 8 N.Y. Supp. 339; *Second Manhattan Bldg. Asso. v. Hayes,* 2 Keyes (N.Y.) 192, 193; *Comm. v. Wyman,* 8 Met. (49 Mass.) 247, 253; *Eastham v. York State Tel. Co.* 86 App. Div. 562, 83 N.Y. Supp. 1019; *U.S. v. Means,* 42 Fed. 599. We have not been able to find any to the contrary."

I am of the opinion that a director of a business corporation is an officer of the corporation within the meaning of secs. 136.05 (1) (d) and (e) and 136.07 (2), whether his only position in the corporation is that of director or whether he is also serving as an officer permitted under sec. 180.41, Stats.

RJV

Loans—Veterans—Loans may be granted to veterans pursuant to secs. 45.35 (8b) or 45.353 for bomb and fallout shelters in construction or improvement of their homes.

December 21, 1961.

GORDON A. HUSEBY, *Director,*
Department of Veterans Affairs.

You have inquired whether the department of veterans affairs presently has statutory authority to lend funds to veterans for bomb and fallout shelters in construction or improvement of homes. You also ask whether such shelters are necessary improvements which can be considered as eligible for a housing loan, a rehabilitation loan or for an advance of funds by a primary lender which will be prior to department's lien.

The department's powers in regard to loans for veterans' housing are established by sec. 45.352, as amended by sec. 11 of ch. 513, Laws 1961. Subsec. (2) (a) thereof, reads in part as follows:

"The department may loan not to exceed $3,500 on the value of the housing accommodation for which it is made, including land, building, improvements, and a garage in construction loans, * * *."

Eligibility of a veteran for loans is established by sec. 45.352 (4) (a) which provides:

"(4) A loan under this section shall be granted only to a veteran who:

"(a) Requires the loan for the purchase, improvement or construction of a home for himself or family."

Webster's New International Dictionary (2d Ed.) defines a "home" in part as follows:

"* * * One's own dwelling place; the house in which one lives; esp., the house in which one lives with his family; the habitual abode of one's family; also, a dwelling house. * * *"

In 45 OAG 22, you were advised that a garage could not be included in the purchase of a home on the basis that a garage is not meant to house a veteran or his family.

Apparently the legislature thought that was to restrictive an interpretation, therefore, garages were made eligible under construction loans by ch. 513, Laws 1961.

The legislature, in encouraging the construction of these shelters, made that portion tax exempt by ch. 425, Laws 1961, which created sec. 70.11 (23).

The federal government makes funds available for the construction of family fallout shelters through the federal housing administration pursuant to the National Housing Act, as amended. (Sec. 203 and sec. 220 (h), National Housing Act).

The legislative intent is amply expressed by these enactments to show that bomb or fallout shelters are to be included in the terms "improvement", "home" or "housing accommodations". It is conceivable that they may be the only "home" that a veteran and his family can call their castle and survive.

Your next question is whether such shelters are necessary improvements. This contemplates exercise of administrative discretion in fact finding such as location of the proposed construction, availability of funds, whether other types of structures should warrant priority or other application of the general law to a specific situation. The attorney general has no authority to engage in fact finding in connection with issuance of opinions upon questions of law under sec. 14.53 (4). 50 OAG 45, 46.

The board of veterans affairs of the Wisconsin department of veterans affairs has the authority to prescribe rules and regulations and for finding facts as to what conditions meet statutory standards, under such provisions as secs. 45.35 (4), (5), (8b), (14) (b) and 45.352 (2) (a), (2) (b), (3) and (4). For example, sec. 45.352 (2) (b) reads:

"(b) The department in administering this section is directed to determine that the purchase price to the veteran of any premises does not exceed the general average of property values and building costs in the area, that the veteran will not be incurring an excessive indebtedness in view of his income, and that the veteran requires a loan in addition to his own funds. In the event that the department determines that the applications for loans shall exceed the funds available, the department shall give priority to loans to the most necessitous cases and take all action necessary to spread the available funds among the maximum possible number of veterans. It is the intent of the legislature that the provisions of ss. 45.352 be construed as liberally as the language permits in favor of the veterans."

It is the function and duty of the Wisconsin department of veterans affairs, as an administrative agency, to ascertain whether these shelters are necessary in light of all the facts and circumstances available to it. This necessarily follows with reference to rehabilitation loans and subordination to primary lenders.
RGM

Beauty Salon—Words and Phrases—Hair Dryers—Discussion of sec. 159.09 (1) relative to hair-washing or hair-drying equipment in business establishments other than beauty salons, and licensing of same.

December 21, 1961.

DR. CARL N. NEUPERT,
State Health Officer.

You ask my opinion on this question: When commercial laundromats or any commercial establishments other than licensed beauty salons or barber shops install hair dryers and other beauty salon equipment in their establishments for use by the public, do they fall within the definition of a beauty salon as stated in sec. 159.01 (3)?

It would appear that the "other beauty salon equipment" referred to in your question would be a dressing table with a mirror and shampoo bowls, apparently placed in the laundromat to enable a patron to wash her hair, with such patron then drying her hair by using the hair dryer on the laundromat premises. On the other hand, a patron might wash her hair (or have it washed) elsewhere, and then come to the laundromat where she would use its hair dryer.

Sub. (3), sec. 159.01, reads in part as follows:

" 'Beauty salon' embraces and includes any establishment or place of business wherein cosmetology is practiced. * * *."

Under this definition, the laundromat here in question is not a "beauty salon" unless cosmetology is practiced therein. "Cosmetology", as used in sub. (3), sec. 159.01, is defined in sub. (1) thereof, so far as it concerns the hair of any person, to mean "* * * any one or combination of practices generally performed by beauty culturists, cosmeticians, cosmetologists or hairdressers and shall include but not be limited to: Arranging, dressing, curling, waving, cleansing, cutting, bleaching, coloring or similar work upon the hair of any person by any means, with hands or mechanical apparatus, or by the use of cosmetic preparations, antiseptics, tonics, lotions, creams or otherwise; * * *."

Does the above-stated definition of cosmetology, so far as it relates to a person's hair, cover hair drying by machine, with the machine's operation being controlled by the person whose hair it is drying? If it does, then the presence of a hair dryer in a laundromat in this state, and its use by a patron to dry her hair, constitutes cosmetology, and makes such laundromat a beauty salon requiring a license under sec. 159.09 (1), which provides in part that, "No person, association, firm or corporation shall operate a beauty * * * salon unless such salon shall be first licensed by the board. * * *."

It is my opinion that the definition of cosmetology above-quoted does not cover hair drying by a hair dryer at a laundromat with the operation of the hair-dryer being con-

trolled by the person whose hair it is drying. In my judgment, it is highly questionable that hair drying constitutes one of those practices "generally performed by beauty culturists, cosmeticians, cosmetologists or hairdressers" defined in sub .(1), sec. 159.01, as including, "Arranging, dressing, curling, waving, cleansing, cutting, bleaching, coloring or *similar work upon the hair of any person by any means,* with hands or mechanical apparatus, or by the use of cosmetic preparations, antiseptics, tonics, lotions, creams or otherwise; * * *." You will note that hair drying goes unmentioned in this statute. Is it, however, "similar work on the hair of any person", i.e., work similar to "Arranging, dressing, etc.". Clearly not. All such practices, even hair cleansing, require some degree of art or skill, and the use of hands or mechanical apparatus is involved in all of them. Hair drying, however, is something that can take place without any use of hands or mechanical apparatus, and even though it is customarily done through use of the hands (drying by towel) or a machine, no art or skill is involved therein. The legislature, in enumerating "Arranging, dressing, etc." before employing general language descriptive of the practices comprising cosmetology, clearly showed that such general language was meant to refer only to practices of the same kind or nature as those specified, doing so by its use of the word "similar" prefacing such general language. Even had it omitted such word, the rule of *ejusdem generis* would produce the same conclusion, namely, that "work upon the hair of any person by any means", following a specific enumeration of various practices as to the care of human hair, would cover only work of the same kind as the enumerated practices. The above-mentioned rule is stated thus: "* * * Where general words follow specific words in an enumeration describing the legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." Sec. 4909, Vol. 2 Sutherland Statutory Construction, 3rd Ed. See also *Chicago and N. W. R. Co. v. Railroad Commission* (1916) 162 Wis. 91, 93; *Johnson v. Bradley Knitting Co.* (1938) 28 Wis. 566, 585,

586 (cited in dissenting opinion); *Thornapple v. Callahan* (1943) 244 Wis. 266, 269; and 46 OAG 28, 29.

It is true that sec. 159.01 (1) states that cosmetology shall "include but not be limited to" certain practices thereafter enumerated specifically and generally. In that context, the word "include" is one of enlargement instead of limitation, so it can be argued that hair drying, even if it falls within none of the practices specifically or generally described as cosmetology" in sec. 159.01 (1), may come within that term nevertheless. Yet even if hair drying is viewed as a practice constituting cosmetology (and in my judgment it should not be), it does not follow that the presence of a hair dryer in a laundromat and its use by a patron thereof constitutes cosmetology. Cosmetology, under sec. 159.01 (1) plainly involves the concept of a service rendered *by one person to another* in the performance of a certain practice, e.g., the waving of such other person's hair, the massaging of her scalp, the manicuring of her nails. If the person receiving such services chose to render them to herself, and to herself alone, at home or elsewhere, she would certainly not be engaged in cosmetology, though she would be if she were to render such service to another person or persons for compensation, either directly or indirectly or in the expectation thereof. See sub. (2), sec. 159.01. Where, then, in the instant case, the hair drying is self-administered by the patron of the laundromat, using a hair dryer on the premises, no cosmetology is practiced on such premises. Nor is any cosmetology practiced thereon, in my opinion, if the patron washes her hair at the laundromat, using facilities provided there for that purpose.
JHM

Drugs—Reducing Aids—Words and Phrases—Oatmeal cookie containing methyl-cellulose is probably not a drug within the meaning of sec. 151.06.

December 27, 1961.

WILLIAM J. MCCAULEY,
District Attorney, Milwaukee County.

You have requested an opinion on the question of whether an oatmeal cookie which contains methyl-cellulose is a drug which may be sold only in a registered pharmacy.

The cookie is sold as an aid in reducing. The theory upon which it operates is that first it is to be consumed one-half hour before meals so as to dull the appetite for food, and secondly it is recommended that the eating of the cookie be supplemented by the drinking of a full glass of water which expands the methyl-cellulose so as to produce a feeling of fullness. The net result is that less food is likely to be consumed at the meal which follows and eventually this will be reflected in loss of weight.

With certain exceptions not material here sec. 151.04 (2) limits the sale of drugs or medicines to registered pharmacists.

Sec. 151.06 provides:

"151.06 **Definition of drug.** The term 'drug', as used in this chapter, means:

"(1) Articles recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them, intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or other animals; and

"(2) All other articles intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or other animals; and

"(3) Articles (other than food) intended to affect the structure or any function of the body of man or other animals; and

"(4) Articles intended for use as a component of any articles specified in subsections (1), (2) or (3); but does not include surgical, dental or laboratory instruments, gases, oxygen therapy equipment, X-ray apparatus, or therapeutic lamps, their components, parts or accessories; or equipment, instruments, apparatus, or contrivances used to render such articles effective in medical, surgical or dental treatment; or articles intended for use or consumption in or for mechanical, industrial, manufacturing, or scientific applications or purposes."

Methyl-cellulose is listed in one of the publications mentioned in sec. 151.06 (1), United States Pharmacopeia, 16th ed. p. 431.

Methyl-cellulose is defined in Dorland's Illustrated Medical Dictionary (23rd ed. W. B. Saunders Co., Philadelphia) as follows:

"A grayish, white, fibrous powder, the methyl-ether of cellulose; used for providing bulk in constipation."

Blackstone's New Gould Medical Dictionary defines it as "a cellulose ether occurring in dry fibrous masses which form a jelly in aqueous solution; used in pharmacy to produce stable dispersions."

Stedman's Medical Dictionary after giving its chemical composition states: "Forms a colorless liquid when dissolved in water, alcohol, or ether. Used to increase bulk of intestinal contents and thus to relieve constipation, or of gastric contents to reduce appetite in obesity; also used dissolved in water as a spray to cover burned areas."

If the product in question consisted solely of methyl-cellulose, it would have to be considered as a drug within the meaning of Ch. 151 of the statutes, because it is included in the United States Pharmacopeia. However, it does not follow that every food product which contains along with

numerous other ingredients a small quantity of some item listed in one or more of the publications mentioned in sec. 151.06 (1) is *per se* a drug, particularly where the effectiveness of the food product which is designed as an aid in reducing depends in part upon the other ingredients to dull the appetite and on the drug item only for bulk.

Consideration should also be given as to whether the cookie in question comes under the classification of "articles intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or other animals" mentioned in sec. 151.06 (2) quoted above.

This is an extremely close question depending largely upon the determination of whether substances which are occasionally used in the treatment of illness must then be considered solely as drugs.

It is difficult to conceive that the legislature intended to treat as a drug every article which a person consumes for the purpose of helping to correct some bodily condition. For instance, many people for the purpose of providing bulk in their diet whether for constipation or for depressing the appetite, use bran (the skin, husk, or hull of the grain) as a breakfast food. In addition, other high-molecular weight carbohydrates, of which methyl-cellulose is one example are commonly used in food. Other examples are tragacanth and agar.

The advertising used in connection with the sale of the cookie product states that it contains no drugs, glandular extracts, or harmful medicine which in themselves will cause weight loss, and that the reducing plan cookie will be found a great help in resisting temptation to eat fattening foods. The ingredients are listed as wheat flour, oatmeal, shortening, sugar, eggs, spices, artificial flavoring, nonfattening milk, salt, leavening, and methyl-cellulose. In other words, the methyl-cellulose is but one of many ingredients, most of which are ordinary food products.

The printed matter which is contained in the package of cookies also stresses the fact that there are a very small

percentage of people who are overweight due to constitutional factors or disease and that this type should reduce only under a doctor's care. However, it is pointed out that "if you are like the millions of others whose obesity is merely due to overeating or indiscretions in diet, you should lose weight following this plan for Easier Reducing."

The purchaser is advised to avoid eating and drinking between meals and to cut down on pies, pastries, fried foods, fats, sweets, sugar, cake, butter, potatoes, gravies and salad dressings. A suggested low calorie menu for a week is included.

The suggestion is also made that since the cookies are designed to curb the appetite they should not be given to children. Counsel for the company in a communication to you have pointed out that the cookie has been marketed for a period of about 7 years in 5 other states in the midwest without any known instance of harm to any person, adult or child. It might be noted also that investigation shows that although these cookies are presently sold in Wisconsin only by drug stores, they are not dispensed as drug items by pharmacists as would be required if the product is to be classified as a drug. See *State v. Wakeen* (1952) 263 Wis. 401, 57 N.W. 2d 364. The cookies are available at self-service counters in drug stores and are checked out by unlicensed clerks along with other non-drug merchandise. It may be concluded from this practice that the pharmaceutical profession does not consider the cookies to be drugs. While not controlling, this practical construction by the profession is of some significance.

As can be seen from the foregoing discussion, the problem is by no means a simple one because of the many variable factors that are or may be involved.

However, in approaching the problem from the standpoint of the prosecuting attorney who has the duty to enforce the state's penal code and who might be called upon to start a prosecution if the product were sold in a grocery store instead of a drug store, some thought should be given to the matter of strict construction of penal statutes. A

penal statute which is open to construction, as this one appears to be, is to be limited rather than extended thereby in favor of the person sought to be penalized, so that in case of fair doubt as to which of two reasonable meanings readable out of the law was intended, that one should be adopted which is most favorable to such person. *Miller v. Chi. & N. W. R. Co.* (1907) 133 Wis. 183, 113 N.W. 384. In other words, if there is a fair doubt as to whether an act charged is embraced within the prohibition of the statute, the doubt is to be resolved in favor of the accused. *State ex rel. Dinneen v. Larson* (1939) 231 Wis. 207, 284 N.W. 21.

I have strong doubts that the legislature ever intended to limit to drug stores the sale of cookies designed to curb the appetite by reason of their being consumed before meals and that contain a filler which expands with water. Moreover, it is doubtful that mere overweight in the average person is a "disease" in the sense of illness or sickness so as to come within the scope of sec. 151.06 (2) or that sec. 151.06 (3) relating to non-food articles is involved. Neither the oatmeal cookie or the cellulose affect the structure or function of the body. Any desired changes in structure are derived from the decreased food intake following the eating of the cookies and not because of anything in the cookies.

This conclusion makes unnecessary any further study of the problem based upon the assumption that the sale of the cookies even though they are held to be "drugs" is nevertheless permissible in non-drug outlets on the theory that they are proprietary medicines as defined in sec. 151.04 (3).
WHR

Rules and Regulations—State Board of Health—H 26.063 (2), Wisconsin Administrative Code is a valid rule of the state board of health.

December 29, 1961.

DR. CARL NEUPERT,

State Health Officer.

You ask my opinion on this question: Does Section H 26.063 (2) of the Wisconsin Administrative Code, adopted by the state board of health, go beyond the statutory authority of such board?

H 26.063 (2) reads as follows:

"OXYTOCICS. Nurses or other non-medical personnel shall not administer oxytocics to antepartum patients unless a physician is present."

You indicate that it is the belief in certain quarters that the above-quoted rule goes beyond the statutory powers of the state board of health "in that it dictates to the attending physician the manner in which he shall engage in the practice of medicine."

The rule here in question is a part of Chapter H 26, Wisconsin Administrative Code, entitled "Maternity Hospitals — Administration and Patient Care." Such hospitals are licensed by the state board of health under sec. 140.35 (2). Sec. 140.05 (8) provides that, "The board shall have power to license *and exercise supervision* over maternity hospitals as provided in ss. 140.35 to 140.39."

Sec. 140.36 (2) reads in part:

"* * * The state board of health shall make such *general* rules and regulations * * * *as shall be necessary to effect the purposes of ss. 140.35 to 140.37.*"

Is H 26.063 (2) within the scope of the rule-making authority conferred on the state board of health by secs. 140.05 (8) and 140.36 (2), and especially by the latter

statute? In my opinion, it is. It seems to me that it was the clear intention of the legislature, in enacting secs. 140.35 and 140.36, to grant the board a broad supervisory power over maternity hospitals and all aspects of their operation, with such power to be exercised to promote the health, safety and welfare of the patients, adults and infants, receiving care therein. This intention is, in my judgment, most plainly shown by certain provisions of secs. 140.35 and 140.36. The latter statute provides in sub. (1) thereof, that,

"* * * The investigation of any application for a license to conduct a maternity hospital shall include an inquiry as to the number of cubic feet of air space available for each patient, the facilities for ventilation and the admission of sunlight to the rooms used for the care of mothers and their infants. No license shall be issued unless the state board of health is satisfied that the physical equipment of the place to be used as a maternity hospital is adequate for the proper care of mothers and infants. * * *"

Such provisions indicate that matters such as air space available for each patient, ventilation facilities, facilities for the admission of sunlight to patients' rooms, and the adequacy of physical equipment of maternity hospitals are subjects which the state board of health may properly inquire into in the exercise of its supervisory power over maternity hospitals. Its clearly established power to inquire into these aspects of maternity hospital operation is surely an excellent index that such aspects are subject to control through rule and regulation of the state board of health. Are they the only aspects of maternity hospital operation subject to the rule-making power of the state board of health? If so, then by far the greater part of maternity hospital operation, including most, if not all, of the actions of doctors and nurses therein, is free from supervision of the state board of health, and beyond the scope of any valid rule issued by such agency. In my judgment, the rule-making power of the board with reference to maternity hospitals is not restricted to so narrow an area, and extends, indeed, over the whole range of physical things and human actions that comprise and make possible the operation of a

maternity hospital in this state. In reaching this conclusion, I am to some extent aided by an opinion of one of my predecessors reported in 39 OAG 388-390, wherein he ruled that the state board of health could make rules, not only as to the *adequacy* of physical equipment in maternity hospitals, but also as to its *use*. This opinion was chiefly based on the provision of sec. 140.36 (1) that, "* * * The state board of health and the local health officer shall keep informed of the nature and reputation of every such maternity hospital and shall visit and inspect the same as often as they deem necessary and for such purposes shall at all reasonable hours be given free and unrestricted access to every part thereof.* * *" Of this provision, my predecessor said:

"* * * This implies far more than the initial investigation as to cubic feet of air space, ventilation, sunlight, etc., although the standards of 'nature and reputation' are admittedly vague."

Whether or not such standards are vague (and I prefer to think of them as being, instead, necessarily broad), my predecessor, in the opinion above-mentioned, relied on their existence as the basis for his opinion that the board's rule-making power, as to maternity hospitals, was broad enough to encompass rules relating to the use, as well as to the adequacy, of physical equipment for such hospitals. On this same basis, it is my opinion that such power extends to the area covered by the rule in question, which seeks to regulate human conduct, in part that of a physician, with reference to the drug induction of labor, involving some risk to mother and fetus. Surely such conduct, and the method in which it is carried out, together with its attendant results, are as much (and perhaps more) a part of the "nature and reputation" of a maternity hospital as is the use of its physical equipment. If the latter subject, as my predecessor has concluded, is governable by state board of health rule, because sec. 140.36 (1) has given the board the duty of keeping itself informed as to the "nature and reputation" of maternity hospitals, and the visitorial powers to carry out such duty, then logic dictates that the human conduct cov-

ered by the rule here in question is properly governable by such rule, for the same reason. In my judgment, the legislature, in imposing the above-mentioned duty and granting the considerable power of visitation to implement it, implied another duty and another power for the state board of health — the duty and power to adopt all rules and regulations necessary to assure for any maternity hospital, assuming it faithfully followed such rules, a nature and reputation consistent with its operation in a manner designed to promote the health, safety and welfare of persons cared for therein.

The administration of the drugs here in question, to induce labor, doubtless constitutes the practice of medicine. See 29 OAG 149, 150, 151 and 30 OAG 246, 248. The power of our legislature to regulate the practice of medicine in Wisconsin is clear. *State v. Michaels* (1938) 226 Wis. 574, 580. See also 41 Am. Jur. Physicians and Surgeons, sec. 8. It follows that the rule in question, as a regulation of the practice of medicine, is a valid exercise of the police power for the preservation and protection of public health unless it goes beyond the scope of the rule-making power with respect to maternity hospitals conferred on the state board of health. For the reasons above-shown, my opinion is that H 26.063 (2), WAC, is well within the scope of that rule-making power. It must be borne in mind that such power, being a power conferred upon a health authority (the state board of health) is subject to liberal construction. "Powers conferred on boards of health to enable them effectually to perform their important functions in safe-guarding the public health should receive a liberal construction; * * *." 39 C.J.S. Health, sec. 9.

In conclusion, then, it is my opinion that H 26.063 (2), WAC, is a valid rule.
JHM

County School Committee—School Districts—Sec. 40.03 (1) (a), created by ch. 232, Laws 1961, merely provides a county school committee with a means to deter repetitive petitions.

December 29, 1961.

DONALD J. BERO,
Corporation Counsel, Manitowoc County.

A question has been raised as to the application of sec. 40.03 (1) (a) created by ch. 232, Laws 1961, which reads:

"40.03 (1) (a) If the county school committee determines that a petition filed under this subsection is identical with or essentially similar to a petition on which it has acted during the past year, it may set the date for a hearing approximately one year from the date on which it held its last hearing on the matter. The petitioners may require that the hearing be held as provided in the introductory paragraph to this subsection if they agree to pay all costs involved, and post bond to cover the cost of the hearing."

About a month ago the county school committee, pursuant to proceedings under sec. 40.03, upon a petition filed with it, duly made an order of school district reorganization in respect to certain territory, to be effective July 1, 1962. Subsequently, certain persons approached the committee informally relative to changing this order with respect to the territory included therein. You ask whether by virtue of this new sec. 40.03 (1) (a) the county school committee has the power to entertain such new petition, or adopt a new resolution, making a proposal involving the same territory in said order, hold a hearing thereon, and make a new and different order in respect to such territory, to be effective July 1, 1962 or at some earlier date.

The provisions of sec. 40.025 (1) (c) clearly deny any such power in the county school committee. Such provisions state that when an order of reorganization has been made, then until the order has gone into effect, every other reor-

ganization proceeding commenced, and every other reorganization order made, pertaining to all or any part of that same territory, is void. Such an intervening proceeding or order is not voidable, but is absolutely void and of no effect whatsoever, whether by the same reorganization authority that made the first order or some other one. But, it is suggested that the enactment of the provisions in sec. 40.03 (1) (a) by ch. 232, Laws 1961, which took effect July 21, 1961, removes this prohibition to the extent of authorizing the filing with a county school committee a new petition relating to the same territory included in an order made by that same committee within the preceeding year but which has not as yet gone into effect. The suggestion is that such provisions preclude such committee from rejecting such new petition as void under the provisions of sec 40.025 (1) (c), but give the committee the discretion to set over the hearing on such new petition to approximately one year from the date of the hearing it held on the prior order.

Review of the background of ch. 232 shows that the purpose of these new provisions in sec. 40.03 (1) (a) was not the creation of an exception to the prohibitions in sec. 40.025 (1) (c). Rather, the intent was to furnish a deterrent to the recurrence of certain vexatious situations that had arisen in a number of instances through an abuse of the effect of the provisions in sec. 40.025 (1) (c).

The provisions of sec. 40.025 were enacted as a part of the revamping of the school district reorganization statute by ch. 536, Laws 1957, to eliminate the previously existing confusion and uncertainty as to the precedence of reorganization proceedings, by providing definite guides therefor. Sec. 40.025 (1) (c) provides that once a county school committee or local municipal board has acquired jurisdiction in a reorganization proceeding, no other county school committee or local municipal board has any power to entertain a reorganization proposal relating to any of the territory included therein, either by petition or by resolution, until the one that acquired jurisdiction has lost its power to act further in the matter perforce of any of the provisions in sec. 40.025 (1) (d). This precludes overlapping of reor-

ganization proceedings and orders. However, sec. 40.025 (1) (c) goes further in the interests of stability and provides that such exclusive jurisdiction continues until an order that has been made in such reorganization proceeding has gone into effect. As sec. 40.025 (4) provides that an order shall take effect on the date it specifies, which shall not be less than 30 days nor more than 1 year from the date it is filed as provided therein. This accords to a county school committee or a local municipal board a latitude for giving stability to school districts according to the individual situation.

The obvious result is that once territory is included in a proposal this precludes any other proceeding being commenced before the same or any other reorganization authority respecting that territory in the proposal is disposed of. In a number of instances, persons insistent on their position that no reorganization be effected in respect to certain districts or territory or that the reorganization be only that which they favored, filed a petition with a county school committee for a specifically stated reorganization. Thereupon the committee, after holding a hearing and following the prescribed procedure, took action to deny it. They filed a new petition with the committee for the same or practically the same proposal before any other petition for a different reorganization respecting the territory or any part of it was filed. This was repeated several times, with the result that, notwithstanding the committee had decided against the proposal, it was required to entertain the repetitive petitions, give the notices and hold hearings thereon. This blocked any consideration by the committee of any other reorganization proposals which it might find desirable. There were also other variations of situations in which repetitive petitions were filed with a county committee for proposals the committee had already considered and turned down. These repetitive petitions were of a harassing nature, and the cost of giving the notices and the expenses incident to holding the hearings, especially in cases where joint committee action was involved being sizeable, was burdensome to the counties involved. But, the county school

committees were powerless to cope with such contumacious procedures, and as no other reorganization proceeding was pending involving the territory, they had no choice but to entertain and act on each repetitive petition anew.

These provisions in sec. 40.03 (1) (a) were designed and enacted to furnish county school committees with a means of deterring the filing of repetitive petition. The sponsors thereof indicated that such was its purpose. There is nothing in the language which indicates any intention to change or make an exception to the prohibitory provisions in sec. 40.025 (1) (c). The language does not mention such provisions either expressly or by implication. It does not say that a petition may be filed thereunder while another proceeding is pending relative to the territory. Nor does it say that a petition may be filed while an order that has been issued has not gone into effect. To have the suggested application compelling language would be necessary. In the absence thereof the two statutory provisions must be read together and each given an application that does not conflict with the other, if that is possible. It is well established that in interpreting statutes they must be construed, if possible, so as to avoid inconsistency and conflict and to give effect to all parts thereof. *State v. Berres* (1955) 270 Wis. 103, 107, 70 N. W. 2d 197; *Associated Hospital Service, Inc. v. City of Milwaukee* (1961) 13 Wis. 2d 447, 109 N. W. 2d 271, 279.

If it had been the intention of ch. 232, Laws 1961, to authorize a county school committee which had made an order of reorganization, that had not gone into effect, to entertain a petition to undo what it had done because it felt it had reached an incorrect result and wished to rectify its error, certainly the burden of paying the cost of the hearing would not have been so placed upon the petitioner. Rather, if that were the case, the legislature would have instead placed the burden of the cost on the county. It would be most anomalous in such a situation to rest the cost on the ones who were not at fault. In addition, if that were the intention of the statutes, there does not appear to be any ration in the provision for postponement of the hearing. If

the intention were to give the committee power to correct a mistake, it should be able to do so at once. The permitting them to postpone it is incompatible with the statutes having any such intent.

Furthermore, the position of the new provisions in the statutes is indicative of the purpose thereof. Had it been the intent to modify or relax the prohibitions in sec. 40.025 (1) (c), it would be expected that these provisions would be put in that section. But, it is not the force of the provisions there which requires a county school committee to forthwith proceed to consider and act upon repetitive petitions. The compelling force therefor is found in the provisions in sec. 40.03 (1) prescribing that the committee shall give notice of and hold a hearing on a petition within 30 days. The obvious place for provisions designed to meet adverse situations arising therefrom thus is either in that subsection or closely following it.

The background of ch. 232 and the foregoing considerations support the conclusion that the purpose of the provisions in sec. 40.03 (1) (a) is to supply county school committees with a deterrent to repetitive petitions by the postponement of any consideration thereof up to a year, unless the proponents post a bond to pay the costs. This will stop harassing petitions, for it would be only where there are good reasons for the new petition that the parties would be willing to undertake the expense thereof or the committee would not impose that as a condition to immediate consideration.

Therefore, the provisions in sec. 40.03 (1) (a) as created by ch. 232, Laws 1961, do not authorize a county school committee to entertain a petition in relation to territory included in an order of the committee which has not as yet gone into effect. It merely provides the county school committee with a means of stopping vexatious repetitive petitions, and is intended to have no further affect.
HHP

Liens—Certificate of Title—Motor Vehicle Department— The motor vehicle department is not empowered to remove the name of a lienholder from a certificate of title at the request of the owner and issue a new certificate unless the terms of sec. 342.25 are met.

December 29, 1961.

JAMES L. KARNS,
Commissioner, Motor Vehicle Department.

You have forwarded a file consisting of correspondence between your department and Mr. John F. Doyle, supervisor of the division of consumer credit, state banking department, concerning certain practices engaged in by a Milwaukee automobile dealer in the sale of automobiles on an installment basis, and have enclosed samples of a sales statement and contract.

The order form and conditional sales contract employed by the company appear to be standard except that a rubber stamp is employed to add the following statements:

In statement of sale —

"TRADE-IN ALLOWANCE IF FINANCED $_____

TRADE-IN ALLOWANCE IF CASH $_____

'OR IF CONTRACT PRE-PAID IN LESS THAN 12 MONTHS'

Dealer reserves a lien for forfeiture of allowance subject only to the prior lien for financing."

In conditional sale contract, in reference to trade-in allowance and the assignment —

"A conditional discount or allowance has been granted by the 'X' Company for which it shall have a lien in case of forfeiture, subject only to the within contract."

On the sample statement of sale form furnished, the figure $700.45 appears in the blank following the "Trade-

In-Allowance If Financed" and the lesser sum of $600.45 appears in the blank following "Trade-In Allowance If Cash Or If Contract Is Prepaid In Less Than 12 Months." The $700.45 figure appears in the blank provided for the total trade-in allowance figure on the statement of sale.

The $700.45 figure is also used on the conditional sales contract, and the $600.45 figure does not appear on such contract.

The purpose of the plan is to create a lien in the seller for $100 difference, if the contract is prepaid, which lien is intended to be separate and apart from the lien of the assignee of the conditional sales contract.

The automobile dealer has his name shown on the certificate of title as lienholder at the time the license for the car is applied for. The conditional sales contract is then assigned with or without recourse to a finance company and the title to the car is assigned to the finance company, but the finance company does not have its name recorded on the certificate of title issued by your department as lienholder. If the purchaser desires to prepay his contract prior to the time 12 months have elapsed, the finance company accepts payment of the amount due it under the contract, but advises the purchaser to go to the automobile dealer, an affiliated company, to have the lien removed from the title certificate by having it stamped paid. The automobile dealer then insists that the purchaser pay the $100 as a forfeiture contending that he has a lien on the car and that until such time as the balance due on the contract plus the $100 forfeiture is paid, he will not stamp the title paid.

You state that the purchaser in some cases then comes to your department and requests that the name of the lienholder be removed from his title because the contract has been paid in full.

You inquire whether the department may remove the name of the lienholder in such a case.

The answer to this question is in the negative.

You also inquire whether the practices followed by the automobile dealer in stating the alternative trade-in allowance figures and collecting a $100, or other forfeiture in case of prepayment of an executed conditional sales contract involve a violation of sec. 218.01.

This question is answered in the affirmative.

Sec. 342.10 (1) (b) provides that a certificate of title issued by the department shall contain:

"(b) The names of any lienholders."

Sec. 342.10 (2) provides:

"(2) The certificate of title shall contain forms for assignment and warranty of title by the owner, and for assignment and warranty of title by a dealer, and may contain forms for application for a certificate of title by a transferee and for the naming of a lienholder."

The owner of a vehicle subject to registration must make application for a certificate of title. Secs. 342.05 (1) (a), (b), 342.19. Sec. 342.06 (1) provides that the application shall contain in part:

"* * *

"(c) The date of purchase by the applicant, the name and address of the person from whom the vehicle was acquired and the names and addresses of any lienholders.

"(d) If the vehicle is a new vehicle being registered for the first time, the signature of a dealer authorized to sell such new vehicle.

"* * *"

Sec. 342.18 (1) provides in part:

"(1) Whenever the owner of a vehicle for which a certificate of title has been issued sells or otherwise transfers his interest in such vehicle, he shall at the time of sale or transfer of the vehicle to the transferee:

"(a) Endorse upon the certificate of title in the spaces provided therefor the name and address of the transferee together with a statement of all liens and encumbrances on the vehicle. The seller shall sign the title in the space pro-

vided. If the transferee is a dealer, distributor or manufacturer registered under s. 341.51, he shall endorse upon the certificate of title in the spaces provided for such registered dealer the name and address of the purchaser, the required information on all liens and encumbrances, the firm name, the counter signature and dealer license number; and

"* * *"

Sec. 342.19 (1) and (2) provide:

"(1) Immediately after transfer to him of a vehicle subject to registration, the new owner shall execute an application for a new certificate of title in the space provided therefor on the certificate of title delivered to him by the previous owner and cause the certificate to be mailed or delivered to the department. If the transferred vehicle is new or for some other reason does not have a certificate of title, the new owner shall execute the application upon the form prescribed therefor by the department. If ownership of the vehicle was transferred by judicial decree or judicial sale or by operation of law, the application shall be accompanied by such evidence as the department reasonably requires as proof that ownership of the vehicle passed to the applicant. Applications shall in every case be accompanied by the required fee.

"(2) A dealer, distributor or manufacturer registered under s. 341.51 need not apply for a certificate of title for a vehicle in stock or acquired for stock purposes. Upon transfer of such vehicle, he shall give the transferee evidence of title which, in case the vehicle has a certificate of title, shall be a reassignment of such certificate and delivery thereof to the transferee.

"* * *"

In *Commercial Credit Corp. v. Schneider* (1953) 265 Wis. 264, 61 N.W. 2d 499 in discussing Ch. 85 (now Ch. 342), the court stated at page 267:

"Ch. 85 of the statutes mentions liens only incidentally, in prescribing the duties of an owner of a motor vehicle in

order to register his vehicle with the motor vehicle department if he wishes to operate it on the highway. A reading of the registration portions of ch. 85, Stats., can lead only to the conclusion that they were enacted for two purposes: (1) To raise revenue by the payment of a fee; (2) to aid law enforcement by furnishing means of identification of car and owner in case of loss, theft, or other violations of the law. The certificate of registration and the certificate of title are made up by the motor vehicle department from information supplied by the *applicant for registration,* and the statute specifically provides for a penalty upon the *applicant* if he gives false information. There is no language whatever in ch. 85, Stats., placing a duty upon a lien holder under a conditional sales contract to apply for a registration certificate or a certificate of title or to furnish any information therefor. Further, it is obvious that since the certificate of title is renewed only once a year, any notation or lack of notation upon it with respect to the existence of a lien cannot be relied upon as an accurate record for the protection of the public; for at any time between renewals a lien might be satisfied or a new lien might be placed against an automobile as security for other transactions, and in either case the circumstance would not be recorded on the certificate of title until a subsequent renewal."

Sec. 342.25 provides:

"342.25 **Issuance of new certificate upon release of lien.** Upon receiving a certificate of title upon which a lienholder has released or assigned his interest to the owner or upon receipt of a certificate of title not so endorsed but accompanied by a legal release from a lienholder of his interest in the vehicle, the department shall issue to the owner a new certificate of title without charge."

Where the name of a lienholder appears on a certificate of title, the department is not empowered to remove the name at the request of the owner and issue a new certificate unless the terms of sec. 342.25 are complied with.

Where the name of a lienholder is shown on a certificate the department is not empowered to determine a dispute

between the owner and named lienholder as to whether there is a valid lien and proceed to remove the lienholder's name from the certificate if it finds the lien invalid. This does not mean that the department cannot inquire into the validity of claimed liens where a dealer's license is in question, and the dealer licensee has caused the name of a lienholder to appear on the certificate of title, and has refused to release the lien after payment of the contract or chattel mortgage in an effort to collect an open account or amount to which it has no valid lien. Motor vehicle dealers who are also sales finance companies and motor vehicle dealers working with captive sales finance companies should be careful not to become involved in improper practices in this regard. The department can also inquire into the validity of a claimed lien where the applicant has failed to name a lienholder. See sec. 342.11 for grounds for refusing issuance of a certificate of title.

There is no question but that there can be multiple liens on the same piece of personalty. We have common law liens, equitable liens arising from contract, and statutory liens. Common law liens and a statutory lien, such as a garageman is granted, exist only so long as the owner of the lien retains possession of the personalty.

In the instant case any liens created are equitable liens created by contract. All parties agree that a lien by installment sale contract is created in the dealer in the instant case to the amount shown on contract as the balance due seller from purchaser in the amount of $3295.92. This lien is assigned to the finance company. The automobile dealer also claims that, by reason of the purchase order which sets up the "Trade-In Allowance If Financed at $700.45" and "Trade-In Allowance If Cash Or If Contract Is Prepaid In Less Than 12 Months $600.45", and states that "Dealer Reserves A Lien For Forfeiture Of Allowance Subject Only To The Prior Lien For Financing", a lien for $100 in this case is created in the dealer separate and apart from the lien created by the conditional sales contract and that the lien is reserved to the dealer by the use of the wording on the conditional sales contract; to-wit: "A conditional dis-

count or allowance has been granted by the 'X' Company for which it shall have a lien in case of forfeiture, subject only to the within contract."

We need not decide here whether a separate lien is created. It can be argued that there is no present lien created and that the lien could accrue only when the condition was met. It could also be argued that giving up possession of the property and assignment of the conditional sales contract by the dealer was inconsistent with retention of any lien. It could also be argued that any separate lien created by the sales order was merged into the conditional sales contract as the $700.45 allowance figure is the only figure used on that contract. If a lien is created, it is an invalid lien in violation of sec. 218.01.

The fact that a dealer is willing to give a higher allowance for an automobile to be financed than for a cash sale is alarming, and is an indication that the rates established by the legislature are excessive. While this is primarily a matter of legislative concern, the departments charged with the administration of the laws in question should be interested in recommending reasonable rates at which the industry can operate since excessive rates lead to abuses in kickbacks and the buildup of excessive dealer reserves.

Our court has held that the time-price theory of selling is permissible, that a seller can have two prices for his merchandise, one at which he is willing to sell for cash and one at which he is willing to sell on a time installment basis. The difference between the cash price and the time sale price is not interest. Historically the cash price has been the lower price. Wisconsin does not have an all-goods installment sales act, but the sale of motor vehicles by installment sale is closely regulated by sec. 218.01.

An automobile transaction is either cash or by installment. The transaction here involved is clearly an installment sale all the way. The $600.45 "Trade-In Allowance Of Cash" statement is meaningless as the transaction was never intended to be cash. While there is nothing legally wrong with giving a higher trade-in allowance for a finan-

ced transaction than for a cash transaction, the parties in the instant case never intended a cash transaction. The $600.45 trade-in allowance figure given on the statement of sale is intended to apply in a case where the sale *is financed* and where the contract *is prepaid* in less than 12 months. The difference between $600.45 and $700.45 is, in such case, intended to be forfeited to the dealer. This is clearly A PENALTY FOR PREPAYMENT and as such is a violation of sec. 218.01 (1) (i), (6) (b), as it is intended to be collected in addition to the amount listed as the charge for financing and sec. 218.01 (1) (i), defines "Time price differential" as including all penalties exclusive of insurance premium costs and except those charges specifically provided for in sec. 218.01 or by lawful order of the licensor. The penalty or forfeiture attempted to be collected is not specifically provided for in sec. 218.01 and cannot be authorized by the licensor.

Sec. 218.01 (1) defines the following:

"* * *

"(e) 'Retail installment contract' or 'installment contract' means and includes every contract to sell one or more motor vehicles at retail, in which the price thereof is payable in one or more installments over a period of time and in which the seller has either retained title to the goods or has taken or retained a security interest in the goods under a form of contract designated either as a conditional sale, chattel mortgage or otherwise.

"* * *

"(h) 'Cash price' means the retail seller's price in dollars for the sale of the goods, and the transfer of unqualified title thereto, upon payment of such price in cash or the equivalent thereof.

"(ha) 'Time price' means the total amount which the buyer contracts to pay under a retail installment contract.

"(i) 'Time price differential' means that part of the total price in the retail installment contract of sale in excess of the cash price, and includes all charges of any nature

whatsoever which may be assessed the retail buyer by the seller for costs, charges, examinations, appraisal, service, brokerage, commission, expense, fees, fines, penalties exclusive of insurance premium costs and except those charges which may be specifically provided for in this section, or in the lawful orders issued by the licensor.

"* * *"

Sec. 218.01 (6) (b) provides that in addition to the installment sale contract, the installment sale purchaser must be furnished with a written statement which must in part set forth:

"* * * the amount credited the buyer for any trade-in and a description thereof, * * *"

It is my opinion that the amount credited must be a fixed amount and cannot be conditional. The reasons for this conclusion have been already set forth. There is only one sale. It is either cash or by installment. If it is an installment sale it is for a fixed period. The time price differential, the finance charge, includes all penalties and is the amount due the dealer for financing if the contract is paid according to the terms of the contract. If the contract is prepaid, the purchaser may be entitled to a refund in an amount based upon a number of factors which need not be considered here, but he cannot be assessed any additional amount as a penalty or forfeiture for prepayment.

You are aware of the effect violation of the statute may have on enforcibility of the contract, sec. 218.01 (6) (b) on the right of the licensee or licensees to continue to be licensed, sec. 218.01 (3); and on liability for and imposition of criminal penalty, sec. 218.01 (8).

RJV

Licenses—Cosmetologist—Discussion of sec. 159.08 (6) relative to the qualifications of applicant for cosmetologist's license.

December 29, 1961.

DR. CARL N. NEUPERT,
State Health Officer.

You ask my opinion on this question: May an applicant for a Wisconsin cosmetologist's license be admitted to an examination under provisions of sec. 159.08 (6), if she does not possess a current license in another state?

As background for this question you have advised me as follows:

"An applicant has been denied admission to examination for a Wisconsin cosmetologist's license on the basis that she did not qualify under provisions of Section 159.08 (6), Stats., in that wording 'any cosmetologist registered or licensed under the laws of another state or territory' meant being currently licensed whereas the applicant's license in another state had expired on June 30, 1942. She was advised to renew her license in the other state in order to be eligible to take the Wisconsin examination.

"Her hubsand contends that the word 'license' as used in the statutes is not properly interpreted as meaning currently licensed and that therefore his wife is eligible to take the Wisconsin examination on the basis of having been licensed in another state in the past. * * *"

Sec. 159.08 (6) reads as follows:

"(6) Any cosmetologist registered or licensed under the laws of another state or territory of the United States or of a foreign country or province, who can provide evidence satisfactory to the board that he had met requirements substantially comparable to the requirements of this state may be licensed as follows:

"(a) As an operator upon satisfactorily passing an examination conducted by the board to determine his fitness

to practice as an operator or upon providing evidence satisfactory to the board of having practiced as an operator for 2 years during a 6-year period immediately prior to the application for license in this state.

"(b) As a manager upon satisfactorily passing an examination conducted by the board to determine his fitness to practice as a manager or upon providing evidence satisfactory to the board of having practiced as a manager for 4 years during a 6-year period immediately prior to the application for license in this state."

This statute was enacted in its present form in 1951. Ch. 723, Laws 1951. It is my understanding that since its enactment this statute has been administratively construed to apply only to a cosmetologist *currently* registered or licensed under the laws of another state or territory of the United States or of a foreign country or province and able to provide the state board of health with the evidence described in such statute.

If sec. 159.08 (6) is ambiguous, its administrative construction, one of long standing and unchallenged for nearly a decade, is entitled to great weight. *State ex rel. City Bank & Trust Co. v. Marshall & Ilsley Bank* (1959) 8 Wis. 2d 301, 307. It may, in fact, be of controlling weight. *State ex rel. West Allis v. Dieringer* (1956) 275 Wis. 208, 218. In my judgment, sec. 159.08 (6) is ambiguous in that the words "registered" and "licensed", as used in the first paragraph thereof, are of doubtful meaning, and therefore make the meaning of such statute open to construction. "A statute, or any sentence, clause, or word thereof, is 'ambiguous' when it is capable of being understood by reasonably well-informed persons in either of two or more senses. *Thompson v. Akin* 81 Ill. App. 62." 3 Words and Phrases (Perm. Ed.), p. 440. The word "ambiguous" has also been held to mean "doubtful and uncertain" and "open to construction". The words "registered" and "licensed", in the context of sec. 159.08 (6), are capable of being understood by reasonably well-informed persons in either of two or more senses. Viewed as adjectives in such statute, they support and war-

rant the administrative construction in question. The adjective "licensed" is defined in Webster's International Dictionary, 2d Ed., Unabridged, as *"having* a license." (Emphasis mine). The word "registered" is recognized in the same lexicon as an adjective, as well as the past participle of the verb "register". As an adjective, "registered", in sec. 159.08 (6) clearly means "having registration" as a cosmetologist. As adjectives, then, both such words convey the idea of a current licensing, rather than of a licensing past and expired. This same idea is conveyed by sec. 159.08 (6), if its commencement be viewed as reading, "Any cosmetologist [who is] registered or licensed * * *". On the other hand, a "reasonably well-informed person", as the husband of the applicant no doubt is, might find the words here in question capable of being understood as meaning, in the context of sec. 159.08 (6), "having been registered" and "having been licensed", or "[who has been] registered" and "[who has been] licensed". Such a construction would, of course, permit the applicant in question to take an examination as an operator or manager, pursuant to sec. 159.08 (6). It is, however, at odds with the administrative construction above mentioned.

Such administrative construction would find sufficient justification in the ambiguity above-mentioned in sec. 159.08 (6), coupled with the fact that the words "registered" and "licensed" are capable of being understood by reasonably well-informed persons to convey a meaning of a current licensing leading to such construction. If additional justification were needed for the administrative construction in question, it is found in the statutory history of sec. 159.08 (6). Such history was doubtless a major factor in bringing about the administrative construction in question. It shows that in adopting such construction the state board of health did not merely make an arbitrary choice between two conflicting statutory constructions, each being on a par with the other. Instead, the statutory history of sec. 159.08 (6) leads me to the conclusion that its administrative construction was adopted in the light of that history, and is amply justified by that history, as well as by the additional con-

siderations above-mentioned.

The predecessor statute of sec. 159.08 (6) reads as follows:

"(6) Any cosmetician from out of the state who is at least twenty years of age and presents proof that he is of good moral character, in good physical and mental health and has completed a tenth grade education as verified by certificate or affidavit or has an equivalent education as determined by the extension division of the university of Wisconsin or the Milwaukee board of school directors and either:

"(a) *Presents a license or certificate as a practicing cosmetician* from another state which requires as a prerequisite to the granting of said certificate a course of not less than fifteen hundred hours in an accredited beauty school or an apprenticeship requirement substantially equal to that required in this state, or

"(b) Can prove by affidavit that he has practiced as a cosmetician in another state or country for the four years immediately prior to making application in this state shall be entitled to take the examination for an operator's license." Ch. 431, Laws 1939.

It will be observed that this statute plainly applied only to a cosmetician "from out of the state" who could prove by affidavit that he had practiced as a cosmetician in another state or country for the four years immediately prior to making application for examination in Wisconsin, or who was *currently* licensed in another jurisdiction. Obviously, an applicant who, under the 1939 verson of sec. 159.08 (6) presented "a license or certificate *as a practicing cosmetician*" was an applicant *currently* licensed in the state issuing such license or certificate. It is therefore not surprising that the board, in construing the 1951 (and present) version of sec. 159.08 (6), interpreted it to apply only to applicants currently licensed in a jurisdiction other than Wisconsin, for the language of the new statute was susceptible to such construction, and the history of such statute

strongly suggested it as the proper one. The board was entitled to give full weight, too, to the fact that the legislature, in making its 1951 changes in sec. 159. 08 (6), did not use language clearly showing that the new statute was to apply, not only to applicants currently licensed in another jurisdiction, as was the case under the 1939 statute, but also to applicants previously, but not currently, licensed therein. Instead, the legislature employed language which, while concededly ambiguous, could be construed to apply, as the 1939 statute clearly had applied, only to currently licensed applicants from other jurisdictions. The administrative construction here in question, then, was logical and well justified in the light of the history of sec. 159.08 (6).

It might be contended that the provisions of subs. (a) and (b) of sec. 159.08 (6) imply no need for current licensing of a cosmetologist to whom sec. 159.08 (6) would pertain. Under sub. (a) of such statute a cosmetologist may, without examination, be licensed as an operator "upon providing evidence satisfactory to the board of having practiced as an operator for 2 years during a 6-year period immediately prior to the application for license in this state." Under sub. (b) of such statute a cosmetologist may, without examination, be licensed as a manager "upon providing evidence satisfactory to the board of having practiced as a manager for four years during a 6-year period immediately prior to application for license in this state." Does sub. (a), sec. 159.08 (6), for example, imply that an out-of-state cosmetologist licensed *and practicing* in Minnesota in the years 1956 and 1957, but not licensed therein in 1959, may in 1959 avail himself of the provisions of sub. (a) to gain his license as an operator in Wisconsin without examination? In my opinion, he may not. The intent of sec. 159.08 (6), it seems to me, is to require current licensing of all applicants for a license thereunder; but if an applicant, having a current license, also has had the benefit of 2 years of practicing as an operator in the 6-year period immediately prior to his application, he may be licensed as an operator without examination. I find no intent in subs. (a) or (b), sec. 159.08 (6) to relieve an applicant for

license thereunder from the current license requirement. Instead, the intent is to give the board the power, if the applicant is currently licensed and blessed with the proper amount of recent experience as an operator or as a manager to confer a license upon him as an operator or as a manager without examination.

It is my opinion, then, that an applicant for a Wisconsin cosmetologist's license under sec. 159.08 (6) may be admitted to an examination thereunder only if she possesses a current license in another jurisdiction.

It is conceivable that in some instances the requirement of sec. 159.08 (6), for current licensing could be harsh in its operation. If so, the remedy is with the legislature, which can relax such requirement, should it see fit to do so, so that it could be met by past licensing as well as by current licensing.
JHM

Words and Phrases—Cosmetology—Students and apprentices, as defined by Ch. 159 are ineligible to attend educational meetings, seminars, lectures or demonstrations conducted pursuant to sec. 159.03 (4).

December 29, 1961.

DR. CARL N. NEUPERT,
State Health Officer.

You ask my opinion on this question: Can apprentices and students who are issued permits under Ch. 159, as well as operators, managers and instructors who are issued licenses thereunder, be allowed to attend institutes conducted under the provisions of sec. 159.03 (4)?

Sec. 159.01 (8) reads:

" 'Apprentice' is any person who is not a manager, itinerant cosmetologist, operator, or student who is engaged in

learning and acquiring the practice of cosmetology under the direction and supervision of a licensed managing cosmetologist. 'Student' is any person engaged in learning cosmetology in a licensed school of cosmetology."

Sec. 159.01 (5) reads:

" 'Operator' is any person who is not a manager, itinerant or apprentice cosmetologist, who practices cosmetology under the direction and supervision of a managing cosmetologist."

Sec. 159.01 (4) reads:

" 'Manager' or 'managing cosmetologist', as used in this chapter, is defined as any person who has direct supervision over operators or apprentices in a beauty salon."

Sec. 159.01 (13) reads:

" 'Instructor', as used in this chapter, is any person who gives instruction or training in theory or practical cosmetology to apprentices or students other than in a beauty salon."

Sec. 159.03 (4) reads:

"The board [State Board of Health] may on its own or in co-operation with vocational schools conduct educational meetings, seminars, lectures or demonstrations open to those *licensed under this chapter* for the purpose of promoting the standards of the practice of cosmetology in this state. Qualified lecturers or demonstrators may be employed for this purpose outside the classified service."

Managers, operators, and instructors, as defined in Ch. 159, are clearly persons licensed under such chapter. See sec. 159.08 (2), (4) and (9). They are therefore eligible to attend the "educational meetings, seminars, lectures or demonstrations" referred to in sub. (4), sec. 159.03. Your question is whether "apprentices" and "students", as defined in Ch. 159, are also eligible to attend such meetings, seminars, lectures or demonstrations. It is my opinion that they are not, inasmuch as they are not licensed under Ch. 159.

My above-stated opinion is based on a conclusion that the legislature has plainly indicated, in several portions of Ch. 159 that it places persons licensed thereunder in one category, and students and apprentices, as permit-holders under Ch. 159, in another category. This distinction is evidenced in and by secs. 159.03 (1) and (2); 159.08; 159.10 (1) and (2); 159.14 (2).

Sec. 159.03 (1) reads in part:

"The board * * * shall prescribe and enforce rules and regulations * * * for the examining and *licensing* of managers, operators, manicurists, electrolysists and instructors and the *registration* of apprentices and students * * *."

Sec. 159.03 (2) reads in part:

"The board shall keep a record of all students, *registered* apprentices, *licensed* managers, operators, itinerant cosmetologists, manicurists, electrolysists and instructors * * *."

It will be observed from these portions of sec. 159.03 that they clearly make a distinction between persons licensed under Ch. 159, including managers, operators and instructors, and apprentices and students. It should be observed that sub. (4), sec. 159.03 was not enacted until 1959 (Laws of 1959, c. 546, sec. 2), and when it was enacted the above-quoted portions of subs. (1) and (2), sec. 159.03, were already in existence. It must be assumed that the legislature, in enacting sub. (4), sec. 159.03, was familiar with the provisions of subs. (1) and (2) of such statute, and aware of the distinction they clearly made between persons licensed under Ch. 159 and apprentices and students. This being so, the legislature, had it desired to open the meetings, seminars, lectures or demonstrations in question to students and apprentices, as well as to those licensed under Chapter 159, would surely have specifically referred to such students and apprentices as being so privileged.

Sec. 159.08, entitled, "Applications for licenses; requirements", manifestly deals only with the licensing of managers, operators, manicurists, and instructors, and is further

evidence that students or apprentices, receiving permits under Chapter 159, are not persons licensed under such chapter.

Sec. 159.10 (1) reads in part:

"Any person eligible for licensure as a manager, operator, itinerant cosmetologist, instructor, electrolysist, or manicurist * * *."

Sec. 159.10 (2) reads in part:

"Any person who held a Wisconsin license as a manager, operator, instructor, electrolysist, or manicurist * * *."

The above-quoted portions of this statute, which is entitled, "Persons formerly licensed", are further evidence to me that our legislature has never considered students or apprentices, as defined in Ch. 159, as being persons licensed pursuant to such chapter.

Sec. 159.14 (2), provides further convincing evidence of the same character. The pertinent part thereof reads as follows:

"The board may either refuse to issue or renew or may suspend or revoke any certificate of registration of a school of cosmetology, beauty or electrolysis salon license, manager's, operator's, manicurist's, electrolysist's or instructor's *license,* apprentice or student's *permit* for any of the following causes: * * *."

This statute very plainly recognizes the distinction between a license issued under Ch. 159 and an apprentice or student's permit issued thereunder.

It is true that there are several portions of Ch. 159, on which there could be predicated an argument that students and apprentices, holding permits under Ch. 159, are licensed thereunder and are therefor eligible to attend the meetings, seminars, lectures or demonstartions reffered to in sec. 159.03 (4). In sec. 159.11, entitled, "Licenses and certificates; terms of license", we find this language:

"(1) The board shall furnish a card in such form as it shall determine, bearing the seal of the board and the signature of its secretary, to each:

"(a) *Apprentice, student,* operator, manager, manicurist, instructor and electrolysist certifying that the holder is entitled to practice cosmetology, manicuring or electrolysis and *such license* shall be posted in a conspicuous place in the salon or school."

The usage of the word "license" in this statute is clearly a loose one, since it obviously encompasses not only true licenses issued to operators, managers, manicurists, instructors and electrolysists but also permits issued to apprentices and students. Such usage does not persuade me that the legislature thereby intended to confer on apprentices and students the status of licensees under Ch. 159.

Still another instance wherein the word "license" has been employed loosely in Ch. 159, is found in sec. 159.15, which reads in part:

"Any person, association, partnership, firm or corporation that shall without a *license* practice cosmetology either as a manager, operator, *apprentice,* itinerant cosmetologist, manicurist, electrolysist or instructor * * *."

It might be argued that the foregoing language implies that an apprentice must be licensed under Ch. 159 in order to practice cosmetology, inasmuch as it refers to his practice of cosmetology "without a license." Other statutes, however, very clearly establish that an apprentice, as defined by Ch. 159, is nnt licensed as such but receives, instead of a license, a permit or registration card, and practices cosmetology thereunder subject to "the personal supervision and direction of a licensed manager." See sec. 159.12 (1) and (2).

In conclusion, then, it is my opinion that students and apprentices, as defined by Ch. 159, are ineligible to attend educational meetings, seminars, lectures or demonstrations conducted pursuant to sec. 159.03 (4).
JHM

STATUTES AND CONSTITUTIONAL PROVISIONS, SESSION LAWS, LEGISLATIVE BILLS AND RESOLUTIONS REFERRED TO AND CONSTRUED

INDEX