

**OPINIONS**  
**OF THE**  
**ATTORNEY GENERAL**

**OF THE**  
**STATE OF WISCONSIN**

**VOLUME 52**

**January 1, 1963 through December 31, 1963**

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**GEORGE THOMPSON**  
Attorney General



**MADISON, WISCONSIN**

**1963**



## 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, Water- town	from Jan. 1, 1866, to Jan. 3, 1870
STEPHEN S. BARLOW, Dellona	from Jan. 3, 1870, to Jan. 5, 1874
A. SCOTT SLOAN, Beaver Dam	from Jan. 5, 1874, to Jan. 7, 1878
ALEXANDER WILSON, Min- eral Point	from Jan. 7, 1878, to Jan. 2, 1882
LEANDER F. FRISBY, West Bend	from Jan. 2, 1882, to Jan. 3, 1887
CHARLES E. ESTABROOK, Manitowoc	from Jan. 3, 1887, to Jan. 5, 1891
JAMES L. O'CONNOR, Madi- son	from Jan. 5, 1891, to Jan. 7, 1895
WILLIAM H. MYLREA, Wausau	from Jan. 7, 1895, to Jan. 2, 1899
EMMET R. HICKS, Oshkosh	from Jan. 2, 1899, to Jan. 5, 1903
LAFAYETTE M. STURDE- VANT, Neillsville	from Jan. 5, 1903, to Jan. 7, 1907
FRANK L. GILBERT, Madison	from Jan. 7, 1907, to Jan. 2, 1911
LEVI H. BANCROFT, Richland Center	from Jan. 2, 1911, to Jan. 6, 1913
WALTER C. OWEN, Maiden Rock	from Jan. 6, 1913, to Jan. 7, 1918
SPENCER HAVEN, Hudson	from Jan. 7, 1918, to Jan. 6, 1919
JOHN J. BLAINE, Boscobel	from Jan. 6, 1919, to Jan. 3, 1921
WILLIAM J. MORGAN, Mil- waukee	from Jan. 3, 1921, to Jan. 1, 1923
HERMAN L. EKERN, Madison	from Jan. 1, 1923, to Jan. 3, 1927
JOHN W. REYNOLDS, Green Bay	from Jan. 3, 1927, to Jan. 2, 1933
JAMES E. FINNEGAN, Mil- waukee	from Jan. 2, 1933, to Jan. 4, 1937
ORLAND S. LOOMIS, Mauston	from Jan. 4, 1937, to Jan. 2, 1939
JOHN E. MARTIN, Milwaukee	from Jan. 2, 1939, to June 5, 1948
GROVER L. BROADFOOT, Mondovi	from June 5, 1948, to Nov. 15, 1948
THOMAS E. FAIRCHILD, Mil- waukee	from Nov. 15, 1948, to Jan. 1, 1951
VERNON W. THOMSON, Rich- land Center	from Jan. 1, 1951, to Jan. 7, 1957
STEWART G. HONECK, Madi- son	from Jan. 7, 1957, to Jan. 5, 1959
JOHN W. REYNOLDS, Green Bay	from Jan. 5, 1959, to Jan. 7, 1963
GEORGE THOMPSON, La Crosse	from Jan. 7, 1963, to

## ATTORNEY GENERAL'S OFFICE

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GEORGE THOMPSON .....	Attorney General
LYLE E. STRAHAN .....	Deputy Attorney General
WARREN H. RESH .....	Assistant Attorney General
JAMES R. WEDLAKE .....	Assistant Attorney General
HAROLD H. PERSONS .....	Assistant Attorney General
WILLIAM A. PLATZ .....	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 <sup>1</sup> .....	Assistant Attorney General
JAMES H. McDERMOTT .....	Assistant Attorney General
JOHN H. BOWERS <sup>2</sup> .....	Assistant Attorney General
LEROY L. DALTON .....	Assistant Attorney General
ALBERT O. HARRIMAN .....	Assistant Attorney General
ROY G. MITA .....	Assistant Attorney General
WILLIAM H. WILKER .....	Assistant Attorney General
GEORGE SCHWAHN .....	Assistant Attorney General
GORDON SAMUELSEN .....	Assistant Attorney General
JAMES P. ALTMAN <sup>3</sup> .....	Assistant Attorney General
ROBERT D. MARTINSON <sup>4</sup> .....	Assistant Attorney General
WARREN D. SCHMIDT <sup>5</sup> .....	Assistant Attorney General
DAVID G. McMILLAN <sup>6</sup> .....	Assistant Attorney General
BETTY R. BROWN <sup>7</sup> .....	Assistant Attorney General
MILO W. OTTOW .....	Chief Investigator

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1. Leave commencing October 1, 1963

2. Resigned August 31, 1963

3. Appointed February 11, 1963

4. Appointed November 7, 1963

5. Appointed November 26, 1963

6. Appointed December 2, 1963

7. Appointed December 9, 1963

OPINIONS  
OF THE  
ATTORNEY GENERAL  
OF  
WISCONSIN

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Volume 52

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*Board of Health—Vital Statistics—Birth Certificates—*

The state registrar of vital statistics has no power, under 69.33 (1), or under any other statute, to change the birth certificate of an adopted child born in Wisconsin.

January 24, 1963

CARL N. NEUPERT

*State Health Officer*

You ask my opinion on this question: Does the state registrar have authority to change the place of birth on a new record of birth to be filed subsequent to adoption for a child born in Wisconsin?

It is my opinion that the state registrar does not have such authority.

Section 69.33 (1), contains certain language providing the basis for an argument that such statute authorizes the state registrar to change the place of birth on a new record of birth to be filed subsequent to adoption for a child born in Wisconsin. Sec. 69.33 (1), reads as follows:

“On being advised pursuant to s. 48.94 of the adoption of any child whose birth has previously been registered or pursuant to s. 245.25 of the legitimation of any child by the marriage of the parents, the state registrar of vital statistics shall file a new birth certificate filled out and signed by himself or his authorized representative. In this new

certificate reference shall be made to this section by number only. In all other respects the certificate shall be the same as other birth certificates and shall contain nothing else to differentiate it therefrom. In case such adopted child was born elsewhere a new certificate may be filed as herein provided if the adoptive parent shall file with the state registrar a certified copy of the original birth certificate or satisfactory proof that the birth was not recorded. *The place of birth may be given as the place where the adoption order was made* and the date of birth shall be taken from the original certificate, or, in the absence thereof, from the adoption order except that if the child was born outside the United States, the actual place of birth shall be given whether or not the natural parents were United States citizens, but if they were not, the certificate shall not be issued until proof of naturalization of the child has been furnished to the registrar."

I am informed that the italicized language in the above-quoted statute has been viewed in some quarters as conferring upon the state registrar the authority to change the place of birth on a new record of birth to be filed subsequent to adoption for a child born in Wisconsin. In my judgment, such language is not properly subject to that construction, for it seems to me to apply only to a new birth certificate to be filed in a case where the adopted child was born "elsewhere", i.e., outside of Wisconsin. In its context, there is sufficient ambiguity in such italicized language to justify the construction thereof. The language of sec. 69.33 (1), used as an intrinsic aid to such construction, and the history of such statute used as an extrinsic aid to such construction, lead me to believe that it was never intended to confer on the state registrar any power to change the place of birth on a new record of birth to be filed subsequent to adoption for a child born in Wisconsin.

You will observe that the specific language in question, reading "The place of birth may be given as the place where the adoption order was made" is immediately preceded in the text of sec. 69.33 (1), with the sentence reading, "*In case such adopted child was born elsewhere* a new certi-

ificate my be filed as herein provided if the adoptive parent shall file with the state registrar a certified copy of the original birth certificate or satisfactory proof that the birth was not recorded." To me, this juxtaposition signifies that the place of birth of a child may be given as the place where the adoption order was made only in a new birth certificate relating to a child adopted in Wisconsin but born outside of this state. There are further indications in sec. 69.33 (1), that the right of the state registrar to change the place of birth on a new birth certificate is limited to the case of an adopted child born elsewhere. The first three sentences of sec. 69.33 (1), obviously deal with the issuance of a new birth certificate for a child adopted in this state *and born in this state*. The second sentence of such statute states that in a new birth certificate issued for such a child "reference shall be made to this section by number only", and the third sentence then provides that, "*In all other respects the certificate shall be the same as other birth certificates and shall contain nothing else to differentiate it therefrom.*" This provision must be viewed in conjunction with the provisions of sec. 69.29 (2), as to the contents of the standard short form certificate of birth, an element of which is "the name of the town, village or city, and country" in which the child was born. I construe the third sentence of sec. 69.33 (1) to mean that a new birth certificate issued for a child adopted in Wisconsin and born in this state shall, like any other birth certificate filed for a child born in this state, show the *true* place of birth of such child in Wisconsin, and shall not show, as the place of birth, the place where the adoption order was made, if that place in Wisconsin is different than the place of birth.

Still another indication that the provisions of the fifth and last sentence of sub. (1), sec. 69.33, are meant to refer only to the case of an adopted child born outside of Wisconsin is found in the reference in such fifth sentence to "the original certificate" of birth, which reference manifestly relates back to the fourth sentence reference to "original birth certificate" of an adopted child born outside of Wisconsin.

I turn now to the history of sec. 69.33 (1), which strongly indicates that no power is thereby given the state registrar to change the place of birth on a new record of birth to be filed subsequent to adoption for a child born in this state.

In 1942 the predecessor statute of sec. 69.33 (1) was sec. 69.60 (1). It read as follows:

“On being advised pursuant to section 322.05 of the adoption of any child whose birth has previously been registered or pursuant to section 245.35 of the legitimation of any child due to the subsequent marriage of the parents, state registrar of vital statistics shall cause a new birth certificate to be filled out signed by himself or his authorized representative. In the certification of this new certificate, and over his signature, reference shall be made to this section of the statutes by number only. In all other respects the certificate shall be the same as other birth certificates, and shall contain nothing else to differentiate it therefrom.”

You will observe that the foregoing statutory language is substantially the same as that which now constitutes the first of three sentences of sec. 69.33 (1) dealing with the filing of a new birth certificate for a child adopted in Wisconsin and born in this state. In 1942, this statute came under the scrutiny of one of my predecessors, who, in an opinion reported at 31 OAG 396-399, concluded that such statute authorized the state registrar of vital statistics to file new birth records in cases of adoption or legitimation only in cases of persons born within Wisconsin. It would appear that this opinion led the legislature, in 1943, to adopt ch. 284, Laws 1943, which created sec. 69.60 (1a). This statute read as follows:

“In case of the adoption of any child born within the United States *and for which adopted child no birth certificate is of record at the place or in the state of birth*, upon information submitted from the place or state of birth of said child that the birth is not of record the state registrar of vital statistics shall cause a certificate of the birth of

such child to be filled out, signed by himself or his authorized representative. *The place of birth of said child shall be given in said birth certificate as the place at which the adoption order was made.* The date of birth in said birth certificate shall appear thereon as found and determined by the county court making the order for adoption. In the certification to this certificate and over his signature reference shall be made by the registrar to this section of the statutes by number only. In all other respects the certificate shall be the same as other birth certificates and shall contain nothing else to differentiate it therefrom. Such birth certificate when issued shall be of the same force and effect as all other birth certificates issued by the state registrar of vital statistics.”

You will observe that sec. 69.60 (1a), did not authorize the state registrar to change the birth certificate of an adopted child born in Wisconsin where a birth certificate for such child had been filed in this state previous to his adoption. Sec. 69.60 (1a) applied only in case of the adoption of any child born within the United States (and this would include Wisconsin) *and for whom no birth certificate was of record at the place or in the state of birth.* For such a child, and for such a child only, could a birth certificate be prepared under sec. 69.60 (1a) which would give as the place of the child's birth the place at which the adoption order was made. Sec. 69.60 (1a) clearly did not authorize the state registrar, in the case of the adoption of a child born in Wisconsin for whom a birth certificate had been filed prior to his adoption, to change the new birth certificate for such child filed following his adoption to show as his place of birth the place at which the adoption order was made. The contents of the new birth certificate issued for such a child were governed by the provisions of sec. 69.60 (1), and such provisions did not empower the state registrar to make any change whatsoever in the place of birth shown on the original birth certificate for such child.

In 1943, after the enactment of sec. 69.60 (1a), sec. 69.60 (1) was renumbered and became sec. 69.33 (1), while

sec. 69.60 (1a) was renumbered and became sec. 69.33 (1a). See Sec. 61, ch. 503, Laws 1943 and Sec. 15, ch. 552, Laws 1943.

In 1947, sec. 69.33 (1a) was repealed, and sec. 69.33 (1) was amended to read as follows:

“On being advised pursuant to section 322.05 of the adoption of any child whose birth has previously been registered or pursuant to section 245.36 of the legitimation of any child by the marriage of the parents, the state registrar of vital statistics shall file a new birth certificate filled out and signed by himself or his authorized representative. In this new certificate reference shall be made to this section by number only. In all other respects the certificate shall be the same as other birth certificates and shall contain nothing else to differentiate it therefrom. *In case such adopted child was born elsewhere in the United States, a new certificate may be filed as herein provided if the adoptive parent shall file with the state registrar a certified copy of the original birth certificate or satisfactory proof that the birth was not recorded. The place of birth may be given as the place where the adoption order was made and the date of birth shall be taken from the original certificate, or, in the absence thereof, from the adoption order.*”

The italicized language in the above-quoted statute constituted the amendment thereof, with the first three sentences being those which for many years had constituted sec. 69.33 (1) and its predecessor statute, sec. 69.60 (1). The italicized language added to sec. 69.33 (1) owed its origin to the repealed sec. 69.33 (1a), but its provisions were more restricted in the scope of their operation than the repealed provisions of sec. 69.33 (1a), insofar as birth certificates for adopted children born in Wisconsin were concerned. Under the repealed sec. 69.33 (1a) the state registrar of vital statistics could cause a certificate of birth to be filled out for an adopted child born in Wisconsin if there was no birth certificate record for such child, and only if such was the case. The birth certificate prepared by the state registrar for such a child could show as the

place of birth the place at which the adoption was made. Under sec. 69.33 (1), as amended in 1947 (ch. 184, Laws 1947), however, it is clear that the last two sentences applied only to the case of an adopted child born outside of Wisconsin and it was only in his "new certificate" that his place of birth could be shown as the place where the adoption order was made. In sec. 69.33 (1), as it stands today, the penultimate sentence is substantially the same as it was in 69.33 (1) as amended in 1947. The last sentence of the present-day sec. 69.33 (1) embodies all the last sentence of sec. 69.33 (1) as amended in 1947, with an addition not pertinent to this opinion.

The contention could be made, of course, that when the legislature of 1947 repealed sec. 69.33 (1a) and amended sec. 69.33 (1) by adding thereto the two sentences above-italicized, it was the intention of the legislature that the provisions contained in the second of such two sentences should relate to the new birth certificate filled out for an adopted child born in Wisconsin as well as to a new certificate filed for an adopted child born elsewhere in the United States. I think it plain, however, that such was not the intent of the legislature, and that the provisions of the last sentence of sec. 69.33 (1), as amended in 1947, were meant to apply only to the "new certificate" referred to in the preceding sentence, which new certificate would be filed only for an adopted child "born elsewhere in the United States." Prior to the amendment of sec. 69.33 (1) in 1947 it had never been possible for the state registrar of vital statistics, in the case of adoption of a Wisconsin-born child for whom a birth certificate had been filed in this state prior to adoption, to change such birth certificate by altering the place of birth shown thereon to make it the place where the adoption order was made; and in my judgment, the amendment of sec. 69.33 (1) was manifestly not intended to confer that power on the state registrar. I have carefully checked the bill-drafting file on ch. 184, Laws 1947, in the legislative reference library to determine, if possible, why the legislature chose to amend sec. 69.33 (1) by adding thereto the two sentences above-italicized, rather than placing those two sentences in a separate subsection.

The file sheds no light on this matter, and leads me to conclude that it may have been merely a desire for brevity that produced such an amendment of sec. 69.33 (1). Such bill-drafting file shows that Mr. William A. Platz, then as now, an assistant attorney general, drafted the amended sec. 69.33 (1). His handiwork of more than fifteen years past has been discussed with Mr. Platz, but understandably he is unable now to recall just why sec. 69.33 (1) was amended by adding thereto the last two sentences, rather than inserting such sentences in sec. 69.33 in the form of a new subsection.

In conclusion, then, for the reasons above shown, it is my opinion that the state registrar has no authority, under sec. 69.33 (1) or any other statute, to change the birth certificate of an adopted child born in Wisconsin, by altering the place of birth shown thereon to make it the place where the adoption order was made.

JHM

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*State Insurance Fund—Commissioner of Insurance—*  
State insurance fund records are open to inspection and copying, but commissioner of insurance is not obligated upon request therefor to compile and furnish a list of the policyholders thereof.

February 8, 1963

CHARLES L. MANSON

*Commissioner of Insurance*

There are over 700 county, city, village, town, school district and library policyholders in the state insurance fund pursuant to sec. 210.04. You have no concern over and are agreeable to furnishing information when requested as to whether a particular local entity is such a policyholder. However, on occasions you are requested to furnish a complete list of the names of such policyholders. The records of the fund are kept manually and as no list is maintained, clerical time would be required to compile such a

list. You request an opinion as to whether you are obliged to comply with such request and furnish a complete list of policyholders.

There is nothing in the provisions of secs. 210.01 et seq. stating that the records of the state insurance fund therein provided are confidential or privileged. The records of the fund are kept by you in your official capacity as commissioner of insurance and, therefore, are public records. As such, they are open to public inspection the same as other public records.

Sec. 18.01 (2) expressly provides for access to public records for the purpose of examining them and the right to copy the same. It reads as follows:

“(2) Except as expressly provided otherwise, any person may with proper care, during office hours and subject to such orders or regulations as the custodian thereof may prescribe, examine or copy any of the property or things mentioned in subsection (1).”

Sec. 327.18 (2) provides that a certified copy of a public record is admissible in evidence with like effect as the original whenever the original is admissible. Sec. 327.18 (3) in effect provides that any state officer shall furnish a certified copy of any public record when he is tendered the legal fee therefor and requested to furnish the same.

The foregoing statutory provisions, thus, establish the right of access to examine any public record and make a copy thereof and the right to be furnished a certified copy of such record, unless other provisions in the statutes or in the inherent character of the public record accords the same a confidential or privileged status. There is nothing in sec. 210.01 et. seq. or elsewhere in the statutes that accords to the records of the state insurance fund any privileged or confidential status. Nor is there anything in the statutes which makes it the duty of the commissioner of insurance to compile or furnish any list of the policyholders in that fund.

Any person desiring a list of all the policyholders of the fund is entitled to examine your records at all reasonable

times during office hours, subject to such reasonable regulations as you may prescribe, and copy the same or take information therefrom to compile a list of the policyholders in the fund. If such a list were maintained in your records, then, of course, such list itself would constitute a public record which any person might examine under the provisions of sec. 18.01 (2) and have a certified copy furnished to him under sec. 327.18 (3). But, in the absence of the existence in your records of such a list, you are under no obligation to compile and furnish the same in response to a request therefor.

HHP

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*Words and Phrases—Sales Tax—Tax Commission—*  
“Computed full value rate” is calculated under sec. 77.63 (4) (a) by including only those special assessments that were included and inserted in the tax roll of the municipality for the applicable year.

February 13, 1963

JOHN A. GRONOUSKI

*Commissioner of Taxation*

The provisions of sec. 77.63, relating to the distribution of the sales and use taxes, use the phrase “computed full value rate” and such phrase is defined in subsec. (4) thereof, as follows:

“(4) DEFINITIONS. (a) ‘Computed full value rate’ means the sum total of all general property taxes (including state, county, local and school taxes), special assessments, occupational taxes, forest crop taxes and woodlands taxes levied and extended by a town, village or city, as reported to the department of taxation in its abstract of assessments and taxes, divided by the full value of all taxable property in such municipality as equalized for state purposes pursuant to s. 70:57, and the quotient expressed in mills per dollar of valuation.”

The owners of properties against which special assessments are levied by a town, city or village are accorded the election of making full payment of the assessment that year or of spreading the amount thereof, together with future interest, in installments payable over a prescribed period of years. Upon receiving notification of the special assessment levied against their properties, some owners pay up in full at once. Others, although they do not elect to pay in installments, do not pay the assessment and the full amount thereof then is inserted in the tax roll for the current year. Where the installment method is selected, then only the installment falling due each year is inserted in the tax roll of that year.

A question has arisen and you request an opinion whether the special assessments of a town, city or village to be included in the "computed full value rate" of said municipality for the applicable year are the total of the special assessments which are entered in the tax roll for that year, or include also the amount of special assessments levied by such municipality that year, but which were not included in the tax roll because of being paid by the owners of the properties upon their being billed therefor. The answer is found in the language used in sec. 77.63 (4) (a), where, in defining "computed full value rate," it is there said that such rate is the sum total of the several enumerated items of taxes that are "levied and extended by a town, village or city, as reported to the department of taxation in its abstract of assessments and taxes, \* \* \*."

The word "extended" is used commonly in Wisconsin property taxation as meaning entered in the tax roll and throughout the statutes the phraseologies, "extended", "entered in", and "set forth in" the tax roll are used interchangeably. To illustrate sec. 70.01 says that real estate taxes are "deemed to be levied when the tax roll on which they are extended has been delivered to the local treasurer with his warrant for collection." Similarly sec. 66.60 (15) provides "that all assessments or installments thereof which are not paid by the date specified shall be extended upon the tax roll as a delinquent tax against the property \* \* \*."

Therefore, when the legislature used both the words "levied" and "extended" in sec. 77.63 (4) (a), it could refer only to such of the several items of tax exactions mentioned as not only were levied, but were also entered and included in the tax roll of the applicable year.

As further evidence that in the calculation of the "computed full value rate" there is included only the special assessments that were entered in the tax roll of the municipality of the applicable year, we cite the fact that this statute further says that the several items which are to be included are those "as reported to the department of taxation in its abstract of assessments and taxes,\* \* \*." Sec. 68.02 provides that each town, village and city clerk shall annually, before the third Monday in December, file with the department of taxation a statement of taxes levied in his municipality for that year. It is provided that the department of taxation shall prepare and furnish the blanks for such statement. This statute has been on the books for many years. The form, usually referred to as the "abstract of assessments and taxes", as prescribed and furnished by the department of taxation, now contains, and has contained over the years, sections or schedules for entry in appropriate columns and under the proper headings the amounts of the several types of taxes included in the tax roll of the municipality.

Among such sections is one designated "F" titled "SPECIAL ASSESSMENTS" and the instructions printed on the back of the form direct that there be entered under section "F" the amount of each type of special assessment "entered in the tax roll." At the foot of the second page of the form there is to be entered the total of the amounts of the several types of taxes entered in the various sections, including section "F" for special assessments. The space there for the entry of the total resulting from adding up such amounts is designated the "Aggregate Amount of Tax Roll."

It is thus clear therefrom that the special assessments, as well as the other items of taxes which are to be included in such report form, are only those which are included in

the tax roll of the municipality for that year. Factually, over the many years in which this report form has been in use, the special assessments entered therein have been only those which were entered and included in the tax roll of the municipality of the year to which the report pertains. Furthermore, it is inherently necessary that such be the amount of special assessments set forth and reported in such form because the total of the several items set forth is required to be the total of the taxes that are in the tax roll and in the warrant to the municipal treasurer.

When the legislature used the language in sec. 77.63 (4) (a) "as reported to the department of taxation in its abstract of assessments and taxes" it knew that each municipality annually made up and filed this report as required by sec. 68.02 and that the only items of taxes or other exaction which were included and set forth in such form each year were those which were carried into and entered into the tax roll of the municipality of the referable year. The legislature in providing for this computation of "computed full value rate" knew that the department of taxation would have to have the total amounts of the several items to be used. Therefore, as a matter of administrative convenience, the legislature took for use the computation figures it knew the department of taxation would have at hand through the filing of such annual statements. The figures so reported are the only information the department has readily available as to special assessments and were some other amounts to be used, it would be necessary to have a special report made in respect thereto. If the legislature intended that the figures to be used were to be taken from some other source, it should have used different language. In that situation it certainly would not have used the language it did that specifies definitely the source from which the required information is to be taken.

In sec. 77.64 (1) (a), it provided for a special report to the department of taxation of information it otherwise would not have, but which was necessary to make a required computation. If the legislature had intended that, in computing the "computed full value rate" under sec.

77.63, special assessments other than as reported by a municipality in its abstract of assessments and taxes were to be used, it would have made provisions for another report which would include the required information.

It is, therefore, my opinion that the amount of special assessments included in the calculation of "computed full value rate" pursuant to sec. 77.63 (4) (a), is the total of the special assessments which are included in the tax roll of the municipality of the applicable year and are reported annually to the department of taxation pursuant to sec. 68.02 and does not include any special assessments that are not included in such tax roll.

HHP

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*Compatibility—District Attorney—Public Administrator*  
—Positions of part time district attorney and public administrator are compatible, and the individual serving in both capacities is entitled to such fees as public administrator, in addition to his salary as district attorney.

February 14, 1963

JOSEPH H. RIEDNER

*District Attorney*

*Pepin County*

You have inquired whether the office of part-time district attorney in a county under 200,000 population, and the office of public administrator are compatible, and if so, whether the individual serving in both capacities is entitled to the fees as public administrator in addition to his salary as district attorney.

We are of the opinion that the offices are compatible and that the individual serving in both capacities is entitled to such fees as the county judge may order under the provisions of sec. 72.17 (3) in addition to his salary as district attorney.

Two offices are incompatible if there is a conflict of interests or duties, so that the incumbent of one cannot discharge with fidelity and propriety the duties of both. A review of the applicable statutes does not disclose any compelling reason why the two positions are incompatible.

Sec. 59.49 provides in part:

“\* \* \* nor shall any district attorney while in office be eligible to or hold any judicial office whatever, \* \* \*”

We are of the opinion that the office of public administrator is not a judicial office within the meaning of this section, but even if it were, the above provision was included in sec. 59.49 at the time sec. 72.17 (3) was amended in 1923 to provide that a district attorney can be appointed acting public administrator.

The public administrator is appointed by the county judge, pursuant to sec. 253.25 (1), and is required to be an attorney if one is available. His duties are set forth in sec. 72.17 and subsecs. (3) and (4) thereof provide:

“(3) DUTIES; FEES. It shall be the duty of the public administrator, under the general supervision of the department of taxation and with the assistance of the district attorney, when required by the department of taxation or county judge, to investigate the estates of deceased persons within his county and to appear for and act in behalf of the county and state in the county court in such estates as the court may in its discretion deem necessary, and for such services the public administrator shall be entitled to 5 per centum of the gross inheritance tax as determined in each such estate, to be paid by the county treasurer out of the inheritance tax funds upon an order of the county judge, \* \* \* *When the public administrator is not available, or is not qualified to act as such in any case, the court may call upon the district attorney or any attorney to act as public administrator in such case, and such acting public administrator shall be entitled to the fees above provided.* \* \* \*”

“(4) COUNTIES OVER TWO HUNDRED THOUSAND, PUBLIC ADMINISTRATOR. In counties containing a population of over two hundred thousand, an assistant district attorney, compensated as otherwise provided by law, may by order of the county court be designated to take the place of and perform all the duties of the public administrator relating to the inheritance tax laws, except as provided in subsections (1) and (2). Whenever the assistant district attorney is designated as public administrator he shall receive the same fees as the public administrator in other counties, provided, however, that all such fees, collected by him as public administrator shall be turned in to the county treasurer.”

We are cognizant of an early opinion of this office reported 1910 OAG 602, which came to an opposite conclusion on the basis of a public policy argument.

When the above opinion was written, the statute setting forth the duties of the public administrator, then sec. 1087-17 (3), did not contain the provisions in present sec. 72.17 (3), underlined above. This provision was created by ch. 72, Laws 1923. The addition of this provision clearly overrules the main portion of the public policy argument noted in 1910 OAG 602. There are policy reasons in favor of the proposition that the county and state should benefit from the services of two individuals, rather than permitting one individual to hold both offices. There are also policy reasons in favor of permitting one individual to serve in both capacities, and the practice of having one individual serve in both capacities may be especially beneficial in the more sparsely populated counties.

The county judge should properly consider the policy question as to availability, competency and possible conflict of interests before appointing an individual holding the office of district attorney to the position of public administrator. However, where he does choose to appoint the district attorney to the position of public administrator, he is not precluded from appointing another attorney to serve as acting public administrator in specific cases, under the provisions of sec. 72.17 (3), when the public administrator is

not available, or is not qualified to act as such in any case. This provision should serve to protect the interests of the county and state in all instances.

RJV

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*Legislature—Oath of Office—Election—Discussion of contested election to the legislature and compensation and oath of office of members.*

February 15, 1963

HOWARD J. KOOP, *Commissioner*

*Department of Administration*

This will acknowledge your letter of February 12, 1963, relating to a question that has arisen concerning the compensation of the assemblyman from the 2nd district of Kenosha county, in which district there was a contested election.

The name of Earl H. Elfers was included in the list of members of the assembly elected at the November election as certified by the secretary of state. At the same time the secretary of state transmitted to the assembly a certified copy of a notice of contest filed by Russell A. Olson on December 28, 1962, contesting the election of Mr. Elfers.

Mr. Elfers filed his oath of office with the secretary of state on January 9, 1963, and he has been paid his salary for the balance of January. The chief clerk and the speaker of the assembly on February 11 submitted a payroll voucher including the name of Mr. Elfers for the first 7 days of February and the name of Mr. Olson for the period of January 9 to February 28. Mr. Olson's oath of office was filed with the secretary of state on February 7.

You have asked for a letter on the question of who is entitled to compensation as assemblyman from January 9 to February 7, 1963.

Sec. 13.04 provides:

**“Compensation certificate.** The presiding officer of each house, immediately after the commencement of each regular or extra session of the legislature, shall certify to the secretary of state the names of all qualified members of the house over which he presides; also the number of miles of travel for which each member is entitled to compensation. However, when any seat is contested, and notice of such contest has been filed as provided in Section 13.16, no certificate with respect to such seat, or any claimant thereof, shall be issued until the question of the right thereto is finally determined. All such certificates shall be countersigned by the chief clerk.”

Sec. 13.16, reads:

**“Election contests; notice.** Any person wishing to contest the election of any senator or member of the assembly shall, within thirty days after the decision of the board of canvassers, serve a notice in writing on the person whose election he intends to contest, stating briefly that his election will be contested and the cause of such contest; and shall file a copy thereof in the office of the secretary of state at least ten days before the day fixed by law for the meeting of the legislature. *If any contestant fails to so file a copy of such notice, he shall not be entitled to any mileage or salary in case payment has been made therefor to the sitting member.*”

Sec. 13.17 sets up the procedure for determination of election contests by legislative hearings pursuant to which Mr. Olson was determined to be the winner of the election and pursuant to Art. IV, sec. 7, Wis. Const., to the effect that each house shall be the judge of the elections, returns and qualifications of its own members.

Presumably Mr. Elfers was found to be the winner by the county board of canvassers acting under sec. 6.63 and sec. 6.64, and a certificate of election was, no doubt, issued to him by the county clerk under sec. 6.65, who in turn certified the result to the secretary of state under sec. 6.67 (1).

Thus, he was initially at least a de facto officer despite the fact that there was a cloud on his title to the office arising out of the notice of contest of the election and his failure to have a certificate as a qualified member of the legislature from the presiding officer under sec. 13.04, which provides that no certificate shall issue until the question of the right has been finally determined. See 43 Am. Jur. "Public Officers," secs. 471 and 472, pp. 225-226.

The courts are agreed that in the absence of statutory permission, salary which has been paid to a de facto officer cannot be recovered by the public authorities, at least where, acting in good faith, he actually rendered the services for which he was paid. 43 Am. Jur. "Public Officers," sec. 491, p. 239. By the decided weight of authority, a de facto officer cannot maintain an action to recover the salary, fees, or other emoluments attached to the office, even though he has performed the duties thereof. Sec. 488, p. 237. It may be noted, by way of explanation, however, that the rule has been refined in Wisconsin to permit a de facto officer to recover salary, in the absence of an adverse claimant to the office. *State ex rel. Elliott v. Kelly*, (1913) 154 Wis. 482, 489, 143 N.W. 153.

There cannot be two persons in the possession of an office at the same time, even when the two are an officer de jure and an officer de facto. 43 Am. Jur. "Public Officers," sec. 473, pp. 226-7.

This is not to say, however, that there may be no overlapping of salaries as between two persons having claim to the same legislative office. See 1 OAG 532, in which it was concluded that a member of the legislature elected to fill a vacancy, may if he sits during a regular session be compensated even though his deceased predecessor had drawn the full pay and mileage.

So far as the compensation which Mr. Elfers has already received is concerned, it would appear that there is sound authority for concluding that he may retain it as will be more fully discussed later.

As to the payroll voucher for him covering the first 7 days of February, there would appear to be a substantial question under general legal principles relating to public officers as well as in the absence of statutory authorization therefor.

There, of course, can be no question as to the propriety of the payroll voucher for Mr. Olson for the period subsequent to the determination that he was the rightfully elected assemblyman from the 2nd district of Kenosha county. He is a *de jure* officer, that is, one legally qualified to hold the office, and the general rule is that the emoluments follow the legal title to the office. See 7 A.L.R. 1682, annotation, entitled "Right to salary of one illegally elected or appointed to legislature."

The only two troublesome questions are whether Mr. Elfers is entitled to receive compensation for the period of his service as a *de facto* officer for which he has not already been paid and secondly whether Mr. Olson who is the lawful holder of the office is entitled to be paid from the beginning of the session or only for the period subsequent to the determination of the contested election in his favor.

There are no Wisconsin cases which directly answer the problem here, and the difficulty in relying upon case law from other jurisdictions is that such cases turn pretty much upon the wording of specific statutes.

The key to the answer to your question appears to be in the underscored language of sec. 13.16, above reading: "If any contestant fails to so file a copy of such notice [contest of election] he shall not be entitled to any mileage or salary in case payment has been made therefor to the sitting member."

This seems to say by implication that where there is a contest and the proper notice is given the person who was sitting but who has been unseated may keep what he has received and that his successful opponent will be entitled to the emoluments of the office which is rightfully his from the commencement of the session.

It does not, however, imply that once the contest has

been decided the de facto officer is entitled to collect any unpaid mileage or salary. Nor does there appear to be any law to support that position in the absence of specific statutory language.

However, the problem is further complicated so far as Mr. Olson's right to salary is concerned for the period from the commencement of the session to February 7, 1963, when he filed his oath of office.

Art. IV, sec. 28, Wis. Const., provides:

**"Oath of office.** Section 28. Members of the legislature, and all officers, executive and judicial, except such inferior officers as may be by law exempted, shall before they enter upon the duties of their respective offices, take and subscribe an oath or affirmation to support the constitution of the United States and the constitution of the state of Wisconsin, and faithfully to discharge the duties of their respective offices to the best of their ability."

In the case of *State Bank of Drummond v. Nuesse*, (1961) 13 Wis. 2d 74, 108 N.W. 2d 283, it was held that these words are direct, unambiguous expressions which are mandatory and leave no room for construction. It was concluded that where a candidate for the assembly was elected on April 22, 1947, to fill a vacancy but did not take the oath of office until April 29, 1947, he was not a member of the assembly on April 24 and could not vote as such. "He was an assemblyman-elect until he took his oath of office." P. 78.

Hence, sec. 13.16 could not be constitutionally construed as permitting payment for services as a member of the legislature prior to the date when such member took his oath of office.

Accordingly, it is concluded that the payments already made to Mr. Elfers are not improper but that he is entitled to no further payments and that Mr. Olson is entitled to the emoluments of the office only from the date that he took his oath of office.

WHR

*County Boards—County Highway Committee—* County board members receiving annual salary under the provisions of 59.03 (2) (i), cannot authorize county highway committee members per diem compensation while working on acquisition of rights of way for county highways.

February 20, 1963

RICHARD T. BECKER

*District Attorney, Washington County*

You have requested my opinion as to whether the county board may, by resolution, authorize the county highway committee members to be paid a per diem while engaged in the acquisition of right of way for county highways. You state that the Washington county board is paid under the "alternative compensation" provision of sec. 59.03 (2) (i) receiving an annual salary of \$900.00. The highway committee members receive an additional salary of \$240.00 per annum as authorized by said section.

The pertinent sections, sec. 59.03 (2) (f) and (i), read as follows:

"(f) *Compensation.* Each supervisor shall be paid a per diem by the county for each day he attends a meeting of the board. Any board may, at its annual meeting, by a two-thirds vote of all the members, fix the compensation of the board members to be next elected. Any board may also provide additional compensation for the chairman.

"\* \* \*

"(i) *Alternative compensation.* As an alternative method of compensation, in counties having a population of more than 25,000 the board may at its annual meeting, by a two-thirds vote of the members entitled to a seat, fix the compensation of the supervisors to be next elected at an annual salary for all services for the county including all committee services, except the per diem allowance for services in acquiring highway rights of way set forth in s. 84.09 (4). The board may, in like manner, allow additional salary for the members of the highway committee

and for the chairman of the board. In addition to the salary, the supervisors shall receive mileage as provided in par. (g) for each day's attendance at board or committee meetings."

The language of the statute is clear and unambiguous. I agree with your conclusion that the county highway committee cannot be paid on a per diem basis for county work under these circumstances. Sec. 59.03 (2) (i), states very specifically that where the board elects to come under the annual salary provisions, that such is "for all services for the county including all committee services, except the per diem allowance for services in acquiring highway rights of way set forth in s. 84.09 (4) (work on state highways). The board may, in like manner, allow additional *salary* for the members of the highway committee and for the chairman of the board. \* \* \*" Additional salary has been allowed. I see no provision whereby a per diem could be paid. See 37 OAG 164 for similar conclusion as to a building committee.

REB

*Board of Health—Laboratory of Hygiene*—Specimens described in 36.225 (5) when properly submitted by licensed personnel must be examined without charge by laboratory of hygiene. Laboratory cannot deny service to physicians in one area of the state while granting service to physicians elsewhere in Wisconsin.

February 21, 1963

CARL N. NEUPERT

*State Health Officer*

You ask my opinion on this question: may the state laboratory of hygiene legally deny any laboratory examination or test services to physicians in certain areas of the state while it makes such services available to the other physicians within the state?

As background for this question you have advised me as follows:

“The State Laboratory of Hygiene has recommended to the State Board of Health that it exercise its authority under Section 143.15 of the statutes to provide for certification of hospital and private laboratories as competent to perform such laboratory procedures as clinical chemistry and cervical cytology, the latter a screening method for the early detection of cancer of the uterus, with the stated purpose of denying such laboratory services of the Laboratory of Hygiene to physicians practicing in the cities or counties where certified laboratory services in specified tests are available to all physicians of that area and are adequate.”

You further advised me, in connection with this question, that, “The examination of specimens taken from persons to determine whether there is cancer present has been carried out by the laboratory [The State Laboratory of Hygiene] for years.”

It also appears from information you have provided me that the “laboratory examination or test services” referred

to in your above-stated question are services rendered by the above-mentioned laboratory pursuant to sec. 36.225 (5). Sec. 36.225 is entitled "State laboratory of hygiene" and deals, among other things, with the various services rendered by such laboratory. Sub. (5) thereof reads:

"Examination of the following specimens shall be done without charge when submitted in proper containers by licensed physicians, veterinarians, health officers and health commissioners: Material collected from patients afflicted with tuberculosis or from persons suspected of being afflicted with tuberculosis; blood from suspected typhoid fever cases and other enteric infections; swabs from persons suspected of having diphtheria, septic sore throat or other communicable diseases involving the upper respiratory tract and for the release from quarantine of persons who have been afflicted with these diseases; material from men or animals suspected of suffering from rabies, anthrax and glanders; examinations pertaining to industrial health hazards *and such other examinations as may be necessary for the control and prevention of those diseases which cause a public health problem.*"

It is my opinion that the state laboratory of hygiene may not legally deny to any licensed physician, veterinarian, health officer, or health commissioner the examination, without charge, of any of the specimens described in sec. 36.225 (5), when submitted to the laboratory in a proper container. Sec. 36.225 (5), is very clearly mandatory, rather than directory, in nature, and imposes upon the laboratory a duty to conduct examination of the specimens described therein, free of charge, when such specimens are submitted in proper containers by the qualified person named in the statute. The statute in question does not say that examination of the specimens therein described "may" be done by the laboratory, but instead provides that examination of such specimens "shall" be done by it. In a statement of principle applicable to public agencies or instrumentalities as well as to public officials, it has been said that "In construction of statutes addressed to public officials the word 'shall' is generally considered as mandatory." 67

C.J.S. Officers, sec. 113, page 401. It has also been said that, “\* \* \* the word ‘shall’ is ordinarily imperative, operating to impose a duty which may be enforced.” 82 C.J.S. Stats., sec. 380, page 877. In my judgment, the word “shall” was clearly used in sec. 36.225 (5), in its ordinary imperative sense, and its usage in that sense imposes upon the laboratory a duty to conduct examination of the specimens therein described when properly submitted by qualified persons. There can be no lawful evasion of this duty in whole or in part, and it therefore follows that the state laboratory of hygiene cannot legally deny examinations of specimens under sec. 36.225 (5), to physicians in certain areas of the state while making the examinations available to other physicians within Wisconsin. You will have noted that while sec. 36.225 (5), clearly specifies the nature of most of the examinations required thereby, it includes a category of examinations not specifically described, namely, “such other examinations as may be necessary for the control and prevention of those diseases which cause a public health problem.” Cervical cytology is not among the examinations specifically described in sec. 36.225 (5), and it would appear that the examination of specimens taken from persons to determine whether there is cancer present, carried out by the laboratory for years, falls into the category “such other examinations as may be necessary for the control and prevention of those diseases which cause a public health problem.” It should be pointed out that the matter of determining the specimen examinations which come within this category is apparently a matter of policy, and as such is within the province of the administrative committee for the state laboratory of hygiene created by sec. 36.225 (7), which reads in part as follows:

“For the purpose of co-ordination between the state board of health and the university board of regents *and for the purpose of determining policies*, an administrative committee for the state laboratory of hygiene is created to be composed of the president of the university, the dean of the medical school, the president of the state board of health, the secretary of the state board of health and the director of the laboratory or their representatives. \* \* \*”

While the state board of health under sec. 143.15 has the power to evaluate and certify certain laboratory examinations conducted by hospital and private laboratories, such power clearly does not confer upon the state board of health the ability or capacity to relieve the state laboratory of hygiene of any of the duties imposed upon such laboratory by sec. 36.225, including its duty of examination of specimens under sub. (5). There is no language whatsoever employed in sec. 143.15 indicating that it was the intent of the legislature, in enacting such statute, to give the state board of health a grant of power which would enable the board to relieve the state laboratory of hygiene from performance of any of the above-mentioned duties. True, the laboratory examinations designated by the board as necessary for the protection of the health of the public are acceptable for official purposes when carried out by a laboratory holding a certificate of approval issued by the board covering such examinations; but that this is provided by sec. 143.15 (3) does not mean that the state laboratory of hygiene is therefore freed from its duty to examine, when properly submitted by qualified persons, those specimens described in sec. 36.225 (5) on the ground that the specimens submitted for examination come from an area where certified laboratory services are available which would provide examinations, in the language of sec. 143.15 (3) "acceptable for public purposes." The sole purpose of sec. 143.15, as plainly stated in sub. (1) thereof, is to insure the reliability of laboratory examinations made for the protection of the health of the public when such examinations are made by a hospital or private laboratories. No purpose is expressed in such statute, or implied thereby, to relieve the state laboratory of hygiene of its duties under sec. 36.225 (5).

JHM

*Neglected Children—Courts—Juvenile Judges*—When neglected children are present in a county other than that of the court having continuing jurisdiction, said court may, by order under 48.35 (3), transfer jurisdiction to the county where the children are present and the juvenile judge of the latter county is obliged to assume jurisdiction.

February 22, 1963

WALTER DALLAGRANA

*District Attorney, Florence County*

You ask whether a juvenile judge of one county can order the transfer of a pending case to a juvenile judge of another county pursuant to sec. 48.35 (3) under the following circumstances:

A mother and seven children, who were residing in and receiving aid to dependent children from Langlade county, moved to Florence county, and the A.D.C. case was administratively transferred to Florence county. Subsequently, the juvenile judge of Florence county found the children to be neglected and then transferred the custody of the children from the mother to an adult son residing in Langlade county until each of the children attains 21 years of age.

The juvenile judge of Florence county attempted to transfer jurisdiction of the case to Langlade county. The juvenile judge of Langlade county has refused to accept such transfer.

This opinion is addressed solely to the question whether a juvenile judge, having jurisdiction over a child who is present or residing in a county outside the court's jurisdiction, may, by proper order, transfer jurisdiction to the court of that county where the child is.

You also state that the receiving juvenile judge refuses to accept jurisdiction on another ground; that the transferring judge has no jurisdiction to issue such an order.

Sec. 48.35 (3) reads as follows:

**"(3) CONTINUING JURISDICTION.** If a child who is under the continuing jurisdiction of the court under this section is present in another county, the court may order that case transferred along with all appropriate records to the court of the county where the child is."

It is my opinion that the judge of the juvenile court, having continuing jurisdiction over a child, may divest himself of jurisdiction by order transferring the case to another county where the child is present. The language appears clear and unambiguous that the discretion lies with the transferring judge who has jurisdiction. No discretion is given to the court of the county where the child is.

The notes attached to Bill No. 444, S., (ch. 575, Laws 1955) of the 1955 legislature, constituting the revision of the children's code, show that the reason for subsec. (3) of sec. 48.35 is the same as for subsec. (4) (b) of sec. 48.34.

At page 43-a, Wisconsin Legislative Council, Child Welfare Committee Report, dated March 9, 1955, is the following note:

"Sub. (4) (b) allows for the transfer of a case from one county to another if a child is in that county. This undoubtedly happens at present but would be desirable in the statutes. A transfer is desirable particularly where a child is under supervision by a person working under the juvenile court."

At page 45 of this report is the following note in reference to sub. (3) of sec. 48.35:

"The discussion of these provisions in the note to that section (sec. 48.34 (4) (b) ), applies here."

This conclusion is further supported by sec. 48.16, which reads:

**"Venue.** Venue for any proceeding under ss. 48.12 and 48.13 shall be in any of the following: the county where the child resides, the county where he is present or, in the case of a violation of a state law or a county, town or municipal ordinance, the county where the violation occurred."

Jurisdiction, therefore, is not exclusively in any particular juvenile court.

Since the children are now present in Langlade county, the juvenile judge of Florence county has authority to transfer the case and the juvenile judge of Langlade county has the duty to take jurisdiction.

RGM

JEA

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*Words and Phrases—Motor Vehicle*—Proof of a violation of sec. 346.57 (2) and (3) does not require showing a collision with an object, person, vehicle or other conveyance on or entering the highway.

February 26, 1963

ROGER P. MURPHY

*District Attorney, Waukesha County*

You have inquired whether proof of a violation of the provisions of sec. 346.57 (2) and (3) requires a showing of a collision with an object, person, vehicle or other conveyance on or entering a highway.

The opinion at 45 OAG 309 was concerned with these sections, then numbered sec. 85.40 (2) (a) and (b), but dealt with a fact situation involving a collision with another vehicle. We believe that opinion was correct, but does not control here.

Sec. 346.57 (2) and (3) provide:

“(2) REASONABLE AND PRUDENT LIMIT. No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard for the actual and potential hazards then existing. The speed of a vehicle shall be so controlled as may be necessary to avoid colliding with any object, person, vehicle or other conveyance on or entering the highway in compliance with legal requirements and using due care.

**“(3) CONDITIONS REQUIRING REDUCED SPEED.** The operator of every vehicle shall, consistent with the requirements of sub. (2), drive at an appropriate reduced speed when approaching and crossing an intersection or railway grade crossing, when approaching and going around a curve, when approaching a hillcrest, when traveling upon any narrow or winding roadway, when passing school children, highway construction or maintenance workers or other pedestrians, and when special hazard exists with regard to other traffic or by reason of weather or highway conditions.”

Sec. 346.01 provides:

**“Words and phrases defined.** Words and phrases defined in s. 340.01 are used in the same sense in this chapter unless a different definition is specifically provided.”

Sec. 346.02 (1) provides:

**“Applicability of chapter. (1) APPLIES PRIMARILY UPON HIGHWAYS.** Chapter 346 applies exclusively upon highways except as otherwise expressly provided in this chapter.”

Sec. 340.01 (22) and (54) provide:

**“(22) ‘Highway’** means all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads or driveways in the state, county or municipal parks and in state forests which have been opened to the use of the public for the purpose of vehicular travel and roads or driveways upon the grounds of institutions under the jurisdiction of the board of regents of state colleges, but does not include private roads or driveways as defined in sub. (46).

**“(54) ‘Roadway’** means that portion of a highway between the regularly established curb lines or that portion which is improved, designed or ordinarily used for vehicular travel, excluding the berm or shoulder. In a divided highway the term ‘roadway’ refers to each roadway separately but not to all such roadways collectively.”

Sec. 85.40 (2) (a) and (b) of the 1955 statutes provided:

“(2) (a) No person shall operate a vehicle at a speed greater than is reasonable and prudent under conditions and having regard for the actual and potential hazards then existing and the speed of the vehicle shall be so controlled as may be necessary to avoid colliding with any object, person, vehicle or other conveyance on or entering the highway in compliance with legal requirements and using due care.

“(b) The operator of every vehicle shall, consistent with the requirements of paragraph (a), operate at an appropriate reduced speed when approaching and crossing an intersection or railway grade crossing, when approaching and going around a curve, when approaching a hillcrest, when traveling upon any narrow or winding roadway, when passing school children or other pedestrians, and when special hazard exists with regard to other traffic or by reasons of weather or highway conditions.”

Present sec. 346.57 (2) and (3) was created by ch. 260, Laws 1957. The legislative council's note to the bill which appears in Wisconsin Annotations, 1960, at page 1825 states:

“Legislative Council Note, 1957: This is a restatement of s. 85.40 (1) (a) to (h) and (2) (a) and (b), with several changes to be noted.

“The definitions in sub. (1) can best be discussed in connection with the provisions to which they pertain.

“Subsection (2) is a restatement of s. 85.40 (2) (a). The reasonable and prudent limit applies under all circumstances.

“Subsection (3) is a restatement of s. 85.40 (2) (b). Highway construction and maintenance workers have been added to the enumeration of persons on a roadway for whom reduced speed is required. This is primarily a matter of emphasis rather than a change in the law.”

You will note that the provisions of former sec. 85.40 (2) (a) were stated in a single sentence, whereas sec. 346.57 (2) appears as two sentences.

The first sentence of such subsection can stand alone. The reasonable and prudent limit applies under all circumstances. It is only necessary to prove that the speed was greater than is reasonable and prudent under the conditions and having regard for the actual and potential hazards then existing. The second sentence is a particularizing but not exclusive description of circumstances which would constitute a violation.

A violation of sec. 346.57 (2) could occur where a single car is operated at an excessive rate of speed on straight, level highway. Even on a straight, level highway, there is a speed area or point which cannot be reasonably and prudently exceeded in view of the actual and potential hazards then existing. The attainment of a certain speed, under certain circumstances, will cause an operator to lose control of his vehicle. He may or may not overturn his vehicle, collide with a person or object, or run off the highway. There are many conditions and actual and potential hazards which may make a given speed greater than is reasonable and prudent. The fact that a vehicle went off the road may be evidence of excessive speed under the circumstances and should be considered as such absent other explanation. There may be a violation of the statute even where there is some other cause contributing to the collision or act of leaving the highway.

A violation of sec. 346.57 (2) could exist even where the vehicle was being operated within the fixed speed limits of sec. 346.57 (4), if some special hazard such as a temporary obstruction were present or if the condition of the vehicle, by reason of limited physical capabilities or state of disrepair, would not safely permit the operator to drive at the maximum speed permitted by sec. 346.57 (4).

It is not necessary to determine here whether there is a "collision", as between the vehicle and the highway, shoulder, or ditch, in a case where the vehicle overturns on

the highway or is stopped or upended by impact with the  
wyside as distinguished from the highway proper.

In order to prove a violation of sec. 346.57 (2) it is necessary to prove that the speed was greater than that which was reasonable and prudent under the conditions, and having regard for the actual and potential hazards then existing. It is necessary to prove that the vehicle was operated on the highway at the excessive speed, but it is not necessary to prove that there was a collision with an object, person, vehicle or other conveyance on or entering the highway in compliance with legal requirements and using due care.

Sec. 346.57 (3) sets forth certain specific conditions which require a reduced speed, and also provides for reduced speeds when special hazard exists with regard to other traffic or by reason of weather or highway conditions.

In order to prove a violation of sec. 346.57 (3) it is necessary to prove that the vehicle was operated on the highway at an excessive speed in view of the conditions or special hazard then existing, but it is not necessary to prove that there was a collision with another vehicle, object or person on the highway. A vehicle going around a curve at an excessive speed may, by reason of centrifugal force and other cause, leave the highway. A violation of sec. 346.57 (3) would be present even though there was no collision on the highway.

RJV

*Retirement—County Judges—Constitutional Amendments*—Protection of the contract impairment clause of the U. S. Const. Art. I, sec. 10, does not extend to the term of office of county judges, and such judges reaching the age of 70 would be subject to the amendment of Art VII, sec. 24, Wis. Const., if adopted, regardless when their terms commenced.

March 1, 1963

THE HONORABLE, THE SENATE:

By Resolution No. 10, S., the senate has asked the attorney general for an opinion on Joint Resolution No. 9, S., which presents to the legislature for second consideration an amendment to the Wisconsin constitution relating to the retirement of judges of courts of record.

The questions presented to the attorney general are as follows:

"1. If the proposed amendment to the constitution were ratified, would Judge Schultz and Judge Mudroch, who under chapter 201, laws of 1937, as amended, are members of the Milwaukee county retirement system and being elective officials are not required to retire at 70, be require to retire at 70 or do they have a vested contractual right to their positions which cannot be impaired by the legislature and which would permit them to serve until the end of their term for which elected?

"2. Is the right of Judge Schultz and Judge Mudroch to serve out their terms, which expire in 1966 and 1968, respectively, protectable against impairment of the obligation to contract?

"3. If the 2 judges have a protectable right to their office until their terms expire under the provision of the law under which they were selected:

"a. Would the amendment be totally invalid?

"b. Would the amendment be invalid as far as Judge Schultz and Judge Mudroch are concerned, but valid as to others?

"c. Would Joint Resolution No. 9, S. which provides for second consideration have any validity if it were adopted?"

Perhaps it should be pointed out before answering the questions that they are predicated upon language of the proposed amendment reading in part as follows:

~~"\* \* \* No supreme court justice or circuit judge of any other court of record may serve beyond the end of the month in July 31 following the date on which he attains the age of seventy, but any such justice or judge may complete the term in which he is was serving or to which he has had been elected when this section takes effect. Any person retired under the provisions of this section may, at the request of the chief justice of the supreme court, serve temporarily as a circuit judge and shall be compensated as the legislature provides. This section shall take effect on July first following the referendum at which it is approved on July 1, 1955. \* \* \*"~~

The former language of Art. VII, sec. 24, became effective on July 1, 1955, following its approval at the April, 1955, referendum, and there was then need of language which would have excepted from compulsory retirement supreme court justices who had commenced or been elected to terms which would not have expired prior to attainment of the age of 70. Supreme court justices have ten year terms under Art. VII, sec. 1 [4], Wis. Const., and thus there would have been a conflict between Art. VII, sec. 1 [4], and the new Art. VII, sec. 24.

Also, it was held in *State ex rel. Kleist v. Donald*, (1917) 164 Wis. 545, 160 N.W. 1067, that in view of Art. VII, sec. 13 (prescribing the method by which a circuit judge may be removed) and Art. VII, sec. 6 (providing that no alteration of the boundaries of a circuit shall have the effect to remove a judge from office), the power of the legislature under Art. VII, sec. 7, to fix the term of office of circuit judges cannot be so exercised as to have the effect of removing a circuit judge from office. Hence, it was held that ch. 6, Laws 1915, shortening by one year the term of one of the judges for the second

circuit was void. Nevertheless, the terms of circuit judges are not fixed by the constitution as in the case of supreme court justices but are prescribed by the legislature under Art. VII, sec. 7. There would accordingly be no conflicts with other provisions of the constitution if an amendment to the constitution were adopted which would have the effect of shortening the term of a circuit judge.

County courts are deemed to be "inferior courts" of limited jurisdiction under Art. VII, sec. 2. *In re Gill*, (1866) 20 Wis. \*686. However, they are courts of record. The only constitutional provision relating to the terms of office of inferior courts and municipal courts is that such terms shall not be longer than the terms of judges of the circuit courts. Art. VII, sec. 2. Thus, so far as Wisconsin constitutional provisions are concerned there were no conflicts which made it necessary to except from compulsory retirement county judges who had commenced or been elected to terms which would not expire prior to attainment of the age 70.

The only question is one which might arise under the contract clause of the federal constitution which will be discussed in the answers to your questions.

#### I.

Reference is made in your inquiry to the fact that the 6-year terms of County Judges Schultz and Mudroch expire in 1966 and 1968 respectively. It is assumed that each will attain the age of 70 prior to the expiration of his term and the first question is whether compulsory retirement at that age will result in the impairment of any of their contractual rights. They were, of course, last elected subsequent to the July 1, 1955, date mentioned in the proposed amendment.

The answer to the first question is, No. The protection of the impairment clause of the federal constitution, Art. I, sec. 10, does not extend to public officers or to the salary affixed to such offices, since these do not come within the import of the term "contract" in a constitutional sense. See 12 Am. Jur. "Constitutional Law" §405, p. 36.

This circumstance is not altered by the fact that under the Milwaukee county retirement system they are not required to retire at age 70. Even if the Milwaukee retirement system law purported to give to Milwaukee county officers the right to work indefinitely, such provision would have to yield to the positive mandate of the state constitution. It must be remembered that while constitutional amendments are initiated by legislative resolution, they are not legislative enactments and they come into being only on affirmative vote of the electors of the state of Wisconsin. *vox populi, vox Dei.*

As stated in 16 C.J.S. "Constitutional Law" §313, p. 1346:

"Even though created or protected by the constitution, public offices, may be abolished and their incidents affected by the adoption of a new constitution or of an amendment to an existing constitution."

## II.

The answer to the first question likewise answers the second question. The right of a public officer to serve out his term is not a contract right and does not rise above the state's constitution.

## III.

The third question is predicated upon an affirmative answer to the question of whether the two judges have a protectable right to serve out their terms irrespective of the proposed constitutional amendment if adopted. Since the answer to these questions was negative, it becomes unnecessary to answer question 3.

WHR

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*Legislature—Constitutionality—Appropriations—Creation of statutes covering sale of land and improvement by department of public welfare and appropriation of proceeds to department for acquisition of replacements does not violate constitutional prohibitions and is not in conflict with 16.47 (2).*

March 4, 1963

THE HONORABLE, THE SENATE

Resolution No. 8, S., of the 1963 legislature requests an opinion from the attorney general as follows:

“Resolved by the senate, that the attorney general be and he is hereby requested to render as soon as possible his official opinion to the senate as to whether or not, in view of the restrictions imposed by section 16.47 (2) of the statutes, the legislature may legally enact bill no. 39, s., into law before enacting into law a general budget bill.”

Sec. 16.47 (2), Stats., reads:

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

Section 1 of Bill No. 39, S., of the 1963 legislature would create sec. 20.670 (61e) relating to the proceeds from the sale of certain state owned land as follows:

“20.670 (61e) PROCEEDS FROM SALE OF LAND. The net amount of the proceeds received as a result of sale of farm land as specified in chapter , laws of 1963 (LRL No. 494), shall be deposited in the general fund and are appropriated therefrom to the state department of public

welfare for the purchase, subject to the approval of the state building commission, of other correctional institution farm land including buildings and for the remodeling or construction of buildings. Such net amounts or any part thereof are not to be a part of the revolving fund under sub. (61).”

Section 2 of the bill reads:

“The state department of public welfare, with the approval of the governor, is authorized to sell and convey under such terms, conditions and covenants as the state building commission determines, that portion of reformatory farm land lying in the town of Allouez, Brown County, Wisconsin, in Private Claim 20 E, extending easterly from South Webster Avenue to the East River.”

At the outset it should be noted that the framers of the Wisconsin constitution vested the legislative power of the state in the senate and assembly. The exercise of such power is subject only to the limitations and restraints imposed by the Wisconsin constitution and the constitution and laws of the United States. *Bushnell v. Beloit*, (1860) 10 Wis. 155. *Cutts v. Department of Public Welfare*, (1957) 1 Wis. 2d 408, 84 N.W. 2d 102.

The same principle is clearly set forth in the case of *State ex rel. Francis X. McCormack, et al. v. Hon. Leander J. Foley, Jr., Judge of the County Court of Milwaukee County*, recently decided by the Wisconsin supreme court but not yet reported.

Hence, sec. 16.47 (2) is not a restriction of a constitutional nature which the legislature is bound to follow assuming that it were in conflict with the provisions of Bill No. 39, S.

Moreover, it is doubtful that the legislature ever intended sec. 16.47 (2) to be applicable to the sale of state-owned lands under the jurisdiction of a particular department where provision is made for the use of the proceeds for the purchase of other more suitable lands and construction of buildings thereon to serve the same purpose as was served by the out-moded buildings at a previous location.

There is ample legislative precedent for the steps contemplated by Bill No. 39, S. See sec. 36.34 (1), which provides a similar procedure in the case of the sale and relocation of certain agricultural lands used by the university of Wisconsin for agricultural instruction, research and extension purposes. This change was made desirable by the rapid expansion of the city of Madison westward into the general area of the University Hill Farms.

Also the legislature by ch. 610, Laws 1961, followed a similar procedure in creating sec. 36.34 (1a) authorizing the sale by the university of certain agricultural lands in La Crosse county with replacement of the land and improvements in other areas more suitable for university purposes.

Provisions of this type relating to what might be termed internal or housekeeping arrangements within a state department and which in net effect result in the substitution of other property for existing property can hardly be regarded as an inherent and integral part of the state's overall budget bill. No new money must be raised by the state to meet the requirements of such bills. So far as appropriations are concerned the departments are limited to the proceeds of the sale of property which the state already owns, and they are limited as to the use of the proceeds for replacement of the property sold.

It may well be that in the process of the exchange the department concerned may want to spend more money for land purchase and improvements than can be realized from the sale of existing property, but when, as, and if that situation develops it will be necessary for the department to come back to the legislature for additional funds. This, however, would have to be covered by an additional appropriation beyond that made in a proposed bill such as No. 39, S. As previously indicated, this bill limits the appropriation strictly to the proceeds from the sale of existing property.

It is therefore concluded that the legislature may properly enact Bill No. 39, S., without violating any constitu-

tional provision and without violating the legislative principles enunciated in sec. 16.47 (2), Stats.

WHR

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*Riparian Rights—State Leases—*Under 24.39 (4), 1961 stats., state may lease riparian rights on shores of Green Bay to the city of Green Bay, which in turn can sublease area for harbor or navigation improvement purposes.

March 5, 1963

FRANK ZEIDLER

*Director, Department of Resource Development*

Your predecessor in office asked my opinion based on the following fact situation:

“In the 1930’s the City of Green Bay acquired title to a parcel of land riparian to the waters of Green Bay at the mouth of the Fox River. This parcel of land was in private claim 46 west of Cryan’s plat. In 1952 the city quit claimed this land to Chester S. McDonald. By this quit claim deed the city conveyed to Mr. McDonald riparian rights westerly to the Fox River, but specifically reserved to the city the riparian rights northward to the waters of Green Bay. The McDonald Lumber Company is presently excavating for a boat docking slip just north of the McDonald property.

“We have received an inquiry recently as to whether the state would lease the area just north of the McDonald property between Quincey Street extended on the east and the federal harbor line on the west, to be developed for navigation and harbor purposes.”

The first question asked is whether the city of Green Bay now owns riparian rights in the waters of Green Bay to the north of the McDonald property. The answer is yes. The city acquired title to this parcel of riparian land by deed. This included all riparian rights. When the city

sold this land, it granted to Mr. McDonald the riparian rights westward to the river, but specifically reserved to the city the riparian rights northward to the waters of Green Bay. A riparian owner has the power to do this. It is generally held that riparian rights may be separated from the ownership of the land to which they are appurtenant, either by grant of such rights to another, or by a reservation thereof in the conveyance of the land. 56 Am. Jur., Waters, §288; 93 C.J.S., Waters, §§206, 207, 209, 213; Farnham on Waters, Vol. III, pp. 2199-2203.

The second question is whether under chap. 535, Laws 1961, the commissioners of public lands can lease the area just north of the McDonald property to the city of Green Bay for navigation and harbor purposes. The answer is yes. Sec. 24.39 (4) (a), created by chap. 535, Laws 1961, provides:

“Subject to pars. (c) and (d) the commissioners of the public lands are empowered to: 1. Lease to riparian owners rights to the beds of lakes and rights to fill in beds of lakes or navigable streams, held by the state in trust for the public, when the purpose of the lease is for the improvement of navigation or for the improvement or construction of harbor facilities as defined in s. 30.01; and 2. Lease such rights to municipalities as defined in s. 30.01 and in locations where the municipality is the riparian owner, when the purpose of the lease is for the improvement or provision of recreational facilities related to navigation for public use.”

The city of Green Bay, having reserved to itself the riparian rights involved, is a riparian owner within the meaning of those words as used in the statute, and the statute specifically authorizes such a lease.

The third question is whether the city could then sublease to a private person or corporation for the same purposes. The answer is yes. Sec. 24.39 (4) (f) specifically authorizes this. This section reads:

“A municipality may sublease rights leased to it under par. (a) 1 or 2 to corporations or private persons. A municipi-

pality may also make physical improvements on and above the bottoms to which rights were leased from the commissioners of the public lands and may sublease these improvements to corporations or private persons. Any subleases under this paragraph shall be consistent with this subsection and with whatever standards or restrictions the public service commission, acting under s. 30.11 (5), may have found at the time of execution of the original lease by the commissioners of the public lands to the municipality."

The fourth question asks, if this were done, who would have the right to the use and control of the area of the McDonald slip excavation. This area was originally a part of the bed of Green Bay. The state has title to such a lake bed area. *Muench v. P.S.C.*, (1951) 261 Wis. 492, 53 N.W. 2d, 514. This area was filled in by channel dredging and city dump operations. It is fundamental that the state does not lose title to such lake bed area as a result of such filling. *Illinois Steel Co. v. Bilot*, (1901) 109 Wis. 418, 84 N.W. 855. The McDonald Lumber Company has excavated a slip in this filled area. That company does not claim title to this area because it is outside of and northward from the area conveyed by the city to Mr. McDonald. The McDonald interests do not have riparian rights in that direction and they have failed to get a permit from the public service commission for such excavating operations.

We understand that the city of Green Bay claims title to this area as an artificial accretion. Wisconsin does not recognize the doctrine of artificial accretion. *Austin v. Rutland R.R. Co.*, 45 Vt. 215, adopted as the law of this state in *Diedrich v. The N. W. U. Ry. Co.*, (1877) 42 Wis. 248, 270, 271, 3 N.W. 749; *Menominee River Lumber Co. v. Seidl*, (1912) 149 Wis. 316, 135 N.W. 854; *Skalitsky v. Consolidated Badger Coop*, (1948) 252 Wis. 132, 31 N.W. 2d 153; *State v. Bowen*, (1912) 149 Wis. 203, 135 N.W. 494. We conclude that the city does not have title to the area of the McDonald slip excavation. *State v. McDonald Lumber Company*, (1962) 18 Wis. 2d 173, 118 N.W. 2d

152, recently decided by the Wisconsin supreme court, did not determine the city's claim of title to this area.

It is therefore my opinion that the state is the owner of the area of the McDonald slip excavation, since it is part of the bed of Green Bay. The state may lease this area to the city of Green Bay. The city may lease it to a third party. Such third party could use or occupy such area to the exclusion of the McDonald Lumber Company. However, I believe that the commissioners of public lands, acting under sec. 24.39 (4) (e), could attach to any lease granted by them such conditions and terms as would avoid conflict in the subsequent use made of the slip area by such third party lessee and the McDonald Lumber Company.

AH

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*Legislature—Constitutionality—County Boards—Statute enacted from Bill No. 42, S., would not violate Art. IV, sec. 23, Wis. Const., if enacted after investigation determined change, regarding election of county board supervisors at large, was necessary.*

March 6, 1963

THE HONORABLE, THE SENATE:

Resolution No. 7, S. requests my opinion as to whether the provisions of Bill No. 42, S. violate the uniformity provisions of Art. IV, sec. 23, Wis. Const.

Bill No. 42, S. would create sec. 59.03 (1a) and would amend the introduction to sec. 59.03 (2) to provide:

“59.03 (1a) COUNTIES BETWEEN 200,000 AND 500,000. In each county having a population of at least 200,000 and less than 500,000 and more than one town, the board shall be composed of 4 members from each assembly district elected at large from such district. At the first spring

election in an odd-numbered year, after the enactment of this subsection (1963), each assembly district in such county shall elect 2 supervisors for one year and 2 for 2 years. Thereafter 2 shall be elected each year for 2 years. Any incumbent members of the board whose term has not expired when this plan goes into effect shall complete his term."

"59.03 (2) (intro. par.) In counties containing less than 200,000 population and more than one town:"

Art. IV, sec. 23, Wis. Const., provides:

"The legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable."

At present sec. 59.03 provides for three classes of counties for purposes of composition of county boards and election and compensation of supervisors. In counties having in excess of 500,000 population, one supervisor is elected from each assembly district, by the electors thereof, for a term of four years. In counties containing less than 500,000 population and more than one town, the board is composed of the chairmen of the town boards, a supervisor from each city ward, with exceptions, and a supervisor from every village. In counties having only one town the board is composed of the members of the town board and one supervisor from every incorporated village.

The present provision as to one town counties has not been tested in the courts. A previous similar provision was upheld in *Cathcart vs. Comstock*, (1883), 56 Wis. 609. The separate provision as to Milwaukee county has been held not to be violative of the uniformity clause. When the provision was tested, the statute as created by ch. 398, Laws 1907, was applicable to all counties having a population of at least 250,000. Milwaukee county was the only county then qualified under the provisions.

In *State ex rel. Scanlan v. Archibald*, (1911) 146 Wis. 363, 368-371, 131 N.W. 895, the court stated:

"\* \* \* that the question of uniformity is subject to review by the courts, but it must also be remembered that

under the repeated decisions of this court a broad discretion is vested in the legislature in determining whether the system of government under sec. 23, art. IV, of the constitution is as nearly uniform as practicable. *State ex rel. Peck v. Riordan*, 24 Wis. 484, 490; *Cathcart v. Comstock*, 56 Wis. 590, 14 N.W. 833; *State ex rel. Busacker v. Groth*, supra.

“\* \* \*

“The election of supervisors by assembly districts was in force when *State ex rel. Peck v. Riordan*, 24 Wis. 484, was decided, and such system does not appear to be questioned by appellants provided the classification of counties be proper. But it is argued that the classification is not proper or germane to the object of the law, because many other counties in the state having a much smaller population have as large a number of supervisors as Milwaukee county with more than 250,000 population, therefore it is claimed that the system is not as nearly uniform as practicable.

“\* \* \*

“That classification of counties according to population is proper is no longer an open question, and that, too, even though there be but one county falling within the class at the time of the passage of the law, when others may grow into the class. *Bingham v. Milwaukee Co.*, supra; *Verges v. Milwaukee Co.*, supra.

\* \* \*

“It must be remembered that the change made by the law under consideration affects only the number and manner of election of supervisors in the counties within the class designated in the law. The powers, duties, and functions of the county boards remain the same. The decisions of this court recognize the validity of the law now assailed, and that the conditions in populous counties, where the population is largely urban, justify legislation different than in counties of small population, mostly rural. *Bingham v. Milwaukee Co.*, 127 Wis. 344, 106 N.W. 1071; *State v.*

*Douglas*, 26 Wis. 428; *State ex rel. Grundt v. Albert*, 32 Wis. 403; *State ex rel. McCoale v. Kersten*, 118 Wis. 287, 292, 95 N.W. 120. \* \* \*

*“Whether the limit of population in the class should have been placed at 250,000 or less was a legislative question. The classification is germane to the objects sought to be accomplished by the law, and the rule of uniformity under sec. 23 art. IV, Const., is not infringed.”* (Emphasis added).

In *State ex rel. Milwaukee County v. Boos*, (1959) 8 Wis. 2d 215, 99 N.W. 2d 139, the court again dealt with sec. 23, Art. IV of the Wis. Const. in considering a statute which established a county executive in counties of over 500,000 gave him power of appointment of all boards and commissions and veto power over county board resolutions and ordinances. At pages 221-222 the court stated:

“It may serve some useful purpose at this time to summarize the position this court has taken on matters involving sec. 23, art. IV of the Wisconsin constitution, as applied to county government. This position encompasses two distinct aspects. First: One system of county government shall be established. Second: The systems adopted by the legislature shall be as nearly uniform as practicable. While there may be variation in carrying out the specific duties in county government, there can be no variation in the system itself. This court realizes the practicable problem which confronts Milwaukee county having a population in excess of 1,000,000 with an annual budget of \$80,279,000 and, in addition, an efficient system of county government, and we do not hesitate to find that the application of sec. 59.031, Stats., to a class of counties having a population of 500,000, of which Milwaukee county is presently the only member, does not violate the ‘uniform as practicable’ tests. We do find that sec. 59.031 as presently enacted does violate the ‘one system’ test.

“Under sec. 59.031 (2) (b), Stats., the county executive has broad powers of appointment entirely beyond control of the board of supervisors.

“Under sec. 59.031 (5) and (6), Stats., the county executive has broad veto powers over resolutions, ordinances, and budget.

“This court is not unmindful of the practicable problems existing in the carrying out of government functions in counties varying in size and character, *i. e.*, urban, rural, semirural, and semiurban.

“However, the changes referred to can only be in the particulars of county government and not in the substantive character or nature of county government. Thus, a statute allowing counties to exercise an option to adopt a commission form of government was held unconstitutional in *State ex rel. Adams v. Radcliffe* (1934), 216 Wis. 356, 257 N.W. 171.

“Changes in county government may be made where it is not practicable to carry on such government in a particular class of counties in the same manner as is carried on in other counties, provided there is a reasonable basis for diversity and the powers, duties, and functions of the county board remain the same. Accordingly, the classifications of counties according to population was held proper. *Bingham v. Board of Supervisors of Milwaukee County* (1906), 127 Wis. 344, 106 N.W. 1071, and *State ex rel. Scanlan v. Archibold* (1911), 146 Wis. 363, 131 N.W. 895.”

The court held that the portions of the statute not requiring confirmation of appointments by the county board, power of veto over increases and decreases in the budget, and power of veto and approval of resolutions and ordinances, unconstitutional.

If the classification of counties is germane to the objects sought to be accomplished by enactment of Bill No. 42, S. we are of the opinion that the limit of population included therein is a legislative question. We are of the opinion that the uniformity clause would not be violated by reason of the fact that the bill provides for the election of four county board members from each assembly district rather than one as provided in present sec. 59.03 (1) applicable to counties in excess of 500,000 population.

While not fatal to the bill, we are of the opinion that the word "members" should be deleted and the word "supervisors" substituted. The bill now utilizes both terms.

Neither the bill itself nor the accompanying resolution fully set forth the objects sought to be accomplished or the conditions prevailing in populous counties requiring a change.

We take notice of the fact that Dane county would be the only county presently affected if the bill were enacted into law. Such fact in itself would not mean that such statute would be invalid since other counties could grow into the class. Under the bill, the powers, duties and functions of county boards would remain the same. The decisions of our supreme court recognize that the conditions in populous counties, where the population is largely urban, or semi-urban, justify legislation different than in counties of small population, mostly rural.

We are of the opinion that a statute enacted from Bill No. 42, S. would be valid and not violative of Art. IV, sec. 23, Wis. Const., if it were enacted after the legislature had fully explored the objects sought to be accomplished and had determined that the conditions prevailing in populous counties required a change.

A member of a board of supervisors in a county other than Milwaukee county, chosen in a city or village, is a city or village officer for some purposes, 32 OAG 404 (1943), 14 OAG 51 (1925). However, while serving on the board he has a dual capacity even though he is not a county officer within the meaning of Art. VI, sec. 4, Wis. Const. *State ex rel. Gill, Att'y. Gen. vs. The Supervisors of Milwaukee County*, (1867) 21 Wis. \*443; *State ex rel. Williams v. Samuelson*, (1907), 131 Wis. 499, 111 N.W. 712.

If Bill No. 42, S. were enacted into law, supervisors, in counties of from 200,000-500,000 population, would essentially be county officers although elected from assembly districts. To fully implement the statute it would be necessary to amend sec. 61.19 to provide that in villages in counties having a population of at least 200,000 and more

than one town, no supervisor shall be elected and sec. 62.09 to provide that in cities in counties of at least 200,000 and more than one town, no supervisor shall be elected.

We also hasten to point out that Bill No. 42, S. does not provide for any compensation or expense allowance for supervisors in counties from 200,000 to 500,000, as such matters are now covered by subparagraphs (f) to (j) of sec. 59.03 (2) which would no longer apply. The amount and nature of compensation are matters of legislative concern.

RJV

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*Elections—Ballots*—Discussion of statutes regulating the interpretation of the intent of voters in marking ballots under party and by individual names.

March 8, 1963

ROBERT P. RUSSELL

*Corporation Counsel, Milwaukee County*

You have asked for my opinion whether ballots marked with an "X" in the circle at the top of the column under the party designation, and then marked further down said column with an "X" in the square to the right of one or more, but not all, of the individual party candidates, should be counted as votes for all the candidates in said column or just for those individual candidates particularly marked and for them only.

You enclosed in your letter dated January 7, 1963, six sample ballots, representative of some cast in the November 6, 1962, general election, and stated:

"In examining the six sample ballots which are enclosed, it will be noted that it would be impossible to ascertain the intent of the voter in each of the six instances. In Sample No. 1 you might very well say that since an 'X' is marked after all of the names with the exception of that

of Governor, that he intended to vote for all of the candidates except that of Mr. Reynolds, and that the placing of an 'X' at the top of the column was simply a mistake.

"On the other hand, if you examine Sample No. 2 where the 'X' is placed in the circle at the top of the column and then has marked squares following the first six offices, you could very well argue that the voter started out and marked the squares on an individual basis, and then suddenly decided why spend all that effort when he could accomplish the same purpose by placing an 'X' in the circle at the top of the column.

"An examination of the remainder of the sample ballots will disclose many possible interpretations as to the intent of the voter."

Sec. 6.22 which contains, inter alia, instructions for the information and guidance of voters, reads in part as follows:

"(1) (b) 1. If a voter wishes to vote for all the candidates nominated by any party he shall make a cross or other mark under the party designation printed at the top of the ballot in the circle made for that purpose. A ballot so marked and *having no other mark* will be counted for all the candidates of that party in the column underneath, unless the names of some of the candidates of the party have been erased or a name shall be written in or a cross mark be placed in the square at the right of the name or names of candidates in another column. *If the voter does not wish to vote for all the candidates nominated by one party, he shall mark his ballot by making a cross or mark in the square at the right of the name of the candidate for whom he intends to vote, or by inserting or writing in the name of the candidate.*"

Sec. 6.42, Stats., which establishes certain criteria to be followed to ascertain the intent of the voter, reads in part:

"6.42 Ascertainment of intent of voter. All ballots cast at any election shall be counted for the persons for whom they were intended, so far as such intent can be ascertained

therefrom. In determining the intent the following rules shall be observed:

"(1) If the elector shall place on his ballot at a general election a cross mark or other equivalent mark or symbol under a party designation, at the head of the column, in or near the space indicated for that purpose, *he shall be deemed to have voted* for all the candidates whose names appear in the column under such mark, unless some name or names shall be erased, or some name shall be written in, or unless in some other column he shall have placed a mark in the square at the right of the name of some other candidate for the same office."

Wisconsin supreme court decisions are not directly in point and a review of the legislative history of secs. 6.22 (1) (b) 1. and 6.42 (1) merely discloses that said sections were enacted by § 12 and § 30 of ch. 379, Laws 1891, and that subsequent amendments thereof did not appreciably alter the substantive contents of same.

This precise question has been raised in other jurisdictions and the decisions have gone both ways. Ballots marked in the circle at the head of the ticket and also in the square to the right of one or more candidates should be counted as a vote for every candidate on that ticket. *Potts v. Folsom*, (1909) 24 Okla. 731 104 Pac. 353; *Dunn v. Gamble*, (1924) 47 S.D. 303, 198 N.W. 821, rehearing denied 47 S.D. 379, 199 N.W. 457. Conversely, they should be counted only for those candidates particularly marked. *Gegg's Election*, (1924), 281, Pa. 155, 126 Atl. 260; *Neal v. Odle*, (1923) 308 Ill. 469, 140 N.E. 31. It should be noted that the provisions of statutes construed in the above cases differed, in each instance, from those contained in secs. 6.22 (1) (b) 1. and 6.42 (1).

Wisconsin supreme court decisions construing provisions of secs. 6.22 and 6.42 have established the following general principles:

(1) Statutes regulating elections should be construed so as to affect the popular will and not to thwart it. *State ex rel. Blodgett v. Eagan*, (1902) 115 Wis. 417, 91 N.W. 984;

*State ex rel. Dithmar v. Bunnell*, (1907) 131 Wis. 198, 110 N.W. 177; *State ex rel. Tank v. Anderson*, (1927) 191 Wis. 538, 211 N.W. 938.

(2) Although the right of the citizen to vote in elections is inherent, it is subject to reasonable regulation of the legislature. *State ex rel. Frederick v. Zimmerman*, (1949) 254 Wis. 600, 37 N.W. 2d 473.

(3) Statutes relating to elections should be liberally construed so as to insure rather than defeat the right of franchise. *Manning v. Young*, (1933) 210 Wis. 588, 247 N.W. 61; *State ex rel. Blodgett v. Eagan*, *supra*.

(4) the voter shall not be disfranchised because of mere mistake. *State ex rel. Blodgett v. Eagan*, *supra*.

(5) Since the intent of the voter, as gathered from the ballot itself, or from surrounding circumstances is to control, ballots which fairly and reasonably indicate the real intention of the elector, as distinguished from mere conjecture, should be counted as cast. *State ex rel. Blodgett v. Eagan*, *supra*; *State ex rel. Crain v. Acker*, (1910) 142 Wis. 394, 125 N.W. 952.

It should be noted that in a group of early opinions, then Attorney General Emmett R. Hicks ruled that a ballot marked in the square under the name of a candidate, but not marked in the party designation, could not be counted for the entire ticket (1902 OAG 78); that a ballot marked within the space at the head of the column designated "individual nominations", and containing no other marks, should be counted for all the candidates appearing in the column (1902 OAG 73); and that a cross put in the square of the party designation should be counted for every candidate in the column unless the names of any candidates are crossed out, in which event only those names not erased should be counted, or by writing the name of another candidate under the name of the person in said column and by placing a cross in the space occupied by a certain name in another column (1902 OAG 74).

After an analysis of the sample ballots you conclude:

"It seems to me that the legislature, in adopting Section 6.42 (1) recognized that it would be impossible to ascertain the intent of the voter in situations such as are illustrated by the six sample ballots. If the votes are to be counted at all, some general rule must be established to apply in all cases. The legislature has done this and, I think, rather clearly. It has indicated that once an 'X' is placed in the circle at the head of the column, the voter *shall be deemed to have intended to vote* for all the candidates whose names appear in the column under such mark, unless

"1) some name or names shall be erased, or

"2) a name shall be written in under a designated office,  
or

"3) unless he shall have placed a mark in a square in another column at the right of the name of another candidate for the same office."

Before answering your question, I believe that it is first necessary to determine whether ballots so marked should be counted at all. The court in *State ex rel. Crain v. Acker, supra*, in effect, held that ballots marked in the same space with the printed names of two candidates, but opposite a blank line left for individual nominations, should not be counted. The court reasoned that under the circumstances it was impossible to determine any intent of the voter to vote for either candidate save by merest guess or conjecture. Thus, an argument could be made that such ballots should not be counted. However, the facts presented in the *Acker Case* differ substantially from those presented in the question here posed. An examination of the six sample ballots clearly discloses an intent, at least, to vote for those candidates particularly marked. In view of these circumstances, the general principles enunciated above and the absence of any statute specifically declaring such ballots void, I believe they should be counted.

Should they then be counted as votes for all candidates in the party column or just for those individual candidates particularly marked? Since Wisconsin supreme court de-

cisions are not directly in point, a review of the legislative history of the statutes concerned' is not enlightening, and the decisions of other jurisdictions, based upon different statutory provisions, have gone both ways, they are not of any assistance. The answer therefore must be found within the wording of the applicable statutes.

The phrase "having no other mark" contained in sec. 6.22 (1) (b) 1. could be interpreted to have several meanings. It could simply be construed to mean that if a voter desires to vote a straight ticket, he can only mark an "X" in one circle at the top under the party designation. Thus, it could be argued that the above phrase has no other significance and therefore, ballots marked in the manner presented here must be counted as votes for all candidates in the party column.

Another possible construction is that said phrase when read together with other provisions contained in sec. 6.22 (1) (b) 1. would require that said ballots should be counted only for those candidates particularly marked. It should be noted that neither the above phrase nor the last sentence of said section are embodied within the provisions of sec. 6.42 (1). On the other hand, the latter section contains the phrase "he shall be deemed to have voted" and can only be construed to mean that such ballots shall be counted as votes for all candidates in the party column. Since sec. 6.22 (1) (b) 1. provides information to the voter and appears directory in nature, while sec. 6.42 (1) provides criteria for ascertaining the intent of the voter and is clearly mandatory, the wording contained in the latter section must control.

Thus, under sec. 6.42 (1), once the voter has placed an "X" in the circle at the head of the column, he *shall be deemed to have voted for all the candidates whose names appear in the column under such mark*, unless he takes affirmative action to indicate that such was not his intent by

- (1) erasing one or more of the names, or
- (2) writing in a name under a designated office, or

(3) placing a mark in a square to the right of another candidate for the same office in another column.

I am therefore of the opinion that ballots marked with an "X" in the circle at the top of the column under the party designation, and then further marked down said column with an "X" in the square to the right of one or more, but not all, of the individual party candidates, should be counted as votes for all the candidates in said column.

Mr. Gaige Roberts, supervisor of the division of elections and records, in the office of the secretary of state, has advised me that this conclusion is in accord with his long-standing administrative interpretation of sec. 6.42 (1). I also believe this conclusion to be in accord with the general principles stated above and previous opinions issued by this office.

GBS

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*County Board—Resolutions*—Resolutions adopted by the county board pursuant to powers granted by 59.02 are valid even though its own rules of parliamentary procedure were not followed.

March 19, 1963

R. E. GIERINGER

*District Attorney, Adams County*

You ask whether a resolution passed by Adams county board, arising from a motion for reconsideration by a member who previously voted in the negative, was valid.

The county board at its fall meeting adopted resolution No. 34 of the resolution committee by a 13 to 7 vote. The following day, a member who voted in the negative moved that resolution No. 34 be reconsidered, and that it be amended as specified in his motion. The motion carried by a vote of 12 to 8. No one objected that the motion was out of order in accordance with rule No. 23.

County board rule No. 23 reads as follows:

“No motion for reconsideration shall be in order unless made the same day or the day following that on which decision proposed to be considered took place, nor unless one of those voting on the same side which prevails shall move for reconsideration.”

The powers of the county board and how they are exercised are enumerated in sec. 59.02:

“**Powers, how exercised; quorum.** (1) The powers of a county as a body corporate can only be exercised by the board thereof, or in pursuance of a resolution or ordinance adopted by it.

“(2) Ordinances and resolutions may be adopted by a majority vote of a quorum or by such larger vote as may be required by law. Ordinances shall commence as follows: ‘The county board of supervisors of the county of . . . do ordain as follows.’

“(3) A majority of the supervisors entitled to a seat on the board shall constitute a quorum. All questions shall be determined by a majority of the supervisors present unless otherwise provided.”

It is my opinion that resolution No. 34 is valid and that any procedural defects were waived by not having been raised timely. If the board had the power in the first instance to consider the substance contained in resolution No. 34, then its proceedings must be liberally construed in order to get at the real intent and meaning of the body.

In *Hark vs. Gladwell*, (1880) 49 Wis. 172, 177, 5 N.W. 323, the court said:

“\* \* \* It will not do to apply to the orders and resolutions of such bodies nice verbal criticism and strict parliamentary distinctions, because the business is transacted generally by plain men, not familiar with parliamentary law. Therefore their proceedings must be liberally construed in order to get at the real intent and meaning of the body. In this case the obvious intent was to adopt the report of the committee in changing the road, and confirm its acts,

which was equivalent to giving the committee full authority to make the change in the first instance.”

In respect to technicalities of procedure, the supreme court said in *Bartlett v. Eau Claire County*, (1901) 112 Wis. 237, 245, 88 N.W. 61:

“\* \* \* All reasonable liberality must be accorded the minor deliberative bodies of the state; notably county boards, town meetings, school-district meetings, and the like, where, by reason of the character and vocation of the men comprising such bodies, the technicalities of procedure are not strictly enforced, nor perhaps fully understood. We must not expect nor demand that the records of such meetings should be made up with the accuracy and technicality of those of monetary corporations, conducted under the direction of skilled counsel; nor, indeed, of the legislature itself. *State ex rel. Bruce v. Davidson*, 32 Wis. 114; *State ex rel. Rochester v. Sup'rs of Racine Co.* 70 Wis. 543, 553; *Ryan v. Outagamie Co.* 80 Wis. 336. \* \* \*”

In *State ex rel. Hunsicker v. Board of Regents*, (1932) 209 Wis. 83, 86, 244 N.W. 618, the supreme court stated:

“It is a well settled principle of law that statute will not be held void because the legislature did not follow its own rules in the passage of the act. 36 Cyc. 958; *McDonald v. State*, 80 Wis. 407, 50 N.W. 185. \* \* \*”

This principle, applicable to the legislative branch of the state, applies also to the legislative branch of county government, there being not statutory provision to the contrary.

I find no statutory provision relating to the procedure to be followed by the county board to reconsider its own resolution. The legislature has not prescribed any rule or method of procedure that must be followed by a county board in the exercise of its powers granted by sec. 59.02. Even though the procedure followed in the consideration of motion to reconsider was contrary to rules of parliamentary procedure adopted by the board, no appeal was taken from the ruling of the chairman declaring it passed. Such resolution is valid if the procedure was otherwise in

compliance with the statutes. 27 OAG 21. Also, see 44 OAG 205 and 18 OAG 268.

RGM

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*Fees—Cognovit—Courts—Cognovit judgment must be taken by circuit or county court procedure in accordance with 270.69 rather than small claims procedure in Ch. 299. Secs. 59.42, 271.04, and 271.21, regarding fees and costs are applicable.*

March 20, 1963

A. W. PONATH

*Corporation Counsel, Outagamie County*

You inquire whether the provisions of Ch. 299, relating to procedure in county court in small claims type actions, are applicable to cognovit matters.

The answer to this question is in the negative.

We no longer have small claims courts. We do have small claims type actions however.

You also inquire as to the fees applicable in cognovit matters.

Ch. 299, is entitled "Procedure in County Court in Small Claims Type Actions."

Sec. 299.01 provides in part:

"**Applicability of chapter.** Subject to the limitations of ss. 299.11, 299.12 and 299.13, the procedure in this chapter shall be used in county court in the following actions:

"\* \* \*

"(4) **OTHER CIVIL ACTIONS.** Other civil actions where the amount claimed is \$500 or less, provided that such actions or proceedings are:

"(a) For money judgments only except for cognovit judgments which shall be taken pursuant to s. 270.69; or

"\* \* \*"

Sec. 299.03 provides:

**“Intent.** Secs. 299.01 and 299.02 are *procedural* and not jurisdictional. Unless otherwise designated wherever the word ‘court’ is used herein it means county court.”

Sec. 299.04 (1) provides:

**“Relation of this chapter to other procedural rules. (1) GENERAL.** Except as otherwise provided in this chapter, the general rules of practice and procedure in Title XXIV and Title XXV shall apply to actions and proceedings under this chapter.”

Sec. 253.01 provides:

**“County court established.** There is established in each county a county court which is a court of record with the jurisdiction specified in ss. 253.10 to 253.14.”

Sec. 253.11 (1) provides in part:

**“Civil jurisdiction. (1)** The county court has jurisdiction of all actions to foreclose a land contract, mortgage, or lien concurrent with the circuit court and of all other civil actions and special proceedings of all kinds concurrent with the circuit court except actions for damages in which a sum in excess of \$25,000 exclusive of interest and costs is demanded in the complaint, \* \* \*”

Sec. 270.69 details which matters may be taken to judgment on cognovit and prescribes the detailed procedure which must be followed in each case.

Sec. 299.01 (4) (a) expressly excepts cognovit judgments from the procedure set forth in Ch. 299, and provides that they shall be taken pursuant to sec. 270.69, which is the procedure applicable to such matters in circuit or county courts. Since this is circuit or county court procedure rather than small claims type procedure, a suit tax of \$5 is applicable. The only reference to cognovit judgments in Ch. 299, is one of exception, whereas they are treated specially, as to procedure, fees and costs in the statutes generally applicable to circuit and county courts. See sec. 271.04.

Sec. 271.21 provides in part:

“**Suit tax.** In each civil action, special proceeding, except probate proceedings, and cognovit judgment in the circuit or county court, excluding all matters brought into the probate branches, a suit tax of \$5 shall be paid at the time the action is commenced, except that in actions by small claim type procedure and forfeiture actions in the county court, the tax shall be \$1. \* \* \*”

Sec. 59.42 provides in part:

“**Clerk of court; fees.** Notwithstadinng other provisions in the statutes or session laws, the clerk of circuit court and the clerk of any other court of record (in all actions and proceedings civil or criminal brought under jurisdiction concurrent with the circuit court, except those handled under essentially justice court or small claims procedure) shall collect the following fees:

“\* \* \*

“(2) **CIVIL ACTIONS.** In civil actions and cognovit judgments at the times indicated below, for all necessary filing, entering, docketing and recording, drawing of jurors, swearing of witnesses, jurors and officers to take charge of jurors, placing cases on the calendar and taxing costs (but no fee other than suit tax shall be paid by counties, municipalities or school districts initially or upon change of venue, nor shall fees other than suit tax be paid in judicial reviews of industrial commission orders or awards; the state shall pay fees but no suit tax):

“Kind of action or proceeding. At time of filing initial document required for commencement of action or proceeding (in addition to state tax)

“(a) Cognovit \$6

“\* \* \*”

Clerk's fees of \$6 are due in cognovit matters.

In summary it may be stated that cognovit judgments may properly be taken in county court, according to procedure set forth in sec. 270.69. Such procedure is circuit or county court procedure and not small claims type procedure. A suit tax of \$5 is applicable, clerk's fees of \$6 apply and costs are governed by sec. 271.04.

RJV

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*Public Access-Lakes*—Public access to a lake or stream under 236.16 (3) must be connected with rest of public highway system by public road. Width of public road depends on statutes.

March 27, 1968

FRANK P. ZIEDLER

*Director, Department of Resource Development*

You ask several questions concerning access to lake and stream shore plats. You quote sec. 236.16 (3) as follows:

“(3) LAKE AND STREAM SHORE PLATS. All subdivisions abutting a lake or stream shall provide public access at least 60 feet wide providing access to the low water mark so that there will be public access at not more than one-half mile intervals as measured along the lake or stream shore unless topography and ground conditions do not permit.”

You ask four questions concerning this section. They will be answered separately in the following paragraphs.

I

The first question reads, “To satisfy the requirement of 236.16 (3), must the public access to a lake or stream be connected by public ways to the rest of the public highway system of the state?”

It is my opinion that the public access at the low water mark must be connected to the rest of the public highway system in order that public access is provided as per the statute. The section provides that all subdivisions abutting a lake or stream shall provide public access at least 60 feet wide providing access to the low water mark. If the public access at the low water mark does not connect to the system of public highways, this would not be public access.

## II.

Your second question reads, "Suppose the local governing body does not want to accept responsibility for the streets or roads of a plat and would accept the plat only if the roads were designated 'private roads,' and the roads would provide the only means of connecting to the rest of the public road system, would an area abutting the lake or stream which is connected to these private roads but designated 'public access' still be eligible to be considered to fulfill the requirements of 236.16 (3)?"

It is my opinion that if the local governing body does not want to accept the plat unless the roads in the plat were designated private roads, and the private roads would provide the only means for connecting public access and the public roads system, the requirements of sec. 236.16 (3) are not being fulfilled. Therefore, the plat would not be eligible to be recorded under Ch. 236.

In passing, it may be helpful to observe that the recourse the property owner would have would depend upon whether the property in question was in a town, city or village. If it were in a town, the property owner could petition with six or more resident fee holders, to lay out a town road to the public access. If the town refused, the property owner could attempt to use sec. 80.39 which provides that the county board may lay out highways and ask that a public highway be laid out to the public access. The county board may also enter into an agreement with the city, village or town to enable the county to construct and maintain the street or highway in the municipalities, should the local unit not want the responsibility. (See sec. 83.035.) The

county board, under sec. 83.03, may also construct, improve or repair or aid in constructing or improving or repairing any highway in the county.

There is also a provision in sec. 23.09 (14) whereby the county board of any county may condemn a right of way for any public highway to any navigable stream, lake or other navigable waters. Sec. 23.09 (15) provides a means of making an application to the conservation commission for state aid for public access to waters.

If the property is in the city, there is a procedure in sec. 62.22 for ten resident fee holders to petition to open a street. Likewise, if the property is in a village, sec. 61.36 gives the village board the power to lay out a street. Therefore, the property owner could petition the village board.

### III.

Your third question reads, "236.16 (3) states that the public access be 60 feet wide; how far back from the low water mark does this 60-foot width of access have to be extended? As an example, could this 60-foot access area be say 150 feet long, thence connected by a street of less than 60 feet wide to the existing public highway system?"

It is my opinion that the access must be 60 feet wide at the low and high water mark. However, if the minimum street width, as established under sec. 236.16 (2) is provided, and this street is connected to the public access, the requirements of statute have been met. If there is an existing public highway system with a street less than 60 feet wide to which the 60 foot access at high water mark is connected, it is my opinion that sec. 236.16 (3) has been complied with. There are other sections of the statutes that provide for minimum street width in addition to sec. 236.16 (2), therefore, I assume that any public highway connecting the public access to the high water mark would be of a sufficient width to provide adequate public access.

### IV.

Your fourth question reads, "The 1955 revisions of chapter 236 changed the width of the public access to lake and

stream plats from 50 to 60 feet. If there already exists a 50-foot public access to the water's edge, as previously required, which 50-foot access is within one-half mile (as measured along the shore line) of all points on the new plat, does the new owner have to provide 60 feet within his plat or arrange for the widening of the existing 50-foot access to 60 feet?"

In your fourth question, if you assume that the 50-foot access is not part of any plat, it would then be my opinion that it would be necessary to widen the access to 60 feet, unless topography and ground conditions did not permit, or the new plat should contain a public access. However, if the 50-foot access was within a plat that was recorded, then the access would not have to be widened, nor would it be necessary to provide a 60-foot access in the new plat.

AJF

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*School Board—Town Board—Bus Drivers—Sec. 946.13* does not prohibit a school board from hiring members of a town board as school bus drivers even where their salaries as such bus drivers exceed \$1,000 per year.

March 27, 1963

TERENCE N. HICKEY

*District Attorney, Sawyer County*

You have directed my attention to the following fact situation. Joint school district No. 1 consists of several towns and villages including the town of Winter in Sawyer county. The chairman and a side supervisor of the town of Winter have been hired by the school board of this school district to drive school busses. You ask whether such town officers can be employed by the school board as school bus drivers in view of sec. 946.13 which reads in part:

“(1) Any public officer or public employe who does any of the following may be fined not more than \$500 or imprisoned not more than one year or both:

“(a) In his private capacity, negotiates or bids for or enters into a contract in which he has a private pecuniary interest, direct or indirect, if at the same time he is authorized or required by law to participate in his capacity as such officer or employe in the making of that contract or to perform in regard to that contract some official function requiring the exercise of discretion on his part; or

“(b) In his capacity as such officer or employe, participates in the making of a contract in which he has a private pecuniary interest, direct or indirect, or performs in regard to that contract some function requiring the exercise of discretion on his part.

“(2) Subsection (1) does not apply to the following:

“(a) Contracts in which any single public officer or employe is privately interested which do not involve receipts and disbursements by the state or its political subdivision aggregating more than \$1,000 in any year, \* \* \*”

This statute prohibits a public officer or public employe, acting in his official capacity, from negotiating any contract in which he will have a private pecuniary interest. In other words a public officer acting in his official capacity may not make a contract with himself acting in a private capacity. In 23 OAG 454 this office said that the purpose of such a statute is to protect the public from loss occasioned by unscrupulous officers who would seek to profit from their office by letting contracts, not on their merits, but in a manner best suited to enrich themselves. In 20 OAG 934 this office said that a town chairman cannot be hired by the town board to work on the town highways.

In *Dodge County v. Kaiser*, (1943) 243 Wis. 551, 561, 11 N.W. 2d 348, it was held that a member of a school board is prohibited from entering into any contract with the board of which he is a member. In 40 OAG 488 this office expressed the opinion that under sec. 348.28 Stats.

1951, a school board may not contract with a member of that board to perform services for the board for compensation in addition to his regular salary where such additional sum exceeds \$1,000. Also in 40 OAG 433 the opinion was expressed that membership on a county school committee is not incompatible with employment as a school bus operator by a school district in the county but if more than \$1,000 is involved in any year, sec. 348.28, Stats. 1951, would prohibit such employment. This section of the statutes has been amended and renumbered sec. 946.13.

Sec. 40.53 authorizes school boards to provide school bus transportation and subsection (7) (b) thereof reads in part:

“All drivers or operators of vehicles used for the transportation of public school pupils for compensation shall be under written contract with the school district for which such drivers or operators transport pupils. \* \* \*”

It is thus clear that school bus drivers are hired by the school district board and not by the town board.

Under sec. 946.13 a town board could not hire one of its own members to perform extra work for the town if the amount of the extra compensation exceeded \$1,000. Likewise, a school board could not hire one of its own members to perform extra work for the school board if the amount of the extra compensation exceeded \$1,000. However, there is no prohibition against the school board's hiring a member of the town board even where the extra compensation exceeds \$1,000.

It is therefore my opinion that joint school district No. 1 in Sawyer and Rusk counties may employ the chairman and side supervisor of the town of Winter as school bus drivers, and that their salaries for this service may exceed \$1,000 per year, without violating sec. 946.13.

AH

*County Parks—Airports—County Boards*—Pursuant to secs. 27.015, 27.02, 59.15 (2) (b), and 114.14 county parks and airports may be operated through committees of the county board.

March 28, 1963

FREDERICK K. FOSTER

*Corporation Counsel, Fond du Lac County*

Your predecessor informed this office that Fond du Lac county has been considering the establishment of a county parks commission and asked several questions regarding the various statutory provisions for operating county parks and airports.

It is clear that county parks may be established and operated by a county rural planning committee or by a county park board under the express provisions of sec. 27.015. County parks may also be operated by a county park commission under secs. 27.02 through 27.05. The question asked is whether county parks may also be operated by a committee of the county board. It is my opinion that this can be done. Sec. 59.15 (2) (b) reads:

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

This statute specifically provides that the county board may transfer the functions of county offices, boards, commissions or committees to a committee of the county board. This would clearly authorize the transfer of the authority to operate county parks to such a county board committee. Thus, counties are authorized to operate county parks in any of the four ways above mentioned. It is my opinion that the existence of these various methods for operating county parks does not violate Art. IV, sec. 23, Wis. Const., which requires a uniform system of county government, be-

cause all counties are invested with the same general powers of local government in this respect with certain minor variations found in sec. 27.02. On the subject of uniform county government, see *State ex rel Milwaukee County v. Boos*, (1959) 8 Wis. 2d 215 and 50 OAG 10.

A county airport may be operated by a county park commission under sec. 27.05 (4), or by an airport commission under sec. 114.14 (2). The question asked is whether such an airport may also be operated through a committee of the county board. It is my opinion that this can be done. A county board can establish an airport under sec. 114.11, and may vest jurisdiction for the operation of such airport in any suitable officer, board, or body of such county under sec. 114.14 (1). Under this section and under secs. 59.06 and 59.15 (2) (b) it is clear that the county board may delegate to a committee of the county board the authority to operate a county airport.

GFS:AH

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*Constitutionality—Legislature—Aid to Industries—Legislation designed to promote the use of state funds or state credit to aid new and expanding industries so as to relieve unemployment would probably require amendment of Art. VIII, secs. 3 and 10, Wis. Const.*

March 28, 1963

LEONARD ZUBRENSKY, *Legal Counsel*

*Executive Office*

In connection with the possible establishment of a state industrial authority for the purpose of making state loans to help finance industries you have asked a number of questions.

I.

One of these questions reads as follows:

“(a) Will legislative declaration that state assistance to labor surplus areas is a public purpose for which public

money may be spent provide a sufficient basis for state loans to help finance industries in redevelopment areas?"

While legislative declarations of the purposes of a statute are entitled to great weight in ascertaining the legislative intent of a statute so ambiguously worded as to be open to construction, such declarations cannot serve the purpose of making valid an otherwise unconstitutional statute.

As is stated in 11 Am. Jur. "Constitutional Law" §141, p. 819:

"\* \* \* Just as bad motives of the legislators do not nullify laws passed within the bounds of the Constitution, it is well established that good motives or good faith on the part of the legislators in passing a law will be ineffective in sustaining it if it clearly violates the provisions of the Constitution."

In the case of *State ex rel. Lamb v. Cunningham*, (1892) 83 Wis. 90, 53 N.W. 35, 13 L.R.A. 145, 35 Am. St. Rep. 27, the court said at p. 139:

"\* \* \* In other words, in so far as the legislature keeps within the limits of its powers, the motives of its members cannot be inquired into, and its discretion is not a subject for review in the courts; but whenever, and to the extent that, the legislature transcends its powers, it is conclusively presumed that it intended to so transcend the same, and hence parol evidence of good motives or other considerations cannot be allowed to obviate the effect of such unlawful intent."

Also directly in point is the case of *Brimmer v. Rebman*, (1891) 138 U.S. 78, 34 L. ed. 862, 11 S. Ct. 213, where it was held that a statute which violates the federal constitution is void regardless of its recited purpose.

Thus the motives of the legislature, good or bad, and whether expressed or unexpressed, are of no concern to the courts in facing up to the question of whether the statute appears on its face to be constitutional and valid.

See also, *State ex rel. Thomson v. Giessel*, (1953) 265 Wis. 558, 564, 61 N.W. 2d 903.

## II.

Another question you have raised reads:

“(b) Is it probable that the legal basis for an assistance program in labor surplus areas would be strengthened if the state dealt directly with municipalities rather than citizen industrial development corporations?”

Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such governmental powers of the state as may be entrusted to them. *Madison Metropolitan Sewerage Dist. v. Committee on Water Pollution*, (1951) 260 Wis. 229, 243, 50 N.W. 2d 424. The state may, at its pleasure, expand or contract the territorial area, unite the whole or a part of it with another municipality, or 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. *State ex rel. Zilisch v. Auer*, (1928) 197 Wis. 284, 293, 221 N.W. 860, 223 N.W. 123.

However, the state may not validly authorize a municipal corporation to expend money for a private purpose any more than the state itself could expend money for a private purpose. In *Heimerl v. Ozaukee County*, (1949) 256 Wis. 151, 40 N.W. 2d 564, it was held that a statute authorizing municipalities to enter into contracts to build, grade, drain, surface, and gravel private roads and driveways, and further authorizing counties to contract with municipalities to perform such work was unconstitutional as authorizing the appropriation and expenditure of public funds for a private purpose without any direct advantage accruing to the public, and as authorizing municipalities to engage in private business.

This is not to say that either the state or municipalities are without authority to take action in the area of unemployment. Sec. 49.05 (1) provides in part:

“Any municipality or county required by law to administer relief may require persons entitled to relief to labor on any work relief project authorized and sponsored by the municipality or county, at work which they are capable of performing \* \* \*”

Sec. 49.05 (3) provides, so far as material here, that municipalities or counties may authorize work relief projects, for the performance of any work not prohibited by law.

However, such work relief projects could not be of a sort which would result in the municipality being engaged in private business. Nor is the result any different from a constitutional viewpoint if instead of engaging directly in private business, the state or the municipality were to furnish the capital for the operation of a private business while leaving the management in private hands.

The welfare of labor is a matter of public concern which justifies the exercise of the state's police power in many ways. Note for example the industrial commission law with its provisions relating to compensation for accidental injuries to employes and which was held valid in the landmark case of *Borgnis v. Falk*, (1911) 147 Wis. 327, 133 N.W. 209. Note also the employment relations act, Ch. 111, Wis. Stats. It has been held that the state may regulate labor relations in the interests of the peace, health, and order of the state. *Wis. Labor Relations Bd. v. Fred Rueping Leather Co.*, (1938) 228 Wis. 473, 279 N.W. 673. It has the right to mark the limits of tolerable industrial conflict in the public interest. *Int'l Union et al. v. Wis. Employment Relations Bd.*, (1949) 250 Wis. 550, 27 N.W. 2d 875, 28 N.W. 2d 254, 336 U.S. 245. The state has a public interest in the relation between employer and employe and its enactments in relation thereto do not destroy nor are they calculated to invade contract rights but they do seek to protect the public against unfair labor practices used to foster the continuance of employer-employe relations in which the public is interested. *Appleton Chair Corp. v. United Brotherhood, et al.*, (1942) 239 Wis. 337, 1 N.W. 2d 188.

The state's legitimate interest in the problem of unemployment is further exemplified in the unemployment compensation act, Ch. 108, Wis. Stats. On its face the compulsory unemployment insurance features of the act might appear to deprive the employer of property and to deprive both the employer and employe of freedom of contract. It was nevertheless concluded in a well written article in 7 Wis. Law Review 136 that this does not take away property and liberty without due process of law but that it is a reasonable exercise of the state's police power for the general welfare.

However, all of the foregoing falls short of constituting approval of the financing of a private business by tax money to the end that business so financed may provide employment for persons who might otherwise be unemployed.

The case which perhaps most nearly establishes the guidelines of permissible activity on the part of the state in aiding private corporations is that of *State ex rel. Wis. Development Authority v. Dammann*, (1938) 228 Wis. 147, 277 N.W. 278, 280 N.W. 698.

Several very important principles were enunciated in that case including the following:

1. The validity of an appropriation of state or other public funds must be judged by the validity of any tax which might be levied to support it, and an appropriation of tax money which might be levied to support it, and an appropriation of tax money for a private purpose amounts to taking the property of one citizen or group of citizens without compensation and paying it to others, and constitutes a violation of the equality clause as well as the taking of property without due process of law.

2. An appropriation solely for a public purpose, and under proper governmental control and supervision, is not invalid merely because it is paid to or through a private corporation or agency.

3. To sustain a public purpose the advantage to the public must be direct and not merely indirect or remote.

4. An appropriation by the legislature must not merely be for a public purpose but for a state purpose, since a tax must be spent at the level at which it is raised.

5. An act of the legislature which created an authority authorized to use an appropriation of state funds to survey the resources and facilities existing and available for the production, transmission, distribution and furnishing of light, heat, water, and power in the state; to make studies and surveys for the economical development, use, and conservation of such resources; and to make studies and surveys for the coordination of water power and fuel power developments with the regulation of rivers for water supply, navigation, flood control, soil conservation, public health, and recreational uses properly appropriates the funds for both a public and state purpose.

6. Such an act so far as it authorized the authority to use an appropriation of state funds to promote the acquisition, ownership, construction, operation, or management of any plant or any part thereof for the production and furnishing of light, heat, water, or power by any cooperative association, nonprofit corporation, city, village, town, municipal power district, or any group or combination thereof is invalid as appropriating state funds for a local, and not a state purpose.

7. Such an act does not violate Art. VIII, sec. 10, Wis. Const., prohibiting the state from contracting any debt for works of internal improvement or being a party in carrying on such works, since the act as limited and construed, merely authorized the encouragement of others to engage in such works.

Admittedly the scope of what may be considered a public purpose may change with the times as the wants and necessities of the people change. *W.D.A. Case*, supra, at p. 182.

However, in view of the principles so clearly enunciated in this case it seems doubtful that the legislature could validly authorize state loans to help finance industries in unemployment areas. We would certainly not advise the expenditure of state funds for such purpose in the absence of a favorable supreme court decision.

### III.

In view of the foregoing there is no point in discussing the mechanics of amending the statutory provisions referred to in one of the other questions you have submitted.

Also there is no point in discussing the so-called building corporation idea referred to in your request since these nonprofit private corporations obtain their funds not through legislative appropriation but through loans from private lending agencies which are willing to make the loans on the strength of commitments by the state to pay rentals to such corporations for the use of buildings constructed by these corporations for the state, it having been held that the payment of future rent is not a presently existing debt of the state prohibited by the state constitution. *State ex rel. Thomson v. Giessel*, (1955) 271 Wis. 15, 72 N.W. 2d 577.

### IV.

You have referred to Jt. Res. No. 15, S., of the 1959 legislature which would have amended Art. VIII, sec. 3, of the state constitution so as to enable the state to give credit on bond issues for guaranteed loans for industrial purposes in aid of individuals, associations or corporations and you inquire whether an amendment of Art. VIII, sec. 10, should also be considered.

To accomplish the desired result it would seem wise to amend both sections. Apparently this was deemed advisable in the 1959 legislature since in addition to Jt. Res. No. 15, S., mentioned above, there was also Jt. Res. No. 16, S., and Substitute Amendment No. 1, S., to Jt. Res. No. 16, S., which would have amended Art. VIII, sec. 10, so as

to authorize the state to appropriate money for the development of private industry.

Art. VIII, sec. 3, provides that the credit of the state shall never be given, or loaned, in aid of any individual, association, or corporation.

Art. VIII, sec. 10, provides in part that the state shall never contract any debt for works of internal improvement or be a party in carrying on such works.

If Art. VIII, sec. 3, were amended so as to authorize the state to give or loan its credit, this would still not authorize the state to become a party to a work of internal improvement. What constitutes a work of internal improvement can be a troublesome question and it may involve a multitude of activities. It has been defined as including "those things which ordinarily might, in human experience, be expected to be undertaken for profit or benefit to the property interests of private promoters, as distinguished from those things which primarily and preponderantly merely facilitate the essential function of government." *State ex rel. Jones v. Froehlich*, (1902) 115 Wis. 32, 38, 91 N.W. 115. It has been said to exclude only such public works as are used by the state in carrying on the affairs of civil government. *State ex rel. Owen v. Donald*, (1915) 160 Wis. 21, 151 N.W. 331. See also, 26 OAG 170 for various examples.

Obviously a statute authorizing the state to engage in the financing of private industries operated for profit might well be in violation of Art. VIII, sec. 10, even though the state were authorized to lend its credit by bond issues for guaranteeing loans for industrial purposes as contemplated by the proposed amendment of Art. VIII, sec. 3, by Jt. Res. No. 15, S., of the 1959 legislature. At least there would be a substantial question which would call for a supreme court decision since under the above authorities what constitutes a work of internal improvement is a judicial question.

While falling outside the scope of your inquiry, it might be suggested that if Art. VIII, sec. 3, is to be amended

it might also be advisable to include a provision in the amendment which would enable the state to guarantee the loans of private nonprofit corporations organized for the purpose of constructing needed buildings for the state. This could result in some interest savings in financing the construction of state buildings and is certainly in furtherance of providing employment.

The foregoing discussion makes unnecessary any further discussion of other problems suggested in your request for an opinion.

WHR

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*Trading Stamps—Constitutionality*—There is no constitutional prohibition against trading stamps being redeemed in merchandise as well as cash.

March 29, 1963

THE HONORABLE, THE SENATE:

Pursuant to Resolution 12, S., you have asked my opinion as to the constitutionality of Bill No. 45, S.

Bill 45, S., proposes to legalize the issuance of trading stamps in connection with the sale of goods which are redeemable in either cash or merchandise.

At the present time, it is legal under sec. 100 .15 (1) to issue trading stamps to a purchaser which entitles the purchaser to redeem the stamps in cash. However, there is a specific prohibition against the issuance of any trading stamp, token, ticket, bond, or similar device, which entitles the purchaser receiving the same to procure any goods, wares, merchandise privilege, or thing of value in exchange for any such device.

It is my opinion, that there is no constitutional question involved. This is a statutory prohibition which may be

changed at any time. Whether or not trading stamps may be exchanged for merchandise, as well as for cash, is a matter of legislative policy.

AJF

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*Civil Service—Vacation—Unclassified Personnel—Discussion of statutes regulating classified and unclassified personnel, vacation credit earned, payment in lieu thereof, serving in two unclassified positions simultaneously, and payment of compensation. Where there is doubt as to validity of payment, such cannot be made until adjudicated by courts.*

March 29, 1963

HOWARD J. KOOP

*Commissioner, Department of Administration*

You state that you were formerly financial secretary to Governor Nelson, and that on December 1, 1962 you began work for the board of regents of state colleges (herein referred to as regents) in a "faculty" position, but that the regents are to be reimbursed for your salary by the state colleges building corporation which is a private corporation with a public purpose. During the same period you remained on the staff of Governor Nelson and were paid out of the executive office appropriations during the same period and that, since you did not take vacation during 1962, Governor Nelson and then Governor-Elect Reynolds agreed that you could remain on the executive office payroll until January 31, 1963, and that you expect to be compensated for January for 3 weeks vacation and one week's work from such source. On January 10, 1963 you were appointed commissioner for administration, but do not expect to be compensated out of the department's budget for January, but expect a full month's salary from the regents for completing work started prior to your appointment as commissioner.

You have requested the bureau of finance to withhold payment to you of moneys claimed due from the regents until an opinion as to legality is received and state that you will reimburse the regents for the salary paid for December, 1962 if you were not entitled to the same.

In view of the intricate questions involved, a further detailing of the circumstances is necessary.

You state that your salary in Governor Nelson's office was at a rate of \$16,000 annually and that during December, 1962, you worked an average of 6 hours daily for 29 days and that during the period January 2-7, 1963 you worked 6 hours daily, and that during the period January 11-31, 1963 you worked an average of 8 hours daily, 7 days a week. You did not file a written letter of resignation from such position and your name was carried on the payroll through January 31, 1963 and you received a salary of \$1,333 for December, 1962 and \$1,333 for January, 1963 from the executive office. You state that there were no established hours of employment in that office, but that over a 3½ year period you worked an average of 60 hours weekly. You state that no compensatory time was ever taken, and that total vacation time used in four years was four weeks.

You indicate that no approval for deviation from the standard work week was ever requested for your position by the governor or by the regents.

You state that your salary beginning December 1, 1962 with the regents was at a rate of \$14,000 per year and that there were no established hours of employment. In December, 1962 you worked an average of 5½ hours a day for 29 days for the regents, from January 2-7, an average of 6 hours a day, from January 8-10, 8 hours a day, and an average of 4 hours daily from January 11-31, for that agency. You did not file a formal written resignation and your name was carried on the payroll through January, 1963. You received compensation of \$1,183 for December, 1962 and claim compensation for January, 1963 in the amount of \$1,183.

You were appointed commissioner of administration on January 10, 1963, and filed your certificate and oath on that date, but have not been confirmed by the senate. Mr. Nusbaum, the former commissioner, was carried on the payroll through January 6, 1963.

You state that your duties for the regents were different and not germane to your duties in the governor's office, and after January 10, 1963 were not germane to your duties as commissioner. You indicate, however, that your services to the governor's office after January 10, 1963 were not substantially different than your services as commissioner of administration which you were performing in February, and that the deputy commissioner performed most routine functions during January.

Your first question is whether an unclassified employe is entitled to compensation for vacation earned but not taken during the preceding vacation year, in addition to his salary in another state agency, where the appointing authorities consent.

Your second question is whether an unclassified employe is entitled to compensation from two separate state agencies for full time positions held with each and for work performed for each during the same period.

Your first letter indicated that you were under the impression that persons in unclassified positions are not in "civil service" and are not subject to civil service laws and regulations. Such impression is erroneous even though it is one widely held by elected and appointed state officials and certain members of the faculties of state colleges and the university. All such positions are within the civil service although many are in the unclassified division as distinguished from the classified division. Hence, many of the provisions of sections 16.01 through 16.30 apply to positions in the unclassified service. In general it can be said that the provisions of sections 16.01 through 16.30, and other provisions of the statutes dealing with state employes, apply to positions in the unclassified service unless they are excepted expressly or by necessary implication

or are treated specifically as to subject matter in point by special statutes.

Sec. 16.02 provides in part:

**"16.02 Definitions.** In ss. 16.01 to 16.30, unless the context otherwise requires:

"(1) 'Board' means the state personnel board.

"\* \* \*

"(2) 'Civil service' means all offices and positions of trust or employment, including mechanics, artisans and laborers, in the service of the state, except offices and positions in the organized militia.

"(3) 'Appointing officers' means the officer, commission, board or body, having the power of appointment, or election to, or removal from, subordinate positions in any office, department, commission, board or institution.

"(4) 'Subordinate' or 'employee' means any person holding a subordinate position subject to appointment, removal, promotion or reduction by any appointing officer.

"(6) 'Department' means any officer whose office is created by constitution or statute, or any agency so created, except legislative and judicial officers and agencies and offices, and agencies created within departments as here defined."

Sec. 16.08 provides in part:

**"16.08 Classification of civil service.** (1) CLASSES. The civil service is divided into the unclassified service and the classified service.

"(2) UNCLASSIFIED SERVICE. The unclassified service comprises positions held by:

"(a) All officers elected by the people.

"(b) All officers and employes appointed by the governor whether subject to confirmation or not, unless otherwise provided.

“(c) The director, chief of the American history research center, chief of interpretation and education of the state historical society; \* \* \*.

“(d) All presidents, deans, principals, professors, instructors, research assistants, librarians and other teachers, as defined in s. 42.20, in the university, state colleges and the Wisconsin school for the deaf.

“(e) All other officers and employes of the state whose positions are expressly excluded from the classified service by statute or whose positions cannot be placed under the classified service because of the restrictions placed on them by statute.

“(f) All legislative officers.

“(g) One deputy or assistant and one stenographer of each elective executive officer and the speaker of the assembly.

“(h) The clerks and other assistants and employes of the supreme court.

“(j) Boys employed in the youth camps created under s. 46.70.

“(3) CLASSIFIED SERVICE. The classified service comprises all positions not included in the unclassified service.”

If we *assume*\* that each of the positions held by you was pursuant to valid appointment, i.e. (1) financial secretary on the executive staff (2) employe of the regents in a “faculty” position (3) commissioner of the department of administration, it will be noted that each position is within civil service, and in the unclassified division thereof. The first by reason of secs. 14.09, 16.08 (2) (b) and 20.901, the second by reason secs. 37.11 (2), 16.08 (2) (d) and 20.901, and the third by reason of secs. 16.003 (2) and 16.08 (2) (b). Your status is further complicated by the fact that in the first two positions you were an employe of the state and as commissioner of administration you are

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\*This opinion is not addressed to the question of the validity of the respective appointments, *per se*.

an officer of the state. *Martin v. Smith*, (1941) 239 Wis. 314. Since you have not been confirmed, you are a *de facto* officer.

In Wisconsin a *de facto* officer is entitled to compensation for the performance of the duties of his office if there is no *de jure* officer claiming it. *State ex rel. Kleinstauber v. Kotecki*, (1913) 155 Wis. 66, 144 N.W. 200; *Clausen v. Fond du Lac County*, (1919) 168 Wis. 432, 170 N.W. 287.

Since you have claimed to have earned three weeks vacation for 1962 while serving as an unclassified employe for the governor, it is important to determine whether such an employe accrues vacation by reason of sec. 16.275. I am of the opinion that such section is applicable.

Sec. 20.901 dealing with appointment of subordinates is important in considering the validity of your appointment to unclassified positions with the executive office and the regents, and must be considered together with the specific statutes relating to those departments. You will note, however, that this section does not relate to office hours, standard work week, accrual of vacation or any right to be employed full time by two separate state agencies.

Sec. 16.275 is not limited to positions in the classified service and provides in part:

**“State office hours; standard work week; leaves of absence; holidays. (1) (a) Except as provided in par. (f) heads of departments shall grant to each person in their employ, based on his accumulated continuous state service, annual leave of absence without loss of pay at the rate of:**

**“1. Two weeks each year for a full year of service during the first 5 years of service.**

**“2. Three weeks each year for a full year of service during the next 15 years of service;**

**“3. Four weeks each year for a full year of service after 20 years of service.**

“(b) An employe, with the approval of the head of his department, may anticipate the annual leave which he could earn during the current calendar year \* \* \*.

“\* \* \*

“(d) Annual leaves of absence shall not be cumulative except that unused annual leave may, subject to the rules of the personnel board, be carried over the first 6 months of the year following the one in which it was earned.

“\* \* \*

“(f) Heads of departments shall grant to each person in their employ on January 1, 1959, or whose absence on such date is covered under par. (g), who was employed prior to January 1, 1958, noncumulative annual leave of absence without loss of pay at the rate of 3 weeks for a full year's service and, based on his accumulated continuous state service, at the rate of 4 weeks after 20 full years of service.

\* \* \*

“\* \* \*

“(6) (a) The office of the departments of state government shall be kept open on all days of the year except Saturdays, Sundays and the following holidays: \* \* \*

“(c) Monday to Friday office hours shall begin at 7:45 a.m. and close at 4:30 p.m. with intermissions from 11:45 a.m. to 12:30 p.m. Departments may, with the permission of the governor, adjust opening and closing hours and intermission periods as the needs of the service require consistent with the principle of the 8-hour day herein established. \* \* \*

“(7) The standard basis of employment for the state service shall be 40 hours per week divided into 5 days of 8 hours each, except that where the conditions of employment cannot be fulfilled by adhering to the standard week, deviations may be permitted upon recommendation of the appointing authority and subsequent approval of the department of administration.”

In the 1959 statutes, sec. 16.275 provided in part:

“Vacation; sick leave; military leave; jury leave. (1) Appointing officers shall grant to each subordinate employed subject to this chapter a noncumulative leave of absence without loss of pay, as provided under s. 14.59 (1) (d).

\* \* \*”

Sec. 14.59, 1959 Stats., was entitled “State office hours; standard work week; leaves of absence” and provided in part:

“\* \* \*

“(1) (d) Heads of departments shall grant to each person in their employ who was originally employed after December 31, 1957, based on his accumulated continuous state service, nonaccumulative annual leave of absence without loss of pay as follows:

“1. Two weeks after the first full year’s service;

“2. Three weeks after 5 full years of service;

“3. Four weeks after 20 full years of service.

“\* \* \*”

Section 14.59 (1) (f), 1959 stat., contained separate provisions for persons employed prior to January 1, 1958. There is no question but that sec. 14.59 (1) (d) and (f) applied to heads of all departments of state *government* and to both classified and unclassified employes thereof.

Section 14.59 (1) (d), 1959 stat., was renumbered 16.275 (1) (a) and amended to its present form by ch. 645, Laws 1961, published January 23, 1962. Section 14.59 (1) (f) was renumbered 16.275 (1) (f). Sec. 14.59 (1) (a), (b), (c), and (2) and (3) of the 1959 stat. relating to officer hours for departments of state government and standard 40-hour week were renumbered sec. 16.275 (6) and (7) by ch. 645, Laws 1961.

Secs. 16.275 (1) (b) and (d) noted above were created by ch. 645, Laws 1961.

Sec. 16.275 (1) (d) now provides:

“(d) Annual leaves of absence shall not be cumulative except that unused annual leave may, subject to the rules of the personnel board, be carried over the first 6 months of the year following the one in which it was earned.”

The personnel board did adopt rules with respect to unused accrued leave; however, Rule, sec. Pers. 18.01, WAC, appears to be applicable to both classified and unclassified employees. Rule sec. Pers. 1802 is apparently intended only for classified employees.

In 30 OAG 466 it was stated that where an employe had earned nine days of accrued vacation, but had not been granted the vacation, his right to compensation as an employe of the state terminated when he ceased to be a state employe, in that case by reason of death, and his estate was not entitled to receive pay for the employe's accrued vacation. It was there stated:

“The right of a state employe to obtain a vacation under the provisions of secs. 14.59 and 16.275, Stats., is a right to remain away from his work for the vacation period and at the same time to receive his usual compensation. The only justification that exists for the expenditure of public moneys as payment of salary to one on vacation is that the vacation contributes to make the employe more efficient or more industrious in the discharge of his duties during the portion of the year when he is not on vacation. \* \* \*”

In 38 OAG 364, it was stated that, since a rule of the personnel board provided that “Whenever a permanent employe is separated from the state service he shall be entitled to pay for any unused portion of his vacation allowance”, employes of a department which ceased to exist by reason of statute could be compensated for unused vacation leave of absence accrued at the date such department went out of existence. This conclusion was reached in that special instance in spite of the many cases from other jurisdictions there cited that there is a logical inconsis-

tency in granting a vacation to anyone who is no longer in the employment of the state.

Michigan and California courts hold that vacation with pay is not a gratuity, but is compensation for services rendered and that in the absence of provision to the contrary, a public employe does not necessarily lose his right to compensation for accumulated vacation periods on being separated from the service, unless he has waived it by refusing to take a vacation before he was laid off. 67 C.J.S. 326.

In 42 OAG 33 it was stated that an unclassified employe in a faculty position who was compelled to retire could be compensated for summer vacation leave he would have received but for retirement. This opinion states that the rules of the personnel board and provisions of the then sec. 16.275 were not applicable to such position. It does not appear that sec. 14.59 was referred to therein, and in any event, the opinion was written prior to the incorporation of sec. 14.59 into sec. 16.275.

In 1958 Rule, sec. Pers. 10.02 (4), it was provided:

“(4) *Payment in Lieu of Vacation.* Whenever an eligible employe with unused vacation is separated from the state service he shall be paid for any unused vacation he may have. In case of the death of an employe, payment for unused vacation allowance shall be made in accordance with the provisions of section 103.39 (2), Wisconsin Statutes. These payments shall be based on full months of service.”

There is no similar rule contained in the present rules of the board. Rule, sec. Pers. 18.02 (5) (d) merely states:

“Upon termination of employment vacation shall be prorated.”

Rule, sec. Pers. 18.03 (5) provides that separation from the service by resignation, retirement, or for cause shall cancel all unused accumulated sick leave allowance.

Rule, sec. Pers. 18.04 (2) provides:

“TRANSFER OF CREDITS. Whenever an employe eligible for vacation or sick leave separates from the service of one employing unit of the state and accepts, by certification or transfer, service in a classified position in another employing unit of the state, obligation for any accumulated and unused vacation and sick leave allowance shall be assumed by the new employing unit.”

The rules of the board no longer expressly provide for payment for unused accrued vacation on separation from the state service. It is material to ascertain the date of separation from state service in each case, whether it was at the end of the vacation period claimed or before. I am informed that the bureau of personnel permits compensation for accrued, but unused vacation on separation from the state service, but usually adjusts the separation date to accomplish that purpose. Sec. 103.39 (2) now provides for payment of unused vacation allowances in the event of death of a state employe.

The bureau of personnel has long had a policy against payment to an employe, of compensation in addition to regular salary, for accrued vacation earned but not used. Some employes have expressed a desire to not take earned vacation, and to be compensated for such period in addition to their salary.

This bureau policy is in conformity with the general rule applicable to employer-employe relationships in general. In 35 Am. Jur. 499, it is stated:

“One is not, under this rule, entitled a double compensation for working during a vacation to which he was entitled under full pay.”

Vacation leave is not cumulative and is lost if not taken, unless the conditions of sec. 16.275 (1) (d) are met, or unless the matter falls within the provisions of sec. 103.39 (2).

In case of a classified employe, it is possible for such employe, where he transfers to another department, to use

unused accrued vacation while in the employ of the new department. Where vacation is not used in the year earned, it can be used in the first six months of the next year, providing that the former department head gave permission to such later use and providing that the new department head agrees to such use.

If the rule applicable to classified employes were to be applied to you as an unclassified employe, and certainly no more liberal rule could be applicable to unclassified employes, it would mean that you could use accrued but unused vacation earned in the executive department, during first six months of the following year, if both department heads consented, but you could not be compensated for the same by either the former department or new department for vacation not taken. The amount of vacation you may have earned as an unclassified employe in the executive department depends upon the date of your original appointment to state service and length of your continuous state service.

The answer to your first question is in the negative. An unclassified employe is not entitled to compensation for vacation earned but not taken during the preceding vacation year, in addition to his salary for a full time position with another state agency even where department heads consent.

I am of the further opinion that the provisions of sec. 16.275, as to holidays, office hours for *offices* of state government, and the standard work week, among others, are generally applicable to both classified or unclassified personnel. See 38 OAG 497 and 13 OAG 211.

This does not mean that all places of state employment must be open during those hours, or that work cannot be done at other hours, or that all employes must work the same hours. Sec. 16.275 (7) does mean, however, that if there is to be deviation from the standard work week for employes, that week being a 40-hour week divided into 5 days of 8 hours each, such deviation shall only be permitted where the appointing authority recommends it and where

there is subsequent approval by the department of administration.

Many of the sections 16.01 through 16.30 are specifically limited in application to the classified service of the civil service. A common misunderstanding is that only individuals in the classified service are regulated as to political activity. Sec. 16.30 is concerned with prohibited political activities of persons in the classified service. The statute regulating political activity of *all* state officers, agents, clerks and employes is sec. 12.57.

Your second question is more difficult.

In 1908 OAG 862, it was stated that a university professor was not a public officer and that he could serve and receive compensation as an "officer" on the civil service commission in addition to his university salary, if the regents approved. Service on the commission was more or less a part-time position.

In *Martin v. Smith*, (1941) 239 Wis. 314, 1 N.W. 2d 163, the supreme court held that University President Dykstra was an employe rather than an officer and was not precluded by reason of Art. XIII, sec. 3, Wis. Const., from serving as federal administrator of the selective service act. The court held that he was entitled to his salary as university president. The regents had approved such appointment with provisions that any salary in excess of expenses, paid to him by the federal government, was to be refunded to the university.

In 1908 OAG 187, it was stated that a classified employe on vacation leave could accept other employment with another state agency, and receive additional compensation from the state for such additional services if the services were not incidental and germane to his first employment or if they were not duties he could have been compelled to do in his first employment.

A public officer takes his office *cum onere* and is entitled to no salary or fees, except what the statute provides. *Otagamie Co. v. Zuehlke*, (1917) 165 Wis. 32, 161 N.W. 6. The

salary of an office is an incident thereto. *State ex rel. Elliott v. Kelly*, (1913) 154 Wis. 482, 143 N.W. 153.

Aside from statutory considerations, there is a settled rule of common law that a public officer cannot hold two incompatible offices at the same time. 42 Am. Jur. 926, Public Officers, Sec. 59. Absent legislative prohibition, one holding two or more separate and distinct offices, not incompatible, is entitled to the compensation attached to each. 43 Am. Jur. 153, Public Officers, Sec. 366. On the other hand, one who is not entitled to hold or perform the functions of more than one office at one time may not collect compensation for more than one office for the same period. Also, a person holding one office whose pay is fixed by law or regulation cannot be allowed to receive additional pay or compensation for performing additional duties, or duties properly belonging to another office, unless authorized by law. 67 C.J.S. 325, Officers, Sec. 87.

The above statements are, of course, not wholly controlling with respect to your question especially since we are primarily concerned with unclassified employe positions, rather than officers, except for the period subsequent to January 10, 1963.

The legislature has provided for cooperation between state agencies and for the full utilization of the abilities of state employes. Sec. 20.904, while not controlling with respect to the question of double employment of one individual by two state agencies, has a bearing thereon and provides in part:

**“Co-operation of functions. (1)** The several state officers, commissions and boards shall co-operate in the performance and execution of state work and shall interchange \* \* \* information, and, by proper arrangements \* \* \* shall interchange such services of employes, or shall so jointly employ or make such assignments of employes as the best interests of the public service require. All interchanges of services and joint employments and assignments of employes for particular work shall be consistent with the qualifications and principal duties of such employes.

“\* \* \*”

I am of the opinion, however, that under certain circumstances an unclassified employe can be employed by two state agencies, provided the positions are compatible. He can draw full compensation for the first position provided he carries out the prescribed duties established by the department head within the hours set forth in sec. 16.275 (6) and (7), and can draw such further compensation from the second department as his other hours of performance on tasks not within the bounds of his first employment may warrant. If the two department heads concerned are agreeable, it is conceivable that an individual could serve “full time” in both positions, for example: 7:45 a.m. — 4:30 p.m. in the first position, and *other* hours, equivalent to the standard 40 hour work week, in the second; he could receive full compensation for each, provided that such deviation from the standard work week had been recommended by the appointing authority and approval had been obtained from the department of administration prior to the commencement of such deviation.

It may be useful to observe a statement of the bureau of personnel as to overtime in the higher salaried classified positions. In its classification and compensation plan, effective July 1, 1962, at page 28 it is said:

“The salaries for positions in classes allocated to salary ranges 1-12 through 1-21 of this schedule are generally intended to compensate for all working hours required, except that equivalent compensatory time off may be granted at the discretion of the appointing authority. In exceptional instances or for current approved deviations where cash payment is authorized for overtime, it shall be computed on the monthly salary at a straight-time rate or on the basis of other approved deviation \* \* \*”

On January 10, 1963, you were appointed commissioner of administration. In order to sustain a claim for additional compensation for any period subsequent to January 10, 1963 from the governor's office, or the regents, it would appear essential that services performed for those departments

since that date were of a different nature than those which you, as commissioner, were required to furnish state agencies in general.

Sec. 16.001 provides in part:

**“Organization of department. (1) PURPOSES.** The purposes of this chapter are to conserve the state’s resources by co-ordinating management services and providing effective aid to agencies of the state government; to present clearly defined alternatives and objectives of state programs and policies so that the state’s agencies, the governor and the legislature may plan co-operatively and finance the services which the state will provide for its citizens; to help the state’s agencies furnish the agreed upon services as efficiently and effectively as possible, avoiding any duplication of effort or waste of money; to assure the legislature and the governor that the services are being provided to the public at the agreed upon quantity, quality and cost; and to anticipate and resolve administrative and financial problems faced by the agencies, governor and legislature of the state.”

Your powers and duties as commissioner are set forth in sec. 16.004 and will not be quoted here, but it can be noted that they are broad and comprehensive, and deal with many or all of the problems you were concerned with as financial secretary to the governor, and may include certain duties you performed for the regents.

For the period January 10, 1963—January 31, 1963, I am of the opinion that as a *de facto* officer you are entitled to the salary applicable to the commissioner of administration *if you were performing such duties*, (however, it is understood you are waiving any claim for compensation for such services), and that you are not entitled to any compensation for vacation accrued but unused while serving in the governor’s office. Whether you could, in addition, be compensated during that same period for services to the regents depends upon the validity of such appointment and the performance of duties other than those

which are germane to your duties as commissioner of administration, and subject to the further condition that said duties were performed pursuant to and within hours of a duly authorized deviation, recommended by the appointing authority and approved by the department of administration prior to the deviation. Since you state that no authority for deviation was sought or received, it is my opinion that a fiscal officer could not safely certify a payroll or authorize payment to you for compensation for claimed full time service to a second position unless a court had first made a determination of your right to such compensation after full consideration of the facts as found in such tribunal.

For the period December 1, 1962 through January 9, 1963, your claim to double compensation as an unclassified employe, for full time services in both the governor's office and for the regents depends upon the validity of the second appointment, assuming the first was valid, and the performance of duties for the one department which were not germane to the other and subject to the further condition that said duties were performed within hours, if deviation was present, recommended by the appointing authority and approved by the department of administration prior to the deviation.

Since you likewise state that no authority for deviation was sought or received, it is my further opinion that a fiscal officer could not safely certify a payroll or authorize payment to you for claimed full time service in two full time positions for the same period unless a court had first made a determination of right after full consideration of the facts as found in such tribunal.

Your position as commissioner of administration places you in a difficult position in the present instance, since your personal claim is involved and you as commissioner, and bureau heads under you, have strict statutory duties with respect to review and audit of payrolls and claims to insure that only such sums as are authorized by statute are paid.

The conclusion reached above to the effect that double compensation for two full time compatible positions may be proper, depending upon the facts, does not mean that you are entitled to the double compensation paid for December, 1962, nor to that claimed for January, 1963. The attorney general does not determine issues of fact. The questions presented are essentially judicial and cannot be resolved with finality by an opinion of the attorney general because the respective rights of the parties, the state on one hand and you as an individual on the other, can be adjudicated with finality only by a court. Where there is doubt as to the validity of payment of moneys out of the public treasury, such payment cannot safely be made without such adjudication. The function of an attorney general's opinion in a matter of this kind, therefore, is solely to demonstrate that the validity of the proposed payment is free from doubt, or, if not free from doubt, to point out the factors creating the doubt.

RJV

*Internal Improvement—Appropriations*—Validity of proposed appropriation for restoration of Symco dam would depend on whether area is in state ownership or private ownership.

April 5, 1963

THE HONORABLE, THE SENATE:

By resolution No. 15, S., the senate has asked the attorney general to render an opinion on the constitutionality of an appropriation of \$50,000 from the funds provided under sec. 20.703 (41), Stats., for the purpose of restoring the Symco dam in Waupaca county.

The constitutionality of similar proposals has been considered in four previous opinions of the attorney general. These are: 36 OAG, 264 (1947); 44 OAG 148 (1955); 45 OAG 28 (1956); 47 OAG 224 (1958). These opinions have uniformly stated that unless the dam creates or maintains a flowage of which the shoreline is wholly owned by the state of Wisconsin, and hence may be considered as part of the development of a park such as the dam which retains the waters of the Horicon Marsh (see *State ex rel. Hammann v. Levitan*, (1929) 200 Wis. 271), it is a work of internal improvement prohibited by Art. VIII, sec. 10, Wis. Const.

In paragraph numbered 3 of Resolution No. 15, S., it is stated that one of the conditions of the appropriation would be "The owners of the property covered by the flowage caused by such dam deed such property to the state; \* \* \*" It is not clear from this sentence whether this area which should be deeded to the state comprises only the land covered by the waters of the flowage, or whether the grants to the state would be more extensive so that the state would own the dam, the dam site and entire shoreline, which it could then maintain as a state park. If the latter is true, then the appropriation would be valid under the rule established in the *Horicon Marsh* case. If it is not true, and the dam and shoreline would remain in private ownership, the maintenance of the dam would constitute a work of internal improvement prohibited to this state.

RGT

*County Boards—Sanatoria*—Discussion of the statutes governing the county board action necessary to establish tuberculosis sanatoria, outpatient department, or branches thereof.

April 5, 1963

CARL N. NEUPERT

*State Health Officer*

You have asked my opinion on seven questions relative to outpatient departments in county tuberculosis sanatoria. These questions will be answered herein in the order in which you presented them to me.

Your first question reads:

“(1) Does the establishment of a county tuberculosis sanatorium under authorization of Sec. 50.01, Stats., automatically establish within such sanatorium an outpatient department as authorized under Sec. 50.06 (1), Stats., or is specific action by the County Board of Supervisors to such effect required?”

It is my opinion that the establishment of a county tuberculosis sanatorium pursuant to sec. 50.01 does not automatically establish within such sanatorium an outpatient department. It is my further opinion that specific action by the county board of supervisors is required to establish such outpatient department. Such action is authorized by sec. 50.06 (1).

Sec. 50.01 (1) reads in part:

“Every county may, pursuant to this section, establish a county tuberculosis sanatorium. \* \* \*”

Sec. 50.06 (1) reads in part:

“Any county may establish and maintain an *outpatient department* or a public health dispensary for tuberculosis and other pulmonary diseases, which department may be housed in the county sanatorium and may enjoy the use of its facilities and personnel. \* \* \*”

If the establishment of a county tuberculosis sanatorium under the above-quoted portion of 50.01 (1) “automatical-

ly" established within such sanatorium an outpatient department, there would have been no need for the legislature to enact the above-quoted portion of 50.06 (1). Of itself alone, the presence of both the above-quoted statutes in Ch. 50, plainly shows that the legislature discerned a need for a statute specifically authorizing the creation of an outpatient department or public health dispensary for tuberculosis and other pulmonary diseases, in addition to a statute authorizing creation of a county tuberculosis sanatorium. It is clear that the legislature did not view the creation of a county tuberculosis sanatorium under the former statute as "automatically" effecting the creation of an outpatient department, and furthermore did not view the latter statute as one empowering counties to create outpatient departments for the purposes above mentioned. The history of the two statutes above-quoted leaves no doubt that such indeed was the thinking of the legislature. It was in 1911 that counties in this state were first authorized to establish county facilities for the treatment of tuberculosis, with the establishment of such facilities subject to the consent of the state board of control. Laws of 1911, ch. 457, Sec. 1. From 1911 to 1919 there was no provision in Wisconsin law for the establishment by counties or by any other unit of government of outpatient departments or public health dispensaries for tuberculosis and other pulmonary diseases. In 1919, the legislature made a substantial change in the law authorizing the establishment of county facilities for the treatment of persons suffering with tuberculosis, removing therefrom the requirement that the establishment of such facilities could only be accomplished with the consent of the board of control. This change was effected by Laws of 1919, ch. 346, Sec. 10, which was published June 16, 1919 and went into effect on that day. It is highly significant that in the following month, on July 14, 1919, there was published ch. 529, Laws 1919, which went into effect on that day. Sec. 1 of such chapter added to the statutes sec. 50.08, which read in part:

"Any county may establish and maintain an outpatient department or a public health dispensary for tuberculosis

and other communicable diseases; which may also be used in connection with the correction of physical defects of school children and child welfare work. \* \* \*

This is the predecessor statute, of course, of that portion of sec. 50.06 (1) above-quoted. Its enactment, eight years after the initial enactment of a statute authorizing the establishment of county facilities for the treatment of persons suffering from tuberculosis, enacted in 1911 and revised in 1919, did not authorize creation of outpatient departments or public health dispensaries for the purposes above mentioned. Consequently, the legislature enacted ch. 529, Laws 1919, in order to provide such authorization. It is clear that in enacting ch. 529 the 1919 legislature did not intend to legislate in vain and had a specific purpose in mind, these things being presumed even in the absence of the useful statutory history herein above mentioned. See *Haas v. Welch*, (1932) 207 Wis. 84, 86.

Your second question reads:

“(2) If the specific action is required by the Board of Supervisors for the creation of an outpatient department for diagnosis and treatment, and since the State Board of Health is required to certify to the State Department of Audit the credits to the county for the care of persons therein, may the State Board of Health require proper notice to such effect from the county board?”

It is my opinion that the state board of health clearly has the power to require counties to give it proper and timely notice of the establishment of an outpatient department, pursuant to sec. 50.06 (1) which is to be housed in the county sanatorium. The board, under 50.07 (1) (a), is empowered to, “Investigate and supervise all the tuberculosis hospitals and sanatoria of every county and other municipality, and familiarize itself with all the circumstances affecting their management and usefulness.” The powers conferred on the board by this statute are certainly broad enough to entitle it to advance notice of the establishment of an outpatient department in a county tuberculosis sanatorium. To assure itself of receiving such notice, the board

could require the giving of such notice by rule. The adoption of such a rule, designed to aid the board in carrying out the powers conferred on it by sec. 50.07 (1) (a), is authorized by sec. 227.014 (2) (b), which reads in part:

“Each [state] agency is authorized to prescribe such forms and procedures in connection with statutes to be enforced or administered by it as it considers to be necessary to effectuate the purpose of the statutes, \* \* \*”

It is also my opinion that the state board of health has the power to require counties to give it proper and timely notice of the establishment of an outpatient department, pursuant to sec. 50.06 (1) which is to be housed *outside* the county tuberculosis sanatorium. This power is not expressly granted by statute, nor may it be inferred from any statute granting general supervisory power to the state board of health over outpatient departments housed outside of sanatoria, because no such statute exists. Instead, such power is reasonably inferred from certain language found in secs. 50.06 (2) and 50.09 (3). Sec. 50.06 (2) reads in part as follows:

“Any county which provides outpatient treatment in a county institution to a person who presents the certificate mentioned in s. 50.02 (1) [correctly, sec. 50.03 (1), Stats.] and who receives diagnostic services or treatment which extends for a period of more than 12 hours in duration shall be credited by the state, *to be adjusted as provided in s. 50.09 for each patient cared for at public charge*, as follows: \* \* \*”

Sec. 50.09 (3), reads in part:

“On each July 1, the superintendent or other officer in charge of each county sanatorium shall prepare a statement of the amount due from the state to the county in which such institution is located, pursuant to law, for the maintenance, care and treatment therein for patients at public charge, on forms supplied by the state board of health. \* \* \* The statements shall be verified by affidavit by the officer making it and certified by the trustees of the

institution to the state board of health, for examination and approval, and a duplicate thereof shall be forwarded by the board to the county clerk of the county involved. *The board shall give proper credit of the amount due the county for any recovery of maintenance and, when approved, the president and secretary of the board shall certify said statement to the department of administration, which shall pay the aggregate amount found due the county \* \* \**

From these statutes, it is manifest that the state board of health has a role to play in giving counties those credits for the care of patients at public charge in outpatient departments. Such credits, you will note must be "adjusted as provided in s. 50.09." Sec. 50.06 (2) above-quoted. It is the board which must certify the statement of amounts due from the state for such care, and give the proper credits. As a concomitant or incident of such responsibility there is, in my judgment, a power implied for the board — the power to require counties to give it proper and timely notice of the establishment of outpatient departments outside sanatoria. Since the board must discharge the above-mentioned statutory responsibility with reference to outpatient departments so located, it surely has the power, in the best interests of administrative preparedness, to require advance notice of their creation. This could be done by administrative rule.

It should also be noted that the board, under sec. 140.05 (1), "shall possess all powers necessary to fulfill the duties prescribed in the statutes". Where one of such duties is that of making the above-mentioned certification pursuant to sec. 50.09, the board clearly has, under sec. 140.05 (1), all the powers necessary to carry out that duty—including the above-mentioned power to require advance notice of the establishment of outpatient departments outside sanatoria.

Your third question reads:

"(3) Does Sec. 50.06 (1), Stats., limit a county to the creation of a single outpatient department, or may it create more than one outpatient department?"

It is my opinion that sec. 50.06 (1) does not limit a county to the creation of a single outpatient department, and that a county may create more than one outpatient department thereunder if it so desires. It is true that sec. 50.06 (1), refers not to outpatient "departments" or to public health "dispensaries", but instead authorizes any county to establish and maintain an outpatient "department" or public health "dispensary" for tuberculosis and other pulmonary diseases. These usages of the singular may, however, be construed as the plural, if doing so would not produce a result inconsistent with the manifest intent of the legislature. See sec. 990.001 (1). It follows that sec. 50.06 (1) may properly be construed as authorizing any county to establish and maintain one or more outpatient departments or public health dispensaries for tuberculosis and other pulmonary diseases.

Your fourth question reads:

"(4) If only a single outpatient department is created by the county board, may extensions or branches be established in other areas of the county by the trustees or superintendent of the sanatorium with or without further specific action for the creation of branches by the county board?"

In answering this question, I shall make the assumption that the "extension" or "branches" of the single outpatient department referred to in your question would be the equivalent or near-equivalent of the single outpatient department created by the county board.

It is my opinion that where a county board, pursuant to sec. 50.06 (1), has established a single outpatient department in a county, the trustees or superintendent of the tuberculosis sanatorium for such county may not establish "extensions" or "branches" of the single outpatient department which are the equivalent or near-equivalent of such department. The establishment or creation of such "extensions" or "branches" of an outpatient department would obviously amount to the creation of other outpatient departments within such county, and the power to create such departments is a power specifically and exclusively conferred

on counties acting through their county boards, by sec. 50.06 (1). The fact that this power is conferred on counties implies that it is a power not to be exercised by other persons or entities, including the superintendent of a county tuberculosis sanatorium or the trustees thereof. “\* \* \* a statute that directs a thing to be done in a particular manner *or by certain persons or entities*, ordinarily implies that it shall not be done in any other manner, *or by other persons or entities*.” 50 Am. Jur. Statutes, Sec. 244.

Your fifth question reads:

“(5) Is the certificate required from a physician as stated in Sec. 50.06 (2), Stats., required also for the care of patients needing diagnosis or treatment for less than 12 hours (Sec. 50.06 (3), Stats.)?”

It is my opinion that the physician's certificate referred to in the above-stated question is required from each patient receiving treatment at an outpatient department or public health dispensary for tuberculosis and other pulmonary diseases. Consequently, your fifth question must be answered in the affirmative.

Sec. 50.06 (2) reads in part:

“(2) Any county which provides outpatient treatment in a county institution to a person who presents the certificate mentioned in s. 50.02 (1) and who receives diagnostic services or treatment which extends for a period of more than 12 hours in duration shall be credited by the state, \* \* \* as follows: \* \* \*”

and the statute then goes on to describe the state credits or aids for the person described therein.

Sec. 50.06 (3) reads:

“Where diagnostic services or treatment required by a patient in any outpatient department shall be completed within a period of less than 12 hours in duration, the determination of legal settlement required in s. 50.09 may be waived. For each patient cared for at public charge or at a fee of less than one-seventh of the applicable weekly per

capita cost, the county shall be credited by the state one-seventh of the amount paid by the state per week under s. 50.04 (7) (a). Such treatment shall not be considered as a patient day in computation of per capita costs of the county sanatorium."

It should be observed that the reference in sec. 50.06 (2) to sec. 50.02 (1) is erroneous and should be read as a reference to sec. 50.03 (1) which reads:

**"50.03 Admission of patients. (1)** Any person suffering from tuberculosis may be received into any such county institution and cared for upon payment of a rate which shall not exceed the actual cost of maintenance therein. There may also be admitted any person who presents symptoms of tuberculosis calling for careful observation in order to make a diagnosis, and who in the opinion of the superintendent and visiting physician, if the superintendent is not a physician, is a proper subject for treatment in any such county institution. *Every applicant for admission shall furnish a certificate of a regularly licensed physician that he is suffering from tuberculosis, or that he presents symptoms of tuberculosis calling for careful observation in order to make a diagnosis.*"

The italicized language in sec. 50.03 (1) makes it clear that every applicant for admission at a county tuberculosis sanatorium must present the physician's certificate therein described. It is equally clear from the language in sec. 50.06 (2) that the person referred to therein, who receives diagnostic services or treatment extending for more than 12 hours in duration, must present the physician's certificate described in sec. 50.03 (1). Sec. 50.06 (3), in referring to a patient in a county outpatient department who receives diagnostic services or treatment of less than 12 hours in duration, fails to refer to presentation by such patient of the physician's certificate described in sec. 50.02 (1), but I do not view this omission as meaning that presentation of such a certificate is not required of a patient who receives outpatient diagnostic services or treatment for a period of less than 12 hours in duration. In my judgment, the word "pa-

tient" as used in the first sentence of sec. 50.03 (3) has no different meaning than the words "person who presents the certificate mentioned in sec. 50.02 (1)" appearing in sec. 50.06 (2). In this connection, it is notable that the legislature, in sec. 50.06 (2) (a) and (b), substitutes the term "patient" for the phrase "person who presents the certificate mentioned in sec. 50.02 (1)." What apparently happened was that this substitution was carried over to sec. 50.06 (3) with no intention, however, that its use, without reference to the physician's certificate here in question, should relieve a prospective patient of an outpatient department of the need to submit such physician's certificate. From these evidences in sec. 50.06, itself, it is apparent to me that the legislature in enacting such statute, felt that all the patients referred to therein required the physician's certificate described in sec. 50.03 (1) before receiving diagnostic services or treatment at an outpatient department. This is further indicated by the fact that it would have been impossible, prior to treating such patients, to break them down into two classes: those patients who would need more than 12 hours of treatment, and would require the certificate in question; and those patients who would need less than 12 hours of treatment, and would require no such certificate. Such an existing fact the legislature must be presumed to have known. *Madison v. Ind. Comm.*, (1932) 207 Wis. 652, 660.

As the foregoing answer to your fifth question makes clear, there is ambiguity in sec. 50.06 (3) that should be eliminated, either by amendment of that statute or by amending sec. 50.03 (1) to make it plain beyond any doubt that the physician's certificate requirement therein applies, not only to patients of county tuberculosis sanatoria, but also to all patients of outpatient departments or public health dispensaries established under sec. 50.06 (1).

Your sixth question reads:

"(6) May an outpatient department established under authority of Sec. 50.06, Stats., be used for the purpose of 'screening' apparently well persons for tuberculosis and other pulmonary diseases, or is it limited to render services for the diagnosis or treatment of such diseases?"

It is my opinion that an outpatient department or a public health dispensary for tuberculosis and other pulmonary diseases, established pursuant to sec. 50.06 (1), is limited to rendering services for the diagnosis or treatment of such diseases. Such services are to be rendered only to persons suffering from tuberculosis or having symptoms thereof and therefore cannot be used for the "screening" of "apparently well" persons for tuberculosis or other pulmonary diseases.

Sec. 50.06 (1) specifies the nature and purpose of outpatient departments or public health dispensaries established thereunder, stating that they are "for tuberculosis and other pulmonary diseases." Sec. 50.06 (2) and (3) read in conjunction with the provisions of sec. 50.03 (1) relating to the physician's certificates discussed in my answer above given to your fifth question, make it clear that the only persons eligible for outpatient treatment in a county institution are persons furnishing certificates of regularly licensed physicians that they are suffering from tuberculosis, or that they present symptoms of tuberculosis calling for careful observation in order to make a diagnosis. Persons "apparently well" would be unable, of course, to present such physician's certificates, and would therefore be ineligible to receive diagnostic services or treatment from one of the above-mentioned outpatient departments or public health dispensaries.

The statutory history of sec. 50.06 also provides strong support for my opinion that an outpatient department established thereunder may not be used for the purpose of "screening" apparently well persons for tuberculosis and other pulmonary diseases. As adopted in 1919, the predecessor statute of sec. 50.06, numbered 50.08, read in part:

"Any county may establish and maintain an out-patient department or public health dispensary for tuberculosis and other communicable diseases; *which may also be used in connection with the correction of physical defects of school children and child welfare work.*"

The language italicized in the foregoing statute was very broad indeed, and obviously permitted the use of an out-

patient department or a public health dispensary established under the statute for considerable variety of purposes encompassed in the language "the correction of physical defects of school children and child welfare work." There can be no doubt that under such italicized language an outpatient department or public health dispensary could be used for the purpose of "screening" apparently well school children for tuberculosis and other communicable diseases. This italicized language existed in the predecessor statute of sec. 50.06 from 1919 until 1951. In 1951 sec. 50.08 was amended and the italicized language referred to above was stricken from it. Laws of 1951, ch. 496, sec. 1. The bill-drafting file supplies no clues as to the reason for the elision of this long-standing language in the predecessor statute of sec. 50.06, but its elision clearly signifies the intent of the legislature, namely, that outpatient departments or public health dispensaries established under sec. 50.08 (1), 1951 (later to become sec. 50.06 (1) ), should confine their services to the diagnosis and treatment of tuberculosis and other pulmonary diseases, with subs. (2) and (3), sec. 50.08, Stats., 1951 (later to become subs. (2) and (3), sec. 50.06), making it clear that such services are to be rendered only to persons having the physician's certificate described in sec. 50.03 (1),—persons not "apparently well", but instead actually or apparently ill with tuberculosis.

Your seventh question reads:

"(7) If the outpatient department may be used for screening of apparently well persons, may the county receive state credit for such services for each visit while persons are so screened?"

In view of the answer given above to your sixth question, this seventh question requires no answer.

JHM

*Legislature—Optometry*—Legislature may validly prohibit the practice of the profession of optometry by corporations. Language of Bill No. 133, A., is open to possible construction of prohibiting various units from engaging the services of licensed optometrists.

April 3, 1963

THE HONORABLE, THE ASSEMBLY:

By Resolution No. 14, A., the assembly has requested the attorney general to render an opinion on the constitutionality of Bill No. 133, A., which would prohibit the corporate practice of optometry and the employment of optometrists by corporations. Section 2 of the bill would also repeal and recreate sec. 153.03 (4) of the statutes relating to the rule-making authority of the Wisconsin board of examiners in optometry, but we do not understand that any question is being raised as to that section of the bill. Nor is there any point in discussing sec. 180.99 referred to in the bill and which relates to so-called "Service Corporations". For a discussion of the purposes of that statute see 51 OAG 157.

In discussing the validity of the bill it might be well to review the history of Ch. 153, the optometric practice act, the court decisions relating thereto, and make some comparisons with statutes of other states and cases from other jurisdictions.

The optometry law was created by ch. 488, Laws 1915, and the requirements for a license under the original law were naturally much less exacting than they are under the present law.

The validity of the optometry law was first challenged in *Price v. State*, (1919) 168 Wis. 603, 171 N.W. 77. It was there held that the practice of optometry has a real and direct bearing upon the public health and calls for special skill and knowledge so as to justify regulation of the practice as a valid exercise of the police power.

It was brought out in this case that the applicant for a license is examined in anatomy and physiology of the eye

and its appendages; physical and theoretical optics, and practical optometry. He must know the general make-up and construction of the eye and be able to recognize a healthy eye, that is, an eye which may properly be fitted with glasses as against an eye which should receive the attention of a medical doctor. He must know the source of the blood supply, the nerve supply and its general action; the action of the nerves on the muscles, and which nerves control the action of the different ocular muscles. Many of the problems of an eye examination were discussed in some detail. It was shown for instance that a patient who has a slight astigmatism and also is far-sighted, if left to pick out his own glasses will almost invariably select near-sighted glasses. However, a near-sighted glass, before a patient of that kind, will give him seemingly better vision, but it will result in constant eye-strain, because it will make his condition of far-sightedness and astigmatism worse.

Also it was pointed out that Bright's disease or kidney conditions are indicated many times very early in the disease by hemorrhages in the inside of the eye. This, of course, interferes with vision and the afflicted person goes to an optometrist to have his eyes examined, thinking his defect is due to the need for glasses. However, the optometrist who is required by law to be versed in pathology is in a position to determine that this is not a case for glasses but is a case of disease and should be referred to a physician. The opinion also refers in some detail to the testimony on the importance of a mastery of the subject of physiological optics by the optometrist, but enough has been said about the public health emphasis given to optometry by the court.

The next case which should receive some attention here is that of *State ex rel. Harris v. Kindy Optical Co.*, (1940) 235 Wis. 498, 292 N.W. 283.

This was a quo warranto action to stop the defendant corporation from practicing optometry. The court pointed out that the original optometric practice act of 1915 used the wording reading in part: "Every person, firm or corporation engaging in the practice of optometry shall \* \* \*." In

1923 by a revisor's bill that portion of the language just quoted was changed to read: "everyone practicing optometry shall." The revisor noted that this was to simplify the language. The court, following the well-established rule of statutory construction that a revisor's bill does not change the law unless the language used clearly indicates such intention, held that there had been no change in the substance of the statute. Accordingly it was concluded that corporations could continue to employ licensed optometrists to practice optometry.

This, of course, was all that was necessary to the decision although the court did go on by way of explanation to point out that optometry is readily distinguished from a profession in the practice of which diseases of the eye are treated. On the basis of the language of the statute relating to corporations it was clear to the court that the legislature had dealt with optometry as a skilled calling and not as a profession involving a relation of special confidence between practitioner and patient.

However, this case furnishes no guidance on the validity of legislation designed to prohibit corporate practice of optometry. It merely makes it clear that corporations do have the right to practice optometry through licensed employes under the present statutory wording.

The next significant case is that of *Ritholz v. Johnson*, (1945) 246 Wis. 442, 17 N.W. 2d 590. In this case the court upheld the validity of sec. 153.10 prohibiting price advertising of eyeglasses. Despite its earlier decision in the *Kindy* case that optometry was not a learned profession in the practice of which diseases of the eye are treated, the court held that the practice of optometry does not involve the mere merchandising of eyeglasses. It was of the opinion that the legislature was not dealing with traders in commodities but with the vital interests of public health saying that the furnishing of eyeglasses as much affects the public health as does the furnishing of dentures by the dental profession. (p. 453.) Thus, this case places optometry on the same professional basis as dentistry so far as being subject

to the exercise of the state's police power is concerned. In this connection it might be noted that in *Modern System Dentists, Inc. v. State Bd. of Dental Exrs.*, (1934) 216 Wis. 190, 256 N.W. 922, the court upheld the provision in the dental practice act (then 152.06 (6) (f), now 152.02 (2)) prohibiting corporate practice of dentistry.

Again in *Bedno v. Fast*, (1958) 6 Wis. 2d 471, 95 N.W. 2d 396, certiorari denied 360 U.S. 931, 79 S. Ct. 1451, 3 L ed. 2d 1545, our court emphasized the position it had taken earlier in the *Ritholz* case saying at p. 477:

"The language of sec. 153.10, Stats., in no way indicates that proof of fraud is necessary to spell out an offense under its price-advertising prohibition. The practice which the statute is intended to protect the public against is that of filling a prescription to meet the price rather than the needs of the patient. To permit price advertising on the part of those who deal with the human eye, even truthful advertising, is to leave the door open for the unscrupulous practitioner to lure and to defraud unsuspecting members of the public. \* \* \*"

Actually the court went a step further than it did in the *Ritholz* case by saying at p. 479:

"\* \* \* In fact, it seems to us that a person's health may be more gravely endangered by wearing improper glasses than by wearing improper dentures."

Whether or not the legislature has specifically defined optometry as a learned profession is of no particular importance so far as the legislature's power to control the practice is concerned. As the Minnesota supreme court said in *Williams v. Mack*, (1938) 202 Minn. 402, 278 N.W. 585, 587:

"There is no occasion to decide whether or not optometry is a profession, a trade, a vocation, or an art; for, by whatever name called, the work of an optometrist is sufficiently related to or connected with public health — eyesight — to come within the domain of the police power of the state."

(As Shakespeare would say: "What's in a name? That which we call a rose by any other name would smell as sweet." *Romeo and Juliet*, Act II, sc. 2, Line 43.)

Also as the U.S. supreme court said in *Williamson v. Lee Optical of Okla.*, (1955) 348 U.S. 483, 75 S. Ct. 461, 466, 99 L. ed. 563:

"\* \* \* We see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers."

A hasty search reveals that the optometry laws of a number of states do define the practice of optometry as a profession (Arkansas, Sec. 1, Opt. Law; Colorado, sec. 102-201; Florida, sec. 463.01; Georgia, sec. 84-1101; Kentucky, sec. 320-200; North Dakota, sec. 43-1301; South Dakota, sec. 27.0701; Tennessee, sec. 63.802; Virginia, Art. I, sec. 54-368). There may be others that have escaped our attention.

In other states it has been necessary for the courts to accord optometry a professional status in the course of interpreting statutes of one sort or another. An example of this is *Babcock et al. v. Nudelman*, (1937) 367 Ill. 626, 15 N.E. 2d 635. The Illinois statute defines optometry very much as does the Wisconsin statute. Nothing is said about its being a profession and the question was whether an optometrist was subject to the retailer's occupation tax applicable to merchants. The court did not consider the sale of lenses and frames to be subject to the tax and held that the optometry statute created a class in the nature of a profession similar to persons practicing medicine, surgery, or dentistry. Hence, the retailer's occupation tax did not apply.

From all of the foregoing it would appear that optometry falls into the classification of a profession. The word "profession" is defined in Webster's Third International Dictionary as follows:

"A calling requiring specialized knowledge and often long and intensive preparation including instruction in skills and methods as well as in scientific, historical, or scholarly prin-

ciples underlying such skills and methods, maintaining by force of organization or concerted opinion high standards of achievement and conduct, and committing its members to continued study and to a kind of work which has for its prime purpose the rendering of a public service."

Also it would logically follow that the legislature may validly prohibit the corporate practice of optometry. As a matter of fact, this has been done in some states.

The Maine optometry law provides in part:

"Sec. 16. Corporate practice of optometry prohibited; penalty for violation of rules of the board. No person who shall receive a certificate of registration or license to practice optometry in this state shall assign, lease, sublet, give or grant unto any person, copartnership, firm or corporation the right or privilege to practice optometry directly or indirectly under said registration, and no registered optometrist, under this chapter, shall associate himself in any way with any person, not a registered optometrist nor any copartnership, firm or corporation for the promotion of any commercial practice for profit or division of profit, which enables any such person, copartnership, firm or corporation to engage, either directly or indirectly, in the practice of optometry in this state, \* \* \*."

Massachusetts achieves substantially the same result by a statute which prohibits optometric practice except under the name or names of optometrists although this does not apply to optometric schools or associations of optometrists. (Sec. 72.)

New Jersey has a comprehensive provision in its statutes reading:

"It shall be unlawful for any person licensed to practice optometry under the laws of the State of New Jersey to advertise, practice or hold himself forth as being entitled to practice under a name other than his own, unless he be an associate of or any assistant to an optometrist licensed under the laws of the State of New Jersey, and it shall be unlawful for any unlicensed person, or any association or cor-

poration directly or indirectly to engage or undertake to engage in the practice of optometry by utilizing the services, upon a salary, commission basis, or by any other means or method, of any person licensed to practice optometry in the State of New Jersey. It shall be unlawful for any optometrist to engage or undertake to engage in the practice of optometry in behalf of any unlicensed person, association or corporation, except that this shall not prohibit the employment by or the formation of partnerships between optometrists or physicians duly licensed in the State of New Jersey." (Sec. 45:12-19.)

The Oklahoma Act contains the following provision:

"Sec. 3. It shall be unlawful for any person, firm, company, corporation or partnership to solicit the sale of spectacles, eyeglasses, lenses, frames, mountings, prisms or any other optical appliances or devices, eye examinations or visual services, by radio, window display, television, telephone directory display advertisement, or by any other means of advertisement; or to use any other method or means of baiting, persuading, or enticing the public into buying spectacles, eyeglasses, lenses, frames, mountings, prisms, or other optical appliances for visual correction. \* \* \*" (Sec. 3.)

It will be recalled that the Oklahoma statute was held valid by the U.S. Supreme Court in *Williamson v. Lee Optical Inc. supra*.

West Virginia likewise has a broad provision in its statutes prohibiting corporate practice of optometry and which reads in part:

"Sec. 10. Unlawful Practice of Optometry; Penalties. Any corporation or voluntary association shall not practice, or assume to practice, or in any manner to hold itself out to the public as being entitled to practice the profession of optometry, or advertise the title of optometrist in such manner as to convey the impression to the public that it is entitled to practice optometry, or furnish optometric advice, and services or advertise that, either alone or together with

or by or through any person, whether a duly registered and licensed optometrist or not, it has, owns, conducts or maintains an office or place for the practice of optometry. Any duly registered and licensed optometrist shall not associate himself with any corporation or voluntary association for the practice of optometry, or in any manner practice such profession, on a salary or commission basis, for any such corporation or voluntary association. Any corporation or voluntary association violating any of the provisions of this section, or any officer, trustee, director, agent, or employee of such corporation or voluntary association who, either directly or indirectly, engages in any of the acts herein prohibited, or assists such corporation or voluntary association to do such prohibited acts, shall be guilty of a misdemeanor, \* \* \*." (Sec. 10.)

The following provision contained in the same section of the West Virginia Act is also of interest:

"\* \* \* It shall be unlawful for any registered optometrist to practice his profession as an employee, lessee, or sub-lessee of any commercial mercantile establishment or to practice his profession in connection therewith, or to advertise either in person or through any commercial or mercantile establishment that he is a duly registered practitioner, and is practicing or will practice optometry as an employee, lessee, or sub-lessee of any such commercial or mercantile establishment or in connection therewith. \* \* \*"

Thus, we have no reservation whatsoever in concluding that the legislature may validly prohibit the corporate practice of optometry.

There is, however, some confusion in the language of the first sentence in Sec. 1 of Bill No. 133, A. This reads:

"It is unlawful for any corporation, body, organization, group or lay individual to engage or undertake to engage in the practice of optometry, directly or indirectly, for profit, through means of engaging the services of any person licensed to practice optometry in the state."

As this sentence reads it is open to the construction that a body, organization or group of licensed optometrists could not hire a licensed optometrist, although that, no doubt, was not intended. This bill was introduced at the request of the Wisconsin Optometric Association and presumably was designed to prevent the professional services of the optometrist from being controlled or exploited by any lay agency, personal or corporate, which intervenes between the optometrist and the person seeking his services.

If we are correct in assessing the purpose of the bill, we would suggest that it be amended accordingly. This could readily be done by changing the sentence to read:

“It is unlawful for any lay agency, personal or corporate, to engage or undertake to engage in the practice of optometry, directly or indirectly, for profit, through the means of engaging the services of any person licensed to practice optometry in this state or through any other means.”

WHR

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*Public Welfare—County—Employes—Counties* must abide by salary schedule fixed by state department of public welfare and many not exclude such employes from being represented at negotiations relative to salaries.

April 16, 1963

J. B. MOLINARO

*District Attorney, Kenosha County*

You ask two questions involving employees of county departments of public welfare.

Your first question is:

“Where a county has adopted one of the compensation schedules established by the State Department of Public Welfare for the compensation of employes of the county department of public welfare, may the county pay such employes any wages in addition to those provided by the

adopted schedule or is payment of such additional wages unlawful as a derogation of the rules of the State Department of Public Welfare?"

As you point out, sec. 46.22 (3) of the statutes precludes a county from fixing salaries for such employes contrary to the rules and regulations adopted by the state department of public welfare under sec. 49.50 (2) to (5). The latter provision requires that employment be on a "merit basis" and directs the state department to fix personnel standards.

Pursuant to sec. 49.50 (2) the state department of public welfare has adopted Rule, PW-PA 10.01 to 10.32, 6 Wis. Adm. Code, containing, among other things, a classification and salary plan. The opinions in 46 OAG 137 and 44 OAG 262 indicate that county authorities may not exercise control over compensation of employes in county welfare departments in a manner inconsistent with those rules.

The wording of your question and the definition you have offered of the term "derogate" indicate that the suggestion may have been made that to fix a salary *higher* than that set by the rules of the state welfare department is not in derogation of the rules, but that a *lower* salary would be. Such a suggestion might be persuasive if the regulations adopted under the statute were for the sole purpose of securing compliance with a *minimum* wage. The schedules in Rule, PW-PA 10.25, however, provide for a "6 consecutive step compensation plan." Subsec. (6) provides:

"At least the minimum for the class shall be paid, and the maximum is the highest rate on which reimbursement shall be made. Intermediate steps shall be the rate of salary advancement between the minimum and maximum."

Sec. 59.15 (2) (c) provides that no action of the county board shall be "contrary to or in derogation of the rules and regulations of the state department of public welfare pursuant to sec. 49.50 (2) to (5)."

The first definition of the term "derogation" in Webster's *Third New International Dictionary* (Unabridged) is:

“partial repeal (as of a law contract, treaty) — used with of or to.”

The quoted language from sec. 59.15 (2) (c), makes clear that any action which seeks to supersede or alter state regulations is beyond the authority of a county. The determining factor is whether the county action is in derogation of a *rule*, not of a specific *salary*.

In answer to your first question, the wages to be paid to an employe in the county welfare department must be *within* the schedule adopted under the rules of the state welfare department, neither higher nor lower.

Your second question is whether a county may “exclude from wage negotiations those members of the union who are employes of the county department of public welfare” in view of the provisions of sec. 111.70 which provide in part:

“(2) RIGHTS OF MUNICIPAL EMPLOYEES. Municipal employes shall have the right of self-organization, to affiliate with labor organizations of their own choosing and the right to be represented by labor organizations of their own choice in conferences and negotiations with their municipal employers or their representatives on questions of wages, hours and conditions of employment, and such employes shall have the right to refrain from any and all such activities.

“(3) PROHIBITED PRACTICES. (a) Municipal employers, their officers and agents are prohibited from:

“1. Interfering with, restraining or coercing any municipal employe in the exercise of the rights provided in sub. (2).

“2. Encouraging or discouraging membership in any labor organization, employe agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment”

The obligation of private employers who are required by federal statute to engage in collective bargaining is limited

to negotiations on the subjects enumerated by the statute. *Labor Board v. Borg-Warner Corp.*, (1958) 356 U.S. 342.

Your second question deals only with "wage negotiations", from which I assume you do not question that welfare department employes have the right to be represented in negotiations with respect to *other* working conditions. That right is given by statute; but it is subject to the limitation that no proposal on any subject may be accepted which is contrary to state regulations.

Even when a statute expressly obligates an employer to bargain collectively, it does not authorize him to enter into any agreement contrary to law. See *W.E.R.B. v. Algoma P. & V. Co.*, (1948) 252 Wis. 549, 32 N.W. 2d 417, 336 U.S. 301, 69 S. Ct. 584. See, also, *Dunphy Boat Corp. v. W.E.R.B.*, (1954) 267 Wis. 316, at 322, 64 N.W. 2d 866, where it was said:

"\* \* \* Necessarily a provision inserted in a collective-bargaining contract requiring the doing of something illegal or against public policy would by implication be void and excluded from the provisions of sec. 111.06 (1) (f). \* \* \*"

Even though sec. 111.70 does not contain an express provision requiring a municipal employer to engage in collective bargaining, similar to that in sec. 111.06 (1) (c), it does give employes the right "to be represented by labor organizations of their own choice in conferences and negotiations with their municipal employers on questions of wages, hours and conditions of employment". Subsec. (3) (a) prohibits municipal employers from interfering with such right.

The law thus gives county welfare department employes the right to be represented in "conferences and negotiations" on the question of wages, even though the county may not pay, and the employes may not receive, salaries which are contrary to rules of the state department of public welfare.

One of the issues to be discussed in such negotiations may be whether there is a proper relationship between the salar-

ies of employes of various departments. There may also be some leeway for adjustment of salaries of welfare department employes within the schedules adopted by the state department or some room for changing the county's election between the alternative schedules. It is possible, too, that one of the subjects under discussion might be whether a recommendation for a re-evaluation of the schedules should be made. The fact that a county is circumscribed in the action it may take with respect to salaries of welfare department employes does not prevent their being represented in conferences and negotiations on the subject.

BL

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*Board of Health—Nursing Homes*—The state board of health in the exercise of its supervisory control of nursing homes has the power to adopt separate and distinct bodies of rules for the regulation of different type of nursing homes and such distinction may appear in the license and name of such nursing home.

April 22, 1963

CARL N. NEUPERT

*State Health Officer*

You ask my opinion on this question: Does the state board of health, in the exercise of its supervisory control of nursing homes conferred by sec. 146.30, have the power to adopt separate and distinct bodies of rules for the regulation of (a) the care of patients in such nursing homes requiring skilled nursing care; and (b) the care of patients therein requiring a lesser degree of nursing care, namely, so-called "personal" care?

The state board of health will hereinafter be referred to as "the board."

It is my opinion that the board does have the power to adopt separate and distinct bodies of rules for the regula-

tion of (a) care of patients in nursing homes requiring skilled nursing care; and (b) the care of patients therein requiring a lesser degree of nursing care.

As you know, the board, under sec. 146.30 (2), has "the power to develop, establish and enforce standards (a) for the care, treatment, health, safety, welfare and comfort of patients in nursing homes and (b) for the construction, general hygiene, maintenance and operation of nursing homes, which, in the light of advancing knowledge, will promote safe and adequate accommodation, care and treatment of such patients in nursing homes; and to promulgate and enforce rules consistent with the provisions of this section." The power granted the board by this statute is obviously plenary in nature, fully enabling it to adopt those rules best designed to bring about "safe and adequate accommodation, care and treatment" of patients in Wisconsin nursing homes. The board, in the exercise of such power, can take cognizance of the well-known fact that patients in Wisconsin nursing homes fall within two general categories, namely, persons requiring skilled nursing care, and persons requiring only "personal" care, i.e., a degree of care less than of skilled nursing care. If separate and distinct bodies of rules for the care of nursing home patients in each of such categories would best promote their "safe and adequate accommodation, care and treatment," then it is clear that under the power conferred by sec. 146.30 (2) the board can adopt such bodies of rules, unless their adoption would constitute class legislation or classification violative of the Federal and Wisconsin constitutions. There can be no doubt, of course, that the adoption of such distinct and separate bodies of rules for the two categories or classes of patients would constitute classification or "class legislation". The latter term has been defined to consist "broadly speaking, of those laws which are limited in their operation to certain persons or classes of persons, natural or artificial, or to certain districts of the territory of the state." (Emphasis mine). 16A C.J.S. Constitutional Law, sec. 489. Such a definition clearly applies to administrative rules, or a body

thereof, applying only to a certain class of persons, e.g., persons in a nursing home who require skilled care.

The power to classify or to adopt class legislation is subject to the requirement that the classification "be based upon real distinctions germane to the purpose of the law and suggesting at least the propriety of substantial difference in legislation." *Kiley v. Chicago M. & St. P. P. R. Co.*, (1910) 142 Wis. 154 at p. 159. "The basis upon which a classification may validly rest must be reasonable and founded upon material differences and substantial distinctions which bear a proper relation to the matters or persons dealt with by the legislation and to the purpose sought to be accomplished. A mere arbitrary distinction in nowise relevant to the subject of legislation will not justify a departure from that equal protection of the law commanded by the Fourteenth amendment nor that equality before the law commanded by sec. 1, art. I of the Wisconsin constitution. \* \* \*" *Brennan v. Milwaukee*, (1953) 265 Wis. 52, 55. These rules as to the validity of a classification are applicable to a statute enacted under the police power, such as sec. 146.30, since general rules as to the validity of class legislation apply to the statutes enacted under that power. 16A C.J.S., Constitutional Law, sec. 493. Such rules as to the validity of a classification are equally applicable to administrative rules (sometimes termed "administrative orders, legislative in character"), the purpose of which is to effect a classification or sub-classification. See 16 C.J.S., Constitutional Law, sec. 71 1st p. 214; *Knudsen Creamery Co. of California v. Brock*, (1951) 27 Cal. 2d 485, 234 P. 2d 26, 31; *Arizona Grocery Co. v. Atchison, P. & S. F. R. Co.*, (1931) 284 U.S. 370, 388. "An act of an administrative body which is legislative in character and has the force of a statute is subject to the same tests as to its validity as an act of the legislature intended to accomplish the same purpose." 42 Am. Jur., Public Administrative Law, sec. 98.

Consequently, the contemplated classification by rule here in question, which would plainly be an exercise of the police power, is subject to the general rules applying to classification in the exercise of such power. Would such classification

comply with those rules, so as to escape condemnation under both federal and state constitutions, as a denial of equal protection of the laws or equality before the law? In my judgment, for reasons hereinafter stated, such classification would comply with those rules and would escape such condemnation.

The "general rules upon which classifications are to be based in the exercise of police power" are set forth in *Brennan v. Milwaukee, Supra*, at page 56;

" (1) All classification must be based upon substantial distinctions which make one class really different from another.

" (2) Classification adopted must be germane to the purpose of the law.

" (3) The classification must not be based upon existing circumstances only.

" (4) To whatever class a law may apply, it must apply equally to each member thereof.

" \* \* \*

" (5) The characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation." ' "

The proposed classification here in question would violate none of these rules. There are substantial distinctions between the two classes of nursing home patients above mentioned, making them really different from one another, and such classification would be based on those distinctions. It would be germane to the purpose of the law, i.e., it would aid in bringing about "safe and adequate accommodation, care and treatment" for nursing home patients in Wisconsin. Such classification would not be based on existing circumstances only, i.e., it would be so framed as to include in the classes of patients above mentioned additional members as fast as they acquired the characteristics of one or the other of such classes. See *Bingham v. Board of Supervisors*

of *Milwaukee Co.*, (1960) 127 Wis. 344, 347; *Johnson v. The City of Milwaukee*, (1894) 88 Wis. 383, 391. The separate and distinct body of rules which, if adopted, would relate only to nursing home patients requiring skilled care, would apply equally to each of such patients; and the body of rules relating only to nursing home patients requiring a lesser degree of care would apply equally to each of those patients. Finally, characteristics of each of such nursing home patient classes or categories are so far different from those of the other class or category as to reasonably suggest at least the propriety, having regard for the public good, of substantially different rules regulating the care of each class in nursing homes.

In connection with the question on which the above-stated opinion is given, you have indicated an interest in having my advice on whether the distinct bodies of rules above mentioned, if adopted, could appropriately contain provisions designed to bring about identification of the type or types of nursing care available in each nursing home licensed under sec. 146.30. It is my opinion that if these rules were adopted, those relating to the regulation of the care of nursing home patients requiring skilled nursing home care could contain a rule to the effect that a nursing home capable of providing such care—and such a home only—must indicate in its name the fact that it has that capability; and the rule could further provide the manner in which the name of such home would indicate that fact. The body of rules relating to the regulation of the care of nursing home patients requiring a lesser degree of care could contain a rule to the effect that a nursing home capable of caring only for such patients must indicate that fact in its name, with the rule also prescribing how the name of such home would indicate that fact. Moreover, it is my opinion that each of such bodies of rules might specify that a nursing home capable of providing care in conformity with such body of rules for the class of patients governed thereby would receive a license under sec. 146.30 (6), showing that capability. In the case of a nursing home capable of providing care to both classes of patients, such fact

would be shown on the license. A nursing home having only the capability to take care of one of such classes of patients in conformity with the rules regulating care of that class would receive a license showing that fact, under an appropriate rule promulgated pursuant to the rule-making power conferred upon the board by sec. 146.30 (2), and pursuant to the requirement of sec. 146.30 (6) (c), that any nursing home license granted by the board shall state, inter alia, such "special limitations as the board, by rule, may prescribe."

JHM

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*Circuit Judges—Salary*—Art. IV, sec. 26, Wis. Const., does not apply to counties and under sec. 252.071 county may increase the amount of additional salary for a circuit judge within the \$3,000 limitation therein provided during his term of office.

April 23, 1963

WILLIAM D. BYRNE

*District Attorney, Davve County*

You have asked for our opinion on the question of whether a county may increase the compensation of a circuit judge during his term of office.

The authority of the county to pay compensation to circuit judges in addition to the salaries paid to them out of the state treasury is found in sec. 252.071, which reads:

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

Sec. 252.016 referred to in the statute quoted above relates to the second circuit and will not be discussed here.

In the absence of a supreme court decision to the contrary, we will assume that sec. 252.071, on its face, is a constitutional enactment and will confine ourselves to a discussion of whether or not the granting of an increase of compensation to a circuit judge by the county would violate Art. IV, sec. 26, Wis. Const., if done during the term of office rather than prior to the commencement of such term. Sec. 252.071 is silent on the question of when the increase may be made effective, and if Art. IV, sec. 26, is applicable, the statute to be valid would have to be so construed as not to permit the increase during the term of office.

It is our understanding that there is a lower court decision to the effect that sec. 252.071 is not a valid option law, but we have been requested here to consider only its applicability to an increase of the compensation of the circuit judge during his term of office.

On December 19, 1962, you received an official opinion from this office to the effect that Art. IV, sec. 26, Wis. Const., is not applicable to additional compensation provided by the county board out of the county treasury for county judges. It was also stated in that opinion that under sec. 253.07 (2) such additional compensation must be the same for each county judge and under sec. 66.195 it may be increased but not decreased during the term of office by action taken prior to December 31, 1963.

Art. IV, sec. 26, Wis. Const., provides in part:

**“Extra compensation; salary change. SECTION 26.** The legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into; nor shall the compensation of any public officer be increased or diminished during his term of office. \* \* \*”

The salary which the legislature itself has provided to be paid out of the state treasury to circuit judges is provided in sec. 20.930 (1) (a), lines 11, 12, 13, and 14 as follows:

"20.930 Statutory salaries. (1) (a) The annual salary for each of the following positions shall be as follows:

"\* \* \*

"11 20.260 (1) Circuit judge (terms commencing June 1, 1951 and thereafter) .....	10,000
"12 20.260 (1) Circuit judge (terms commencing June 1, 1955 and thereafter) .....	12,000
"13 20.260 (1) Circuit judge (terms commencing June 1, 1957 and thereafter) .....	14,000
"14 20.260 (1) Circuit judge (terms commencing June 1, 1959 and thereafter) .....	15,000"

The legislature would clearly be prohibited from increasing or decreasing these amounts during the term of office by the plain language of the constitution quoted above.

It should perhaps be noted that there are two other constitutional provisions which are applicable to circuit but not to county judges. These are Art. VII, sec. 7, and Art. VII, sec. 10. Sec. 7 provides among other things that the circuit judges are to receive such compensation as the legislature shall prescribe and sec. 10 provides in part:

"Compensation and qualifications of judges. SECTION 10. Each of the judges of the supreme and circuit courts shall receive a salary, payable at such time as the legislature shall fix, of not less than one thousand five hundred dollars annually; they shall receive no fees of office, or other compensation than their salary; \* \* \*."

At first glance these provisions are open to the construction that circuit judges are to receive such compensation and such compensation or salary only as the legislature itself provides directly. However, that contention was rejected in the case of *Petition of Breidenbach*, (1934) 214 Wis. 54, 252 N.W. 366.

In *State ex rel. Pierce v. Kundert*, (1958) 4 Wis. 2d 392, 90 N.W. 2d 628, the court makes reference to sec. 252.071, but did not have occasion to discuss the problem raised here.

It did, however, make it clear that so far as uniformity of the salaries provided by the state is concerned the legislature would be powerless to enact a statute providing that the entire salary be paid by any particular county.

The latest case involving the interpretation of Art. VII, sec. 7 and sec. 10, Wis. Const., is *State ex rel. McCormack v. Foley*, (1962) 18 Wis. 2d 274, 118 N.W. 2d 211. Here the court emphasized the all too often forgotten principle that the power of the legislature is plenary in nature and is subject only to the limitations and restraints imposed by the state and federal constitutions. Putting it another way, the Wisconsin constitution is not a grant of power but a limitation upon the powers of the legislature.

So far as Art. IV, sec. 26, of the constitution is concerned, the law seems to be clear that the provision prohibiting an increase of a public officer's compensation during his term of office is applicable only where the salary is payable out of the state treasury. See authorities cited in our opinion to you under date of December 19, 1962, relating to additional compensation for county judges, payable out of the county treasury.

Nor does there appear to be any distinction between a constitutional officer such as a circuit judge and a county judge whose office is created by the legislature. There is an annotation in 31 A.L.R. 1316 on the subject of constitutional inhibitions of increase or decrease in compensation during the term of office as being applicable to a nonconstitutional officer. It is stated at p. 1319:

"It should be noted, however, that the court in the Kalb Case (Wis.) supra, [*State ex rel. Martin v. Kalb* (1880) 50 Wis. 178, 6 N.W. 557] does not appear to have had in mind any conscious distinction as to the applicability of the constitutional provision to offices created by the Constitution and those created by the legislature, for the court adopts as controlling the decisions of the earlier Wisconsin cases (see *infra*) construing the word 'compensation,' as used in the Constitution, as signifying a return for the services in of-

rice by a fixed salary payable out of the public treasury of the state \* \* \*." (Emphasis added.)

Moreover, in the recent case of *Columbia County v. Board of Trustees*, (1962) 17 Wis. 2d 310, 116 N.W. 2d 142, our supreme court stated categorically at p. 326:

"\* \* \* The Wisconsin constitution, sec. 26, art. IV, does not apply to counties."

This being true, it follows that any action of the county with reference to granting additional compensation to circuit judges out of the county treasury pursuant to sec. 252.071 is not subject to the limitations prescribed by said constitutional provision.

Sec. 66.195 also provides further statutory authority beyond that specified in sec. 252.071.

This section provides in part:

"66.195 **Emergency salary adjustments.** During the period commencing February 27, 1951, and ending December 31, 1963, the governing body of any county, city, village or town may, during the term of office of any elected official whose salary is paid in whole or in part by such county, city, village or town, increase the salary of such elected official in such amount as the governing body may determine.  
\* \* \*"

We do not mean to say that sec. 66.195 standing alone would constitute sufficient authority for paying additional county money to circuit judges, but it makes clear the fact that where an elected official is paid in part by the county his salary may be increased during his term during the effective period of this emergency statute.

You are therefore advised that the county may increase the compensation of a circuit judge during his term of office. Your attention is also directed to 47 OAG 116 to the effect that under sec. 252.071, in a single county circuit, the county board may not elect to pay different salary supplements to the circuit judges concerned.

WHR

*Trading Stamps—Motor Fuel*—The legislature may, by proper classification, prohibit issuance of trading stamps in connection with certain business. Bill No. 172, A., enacting a law containing such prohibition would probably be constitutional.

April 23, 1963

THE HONORABLE KENETH E. PRIEBE

*Chief Clerk, Assembly*

You ask my opinion as to the constitutionality of a law resulting from the enactment of Bill No. 172, A., which proposes to prohibit the giving of trading stamps in connection with the sale of motor fuel.

This bill proposes to amend sec. 100.15 (1), which at the present provides as follows:

“No person, firm, corporation, or association within this state shall use, give, offer, issue, transfer, furnish, deliver, or cause or authorize to be furnished or delivered to any other person, firm, corporation, or association within this state, in connection with the sale of any goods, wares or merchandise, any trading stamp, token, ticket, bond, or other similar device, which shall entitle the purchaser receiving the same to procure any goods, wares, merchandise privilege, or thing of value in exchange for any such trading stamp, token, ticket, bond, or other similar device, except that any manufacturer, packer, or dealer may issue any slip, ticket, or check with the sale of any goods, wares or merchandise, which slip, ticket or check shall bear upon its face a stated cash value and shall be redeemable only in cash for the amount stated thereon, upon presentation in amounts aggregating twenty-five cents or over of redemption value, and only by the person, firm or corporation issuing the same; provided, that the publication by or distribution through newspapers, or other publications, of coupons in advertisements other than their own, shall not be considered a violation of this section; and provided further, that this section shall not apply to any coupon, certifi-

cate or similar device, which is within, attached to, or a part of any package or container as packed by the original manufacturer and is directly redeemed by such manufacturer."

Sec. 100.15 (1) as it now reads down to the first semicolon originally was enacted by ch. 480, Laws 1917. The first proviso was added by ch. 29, Laws 1925. The second proviso was added by ch. 238, Laws 1931.

Bill 172, A., adds the following sentence before the first proviso:

"No such trading stamp, token, ticket, bond or other similar device shall be given or issued within this state in connection with the sale of motor fuel as defined in ch. 78."

The constitutionality of the classification made by the original act which excepted the cash redemption by a manufacturer, packer or dealer, was specifically sustained in *Trading Stamp Cases*, (1917) 166 Wis. 613, 166 N.W. 54. See also, *Sperry & Hutchinson v. Weigle*, (1919) 169 Wis. 562, 173 N.W. 315.

The constitutionality of trading stamps was again discussed in the case of *Ed. Schuster & Co. v. Steffes*, (1941) 237 Wis. 41, 295 N.W. 737. This was a case which dealt with sec. 100.15 (2), which prohibits the giving of trading stamps and similar devices on fair trade items. The court sustained the classification and also held "\* \* \* that the legislature may regulate and even prohibit entirely the use of these devices\* \* \*"

There was a dissenting opinion in *Ed Schuster & Co.*, *supra*, which stated that the opinion of the court, holding that the prohibition of the issuing of trading stamps redeemable in cash is justified as an exercise of the police power, was erroneous. However, there is no doubt that the majority of the court held that trading stamps may be completely prohibited under the exercise of the police power, and on page 60 of the opinion, rejected the holding of the Massachusetts court in the case of *Sperry & Hutchinson Co.*

*v. McBride, Director of Division of Necessaries of Life*, (1940) 307 Mass. 408, 30 N.E. 2d 269.

Cases in other jurisdictions have held unconstitutional statutes which prohibited the giving of trading stamps or other trade stimuli.

See,

*The Sperry & Hutchinson Co. v. Boardman*, (1938) 46 Dauph. 145, 33 D & C 571;

*People v. Victor*, (1939) 287 Mich. 506 283 N.W. 666;

*Sperry & Hutchinson Co. v. Prosecuting Attorney of Kent County*, (1939) 287 Mich. 555, 283 N.W. 686;

*Sperry & Hutchinson Co. v. McBride, Director of Division of Necessaries of Life, supra.*

The legislature, in the exercise of police power, may prohibit those things that may be considered detrimental to the public welfare. However, there must be a reasonably conceivable state of facts to justify the prohibition.

In the *Ed. Schuster case, supra.* the court felt the prohibition was justified, since the giving of trading stamps could defeat the fair trade act.

It is also significant, however, that the court in this case, at page 55, said:

“ \* \* \* If the legislature \* \* \* finds that a particular instrument of trade war is being used against that (public) policy in certain cases, it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed.’ ”

Bill 172, A., would prohibit the giving of trading stamps in connection with the sale of motor fuel. It is not a complete prohibition of all trading stamps.

The question of whether the motor fuel industry may be singled out becomes one of whether this is a proper classifi-

cation. The legislature may classify certain persons and organizations for special treatment if there is reasonable economic or social justification therefor. The police power may not be exercised against only a part of a class of persons similarly situated. To do so would be to deny the equal protection of the law.

The constitutionality of the classification which exempts the manufacturer, in sec. 100.15 was discussed in 38 OAG 596. The opinion cast doubt upon this classification. Trading stamps were also discussed in 31 OAG 53, but the opinion did not consider the constitutionality of the statute. The opinion did point out that the 1939 legislature passed a bill prohibiting the use of trading stamps in connection with gasoline sales, although, the bill was vetoed by the governor. There are other evidences of the petroleum industry being singled out for special treatment.

Ch. 460, Laws 1955, created a statute which, due to the subject matter regulated, has some relevancy here. The constitutionality of that statute was never challenged, and ch. 531, Laws 1959, repealed the statute, which read as follows:

“100.18 (2) It shall be deemed deceptive advertising within the meaning of this section, to advertise anything as ‘free’ when the gift is contingent upon a purchase unless the fact that such purchase is necessary is clearly stated in the advertisement. No person shall advertise, offer to give or give any item of merchandise contingent upon the sale of petroleum products at retail.”

There are other statutes applying specifically to the sale of gasoline, including sec. 100.18 (6) and (8).

When the question of equal protection of the law was discussed by Justice Fairchild in the case of *State v. Texaco*, (1961), 14 Wis. 2d 625, 632, he stated:

“3. *Equal protection of law.* Texaco argues that the Wisconsin regulation deprives it of equal protection of law and asserts that a gasoline wholesaler is the only seller who is not permitted to defend against a charge of price discrimi-

nation on the basis of good-faith-and-competitive necessity. It states that sellers prosecuted under sec. 133.17, Stats., are accorded such defense and that there are no conceivable facts 'which justify singling out the petroleum industry for this special treatment in Wisconsin.' We can take judicial notice of many differences between the organization of the business of distributing gasoline and other types of business. It would be presumed that imposition of unique regulations upon a distinct type of business would be reasonably related to the peculiarities of the business until the contrary clearly appears."

There is evidence that the petroleum industry has certain peculiarities, and there have been repeated attempts to apply different regulations to that industry. Whether this is a proper classification depends upon whether the retailing of petroleum is peculiar in that it generates some evil not prevalent in other retailing.

Cases in other states have rejected the classification.

*The Sperry & Hutchinson Co. v. Boardman, supra;*

*People v. Victor, supra;*

*Sperry & Hutchinson Co. v. McBride, Director Of Division of Necessaries of Life, supra.*

A further requirement for a valid classification is that the means adopted by the statute must bear a reasonable relationship to the ends to be served.

In *The Sperry & Hutchinson Co. v. Margetts*, 25 N.J. Super, 568, 96 Atl. 2d 706 (Chan. Div., 1953), the court stated:

"The means adopted by that provision are not reasonably adapted to the accomplishment of the protection and regulation of the public health, safety, morals or welfare, including within the broad ambit of the general welfare, the economy of the State. \* \* \* The legislation bears no real and substantial relation to any of these ends, but denies and unreasonably curtails the common right to engage in a lawful business."

The constitutionality of a statute enacted by the passage of Bill 172, A., cannot be determined without reference to the conditions existing in the sale of motor fuel. There is no recitation in Bill 172, A., of a factual situation establishing the existence of an evil in the sale of motor fuel, (at which the proposed legislation is aimed) which is any different than in the sale of any other commodity. If there is some evil, peculiar to that business, which should be eradicated or reduced in the public interest, and if the prohibition of the issuance of trading stamps in that business is reasonably calculated to accomplish that purpose, such a statute would be valid. I respectfully suggest that the rendering of a legal opinion as to the probable constitutionality of legislation such as here proposed would be considerably facilitated by the availability of facts justifying the particular classification, i.e., an indication of the particular evils surrounding the sale of motor fuel, which this legislation would be designed to alleviate or cure. In this connection, the Wisconsin supreme court has indicated that it might be diligent in so informing itself. In *Ritholz v. Johnson*, (1944) 244 Wis. 494, 12 N.W. 2d 738, at page 502, it said:

“\* \* \* a court has not only the right but the duty to be informed or to inform itself in some appropriate way in regard to the facts involved in a case where the constitutionality of a statute has been challenged \* \* \*”

It is my opinion, however, in view of the court-enunciated principle that its search must be for a means of sustaining the act, not for reasons which might require its condemnation and that every possible presumption is in favor of its validity, notwithstanding views inconsistent with the wisdom of the law, that Bill 172, A., if enacted, would probably be constitutional. *State ex rel. Thomson v. Giessel*, (1953) 265 Wis. 558, 565, 61 N.W. 2d 903. *Nebbia v. New York*, (1934) 291 U.S. 502, 537, 54 Sup. Ct. 505.

JEA

*County Executive—Counties—Legislature*—Bill No. 436, A., creating sec. 59.035 to provide that counties having population of less than 500,000 could establish elective county executive with powers set forth in 59.031, violates the uniformity requirement of Art. IV, sec. 23, Wis. Const.

April 24, 1963

THE HONORABLE, THE ASSEMBLY

Resolution No. 15, A., requests my opinion as to whether the provisions of Bill No. 436, A., violate the uniformity provisions of Art. IV, sec. 23, Wis. Const.

Bill No. 436, A., would create sec. 59.035 of the statutes to provide that county boards of counties having a population of less than 500,000 could, at their option, establish an elective county executive having the powers and duties set forth in sec. 59.031.

Art. IV, sec. 23, Wis. Const. provides:

“The legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable.”

An analysis of permissible limits of classification and variance in systems in light of the above constitutional restriction was made in my opinion to the senate, dated March 6, 1963 with special reference to Resolution No. 7, S., and Bill No. 42, S.

It is my opinion that the optional feature of Bill No. 436, A., violates the uniformity requirement of the constitutional provision cited above.

Inasmuch as Bill No. 436, A., if enacted into law, would be operationally dependent upon sec. 59.031, it is significant that portions of sec. 59.031 already have been declared unconstitutional. In *State ex rel. Milwaukee County v. Boos*, (1959) 8 Wis. 2d 215, 99 N.W. 2d 139, the Wisconsin supreme court held invalid a portion of sec. 59.031 (2) (b) relating to appointments of department heads by the coun-

ty executive requiring no confirmation by the county board, a portion of sec. 59.031 (5) relating to the county executive's power to veto budget increases or decreases, and all of sec. 59.031 (6) relating to the power of the county executive to approve or veto resolutions or ordinances. It is not necessary to decide here whether this partial voidance of sec. 59.031 would invalidate Bill 436, A. The legislature, however, is presumed to have been familiar with this judicial determination of invalidity. 82 C.J.S., Statutes, p. 848, sec. 370. Even if the legislature had specifically re-enacted sec. 59.031 in its entirety, without eliminating the unconstitutional portions, such re-enactment would not put the part previously declared unconstitutional back into the statutes. *Ibid.*

Bill No. 436, A., would grant an option to each county board in this state (except in counties with population of 500,000 or more) to determine whether the particular county would establish the county executive feature in the county system of government. It is this optional feature of the bill which brings it in conflict with the constitutional requirement of uniformity in county government.

In 1934 our supreme court held invalid sec. 59.95, which provided that any county (except one) could reorganize into a county commissioner form of government. *State ex rel. Adams v. Radcliffe*, (1934) 216 Wis. 356, 257 N.W. 171. At page 364, the court said:

“\* \* \* While acts creating diversities in particular counties have been sustained by this court upon the ground that differences in population and other conditions justified the legislature, in its discretion, in somewhat varying the details of the existing system, we know of no case and of no principle that would justify leaving to the option of the counties the adoption of a form of county government so different from that now current. Under the terms of this section, two counties with substantially similar conditions and needs may have systems of county government that are materially and unnecessarily different. \* \* \*”

It has been repeatedly held that a broad discretion is vested in the legislature in determining whether the system of county government is as uniform as practicable. See *State ex rel. Scanlan v. Archibold*, (1911) 146 Wis. 363, 369, 131 N.W. 895 and cases therein cited. Nevertheless, there must be some showing that general uniformity is impracticable and that the departure from uniformity is consistent with some proper classification of counties. The difficulties inherent in sustaining a departure from uniformity where an optional device would permit two similar counties to enjoy dissimilar governmental structures is discussed at some length in 50 OAG 10.

Neither Bill No. 436, A., or any other information available to me indicates that it is impracticable to carry on county government uniformly either with or without a county executive in all save one of the counties of this state. Absent such manifest impracticability, I am unable to escape the conclusion that Bill No. 436, A., if enacted into law, would probably be held unconstitutional as violative of the "as nearly uniform as practicable" requirement of Art. IV, sec. 23, Wis. Const.

RJV:JEA

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*Highway Commission—Surveys*—Consideration given to problems as to highway traffic surveys by regional planning commissions created by sec. 66.945 and contracts pertaining thereto.

April 24, 1963

V. L. FIEDLER

*Secretary, State Highway Commission*

You state that the state highway commission has contracted with the southeastern Wisconsin regional planning commission for the conduct of a regional land use and transportation study to be conducted by the latter agency for that portion of the state within its area.

A part of these surveys will consist of "origin-destination surveys" which are conducted by the stopping and interviewing automobile travelers on the main traffic arteries of the region. You ask a number of questions concerning the "authority, responsibility, legality" of such traffic surveys.

The southeastern Wisconsin regional planning commission was created pursuant to sec. 66.945 of the statutes. A planning commission is created by "the governor, or such state agency or official as he may designate, upon petition in the form of a resolution by the governing body of a local governmental unit and the holding of a public hearing on such petition." The statute is very lengthy and detailed as to the exact composition of these commissions, which vary, depending upon whether or not they contain a city of the first class. The purpose of such commission is primarily to make and adopt a master plan for the physical development of the region. (Sec. 66.945 (9)).

Sec. 66.945 (8) (a) states in part, that, "The regional planning commission may conduct *all types* of research studies, collect and analyze data, prepare maps, charts and tables, \* \* \* In general, the regional planning commission shall have all powers necessary to enable it to perform its functions and promote regional planning. \* \* \*"

It is not necessary here to go into further details as to financing, organization and functions of these commissions. It is sufficient to say that for purposes of the questions here considered, the commissions are created by the legislature and clothed with broad authority to carry out the functions for which they were created.

Below, I have set forth your questions and my answers to the same.

1. Does the SEWRPC have the authority to stop and interview traffic within the course of a regional transportation study on the various road systems within its area of jurisdiction?

In my opinion, the planning commission does have such authority on the basis of those portions of sec. 66.945 (8)

(a), above quoted. An "origin and destination" survey of traffic is a recognized modern means by which certain types of highway traffic studies are conducted. However, for practical reasons, I call your attention to sec. 349.02, which reads as follows:

**"349.02 Police and traffic officers to enforce traffic law.** It is the duty of the police and traffic department of every unit of government and each authorized department of the state to enforce chs. 346 to 348. Police and traffic officers are authorized to direct all traffic within their respective jurisdictions either in person or by means of visual or audible signal in accordance with chs. 346 to 348. In the event of fire or other emergency, police and traffic officers and officers of the fire department may direct traffic as conditions may require notwithstanding the provisions of chs. 346 to 348."

Section 84.01 (8), pertaining to the state highway commission, states:

**"(8) SURVEYS AND PLANS.** The commission shall make provision for and direct the surveys, plans, construction, inspection and maintenance of all highways, whenever the construction or maintenance is under its jurisdiction."

Counties and municipalities have, in recent years, been given broad general powers, and while traffic survey responsibilities have not been spelled out as clearly as sec. 84.01 (8), I do not doubt that they have similar powers regarding surveys as are possessed by the state highway commission.

In order to avoid any possible conflict between the planning commission and state and local authorities, all surveys by the planning commission should be conducted with the full knowledge and consent of the particular highway maintenance and police authorities having jurisdiction of the proposed survey area. Certainly, traffic check points should not be established without approval of local authorities and wherever possible, with the aid and assistance of the appropriate police or sheriff. This, obviously, has many safety

advantages and resolves any disagreement as to possible conflict of jurisdiction.

2. If it does not, which agencies do have such authority and can they delegate it in any way to the SEWRPC?

Your second question, as to what other agency could delegate authority to the southeastern Wisconsin regional planning commission, has been considered and answered above.

3. If such authority rests in the SEWRPC or can be delegated to it, where would the liability for damage or injury to the traveling public or the survey staff rest?

The question of liability is one that cannot be answered categorically. A question of negligence as between individuals, i.e., driver and survey employe is subject to the ordinary rules of negligence in tort cases. If the survey party or a member of it is responsible for the damages, it is my opinion that while a claim could be brought before the state claims commission, it is not possible to predict, however, just what position would be taken by the claims commission regarding state responsibility for claims of less than \$500 or the legislature on larger claims. See sec. 15.94 (6a). Likewise, there may be liability on the part of participating counties or municipalities, depending upon the circumstances. Further uncertainty arises due to the supreme court case, removing sovereign immunity. *Holytz v. Milwaukee*, (1962) 17 Wis. 2d 26. The responsibility under the workmen's compensation law cannot be determined until brought before the industrial commission, because the planning commission law appears to be silent in this regard. I call your attention to sec. 102.07 (10), of the industrial commission laws for basic rules concerning the applicability of the workmen's compensation law.

4. If the SEWRPC has neither the authority nor can be delegated the authority for such survey operations, may they be considered an agent of the state highway commission, (through contract) performing surveys under the highway commission's direction? If so, what extent of direction and identification is necessary?

The answer to this question is set forth in No. 1 above, except as to administrative details, which, I am sure, can be worked out to the satisfaction of all parties involved.

5. Finally, does the highway commission have the authority to stop and interview traffic on any road system in the course of a transportation survey?

See sec. 84.01 (8) *supra*.

It is my opinion that as long as the survey is made for state highway purposes, you would not be limited solely to state trunk highways. No survey could be complete without the study of secondary or feeder roads to determine the location of main state routes, type of construction necessary, and location of highway access points. I am of the opinion the legislature intended to give this section a sensible and liberal interpretation, and I so construe the law.

REB

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*Legislature—Tax Exemption*—Bill No. 137, S., proposing the exemption from general taxation of \$3,750 of the assessed value of real property occupied as a homestead would be invalid as violating the rule of uniformity in Art. VIII, sec. 1, Wis. Const.

April 25, 1963

THE HONORABLE, THE SENATE:

By Resolution No. 14, S., an opinion has been requested as to the constitutionality of Bill No. 137, S., relating to exemption of homesteads from general taxation.

It is proposed in sec. 1 of Bill No. 137, S., to add a new subsec. (24) to sec. 70.11, which sets forth items of property exempted from general property taxes, to read as follows:

“(24) HOMESTEADS. (a) \$3,750 of the assessed value with respect to real property which is the homestead of the owner.

“(b) This subsec., and s. 70.23 (1) as amended in 1963 with reference to homesteads, shall apply to assessments for the calendar year 1963 and subsequent years.”

Sec. 2 of the bill proposes amendment of sec. 70.23 (1) by adding the word “homesteads” to the itemization requirements of the assessment roll and provides a procedure for setting out a homestead description. These are mere mechanics to implement the proposal in sec. 1 of exempting the first \$3,750 of the assessed value of property occupied by the owner as a homestead.

This proposal by Bill No. 137, S., is identical in character with one which was the subject of an opinion given June 30, 1949, in 38 OAG 276. There it was proposed to add a subsection to sec. 70.111, which sets forth the personal property exempted from general taxation, to read:

“(2) INTOXICATING LIQUOR TAXES. The amount of the state and federal excise taxes on intoxicating liquors as defined in section 139.25 (1).”

It was there pointed out that such proposed enactment, although couched in the form of an exemption, did not conform to the mechanical necessities of an exemption because it did not cover an item of property. Bill No. 137, S., is an attempt to exempt a part of the value of item of property rather than to exempt the item itself. The first \$3,750 of assessed value of real property occupied by the owner as a homestead is not an item of property, but a selected amount which is only part of the taxable value of the entire property. As such, it is comparable to the amount of federal and state excise taxes paid in respect to intoxicating liquor, which in the prior opinion, was said to be merely one of the elements of value of the liquor that had become fused or integrated into the intoxicating liquor as property and could not be separated out as an item of property which itself could be exempted.

In such prior opinion it was pointed out that laying aside this mechanical objection, the only effect which could be given to the language used was to interpret it as meaning

that in the assessing of intoxicating liquor for ad valorem tax purposes, the amount of state and federal excise taxes paid in respect thereto should be deducted or subtracted from what would otherwise be the true cash value at which the property is to be assessed. As thus read, the language would be the same as if it were stated that intoxicating liquor should not be taxed at its true cash value, but that the state and federal excise taxes which have been paid in respect thereto and enhanced its intrinsic value should be deducted from its full market or cash value to determine its assessed value. As so viewed, the language would violate the rule of uniformity because either intoxicating liquor would not be assessed on the same basis as all other property, or there would be an attempt to tax it on a different basis from other properties.

What was there said in the prior opinion is equally applicable here. The proposed amendment does not exempt an item of property, which is the mechanics necessary for an exemption, but in substance says that real property which is occupied by the owner as a homestead shall be assessed at \$3,750 lower than if the property were not occupied by him as a homestead. The result would be that two pieces of property, situated side by side, and identical in value, but owned by different persons, one occupied by the owner as his residence and the other not, would be taxed upon a different basis of assessment. This would be a clear violation of the rule of uniformity in Art. VIII, sec. 1, of the constitution, which requires that all property be either exempted or taxed at its assumed cash or market value. It does not permit ad valorem taxation of kinds of property at different levels of assessed value, except as there are now in said Art. VIII, sec. 1, specific exceptions covering forests, minerals, merchants' stock-in-trade, manufacturers' materials and finished products, and livestock, none of which has any possible application to the partial homestead exemption proposed by Bill No. 137, S.

In the prior opinion in 38 OAG 276, and also in another one in 20 OAG 265, there is language which might be taken as indicating that the invalidity was grounded upon the

conclusion that the attempted exemption was not founded upon a reasonable classification. A complete analysis of the cases over the years involving the tax uniformity clause in Art. VIII, sec. 1, establishes that it requires equality of burden as respects the property that is subjected to general property taxation and does not permit of division of property into classes that are taxed unequally.

Some conflicting views in the earlier cases relating to the tax uniformity provision in Art. VIII, sec. 1, of the Wisconsin constitution were either reconciled or rejected by the supreme court in 1906 and a definite meaning given to the provision which has been adhered to and followed. These cases start with the unreported 1855 case of *Milwaukee & M. R. Co. v. Waukesha County*, [See footnote at the end of *Knowlton v. Rock County*, (1859) 9 Wis. 410.] There a statute requiring a railroad company to pay an annual tax of 1% of gross earnings in lieu of all other taxes upon the company and its property was upheld as a "partial exemption", apparently under the view that the tax on the gross receipts was on the property itself. However, in *Knowlton v. Rock County*, *supra*, the majority opinion rejected any theory that "partial exemptions" are permissible and the contention that the legislature might classify property with different rates that were uniform within classes, and held that absolute uniformity in rates is required. A statute which provided that "rural" property within the limits of the city of Janesville was not to be subject to an annual city tax exceeding one-half that levied on other property in the city, was held invalid. The court clearly held that once property is selected it must be taxed entirely and the same rate applied to it as to other property in the district. Subsequently, in *State v. Winnebago L. & F. R. P. Co.*, (1860) 11 Wis. 34, the majority approved the *Knowlton* case and overruled the *Milwaukee & M. R.* case, holding that the gross receipts tax was an unconstitutional tax on the ground that it was a property tax with a rate different than that applicable to other property. The court said the object of the provision was to secure equality between different kinds of property and it could only be obtained by a uniform rate. Next, there

was *Slauson v. Racine*, (1861) 13 Wis. 398, in which a statute annexing lands to the city of Racine was held invalid because it contained a provision that agricultural and farming lands so annexed should be taxed at a different and less rate than other lands in the city. The court cited and relied upon the *Knowlton* case.

The same railroad gross receipts tax involved in the *Winnebago* case was up in *Kneeland v. Milwaukee*, (1862) 15 Wis. 454, in which the court on rehearing overruled the *Winnebago* case and followed the *Milwaukee & M. R. Co.* case. Then followed *Wis. Central R. Co. v. Taylor County*, (1881) 52 Wis. 37, 8 N.W. 833, which involved the validity of a statute exempting the property of the named railroad for a specified period of years. The only issue was the power of the legislature to exempt property but in holding the statute valid the majority approved the *Milwaukee & M. R. Co.* case.

This was the status of the matter for a number of years and although a number of cases were decided subsequent to the *Wis. Cent. R. Co. v. Taylor County* case which involved this clause, none of the discussion therein is of assistance on the instant aspect of it. *Wis. Cent. R. Co. v. Lincoln County*, (1883) 57 Wis. 137, 15 N.W. 121, held that assessment of personalty and realty at different times is not violative thereof. *State ex rel. Baraboo v. Sauk County*, (1888) 70 Wis. 485, 36 N.W. 396, held valid a statutory tax on property in a county, excluding the property in a city or village maintaining its own bridges, to pay part of cost of town bridges. *State ex rel. Holt L. Co. v. Bellew*, (1893) 86 Wis. 189, 56 N.W. 782, held not violative of the provision a statute fixing where saw logs are assessed. *State & M. R. Co. v. Anderson*, (1895) 90 Wis. 550, 63 N.W. 746, said this uniformity requirement is not violated by diversity in methods of selection of assessors. *Lund v. Chippewa County*, (1896) 93 Wis. 640, 67 N.W. 927, said uniformity exists if all in the territorial unit bear an equal burden. *Battles v. Doll*, (1902) 113 Wis. 357, 89 N.W. 187, followed *Baraboo v. Sauk*, *supra*.

*Black v. State*, (1902) 113 Wis. 205, 89 N.W. 533, involved an inheritance tax statute. Ch. 355, Laws 1899 imposed a 5% tax upon the clear market value of property transferred except that as to certain relatives it could not be taxed unless more than \$10,000 in value and then only at 1%. This was held invalid as improper classification on the ground it was discriminatory as all within the class were not treated equally. While the court did make reference to the uniformity of taxation provision in the constitution it said it was not of great importance whether, as indicated in prior decisions, it was applicable only to the taxation of property and thus not to an inheritance or succession tax, because in any event the improper classification was in violation of equal protection provisions. *Kingsley v. Merrill*, (1904) 122 Wis. 185, 99 N.W. 1044, sustained, as against assertion of violation of the uniformity clause, the inclusion of debt due from solvent debtors in property subject to general taxation. *State v. Whitcom*, (1904) 122 Wis. 110, 99 N.W. 468, held invalid a statute licensing peddlers because either as a tax law or a police measure it contained exemptions not based upon any classification germane to its purpose. While reference was made to Art. VIII, sec. 1, uniformity requirement, the court did not pass upon whether it applies only to property taxation and said in any event the law was invalid if applicable or as a denial of equal protection.

In 1903 the legislature revised the taxation of railroad companies, abandoning payment of a percentage of gross earnings in lieu of all other taxes and adopting the present taxation of railroads on an ad valorem basis with the value of the entire railroad property in the state being assessed by the state tax authorities as a unit and application thereto of the average ad valorem tax rate. While in *State v. Railroad Cos.*, (1906) 128 Wis. 449, 108 N.W. 594, the court held that the gross earnings tax was not a property tax but a privilege tax which, with the in-lieu feature, simply provided for the exemption of certain property from the property tax, in *C. & N. W. R. Co. v. State*, (1906) 128 Wis. 553, 108 N. W. 557, the court in upholding such new taxa-

tion of railroads considered the conflicting statements in its prior decisions and either reconciled or rejected them. It there said that, while there is no requirement of universality in the uniformity provision and thus exemptions of reasonable classes of property from taxation are permissible, there can be no partial exemption. It said that there must be absolute uniformity in the effective rate of tax which is applied to all property taxed by any taxing district. Therefore, all property selected by the legislature for taxation and subjected thereto must be taxed at the same rate. Rate as so used means the whole basis of the calculation of the amount of the tax payable. The court there in effect said that this was what it had held, although the language and discussions in some of the prior decisions might appear otherwise, and this had never been departed from in any of the prior cases. The court there also said that the requirement of absolute uniformity in effective rates of taxation does not extend to the mechanics of valuation or assessment if the burden is equal. It also said that property must be taxed ad valorem and that the uniformity provision applies only to direct taxation of property.

In that case the court said that the requirement of uniformity in rates was met because the average state rate there applied to the unit valuation was a reasonable compliance with the uniformity provision as that requires only a uniformity of burden and not necessarily uniformity in the methods of imposing such burden. It observed that the burden of taxation placed on the railroads was substantially equal to that imposed on all the property in the state and therefore there was an equality which constituted compliance with the uniformity provision. This case dispelled any further doubt as to the meaning and application of this uniformity clause in Art. VIII, sec. 1. The case positively laid down that absolute uniformity of effective rates is required but that complete exemption of classes of property is permitted. Thus, all property which is selected for and subjected to general property taxation must be taxed at a uniform rate, that is, all property taxed must bear the tax burden equally. This means that property must either be

taxed in its entirety or be completely exempt, and therefore no partial exemption is permitted.

In *Knowlton v. Rock Co.*, *supra*, at pages 420-421 the court had said of the uniformity clause:

“\* \* \* Its mandate, it is true, is very brief, but long enough for all practical purposes; long enough to embrace within it clearly and concisely the doctrine which the framers intended to establish, viz: that of equality. ‘The rule of taxation shall be uniform,’ that is to say, the course or mode of proceeding in levying or laying taxes shall be uniform; it shall in all cases be alike. The act of laying a tax on property consists of several distinct steps, such as the assessment or fixing of its value, the establishing of the rate, etc.; and in order to have the rule or course of proceeding uniform, each step taken must be uniform. The valuation must be uniform, the rate must be uniform. Thus uniformity in such a proceeding becomes equality; and there can be no uniform rule which is not at the same time an equal rule, operating alike upon all the taxable property throughout the territorial limits of the state, municipality or local subdivision of the government, within and for which the tax is to be raised.”

In that case the court answered the argument that the dividing up and classifying of property does not violate this constitutional rule of uniformity, provided all property in a given class is rated alike, by saying at pages 421-422:

“The answer to this argument is, that it creates different *rules* of taxation to the number of which there is no limit, except that fixed by legislative discretion, whilst the constitution establishes but one fixed, unbending, uniform rule upon the subject \* \* \*.”

Further in the opinion at page 424 the court made the following statement, which was quoted with approval in *Hale v. Kenosha*, (1872), 29 Wis. 599 and also in *C. & N. W. R. Co. v. State*, (1906) 128 Wis. 553, 108, N. W. 557:

“\* \* \* the very moment that the legislature say that a specific article or kind of property shall be taxed, or shall contribute at all towards the expense of government, from

that very moment the first clause of the section takes effect, and it must be taxed by the uniform rule. The legislature can only 'prescribe,' and when they have done that, the first clause of the section governs the residue of the proceeding. There cannot be any medium ground between absolute exemption and uniform taxation."

After quoting the above with approval, the opinion in *Hale v. Kenosha* at page 604 continues as follows:

"We think that this is a sound construction of the constitutional provision; and it seems to go to the extent that, if property is taxable for one purpose, it must be held to be taxable for all purposes of general taxation, or the rule of uniformity would be violated. What would be said of an enactment to the effect that all personal property in the city of Kenosha should be exempt from taxation for city purposes, and taxable for state and county purposes; that all manufacturing establishments therein should be exempt from county taxes, and liable to all others; and that all homesteads therein should be exempt from state taxes, and liable to be taxed for all the other purposes of taxation? Of course no one will contend that such an enactment would not violate the constitutional rule of uniformity in taxation.

"\* \* \*

"The true doctrine unquestionably is, that while the legislature may by law exempt certain specific property or classes of property from taxation, such exemption, to be valid and operative, must be absolute and total. \* \* \*"

In the *C. & N. W. R. Co.* case the opinion at page 602 points out that in these prior cases the discussion concerning "classification of property" in respect to the uniformity clause used the term as referring to or recognizing only (1) division of property into that which is taxed directly and that which is exempted and not so taxed; (2) division of property into that which is taxed directly so as to come within the equality of burden requirements of the rule of uniformity clause and that property not so directly taxed by exemption therefrom but which exempted property is taxed indirectly by some other exaction; and (3) division

of the property that is taxed by direct taxation into different types or kinds of property with reference to situs or other mechanics of the taxation process "in aid of applying one rule to all so as to affect the different kinds of property with as great a degree of equality as to all as practicable."

The court then followed with this statement in respect to those cases:

"\* \* \* Classification for different rules resulting in different rates and unequal taxation, in that one class might not be made to bear the public burdens proportionately with other classes, was not thought of, and the case should not be regarded otherwise. \* \* \*"

And at page 603-604 the court in that opinion also said:

"\* \* \* For the direct method of taxing property, taxation on property so called, as to the rule of uniformity, there can be but one constitutional class. All not included therein must be absolutely exempt from such taxation. All within such class must be taxed on a basis of equality so far as practicable. In that respect *Knowlton v. Rock Co.* and *Hale v. Kenosha* are and have been since they were decided, the doctrine of this court. \* \* \*"

None of the cases since the *C. & N. W. R. Co.* case, in any way erode the principles therein set forth and there has been a uniform application of them ever since. There has been no case in which property has been permitted to be put into a class for general ad valorem tax purposes and subjected to taxation on different basis than other property that is subjected to ad valorem taxation.

*Beals v. State*, (1909) 139 Wis., 544, 121 N.W. 547, involving inheritance taxation held that this constitutional rule of uniformity in Art. VIII, sec. 1, was not applicable as it applies only to the direct taxation of property, and an inheritance tax is an excise levied on the transfer of property and not on the property itself. The court indicated, however, that nevertheless inheritance taxation is subject to the "general" rule of uniformity, i.e., the rule that there is improper classification unless it is founded on a real difference

germane to the subject involved and all within the class are treated with equality.

It is to such statements of this nature in the *Beals* case and other cases to which allusion was made in 38 OAG 276 where it was said that there were indications in later cases that in some respects there would be no violation of rule of tax uniformity if there were proper classifications. It was not intended thereby to say in the opinion that the rule of uniformity clause in Art. VIII, sec. 1, admits of classification, but only to show that if the rule would permit of classification, the classifications there attempted nevertheless would be invalid under the general principles of classification. In other words, all that was done there was state that the bill would violate the constitutional rule of uniformity because it does not permit classification, and then indicate that even if it did the bill still would be invalid as not containing a valid classification. In discussing the uniformity limitations the court in the *Beals* case at p. 557 quite definitely said:

“(3) As to the taxation of property, there can be no classification which interferes with substantial uniformity of rate based upon value.”

In *Lawrence v. Outagamie County*, (1912) 150 Wis. 244, 136 N. W. 619, a provision in the legislative charter of Lawrence college exempting its property from all taxation was held invalid, because of the absence of proper classification. The court said that because it was greater than the general statutory exemption to similar organizations the charter exemption conferred upon Lawrence college, arbitrarily and not as a class, an exemption not based on any distinctive feature that set Lawrence college apart from other educational institutions in its class. This case thus stands for the proposition that, although the rule of uniformity does permit complete exemptions of classes of property, the rule is violated where only a portion of property in the same class is exempted or where some is given a greater exemption than other property of the same class.

*Nunnemacher v. State*, (1906) 129 Wis. 190, 108 N.W. 627, upheld the validity of inheritance tax provisions against

an attack thereon as violation of the constitutional rule of tax uniformity. The court said it considered it settled by a review of the several prior decisions that the rule applies only to direct property taxation but that it does not limit taxation to taxes levied only on property and inasmuch as inheritance taxes are not on property, they are not subject thereto.

*State, ex rel. Manitowoc Gas Co. v. Wis. Tax Comm.*, (1915) 161 Wis., 111, 152 N. W. 848 involving the construction of a provision in the income tax statute made reference to the constitutional uniformity limitation but only to point out that it applies only to property taxation and not to income taxation.

*Nash Sales, Inc. v. Milwaukee*, (1929) 198 Wis. 281, 224 N. W. 126, sustained the validity of a statutory exemption from general taxation of merchandise in the original package while in a commercial warehouse. The court referred to the prior cases as having held that under the constitutional rule of uniformity in Art. VIII, sec. 1, the legislature has the power to prescribe what property should be taxed and what should be exempted. It found no improper exercise of this legislative authority of exemption as the provision was founded upon a valid classification.

In *Milw. E. R. & L. Co. v. Tax. Comm.*, (1932) 207 Wis. 523, 242 N. W. 312, the contention was that, in view of a newly enacted provision in Ch. 70, Stats., exempting motor vehicles from general property taxation, inclusion thereafter of the busses and other motor vehicles of a utility in the unit assessment of its property made pursuant to Ch. 76, Stats., by the state tax authorities and thereby subjected to the average state rate, would violate the uniformity of taxation rule in Art. VIII, sec. 1. The court held that in effect the provisions in Ch. 76, Stats., relieving from general taxation under Ch. 70 those motor vehicles of a utility included in the total valuation of its property as a unit under said Ch. 76 without allocation of any specific value to them, constitute an exemption which was grounded upon proper classification. The opinion quoted extensively

from the *Wis. Cent. R. Co. and C. & N. W. R. Co.* cases, expressing approval of the principles hereinbefore stated as laid down in them and relied upon the proposition that this rule of uniformity permits of complete exemption of classes of property from general property taxation.

In *State ex rel. Baker Mfg. Co. v. Evansville*, (1952) 261 Wis. 599, 53 N.W. 2d 795, the court said at page 609:

“\* \* \* As we heard the city’s oral argument and read its brief we gained the impression that it contends that there is uniformity of taxation if one fraction of true value is applied to all real property, although some other fraction thereof may be used in the case of personalty, — that the requirement of uniformity is satisfied so long as there is uniformity within the class. We do not consider this to be the law. In our view the command of Sec. 1, Art. VIII, of the Wisconsin constitution requires uniformity of taxation, according to the value, of real and personal property without distinction. The methods of determining true, current value necessarily differ in the absence of significant sales, but when once the true value is arrived at, each dollar’s worth of one sort of property is liable for exactly the same tax as a dollar’s worth of any other sort of property, and to assess real property at a different fraction of the value than personalty is error. \* \* \*”

In the comparatively recent case of *Barnes v. West Allis*, (1957) 275 Wis. 31, 81 N. W. 2d 75, where the validity of the statute authorizing the exaction by municipalities of a mobile home parking permit fee was upheld as an excise and not a property tax, the supreme court said:

“\* \* \* Under sec. 1, art. VIII, constitution of Wisconsin, where a property tax is levied, there can be no classification which interferes with substantial uniformity of rate based upon value. But it is also true that as to excise taxation, the term ‘uniformity of taxation’ means simply taxation which acts alike on all persons similarly situated. *Beals v. State*, 139 Wis. 544, 557, 121 N. W. 347.”

In addition to the mentioned opinion in 38 OAG 276 there is also one dated May 8, 1931, in 20 OAG 265 that a statute

authorizing cities to exempt new buildings from property taxation would violate this constitutional rule of tax uniformity, which quoted from the opinion in *Hale v. Kenosha*, *supra*,

“ \* \* \* that while the legislature may by law exempt certain specific property or classes of property from taxation, such exemption, to be valid and operative, must be absolute and total. . . . ”

Also here is another opinion, dated June 14, 1957, in 46 OAG 156, that a proposed statute for the assessment of merchants' inventories, manufacturers' stocks, logs, lumber, timber, etc., upon an average monthly inventory basis would be contrary to this tax uniformity clause in Art. VIII, sec. 1, of the constitution. Reliance was there placed on the statement previously quoted herein from *State ex rel. Baker Mfg. Co. v. Evansville*, (1952) 261 Wis. 599, 53 N. W. 2d 795, reaffirming what had been laid down in the *Knowlton v. Rock Co. and C. & N. W. R. Co.* cases.

It is the absoluteness of this tax uniformity clause in not permitting any classification of property for general taxation except by complete exemption that made necessary the adoption at the 1962 spring election of the amendment inserting in Art. VIII, sec. 1, the present language therein providing that the taxation of merchants' stock-in-trade, manufacturers' materials and finished products, and livestock need not be uniform with the taxation of real property and other personal property. Similarly this quality of the uniformity clause was the reason for the adoption of the amendment in 1927 which added the language authorizing the classification of forests and minerals for property taxation.

It is my opinion that there is no doubt that the rule of tax uniformity in Art. VIII, sec. 1, of the constitution does not permit of classification of property for general property taxation except by total exemption of kinds of property and except as the language therein specifically authorizes it in respect to the enumerated kinds of property. You are, there-

fore, advised that the proposal made by Bill No. 137 S., if enacted, would violate the rule of uniformity in Art. VIII, sec. 1, of the constitution.

HHP

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*Circuit Court—Words and Phrases—Docketing—Discussion of the statutes governing the docketing of small claims judgments rendered in county courts.*

April 25, 1963

R. E. GIERINGER

*District Attorney, Adams County*

You asked my opinion on several questions relating to the docketing of small claims judgments rendered in county courts.

1. In what manner are small claims judgments docketed?

The clerk of the circuit court is also the clerk of the county court. Sec. 253.30 (1) provides:

“The clerk of circuit court shall keep the books and records under s. 59.39 and ch. 299 and perform the duties under s. 59.395 for all matters in the county court \* \* \*”

However, matters under the Childrens Code, Ch. 48, and probate, Title XXIX, are specifically excepted by sec. 253.30 (1).

Sec. 59.395 (1) requires that the clerk keep “court papers, books and records as specified in s. 59.39.”

Sec. 59.39 (5) requires that the clerk keep a judgment book.

Sec. 299.24 (1) requires that the clerk keep a small claims judgment docket, and when a fee of 50 cents is paid to the clerk, the small claims judgment becomes docketed “for all purposes.”

No statutory provision requires the clerk to keep separate docket books for each type of judgment or docket all judgments in a single volume. All the clerk must do according to the statutes is to keep "book and records." [59.39, 59.395, 253.30 (1)] Therefore, the system of keeping the "books and records" is left to the clerk's discretion.

Docket entries must contain those items specified in sec. 270.74. This section applies to small claims judgments as well as other judgments because Ch. 299 applies the general rules of practice and procedure found in Titles XXIV and XXV where Ch. 299 incorporates no particular provision otherwise. Sec. 299.04 (1) states:

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

2. What effect does a small claims judgment have when docketed?

A small claims judgment docketed in the county court has equal force and effect as a judgment docketed in the circuit court for three reasons:

(1) Sec. 299.24 (1) states that a judgment is docketed "for all purposes" upon the payment of the 50 cent fee.

(2) Sec. 299.24 (3) states that sec. 270.79 shall apply with respect to docketed judgments under Ch. 299.

(3) Since Ch. 299 makes no specific provision as to the effect of small claims docketing, sec. 299.04 (1) applies, referring to Titles XXIV and XXV and thus to sec. 270.79.

Sec. 270.79 (1) provides:

"(1) Every judgment, when properly docketed, \* \* \* shall, for 10 years from the date of the entry thereof, be a lien on the real property \* \* \* in the county where docketed, of every person against whom it is rendered and docketed, which he has at the time of docketing or which he acquires thereafter within said 10 years."

The revisor's note found in the *Wisconsin Annotations 1960* states:

"\* \* \* It is provided that the lien of the judgment shall be for ten years from its rendition instead of its first docketing because a uniform rule can thus be applied to all, including justices judgments, and the rule is the same as now in circuit courts if the judgment be docketed, as the law directs, immediately on its rendition. \* \* \*"

Also, see *Sullivan v. Miles*, (1903) 117 Wis. 576, 94 N.W. 298.

3. What procedure is used for docketing small claims judgments in another county, and what is their effect when so docketed?

Sec. 299.24 (2) provides that a duly certified transcript of a small claims judgment can be filed and docketed in the circuit court as prescribed under sec. 270.74. However, no specific provision is made in Ch. 299 for the docketing of small claims judgments in the courts of another county. Therefore, under sec. 299.04 (1) the general rules of practice and procedure in Titles XXIV and XXV apply.

Sec. 270.76 states that when a judgment is docketed as provided in sec. 270.74, the clerk in the second county can docket the properly certified transcript from the original docket. A certified copy of a judgment also can be docketed in the second county and has, under sec. 270.78 "the same force and effect as if such judgment had been originally entered therein." Such judgments then become liens on real property as provided in sec. 270.79.

4. What court clerk's fees are applicable to the docketing of small claims judgments?

It is clear from sec. 299.24 (1) that when a small claims judgment is docketed in the county court which originally renders the judgment the docketing fee is 50 cents.

However, since Ch. 299 provides no specific reference to docketing fees when a small claims judgment is docketed in another county, sec. 299.04 (1) again applies and makes

reference to Titles XXIV and XXV. Sec. 253.30 (1) refers to Ch. 59 which contains the fee schedule applicable to court clerks.

Sec. 59.42 initially provides:

“Notwithstanding other provisions in the statutes or session laws, the clerk of circuit court and the clerk of any other court of record (in all actions and proceedings civil or criminal brought under jurisdiction concurrent with the circuit court, except those handled under essentially justice court or small claims procedure) shall collect the following fees: \* \* \*”

On its face sec. 59.42 appears to make its fees inapplicable to small claims actions. However, 59.42's provisions are only inapplicable to Ch. 299 wherein it makes its own provisions for fees. Thus, when sec. 299.24 (1) states that the docketing fee is 50 cents for a small claims judgment docketed in the county court where first rendered, sec. 59.42 is inapplicable; but since no provision is made in Ch. 299 for docketing fees where a small claims judgment is docketed in another county, the fees stated in sec. 59.42 are applicable.

Legislative history supports this interpretation more clearly, however. Ch. 299 of the statutes was enacted by ch. 519, Laws 1961, as a part of court reorganization. In conjunction with the enactment of Ch. 299, the former small claims chapter, 254, found in the 1959 statutes was repealed in toto.

Sec. 254.15 (2), 1959 Stats., provided fees for the entering of money judgments. The fees were dependent on the amount of the money judgment. However, entering a judgment in small claims court did not effect a lien on land under sec. 254.15 (2), 1959 Stats. To secure a lien on land the small claims judgment had to be docketed in the circuit court.

Sec. 254.17, 1959 Stats., provided that the fees to be charged for docketing either in the circuit court in the county of the small claims court rendering the small claims judgment or a circuit court of another county were to be those

found in sec. 59.42 (8) (b) which remains unchanged in the 1961 statutes. Such circuit court docketing would effect a lien upon real estate located in the county where docketed under 254.17, 1959 Stats.

Therefore, since the former special small claims procedure found in Ch. 254, 1959 Stats., was abolished by court reorganization and placed under the jurisdiction of the county court by ch. 519, Laws 1961, the fees enumerated in 59.42 are applicable to the docketing of small claims judgments by reason of sec. 299.04 (1), except that fee charged for docketing by the county court originally rendering the small claims judgment as prescribed by sec. 299.24 (1).

JPA

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*Highway Easements—Right-of-Way*—Under sec. 80.01 (3) an easement for highway purposes is not abandoned as long as the land is contiguous to other land held for highway purposes. Discussion of land use under easement.

May 2, 1963

ARTHUR M. WIESENDER

*District Attorney, Green Lake County*

You ask certain questions which will be stated in the opinion.

You state that an easement for highway purposes was acquired by Green Lake county in 1899, to construct the highway known as county Trunk "A". In 1957, the county obtained an easement to a triangular piece of property to eliminate a right-angle curve in the area where the travel portion abutted Green Lake. The additional property acquired is contiguous to the old right of way, but the traveled portion of county trunk "A" was moved away from Green Lake.

The old traveled lanes were not obliterated, except at the south end of the improvement where the old lanes are dead-ended. Vehicles may enter the old traveled portion at the

north end of the improvement and travel some 1300 feet to the cul-de-sac. Therefore, there are approximately 1300 feet of the old traveled portion abutting Green Lake, remaining in existence, with right of way existing between the old traveled way and the new traveled way.

You state that the entire right of way is held by easement and that the county highway department has continued to do maintenance work and has been expending funds on the entire area. You state that the owners contend that when the main traveled way was straightened and the new lanes of travel were constructed, the county did, in fact, abandon the easement upon which the old lanes of travel existed, and therefore that portion of the right of way reverted to the fee owners. You ask whether that portion of the highway has been legally discontinued.

I agree with your opinion that sec. 80.01 (3) controls and that there has been no legal discontinuance. The section reads as follows:

“(3) No lands abutting on any highway, and acquired or held for highway purposes, shall be deemed discontinued for such purpose so long as they abut on any highway. All lands acquired for highway purposes after June 23, 1931 may be used for any purpose that the public authorities in control of such highway shall deem to conduce to the public use and enjoyment thereof. Such authorities may improve such lands by suitable planting, to prevent the erosion of the soil or to beautify the highway. The right to protect and to plant vegetation in any highway laid out prior to said date may be acquired in any manner that lands may be acquired for highway purposes. It shall be unlawful for any person to injure any tree or shrub, or cut or trim any vegetation, or make any excavation in any highway laid out after said date or where the right to protect vegetation has been acquired, without the consent of the highway authorities and under their direction, but such authorities shall remove, cut or trim or consent to the removing, cutting or removal of any tree, shrub or vegetation in order to provide safety to users of the highway.”

This section, as you will note, provides that no lands abutting on any highway, and acquired or held for highway purposes, shall be deemed discontinued for such purpose so long as they abut on any highway.

You ask whether the county may construct an access to the lake for boats along a portion of the right of way along the lake.

I assume that you are speaking of a boat ramp, whereby people may back their trailers into the water and load or unload their boats. It is my opinion that a boat ramp, such as you speak of, is a legitimate highway use along with facilities to accommodate the people using the boat ramp.

There are statutes making it possible for municipalities to provide public access to lakes or streams through the public highway system. Sec. 236.16 (3) provides the requirement that all subdivisions abutting a lake or stream shall provide a public access at least 60 feet wide providing access to the low water mark at not more than one-half mile intervals. This, in my opinion, must connect to the public road system.

Sec. 23.09 (15) provides that the county board of any county may condemn a right of way for any public highway to any navigable stream, lake or other navigable waters.

Other municipalities have provided boat ramps from the public highway system, and, in some instances, the state highway commission has constructed them as part of the state trunk highway project.

It is my opinion, that *Walker v. Green Lake County*, (1955) 269 Wis. 103, 69 N.W. 2d 252, is applicable, especially the following portion from page 112:

“The plaintiffs contend that the extension to the highway is not a highway but is merely an area for parking cars and for recreational purposes. They contend that highways are limited to roads for the free and unobstructed passage of vehicles in each direction. It is true that the original definitions of highways were limited to lands used for the purpose

of direct travel. However, the term 'highway' may be used in a broader sense. The conception of highways is changing and it is now felt that highways established for the general benefit must admit of new methods of use whenever it is found that the general benefit requires it. For the courts to limit the use of highways without considering new methods and usage would defeat, to some extent at least, the purpose for which highways are established. The extension was constructed for use by the public generally, as well as to protect the original portion of the highway that was actually constructed in 1926 and 1927. We hold, therefore, that the extension is a part of County Trunk Highway A and that the county has acquired an easement therein for public use."

One merely needs to travel any highway during the summer months to find numerous motorists seeking a ramp, such as you have in mind. The concept of a highway use is broad enough to place a boat ramp within the definition used by the court in the *Walker* case, *supra*. It is my opinion, therefore, that the county may construct the type of lake access described.

You also ask whether the county may establish a park in this area. For the purpose of this opinion, I am considering that you refer to what is commonly known as a wayside, as defined under sec. 84.04. Parking areas are included by this statute.

It is my opinion that the county may provide a wayside area for the traveling public.

An argument may be made that sec. 80.01 (3) seems to indicate that there is a different rule for what is permitted on a highway easement acquired on or prior to June 23, 1931, and what is permitted on a highway easement acquired subsequent to that date.

Under the *Walker* case, however, the court defined the term "highway" in the common law sense. The easement acquired for highway purposes, on or prior to June 23, 1931, would fall within that definition. Sec. 80.01 (3) was intended

to broaden the use to which a right of way could be put, rather than to restrict the definition of a highway purpose or use. Therefore, under the definition of a "highway", as defined by the court in the *Walker* case, it is my opinion that a wayside is a permissible use of a highway easement which was acquired either on or prior to June 23, 1931, or which was acquired subsequent to that date.

AJF/JEA

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*Board of Examiners in Chiropractic—Devices—Discussion of the use of diagnostic and therapeutic devices by chiropractors; deceiving or defrauding the public; and suspension and revoking of licenses.*

May 6, 1963

S. C. SYVERUD

*Secretary, State Board of Examiners in Chiropractic*

You ask my opinion on this question: May the State Board of Examiners in Chiropractic under Chir 3.01 (1), 1 Wis. Adm. Code, prohibit the experimental use by a chiropractor of a device which is alleged to have no diagnostic or therapeutic value, in the absence of proof that such device is actually being used for diagnostic or therapeutic purposes on a patient in the regular course of treating such patient?

Chir 3.01 (1), WAC reads as follows:

"The use of diagnostic instruments as taught in the chiropractic colleges and generally used in chiropractic practice, as well as purely relaxing adjuncts, such as heat lamps or hot towels, used preparatory to the adjustment, are permissible. *The use of instruments or machines constituting specific therapies in themselves, such as: Colonic irrigators, diathermy, plasmatic, short-wave, radionics (various makes or versions), ultra-sonic, and others, are considered outside the scope of chiropractic practice in Wisconsin.* (The

foregoing are illustrative only and are not to be all inclusive)." (Emphasis mine).

If the "device" referred to in the above-stated question does in fact constitute a specific therapy in itself (although your question describes it as being "alleged to have no diagnostic or therapeutic value"), then it is my opinion that its "experimental" use may be prohibited by the board under Chir 3.01 (1), even "in the absence of proof that such device is actually being used for diagnostic or therapeutic purposes on a patient in the regular course of treating such patient." While the second sentence of Chir 3.01 (1) does not expressly state that the use of the instruments or machines described therein is not permissible, or is forbidden, the prohibition of their use is clearly implied by the language of such sentence. It is, in my judgment, a prohibition against *any* use of such instruments or machines "constituting specific therapies in themselves." It is therefore immaterial whether or not the board has proof that such an instrument or machine is actually being used for diagnostic or therapeutic purposes on a patient in the regular course of his treatment. If such instrument or machine is one constituting a specific therapy in itself, e.g., one of those kinds described in Chir 3.01 (1), then any use of it, *including any experimental use*, is plainly prohibited by this rule.

If the device referred to in your question is not a machine constituting a specific therapy in itself, then it clearly follows that no action can be taken under Chir 3.01 (1) with ever, that the board is therefore powerless to proceed effective to its "experimental" use. This is not to say, however, that such use is "of a character likely to deceive or defraud the public" is unprofessional conduct and ground for suspension or revocation of a chiropractor's license. See secs. 147.24 (5) and 147.25 (1), Stats. If the "experimental" use of the device in question is "of a character likely to deceive or defraud the public," then clearly action should be taken to suspend or revoke the chiropractor's license. For my part, I entertain grave doubts that a tolerated "experimental" use of those instruments or machines described in Chir 3.01 (1) could possibly remain free

from fraud. Such a use might be carried on under the guise of research, conceivably with the sincere belief on the part of some of the chiropractors using the instrument or machine that it had research value, present or potential. Nevertheless, such use in a chiropractor's office would inevitably lend itself to the perpetration of fraud and imposition on the public, *unless each and every patient upon whom such instrument or machine was used was adequately warned, before its use on him, that it served no diagnostic or therapeutic purpose, but one of research only.* A written warning of that kind on the instrument or machine might well go ignored by some patients of a chiropractor, and perhaps by many. For the average patient, able to understand English and to hear, it is clear to me that such warning must be oral in order to be adequate. For a deaf patient, the warning, in order to be adequate, would have to be in writing *specifically called to his attention.* The use of such instrument or machine in a chiropractor's office, absent such specific, adequate warning, could readily create in the patient's mind the logical belief that it was a part of diagnosis or therapy. In such a situation, the possibilities of fraud are so evident as to require no further comment, except to say that they make clear the board's obligation to investigate the "experimental" use of the device in question by any chiropractor in this state, with the purpose of moving for a suspension or revocation of his license if such investigation shows that his use thereof is likely to deceive or defraud the public. To institute such an investigation, the board needs no "proof that such device is actually being used for diagnostic or therapeutic purposes on a patient in the regular course of treating such patient." Nor does the board need such proof at the close of such investigation, in order to commence a proceeding, under sec. 147.26 for revocation or suspension of a chiropractor's license. For that purpose, the only proof required would be evidence to show that the "experimental" use of the "device" in question is "of a character likely to deceive or defraud the public," i.e., is such that the average patient receives or may receive the impression, undispelled by clear, adequate warning to the

contrary on the part of the chiropractor, that such use has a diagnostic or therapeutic purpose and value.

You also ask my opinion on this question: What action may be taken by the board if it has satisfactory proof that such a device is actually being used for diagnostic or therapeutic purposes on a patient in the course of professionally treating such patient?

Under such circumstances, it is my opinion that the board could take appropriate action to suspend or revoke the license of the chiropractor involved on the ground of unprofessional conduct, specifically, "conduct of a character likely to deceive or defraud the public."

If the "device" referred to in your second question is one constituting a specific therapy in itself, then still another reason is suggested for viewing the use of such device, described in such question, as unprofessional conduct justifying the above-mentioned action. Sec. 147.25 includes, "without limitation because of enumeration," several acts constituting unprofessional conduct, but among them is not found the act of violating the rule of the board, nor is such an act described in sec. 147.24 as one of the grounds for revocation or suspension of a chiropractor's license. A rule of the board—Chir. 3.01 (1)—would clearly be violated by the use of the above-mentioned device in the manner described in your second question, providing such device constituted a specific therapy in itself; and if it did, it seems to me that the violation of that rule involved in such use would constitute unprofessional conduct serving as a basis for revocation or suspension of the offending chiropractor's license. There is authority in support of the proposition that the violation of an administrative rule is "unprofessional conduct." *Strauss v. University of State of New York*, (1956) 153 N.Y.S. 2d 397, 2 App. Div. 2d 179. Moreover, the conduct described in your second question would be "unprofessional conduct" because it consists of an act or acts "likely to jeopardize the interest of the public"—and such acts have been recognized as constituting "unprofessional conduct" where such term has had statutory employment without precise definition.

See *Lieberman v. Connecticut State B. of E. in Optometry*, (1943) 130 Conn. 344, 34 Atl. 2d 213, 214.

You also ask my opinion on a third question, namely: What action may be taken by the board if such device is actually not being used by the chiropractor for any purpose but is prominently displayed in the chiropractor's office so as to create the impression, either intentionally or otherwise, in the minds of patients that such device constitutes a part of the professional equipment of the office available for use on patients?

Under the circumstances described in the above-stated question, it is my opinion that one course of action clearly open to the board would be to institute an appropriate proceeding for the suspension or revocation of the license of the chiropractor involved. I would assume that this course of action might be taken by the board only if the board was satisfied that the display of the device in question was intended by the chiropractor involved to create the impression in the minds of his patients that such device constituted a part of the professional equipment of his office available for use on patients. It is difficult for me to conceive that the device in question could be displayed in the manner described in your third question without an intent on the part of the chiropractor so displaying the device to have it create the above-mentioned impression in the minds of his patients.

Any proceeding undertaken to suspend or revoke a chiropractor's license on the basis of conduct described in your above-stated third question would, of course, involve charges that such conduct constituted "unprofessional conduct" within the meaning of sec. 147.24 (5). It would, in my judgment, be unprofessional conduct because: (1) it would be conduct of a character likely to deceive or defraud the public; and (2) it would be conduct of a nature likely to jeopardize the interest of the public. In addition, it would be unprofessional conduct because such use of that device would be a violation of Chir 3.01 (1) if—and only if—such device constituted a specific therapy in itself. If it did constitute such a therapy, its use as described in your third question,

although not on a patient, would nevertheless violate Chir 3.01 (1), which forbids *any* use of the instruments or machines therein described, and nowhere indicates that the "use" of such instruments or machines thereby forbidden is confined to their physical "use" on patients.

In answering your second and third questions above-stated, I have stated that the board might, with reference to the situations therein described, take action to suspend or revoke the licenses of chiropractors involved in such situations. This is not to say, however, that the board does not have open to it courses of action, with reference to such situations, less Draconian in nature. If the board deems suspension or revocation of license too severe a penalty under the circumstances, it might certainly undertake appropriate measures to bring about a voluntary cessation of the conduct described in your second and third questions. If voluntary cessation of such conduct took place within a reasonable time, the board might properly determine it unnecessary to institute a proceeding for suspension or revocation of the offending chiropractor's license; but if that chiropractor persisted in a course of action so clearly violative of the board rule here in question, sterner measures could be taken.

JHM

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*Taxes—Urban Agricultural Lands*—Bill 162, S., which proposed the assessment of "urban agricultural lands" as defined therein would violate the rule of tax uniformity in Art. VIII, sec. 1, Wis. Const.

May 8, 1963

THE HONORABLE, THE SENATE:

An opinion has been requested by Resolution No. 16, S., whether Bill No. 162, S., would be valid if enacted into law.

Section 1 proposes to amend subsec. (2) of sec. 70.32, by adding a new class of "urban agricultural" to the classifica-

tions under which the assessor shall list real property in the assessment roll.

Section 2 of the Bill, as amended by amendment No. 1, S., proposes to add to said sec. 70.32, a new subsection (3) which defines "urban agricultural land" and reads as follows:

" 'Urban agricultural land' as used in sub (2) is an area comprising a farm which is actively operated for production of any agricultural, horticultural, viticultural, vegetable, poultry, livestock products including dairying, bees and honey, and timber and wood products for market, and is deemed to have a prospective enhanced value by reason of its proximity to cities, villages or other economic uses when and if converted to other than agricultural use. In assessing property classed as 'urban agricultural,' such value shall not be deemed to include prospective value for such other than agricultural use. Such classification shall not include open tracts of land within any incorporated area unless such land is plowed and cultivated as part of a regular crop rotation at least once every 5 years."

To the extent that there would be created a new classification in which real property is to be separately listed in the assessment roll there would be a valid enactment. But, the provision in the next to the last sentence of the proposed new subsection (3) of sec. 70.32, stating that the land falling within the definition of "urban agricultural" shall be assessed at a value which does not include any prospective value it may have for other than agricultural use, would violate the tax uniformity rule of Art. VIII, sec. 1, Wis. Const.

In an opinion rendered just a few days ago, April 25, 1963, you were advised that a proposed \$3,750 homestead exemption would violate said rule of tax uniformity and the rule was there fully discussed. It was there pointed out that, except for the constitution's specific authorizing of classification of certain enumerated kinds of property for general property tax purposes, none of which would include "urban agricultural land" as defined in the proposal in the Bill 162,

S., this tax uniformity provision in the constitution does not permit any classification except by total exemption of kinds of property. In other words, it was there stated that under this provision there can be no middle ground in property taxation between absolute exemption and uniform taxation.

Among the cases reviewed in my recent opinion is the early case of *Knowlton v. Rock Co.*, (1859) 9 Wis. 410, in which a statute provided that agricultural lands within a city were not to be subject to a tax to exceed one-half of the amount levied on other property within the city. The supreme court held that such statute was in violation of the tax uniformity rule of Art. VIII, sec. 1. It said that once property is selected for taxation it must be taxed entirely and the same tax burden applied to it as is imposed on other property in a district which is taxed. This case has never been overruled and stands as the law of this state.

Here, Bill 162, S., if it became law, would effect an inequality similar to that produced by the statute invalidated in the *Knowlton* case. Land of "urban agricultural" character, as defined in this proposal, would be assessed at valuation that does not include its entire full value because such assessed valuation would not include any value that the land might have because of a prospective use other than agricultural purposes. On the other hand, all other land which is subject to general property taxation would be taxed at its entire full value which would include any and all value which might arise out of any and all prospective use.

Furthermore, in substance, Bill 162, S., proposes to exempt from general property taxation, such part of said "urban agricultural land" as represents any value the land might have which would be attributable to its prospects of use for other than agricultural purposes. This would be an attempted partial exemption and as advised in the April 25, 1963 opinion, partial exemptions are not permissible.

Therefore, in my opinion, the Bill, if enacted into law, would be violative of the tax uniformity rule, Art. VIII, sec. 1, Wis. Const.

HHP

*Pledge of Allegiance—Schools*—Bill 6, A., creating sec. 40.47 (1) (b) which provides for optional, noncompulsory recitation of the pledge of allegiance in public and private schools would not be in violation of the first and fourteenth amendments to the constitution.

May 10, 1963

JOHN W. REYNOLDS, *Governor*

You have requested my opinion regarding the constitutionality of Bill 6, A., which, as passed by the legislature, reads as follows:

“SECTION 1. 40.47 (1) of the statutes is renumbered 40.47 (1) (a).

“SECTION 2. 40.47 (1) (b) of the statutes is created to read: 40.47 (1) (b) Each public and private school shall offer the pledge of allegiance in grades one to 8 at the beginning of school at least one day per week. No student shall be compelled, against his objection or those of his parents or guardian, to recite the pledge.”

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 head-dress. Persons in uniform shall render the military salute.”

On October 24, 1961, you, as attorney general, advised former Governor Nelson that Bill 2, A., of the 1961 legislative session, which would have *required* the pledge of allegiance to be recited *by all pupils* in grades one to eight at least one day a week, violated the 14th amendment to the constitution of the United States under the decision 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.

You also expressed some concern about the use of the words "under God" which congress had inserted in the form of the pledge in 1954, after the decision in the *Barnette* case. You concluded, however, that it was possible 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. 50 OAG 172.

I am of the opinion that Bill 6, A., quoted above, is constitutional for the reason that the compulsory feature of the 1961 bill is lacking here and it is expressly provided that no student shall be compelled to recite the pledge against his objection or those of his parents or guardian.

The regents' prayer case, *Engel v. Vitale*, (1962) 370 U. S. 421, 82 S. Ct. 1261, 8 L. ed. 2d 601, 86 A. L. R. 2d 1285, held that an *optional* recitation of a brief prayer, prescribed by the New York state board of regents, in a public school in New York constituted "an establishment of religion" in violation of the first amendment which was made applicable to the states by the fourteenth amendment. It appears from the concurring opinion of Justice Douglas that "the prayer is said upon the commencement of the school day, *immediately following the pledge of allegiance to the flag.*"

If the U. S. supreme court had considered that the use of the words "under God" in the pledge of allegiance rendered the optional recitation of the pledge subject to the same constitutional objections as the prayer, it had the opportunity in that case to say so. Apparently the court must have considered the optional recitation of the pledge of allegiance unobjectionable, for its holding is limited to the prayer alone, inferentially permitting optional recitation of the pledge. That the court was aware that the pledge now includes the words "under God" is shown by Justice Douglas' footnote No. 5 and by reference to the point in Justice Stewart's dissenting opinion.

WAP

*Aid to Dependent Children—Words and Phrases—*The department of public welfare cannot determine that a woman is without a husband within the meaning of sec. 49.19 (4) (d) in situations contrary to 245.03 (2) and 245.10, and where marriage has not been annulled or held void.

May 15, 1963

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

Your department is concerned with the administration of aid to dependent children, and the statutes provide certain restrictions upon payment of aid to the mother or step-mother in each case. Sec. 49.19 (4) (d) provides in part:

“\* \* \* Aid may not be granted to the mother or step-mother of a dependent child unless such mother or step-mother *is without a husband*, or is the wife \* \* \*” [exceptions not material to the inquiry follow.]

Your first question is whether your department may determine that a woman is without a husband within the meaning of sec. 49.19 (4) (d) where she has married a man within one year of the divorce of either party contrary to sec. 245.03 (2), and where the said marriage has not been annulled or held void in judicial proceedings.

The answer to this question is in the negative.

Such a woman would in reality have two husbands if she remarried during the one year period before her divorce became final. Her second marriage would be a bigamous marriage. She may or may not qualify for aid on the basis of other exceptions set forth in sec. 49.19 (4) (d), but not by reason of the “without a husband” exception.

In an opinion to you dated May 3, 1962 and reported in 51 OAG 61, 64, this office stated:

“A judgment of divorce in Wisconsin, however, does not dissolve the marital status of the parties until the expiration of one year from the granting of such judgment. A wife

who has divorced her husband, remains his wife during the one year period, absent death of either of the parties, but the parties may not cohabit together.

“Sec. 247.37 (1) provides in part:

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

“See *White v. White*, (1918) 167 Wis. 615, 168 N.W. 704; *State v. Grengs*, (1948) 253 Wis. 248, 33 N.W. 2d 248.”

Your second question is whether your department may determine that a woman is without a husband within the meaning of sec. 49.19 (4) (d) where she has married a man, who is in arrears in his support payments, without court permission, contrary to sec. 245.10, and where the said marriage has not been annulled or held void in judicial proceedings.

The answer to this question is also in the negative. The following analysis is also applicable to the negative conclusion reached with respect to your first question.

Sec. 245.03 (2) provides:

“(2) It is unlawful for any person, who is or has been a party to an action for divorce in any court in this state, or elsewhere, to marry again until one year after judgment of divorce is granted, and the marriage of any such person solemnized before the expiration of one year from the date of the granting of judgment of divorce shall be void.”

Sec. 245.10 provides in part:

“245.10 **Permission of court required for certain marriages.** When either applicant has minor issue of a prior

marriage not in his custody and which he is under obligation to support by court order or judgment, no license shall be issued without the order of a court having divorce jurisdiction in the county of application. \* \* \* Any marriage contracted without compliance with this section, where such compliance is required, shall be void, whether entered into in this state or elsewhere."

The general distinctions between a valid, void and voidable marriage are spelled out in *Lyannes v. Lyannes*, (1920) 171 Wis. 381, 389-391, 171 N.W. 683, and have been only moderately qualified in later opinions. Also see *Witt v. Witt*, (1955) 271 Wis. 93, 72 N.W. 2d 748, *State v. Grengs*, (1948) 253 Wis. 248, 33 N.W. 2d 248, *Swenson v. Swenson*, (1923) 179 Wis. 536, 192 N.W. 70, *Roddis v. Roddis*, (1962) 18 Wis. 2d 118, 118 N.W. 2d 109.

In the *Lyannes* case it was stated at page 390 :

"In the void marriage the relationship of the parties, so far as its being legal is concerned, is an absolute nullity from its very beginning and cannot be ratified. It may be questioned at any time during the life of both, and, with some statutory exceptions (*vide* sub. (2), sec. 2351, Stats.), after the death of either or both, and generally whether the question arises directly or collaterally. *As between the two individuals concerned no rights spring therefrom*, and, generally speaking, except as modified by positive legislation, it needs no adjudication by a court that it is void. That such is the law of this state has been repeatedly held. \* \* \*" (Emphasis added)

Sec. 245.21 provides:

"245.21 Unlawful marriages void; validation. All marriages hereafter contracted in violation of ss. 245.02, 245.03, 245.04 and 245.16 shall be void (except as provided in ss. 245.22 and 245.23). The parties to any such marriage declared void under s. 245.02 or 245.16 may, at any time, validate such marriage by complying with the requirements of ss. 245.02 to 245.25."

Sec. 245.002 (3), as created by ch. 505, Laws 1961, provides:

“(3) In this title ‘void’ means null and void and not voidable.”

The *Lyannes* case recognizes that in a void marriage the relationship of the parties is illegal and an absolute nullity and cannot be ratified. Nevertheless, the case recognizes that a *relationship* does exist as between the parties, that there is a marriage, and that such relationship is illegal.

While the parties to a void marriage cannot benefit from their act of going through a marriage ceremony, certain disabilities may arise therefrom, and certain rights may accrue in third persons. The state may bring a criminal proceeding under sec. 245.30. Sec. 245.25, provides in part that “The issue of all marriages declared void under the law shall, nevertheless, be legitimate.”

Where a marriage is shown to have been solemnized, it is presumed to have been legally and properly performed, and it is presumed that the parties had the legal capacity and that the marriage was valid. *Estate of Campbell*, (1952) 260 Wis. 625, 630, 51 N.W. 2d 709. Under present statutes third parties cannot safely treat a marriage declared void by statute as void for all purposes until there has been a court determination of that fact.

In the *Lyannes* case it was stated that a void marriage “except as modified by legislation, \* \* \* needs no adjudication by a court that it is void.”

Sec. 247.02 was created by the 1959 legislature, and was not amended at the time sec. 245.002 (3) was created in 1961. Sec. 247.02, provides in part:

“\* \* \* No marriage shall be annulled or held void except pursuant to judicial proceedings. \* \* \*”

This section means, that at *some time* and in *some judicial proceedings*, if the question is raised by the state or interested third party or by either of the parties doubting the

validity of the marriage or asserting the validity or invalidity of the same, there must be an adjudication by a court that the marriage declared void by statute is void in fact for all purposes.

Such determination can be made in an estate proceeding, *Estate of Campbell, supra, In re Van Schaick's Estate*, (1950) 256 Wis. 214, 40 N.W. 2d 588; in a workmen's compensation review, *Hall v. Industrial Commission*, (1917) 165 Wis. 364, 2 N.W. 312; in a criminal proceeding, *State v. Grengs*, (1948) 253 Wis. 248, 33 N.W. 2d 248, as well as in annulment or validation of marriage proceedings.

Marriages which are designated null and void by statute, may be held void *ab initio* by a court, i.e., an incestuous marriage. A marriage in violation of sec. 245.03 (2), is of a type which would be held void *ab initio*. Some marriages which are designated as void by statute are really merely voidable, and may be annulled for the causes stated in sec. 247.02, in actions brought by the persons therein listed. In some cases voidable marriages may be affirmed in an action brought by either of the parties pursuant to sec. 247.04, or may be validated by the parties pursuant to sec. 245.21, by complying with the requirements of secs. 245.02 to 245.25, or in some cases may be validated by operation of law. See secs. 245.22, 245.23, 245.24. A voidable marriage is considered valid and subsisting until annulled by judgment of a court of competent jurisdiction. *Lyannes v. Lyannes, supra*.

You are advised that your department may not determine that a woman who has remarried in apparent violation of secs. 245.03 (2) or 245.10, is "without a husband" within meaning of that term as used in sec. 49.19 (4) (d), until such marriage has been annulled or held void in judicial proceedings.

The burden of establishing qualification for aid under sec. 49.19 (4) (d) is on the applicant. The burden of obtaining a court determination that a marriage is void for all purposes should rest upon the applicant. There is nothing in the statute which places on the welfare department the bur-

den of going back to the record of the latest marriage to determine whether such marriage is in fact lawful. It should be entitled to rely on the presumption of regularity which attaches to official proceedings. Where a marriage license is issued, the marriage ceremony is performed by a qualified person, and the proper record is made for the bureau of vital statistics, we have what is at least a *prima facie* marriage. Any marriage relationship, although illegal, is much too important to be brushed aside by some clerk in an administrative agency without even so much as a hearing of any sort.

RJV

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*Legislature—Taxes*—Bill 230, S., which proposes to assess land containing new building, under certain circumstances, at the value of the unimproved land only, would violate rule of uniformity.

May 16, 1963

THE HONORABLE, THE SENATE

By Resolution No. 19, S., an opinion has been requested as to the constitutionality of Bill No. 230, S., and Substitute Amendment No. 1, S., to said bill, specifically with reference to Art. VIII, sec. 1, Wis. Const.

Bill No. 230, S. would create sec. 70.102, Stats., to read:

“Any new building which as of May 1 is not occupied and has never been occupied shall be assessed as unimproved land for that year.”

Substitute Amendment No. 1, S. to the above bill would substitute the following language in the proposed new section:

“Any new building which as of May 1 is not occupied or used for the purpose for which intended and has never been

so occupied and so used shall be assessed as unimproved land for that year, but in no event for more than one year."

Art. VIII, sec. 1, Wis. const., provides, so far as here material:

"The rule of taxation shall be uniform but the legislature may empower cities, villages or towns to collect and return taxes on real estate located therein by optional methods. Taxes shall be levied upon such property with such classifications as to forests and minerals including or separate or severed from the land, as the legislature shall prescribe. Taxation of merchants' stock-in-trade. \* \* \* need not be uniform with the taxation of real property and other personal property, but the taxation of all such merchants' stock-in-trade \* \* \* shall be uniform \* \* \*."

You are advised that neither the bill nor the substitute amendment, if passed, would create a valid statute.

For the purposes of this opinion there is no material difference between the original bill and the substitute amendment. Each has the objective of encouraging new building and each provides that building which meets certain tests shall be assessed as unimproved land. Presumably the intention of each is that a new building which meets the prescribed tests is to be ignored and the land is to be assessed as unimproved land. Since a building becomes part of the real property, this, in effect, is a method of providing a different and lower rate of taxation for some real property than for other real property.

Early in the history of our state, the supreme court was called upon to interpret and apply Art. VIII, sec. 1, and stated emphatically that in property taxation there can be no middle ground between absolute exemption and uniform taxation. In *Knowlton v. Supervisors of Rock County*, (1859) 9 Wis. \*410, the court held in violation of Art. VIII, sec. 1, a statute which placed a lower limitation upon a city's authority to tax agricultural lands than to tax other lands within the city. At \*421 the decision states:

"\* \* \* The valuation must be uniform, the rate must be uniform. Thus uniformity in such a proceeding becomes

equality; and there can be no uniform rule which is not at the same time an equal rule, operating alike upon all the taxable property throughout the territorial limits of the state, municipality or local subdivision of the government, within and for which the tax is to be raised. \* \* \*

In that case it was contended that since the constitution provided that taxes shall be levied upon such property as the legislature shall prescribe, the legislature had power to exempt certain classes of property from taxation, in whole or in part. The court answered this in the following language, at page \*424:

“\* \* \* the very moment that the legislature say that a specific article or kind of property shall be taxed, or shall contribute at all towards the expense of government, from that very moment the first clause of the section takes effect, and it must be taxed by the uniform rule. The legislature can only ‘prescribe,’ and when they have done that, the first clause of the section governs the residue of the proceeding. There cannot be any medium ground between absolute exemption and uniform taxation.”

The *Knowlton* case has been cited many times by the supreme court, but there is no subsequent decision of the court which overrules or even restricts the force of the *Knowlton* decision insofar as it declares invalid any attempt to tax two separate parcels of property at different rates. A broad analysis of the meaning of the tax uniformity clause and a discussion of many of the cases involving that clause is contained in my opinion to you dated April 25, 1963, regarding Bill No. 137, S.

You are advised that the proposals contained in Bill No. 230, S., and in Substitute Amendment 1, S., thereto would violate the requirement of uniformity of taxation set forth in Art. VIII, sec. 1, Wis. Const.

EWV

*Licenses*—A peddler's license is not required under 129.01 of one who delivers bakery goods at fixed intervals to regular customers who rely upon such supply system.

May 17, 1963

DONN H. DAHLKE

*District Attorney, Marquette County*

You have requested my opinion as to whether an operator of a bakery maintaining a house-to-house delivery route would be "in the business of a peddler," and require a license under sec. 129.01, Stats. You state that a local bakery partnership has a permanent, established place of business with a retail outlet. It also operates a house-to-house delivery route three days each week conducted by one of the partners. Some of the customers on the route place more or less standard orders, and additional baked goods are also available in the truck that do not have to be ordered in advance. The operation of the route is subsidiary to the main business of conducting a bakery and maintaining a retail outlet.

The applicable portion of sec. 129.01 provides:

"129.01 **Peddler, trucker license.** (1) No person shall engage in the business of a trucker, hawker or peddler without having a license for that purpose as provided in this chapter, but nothing in this chapter shall prevent any person from distributing or selling any agricultural product which he has grown in this state."

The law on this subject is well stated in 35 OAG 419 (1946) and *National Baking Co. v. Zabel*, (1938) 227 Wis. 93, 277 N.W. 619.

Whether a person is a "peddler" or whether a business constitutes "peddling" depends upon the method employed in disposing of goods or merchandise. 21 OAG 158 (1932).

The primary characteristic of peddling is the unsolicited, uninvited or unrequested solicitation in and upon private places not ordinarily open to the general public. The peddler

seeks out his purchaser by going from door to door soliciting without direct or implied invitation, in contrast to the merchant who finds his customer by the usual advertising media of mass announcements by radio, television, bill boards, newspapers, loudspeakers or mail.

The next distinguishing characteristic is that if the goods are carried for sale and sold to chance patrons at uncertain frequencies and quantities, peddling is involved.

The last consideration is the fairly regular repeat business nature of the commodity. The concept of having certain commodities delivered over regular intervals of time is now considered special service, and not peddling.

The element to be policed by licensing is the repeated uninvited and unrequested solicitation in and upon private residences which tends to disturb, inconvenience or annoy people in their homes. *Town of Green River v. Fuller Brush Co.* (10th Cir. 1933) 65 Fed 2d 112, *Town of Green River v. Bwinger*, (1936) 50 Wyo. 52, 58 P 2d 456, 300 U.S. 638, 81 L. Ed. 854, 57 S. Ct. 510. See also 77 ALR 2d 1224 for further discussion on this matter and cases from other jurisdictions.

It should be cautioned, however, that any deviation in the method of selling may make the person a peddler.

In my opinion, the business operation as conducted by this partnership, which you describe as house-to-house delivery on a regular route to its customers on more or less standard orders, with additional bakery items available on the delivery truck, is not peddling under sec. 129.01, and a peddler's license is not necessary.

RGM

*Licenses—Insurance Commission*—Insurance companies, through licensed agents who are also licensed securities agents, may sell stock to policyholders or insurance to stockholders if not conditioned on the issuance of a policy.

May 22, 1963

CHARLES MANSON

*Commissioner of Insurance*

You have requested my opinion as to whether a proposed plan of selling stock of a life insurance company would violate sections 201.53 (8), 207.04 (1) (f) or (h), Stats.

The particular plan involved is for the insurance company to have a number of its licensed insurance agents surrender those licenses and obtain licenses as securities agents and then proceed to sell the stock of the insurance company. You state that in general you do not deem it a desirable business practice for an insurance company to use its insurance agents as agents in promoting the sale of the company's stock.

Your first question is whether the company, through its licensed insurance agents who also hold licenses as securities agents, may sell its own stock to its present policyholders without violating any of the cited statutes. The answer to your first question is in the affirmative.

Sec. 201.53 (8) provides, so far as here material:

“(8) No insurance company nor any agent thereof shall in consideration of or in connection with a policy issued or proposed to be issued, make or offer to make any agreement for any deduction from any premium or any addition to any dividend or other benefit, on account of services rendered or to be rendered by the applicant for the policy or any person interested therein in any capacity or manner; nor contract for, sell or offer for sale any stock of such insurance company \* \* \*”

At first blush it might seem that the adverbial phrase, “in consideration of or in connection with a policy issued or

proposed to be issued," might not modify the words, "contract for, sell or offer for sale \* \* \*." However, if the adverbial phrase did not modify the latter clause, the statute would provide that no insurance company nor any agent thereof shall sell any stock of such insurance company—a patently absurd result.

The purpose of that statute is two-fold—to prohibit methods of selling insurance which are based upon considerations other than the insurance protection and the amount of the premium, and to prohibit any particular benefits or discrimination in favor of only some insureds.

Sec. 207.04 (1) defines as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:

"\* \* \*

"(f) *Stock operations and advisory board contracts.* Issuing or delivering or permitting agents, officers, or employes to issue or deliver, agency company stock or other capital stock, or benefit certificates or shares in any common law corporation, or securities or any special or advisory board contracts or other contracts of any kind promising returns and profits as an inducement to insurance.

"\* \* \*

"(h) *Rebates.* Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of life insurance, life annuity or accident and health insurance, or agreement as to such contract other than as plainly expressed in the contract issued thereon, or paying or allowing or giving or offering to pay, allow or give, directly or indirectly, as inducement to such insurance or annuity, any rebate of premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract; or giving or selling or purchasing or offering to give, sell or purchase as inducement to such insurance or annuity or in connection therewith, any stocks, bonds or other securities of any in-

insurance company or other corporation, association or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the contract.”

Subsequent sections of Ch. 207, empower you to hold hearings and order persons to cease and desist from unfair methods of competition or unfair or deceptive acts or practices enumerated in section 207.04.

That which all of the quoted statutes are designed to prevent is the giving of any rebate or other consideration or offering any special inducement in the way of terms not set forth in the policy, in connection with the sale of insurance. There is nothing in any of these sections which can be construed as a prohibition of the sale of stock of an insurance company to one of its policyholders. Desirable as it may be to avoid having an insurance agent sell the stock of the insurance company which he represents as an insurance agent, such a sale would not violate sec. 201.53 (8) nor be an unfair method of competition nor an unfair and deceptive practice within the meaning of sec. 207.04 (1), so long as the sale of the stock is not connected with the sale of insurance.

In view of the answer to your first question, it is unnecessary to answer your second question.

In your third question you ask whether the company or its insurance agents could solicit its stockholders to purchase life insurance without violating any of the cited sections. Again, the answer is yes, so long as the sale of the stock is in no way connected with the sale of the insurance. There must be many cases in which a stockholder of an insurance company purchases insurance from that company without either the company or its insurance agent being aware that the insured is a stockholder. None of the cited statutes can be construed to prohibit an insurance company from selling insurance to its stockholder.

Lastly, you ask, if any of the previous questions have been answered in the affirmative, what meaning can be ascribed to the provision of sec. 201.53 (8) which states:

“(8) No insurance company nor any agent thereof shall in consideration of or in connection with a policy issued or proposed to be issued, \* \* \* contract for, sell or offer for sale any stock of such insurance company \* \* \*.”

A statutory prohibition such as this cannot be defined exactly in the abstract but must be applied to a given factual situation. Generally speaking, what is prohibited by the quoted language is the sale or offering for sale of stock of the company in connection with a policy of insurance. Obviously, it would be unlawful for an agent of an insurance company to sell stock of the company upon the promise that the buyer, as a stockholder, would be eligible for insurance without having to pass a medical examination, or that he would be eligible for insurance at a lower premium than non-stockholders. While it may be difficult to enforce the subsection when the same individuals are selling insurance in the company and selling the stock of the company, this does not make the sale of the company's stock to its policyholders unlawful *per se*.

EWV

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*Betting—Lottery—Legislature*—Provision in Bill No. 745, A., which would create sec. 178.16 (1) legalizing pari-mutuel or certificate method of wagering upon dog races at licensed tracks, would “authorize a lottery” in violation of Art. IV, sec. 24.

May 28, 1963

THE HONORABLE, THE ASSEMBLY:

You have requested my opinion regarding the constitutionality of Bill No. 745, A., relating to the establishment of dog racing in Wisconsin. The nature of the bill is indicated by its title, which reads: “To create 20.670 (47) (c), 20.885 and chapter 178 of the statutes, creating a state racing commission, providing for the licensing of dog racing and the legalization of the pari-mutuel method of wagering, granting

rule-making powers, providing penalties, and making an appropriation.”

I assume that the opinion is desired because of the provision for pari-mutuel or certificate wagering at licensed tracks. Without that feature, the probability is that the bill would not be enacted. Accordingly, this opinion is limited to a consideration solely of the validity of that provision.

Sec. 178.16 (1), proposed to be enacted by this bill, reads:

“178.16 PARI-MUTUEL SYSTEM OF WAGERING PERMITTED. (1) Any licensee conducting a dog-racing meeting may provide a place in the race meeting grounds or enclosure at which he may conduct and supervise the pari-mutuel or certificate method of wagering upon such dog races held at said race track and within such race track and at such dog-racing meeting shall not under any circumstances, if conducted under this chapter, be held or construed to be unlawful.”

Art. IV, sec. 24, Wis. Const., provides:

“The legislature shall never authorize any lottery, or grant any divorce.”

If the pari-mutuel system of betting on dog races is a lottery, then it cannot be authorized by the legislature by reason of the foregoing section of the constitution. The Wisconsin supreme court has held that a statute exempting a specific type of lottery from the statute imposing a criminal penalty for conducting lotteries as an invalid attempt by the legislature to “authorize a lottery,” in violation of the constitutional provision. *State v. Laven*, (1955) 270 Wis. 524, 71 N. W. 2d 287.

At the outset, it may be remarked that cases are to be found holding that the pari-mutuel system of betting, in some cases on horse races and in others on dog races, is not a lottery. The reasoning is that persons who participate in such betting may exercise judgment in attempting to predict which animal will win by studying form sheets, looking at the animals, considering the relative skill of the jockeys

(in horse racing only, of course), and the like. Then by construing the term "lottery" as limited to schemes in which the result is determined solely by chance, the result is determined solely by chance, the result is reached that such schemes are not lotteries, although they are gambling. *Scott v. Dunaway*, (1958) 228 Ark. 943, 311 S. W. 2d 305, 306; *Gandolfo v. Louisiana State Racing Comm.*, (1955) 227 La. 45, 78 S. 2d 504, 510; *Rohan v. Detroit Racing Asso.*, (1946) 314 Mich. 326, 22 N. W. 2d 433, 166 A. L. R. 1246, 1253, and cases cited.

And in *Commonwealth v. Kentucky Jockey Club*, (1931) 238 Ky. 739, 38 S. W. 2d 987, 993-994, the system of pari-mutuel betting at horse race tracks was held not to be contemplated by the Kentucky constitutional provision, sec. 226, forbidding lotteries and gift enterprises, on the ground that the proceedings of the constitutional convention showed it was not intended to prohibit all forms of gambling and specifically was not intended to prohibit wagering on horse races. No similar inference is to be found in the journals of the 1846 and 1847-1848 Wisconsin Constitutional Conventions; indeed, no debate whatever on the lottery provisions adopted by those two conventions is reported in the journal of either. The Kentucky court also pointed out that great investments of money had been made in race tracks, relying on the construction that no prohibition of horse race wagering was intended by the constitutional provision. This, of course, is not true in Wisconsin.

On the other hand, there are a number of cases holding that the pari-mutuel system or some other like device for wagering on horse and dog races is a lottery on the ground that the determination of the winners is by chance.

In *State ex rel. Moore v. Bissing*, (1955) 178 Kan. 111, 283 P. 2d 418, 423, the court, after defining a lottery as including the elements of consideration, prize and chance, stated, in holding that a system of pari-mutuel betting on dog races constituted a lottery in violation of Art. 15, sec. 3, of the Kansas constitution:

“Applying this definition to the facts before us—what do we find? It is conceded the customer pays for his wager on a particular dog. Such payment constitutes the *consideration*. It is conceded that if his dog wins he receives money in return, the amount, of course, depending upon the size and type of his bet. This return constitutes the *prize*. What, then, is the *chance* involved? The answer is very simple. In the first place, there is no guarantee that a certain dog is going to win, and neither is there any guarantee that a bettor will always pick a winner. In placing a wager the bettor takes a ‘chance’ that he is picking the right dog. In the second place, under the pari-mutuel system of betting every bettor takes a ‘chance’ on the *amount* he will win, even though his dog finishes in the exact position he bet that he would, for the reason that under this system the exact ‘odds’ on a particular dog to ‘win, place or show’ cannot be determined until the betting is closed and information regarding the number and amount of bets is tabulated by the parimutuel machine, which, in the last analysis, is simply a device for calculating the odds.

“Defendant’s argument to the effect that the outcome of the race itself, and human knowledge, skill and experience, the condition and speed of the dog whose efforts, together with the efforts of persons charged with the breeding, training and handling of such animals, are the sole factors which determine the recipient and amount of the prize, and that no element of ‘chance’ is thus involved, simply does not take into account the practical everyday realities of human instincts and life.

“In our opinion the operations under consideration constitute a lottery and the sale of lottery tickets.”

See also, *State v. Ak-Sar-Ben Exposition Co.*, (1929) 118 Neb. 851, 226 N. W. 705, 709; *State v. Ak-Sar-Ben Exposition Co.*, (1931) 121 Neb. 248, 236 N. W. 736, 738; *Streeper v. Auditorium Kennel Club*, (1935) 13 N. J. Misc. 584, 180 A. 212; *State v. Wokan Amusement Co.*, (1933) 162 Okl. 160, 19 P. 2d 967, 968.

The Wisconsin supreme court has not had occasion to determine either (1) whether the lottery prohibition of our constitution contemplates only schemes where pure chance determines the winners; or (2) whether gambling on sporting events is, as to the persons placing bets, a matter of pure chance. In my opinion, however, the rule in Wisconsin is that it is sufficient if the determination of the result is dominated by chance, even though accompanied by some skill. This rule is recognized in the Criminal Code, sec. 945.01 (1) (definition of a "bet") and (2) (a) (definition of a "lottery"). It was stated in 40 OAG 438, 439, an attorney general's opinion to the effect that a so-called "contest" involving the forecasting of the results of 20 football games was a lottery.

"In the first place, it must be understood that the fact that some measure of skill or knowledge on the part of the participant may affect his ability to win does not take the game out of the realm of chance. Although the 'pure chance' doctrine appears to prevail in England, the rule in the United States is different. After stating the English rule, 34 Am. Jur. 649-650—Lotteries § 6, states as follows:

"\* \* \* In the United States, however, by what appears to be the weight of authority at the present day, it is not necessary that this element of chance be pure chance, but it may be accompanied by an element of calculation or even of certainty; it is sufficient if chance is the dominant or controlling factor. However, the rule that chance must be the dominant factor is to be taken in the qualitative or causative sense, rather than the quantitative sense.'

"The Wisconsin supreme court follows the American rule that it is sufficient if chance dominates over skill. *State v. Jaskie*, (1944) 245 Wis. 398, 403; *Milwaukee v. Burns*, (1937) 225 Wis. 296, 302."

The *Jaskie* and *Burns* cases did not involve the construction of the constitutional provision against lotteries, but nevertheless are persuasive that the supreme court would apply the part-chance doctrine to the constitutional provision and hold that even if some skill is involved in attempt-

ing to predict the winner of a horse or dog race, chance is the dominating factor. The reasons why the prediction of such uncertain future events as the winner of a race or an athletic contest is a matter of chance (although to the participants they are contests of speed, skill, strength, or power of endurance) are stated at length in the attorney general's opinion just cited and need not be repeated here.

It is therefore my opinion that the provision of Bill No. 745, A. legalizing pari-mutuel wagering is unconstitutional as violating Art. IV, sec. 24, Wis. Const.

WAP

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*Expenditures—Revenues—Legislature—Director* of bureau of management, department of administration, has power to order reduction of expenditures by all state departments out of general fund to meet estimated revenues. Board of government operations has more restricted powers.

June 3, 1963

THE HONORABLE

THE JOINT COMMITTEE ON FINANCE

By your letter of May 22 you have raised several questions concerning the effect of the inability of the legislative body of the state of Wisconsin, including therein both the legislature and the governor, to agree on a new budget and revenue bill which would be effective in the 1963-1965 biennium. I will restate your questions as asked and answer them seriatim.

I.

In section "A" you inquire what is the responsibility of the legislature, under Art. VIII, sec. 5, Wis. Const. In section "B" you inquire as to time limit and specific action to be taken. Art. VIII, sec. 5. provides:

"Annual Tax Levy to Equal Expenses. SECTION 5. The legislature shall provide for an annual tax sufficient to de-

fray the estimated expenses of the state for each year; and whenever the expenses of any year shall exceed the income, the legislature shall provide for levying a tax for the ensuing year, sufficient, with other sources of income, to pay the deficiency as well as the estimated expenses of such ensuing year.”

The meaning of this section is self-evident. At the time the constitution was adopted the legislature met annually and hence this provision was a directive to the legislature for each year. Since the legislature has been put on a biennial basis it would appear that each legislature should provide for a tax sufficient for each year of the next ensuing biennium.

Further, it would appear that, if in any previous *year* the expenses of the state have exceeded its income, the legislature should provide for a tax for the ensuing year sufficient to insure payment of the previous year's deficit. That is, under proper interpretation of the constitution, provision for repayment of the deficit should not be spread over the biennium.

## II.

In section “A” you inquire what the responsibility and authority of the department of administration is, under sec. 16.50 (2) to act to retain state expenditures within existing revenues. The section under consideration after providing the quarterly estimates by each department of state government except the legislature and the courts provides in part:

“(2) ACTION THEREON BY DIRECTOR. The director shall examine each such estimate to determine whether appropriations are available therefor and can be made without incurring danger of exhausting such appropriations before the end of the appropriation period and whether there will be sufficient revenue to meet such contemplated expenditures. If satisfied that such estimate meets these tests, he shall approve the same; otherwise he shall disapprove the same, in whole or in part, as the facts may require. \* \* \*”

It is apparent upon its face that this subsection of the statute imposes a dual burden upon the director of the

bureau of management to consider first the appropriations and second the availability of revenues to meet expenditures of such appropriation. In carrying out his duties the director must be guided by sec. 20.002 (1) which continues in existence the previous year's executive budget when the legislature has not adopted a new budget.

We are informed by the bureau of management that unless a new budget and revenue measure is passed by the existing legislative body, during the fiscal year, July 1, 1963-June 30, 1964, there may be a substantial deficit of many millions of dollars in general fund revenue available for general state expenses as opposed to state budgetary general fund expenditures under the previous year's budget. From this it would appear that if the general fund is to be kept in balance all general fund expenditures would have to be reduced substantially. Delegation of power to an administrative agency such as is found in sec. 16.50 raises a serious constitutional question which would be obviated in large part if the section were construed to require a uniform reduction in the level of state spending by all departments dependent on the general fund.

From the foregoing interpretation it would appear that the department of administration, acting through its bureau of management, does not have authority to declare that segregated revenues raised and set aside for a particular purpose, such as for example, those of the highway commission, are available for general state expenses.

In your second question under this heading, which you have denominated "B", you inquire at what time the department of administration could act to adjust allotments to conform with income. This is a management question for the department and its director of management, who would act at any time when he reasonably determined that the anticipated revenue of the state would necessitate a decrease in the level of state spending.

In your third question under this heading denominated "C", you inquire whether the fact that the legislature may be in session or not has any effect on the responsibility of

the department of administration to act. As I regard the statutory directive to the department of administration in sec. 16.50, the responsibility is continuing. While the presence of the legislature and the possibility of a new revenue measure might affect management determination of the department, it can not affect the department's responsibility to do such things as are necessary to preserve the fiscal integrity of the state.

In paragraph "D" of this heading you inquire whether some appropriations are beyond the jurisdiction of the department of administration.

A generic answer to this question would be that all appropriations out of the general fund are within the jurisdiction of the department and that revolving or segregated funds probably are not. We address particular attention to the so-called sum sufficient appropriation out of the general fund. It would appear from the dollar amount of these appropriations that, if they are not subject to reduction in the same manner as other general fund appropriations, these other appropriations would suffer far more severely than they would under a uniform reduction in the level of spending. There is nothing in the statutes that indicates that the sum sufficient appropriations are exempt from the jurisdiction of the department of administration. In fact, in a collateral statute, sec. 20.385, which will be discussed further, relating to the board of government operations, it is indicated that the level of spending of previous year must be taken into account in devising a budget for the ensuing year. Accordingly, it would appear that in considering sum sufficient appropriations out of the general fund the department of administration could properly notify each agency to reduce its spending under that of the previous year by the appropriate percentage.

In response to your question in paragraph "E" we have already suggested the serious constitutional issue which might itself be raised if either a department head or the department of administration would attempt to manipulate the manner in which allotments would be decreased. It is

respectfully suggested that this is a matter which should be handled on a case to case basis, particularly in matters which might subject the state itself to suit.

### III.

Under this heading you inquire generally as to the responsibility of the board of government operations under sec. 20.385 (20) of the statutes. It would appear that the authority of the board of government operations is more restricted than the authority of the department of administration under sec. 16.50 because of the several exceptions in 20.385. Further, it might be argued because of the language,

“As an emergency measure necessitated by decreased state revenues \* \* \*”

that this section becomes operative only in a year when the state revenues are less than those of a previous year. Such a construction does not take into account the apparent intent of this statute and also of sec. 16.50 to obey the constitutional mandate that the state shall not go into debt and that in the event of a legislative impasse adequate administration machinery will be provided to insure state solvency.

In my opinion if the board of government operations should not be satisfied with the degree of reduction in state spending suggested by the department of administration, it would have power to direct such cuts itself in all expenditures from the general fund not included within the exceptions set forth in the statute.

In response to “B” I again repeat that, with one exception. there is nothing in the present statutes to indicate that the board of government operations’ responsibility is affected by a presence or absence of the legislature. The exception is sec. 20.385 (5) (a) which provides that the board can not increase salaries while the legislature is in session. It has no application to the present situation.

Conforming to my above stated opinion on the powers of the department of administration to reduce “sum sufficient”

appropriations, I conclude that similar power is also vested in the board of government operations within its sphere of authority.

RGT

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*Counties—Administrator—Reapportionment* — Discussion of substitute amendment No. 1, A., to Bill No. 421, A., creating sec. 59.03 (1m) relative to reapportionment of county supervisor districts, appointment of county administrator, his duties and powers, and violation of uniformity established by constitution.

June 3, 1963

THE HONORABLE, THE ASSEMBLY:

By Resolution No. 20, A., you have requested my opinion as to the validity of the statute which would result from the adoption of Substitute Amendment No. 1, A., to Bill No. 421, A., and its enactment into law.

This substitute amendment would create sec. 59.03 (1m), Stats., and provide that in counties having a population of less than 500,000, but at least 100,000, the county board would be composed of 21 supervisors, one elected from each supervisor district at the spring election, after a spring primary, if one was necessary. It would also provide that the county board of each such county shall create 21 supervisor districts of equal population, such districts to be bounded by precinct, town, village or ward lines and that reapportionment of these districts shall follow each official federal census. The substitute amendment further provides that if the county board shall fail to create equal population supervisor districts by October 1, 1963, or within one year after the release of final federal census figures, any citizen of the county could petition the county court to appoint a citizens apportionment committee to draw new district lines and to report to the court which shall then, by

judicial order, create districts pursuant to the citizens apportionment committee report. Said order is to have the same effect as a county ordinance.

The substitute amendment also provides for two year terms for supervisors, for their compensation, and for yearly elections.

Section 7 of the substitute amendment would create sec. 59.033 to provide for a county administrator in said counties, with limited administrative powers. He would be given the power to appoint certain department heads and appointive officers where the law provides that the appointment shall be made by the chairman of the county board or by the county board. Such appointments would require confirmation by the county board.

The substitute amendment is long, and this opinion will necessarily be limited to considering those portions of it in which a possible conflict with constitutional provisions is most apparent. At least three constitutional provisions are involved: first, Art. IV, sec. 23, which is commonly referred to as the uniformity of county government provision; second, Art. IV, sec. 1, which vests legislative power in the senate and assembly; and third, Art. IV, sec. 22, which permits the legislature to delegate powers of a local, legislative and administrative character to the boards of supervisors of the several counties.

In considering the question of constitutionality, it must be remembered that a regularly enacted statute will be presumed to be constitutional until it has been declared to be otherwise by a competent tribunal. *State v. Stehlek*, (1953) 262 Wis. 642, 56 N.W. 2d 514. *State ex rel. McCormack v. Foley*, (1962) 18 Wis. 2d 274, 279, 118 N.W. 2d 211.

Art. IV, sec. 23, Wis. Const., as amended and ratified by the people at the November 6, 1962 general election provides:

“(Article IV) Section 23. The legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable; *but the legislature*

*may provide for the election at large once in every four years of a chief executive officer in any county having a population of five hundred thousand or more with such powers of an administrative character as they may from time to time prescribe in accordance with this section.'*

\* \* \*” (Emphasis added and indicates new material)

At the same election the people ratified Art. IV, sec. 23a, Wis. Const., giving such chief executive officer in counties of over 500,000 population power to veto or approve resolutions and budget items. This section and the veto power are not involved in the present inquiry, but are noted because they are related to portions of sec. 59.03 (2) (b), which were held invalid in *State ex rel. Milwaukee County v. Boos*, (1959) 8 Wis. 2d 215, 99 N.W. 2d 139.

It has been repeatedly held that a broad discretion is vested in the legislature in determining whether the system of county government is as uniform as practicable. Classification of counties according to population is proper and the limit of population in a class is a legislative question. See *State ex rel. Scanlan v. Archibold*, (1911) 146 Wis. 363, 369, 131 N.W. 895 and the cases therein cited. Nevertheless, there must be some showing that general uniformity is impracticable and that the departure from uniformity is consistent with some proper classification of counties. There may be variation in carrying out the specific duties in county government, but not in the system itself. *State ex rel. Milwaukee County v. Boos, supra*.

In *State ex rel. Scanlan v. Archibold*, it is stated at page 371:

“It must be remembered that the change made by the law under consideration affects only the *number and manner of election* of supervisors in the counties within the class designated in the law. *The powers, duties, and functions of the county boards remain the same.* The decisions of this court recognize the validity of the law now assailed, and that the conditions in populous counties, where the population is largely urban, justify legislation different than

in counties of small population, mostly rural. \* \* \*” (Emphasis added)

On the basis of the 1960 federal census, the counties of Brown, Dane, Kenosha, Outagamie, Racine, Rock, Waukesha and Winnebago presently would fall within the specified classification. All of these counties appear to meet the special conditions and largely urban population tests which would justify similar classification.

The main theme of Substitute Amendment No. 1, A., to Bill No. 421, A., relates to the number and manner of election of supervisors rather than to any change in the powers, duties and functions of the county board in such counties as would fall within the classification.

The county executive provided for, is to be appointed by the county board and is vested by the legislature with very limited administrative powers. One such power which is of some concern in this opinion is the power to appoint certain department heads and members of boards and commissions, which by present law, are appointable by the chairman of the county board *or by the county board*. The bill provides that such appointments shall require the confirmation of the county board. Since Wisconsin holds that *de facto* officers have authority to act and the right to receive compensation, it may be argued that some power is actually taken away from the county board in such counties, since an appointee of the county executive could serve prior to confirmation by the county board while in other counties he could not serve until appointed by the board. Hence, it could be argued that a portion of the power of the county board had been taken away. It is my opinion that such variance would be within permissible limits, and that in any event, such portion of the act, if later held invalid, would be severable and would not affect the validity of the other portions of the system proposed.

I am of the opinion that a statute enacted from Substitute Amendment 1, A., to Bill No. 421, A., would not violate the uniformity provision, Art. IV, sec. 23, Wis. Const., for that reason.

However, (2) of sec. 59.033 which would be created by this act would provide in part as follows:

“(2) DUTIES AND POWERS. The duties and powers of the county administrator shall be, without restriction because of enumeration, to:

“(a) When authorized by the county board, coordinate and direct by administrative orders or otherwise all administrative and management functions of the county government.”

In sec. 59.033 (2), (b) and (c) the legislature would confer specific powers and duties upon the county administrator. In the *Boos* case, *infra*, our supreme court considered the constitutionality of the provisions of sec. 59.031 which were enacted by ch. 327, Laws 1959, and which related to Milwaukee county. With respect to this decision it was said in my opinion to the senate dated March 6, 1963:

“The court held that the portions of the statute not requiring confirmation of appointments by the county board, power of veto over increases and decreases in the budget, and power of veto and approval of resolutions and ordinances, unconstitutional.”

The court held that these provisions offended that part of Art. IV, sec. 23, Wis. Const., which provided that the one system of county government should be “as nearly uniform as practicable.” Thereafter said Art. IV, sec. 23, was amended and Art. IV, sec. 23a, was created. Presumably the court would not have invalidated said portions of 59.031 if said constitutional changes had been made before the passage of ch. 327, Laws 1959.

Sec. 59.031 which was considered by the court in the *Boos* case provided in part:

“(2) *Duties and powers.* The duties and powers of the county executive shall be, without restriction because of enumeration, to:

“(a) Co-ordinate and direct by executive order or otherwise all administrative and management functions of the

county government not otherwise vested by law in boards or commissions, or in other elected officers.”

Upon the creation of sec. 59.031 the legislature invested the county executive with the duties and powers specified in 59.031 (2) (a) quoted above.

Under Substitute Amendment 1, A., to Bill 421, A., the county administrator would have the duty and power to “co-ordinate and direct by administrative orders or otherwise all administrative and management functions of the county government” only “When authorized by the county board.” It is not clear whether the only action which the county board could take under this statute would be to adopt one resolution or ordinance authorizing the county administrator to “co-ordinate and direct by administrative orders or otherwise all administrative and management functions of the county government” or whether the county board could adopt numerous resolutions or ordinances granting the county administrator such authority piecemeal. Likewise, it is not clear whether the county board, having once acted to grant authority to the county administrator, either plenary or piecemeal, could retract the authority so granted.

In any case it would appear that in all probability if Substitute Amendment 1, A., to Bill 421, A., were adopted some of the eight counties to which the law would apply would act under sec. 59.033 (2) (a) to grant to the county administrator the full duty and power described therein, or portions thereof, in which case there would be a definite variation in the one system of county government which would be created for the counties from 100,000 up to 500, 000 which would constitute a new class under Substitute Amendment 1, A., to Bill 421, A.

In my opinion this would raise a serious question as to whether sec. 59.033 (2) (a) might not violate that part of Art. IV, sec. 23, Wis. Const., which provides that one system of county government which would apply to the counties in the new class to be created by said statute should be “as nearly uniform as practicable.”

I am not confident that the court would hold that this statute violates said provision of the constitution but such a holding is sufficiently probable that I deem it advisable to call your attention to this variation between the provisions of sec. 59.031 (2) (a) and sec. 59.033 (2) (a) and to the constitutional question which may be raised by this variation.

We now pass to the delegation of legislative powers problem.

Art. IV, sec. 1, Wis. Const., provides:

**“Legislative power. SECTION 1.** The legislative power shall be vested in a senate and assembly.”

Art. IV, sec. 22, Wis. Const., provides:

**“Powers of county boards. SECTION 22.** The legislature may confer upon the boards of supervisors of the several counties of the state such powers of a local, legislative and administrative character as they shall from time to time prescribe.”

Section 5 of the substitute amendment would create sec. 59.03 (1m), and would provide in part:

“(b) *Districts.* 1. There shall be created by the county board for the spring election in 1964 and thereafter, 21 supervisor districts of equal population, such districts to be bounded by precinct, town, village or ward lines. Reapportionment of these districts shall follow each official federal census.

“2. If the county board has not created equal population supervisor districts by October 1, 1963, or within one year after release of the final federal census figures, any citizen of the county may petition the county court to appoint a citizens apportionment committee to draw the new district lines and report to the court. The court shall by judicial order create the districts pursuant to the citizens apportionment committee report, which order shall have the same effect as a county ordinance. Expenses of such petition shall be borne by the county.”

The division of a county into supervisor districts is a legislative matter. There is no question but that the legislature could make the division itself. I am of the opinion that proposed sec. 59.03 (1m) (b) 1, sets up standards as to the number, composition and boundaries of such districts sufficient to permit the legislature to delegate the remaining task, which is both legislative and administrative in nature, to the county board of supervisors in the counties within the class. The words "equal population" as used therein means that the districts would have to be substantially equal in that respect.

*Fish Creek Park Co. v. Bayside*, (1957) 274 Wis.  
533, 536, 537, 80 N.W. 2d 437;

*Stetzer v. Chippewa County*, (1937) 225 Wis.  
125, 133, 273 N.W. 525;

*The State ex rel. Graef v. Forest County*, (1889)  
74 Wis. 610, 615 43 N.W. 551;

*Muench v. Public Service Comm.*, (1952)  
261 Wis. 492, 53 N.W. 2d 514.

While it is a matter of state-wide concern as to what type of district shall form the basis for the election of county supervisors, I am of the opinion that at least in a case where the legislature has prescribed the type of district and has established standards as to number, composition and boundaries of such districts, the actual determination of the boundaries in each county is a matter of local concern which may be delegated to counties. Under present law, sec. 59.03 (1) (a), Stats., provides that supervisors in counties of 500,000 or more shall be elected from assembly districts, which are required by our Constitution to be established by the legislature, whereas sec. 59.03 (2) (b), Stats., provides that, in counties containing less than 500,000 population and more than one town, a supervisor shall be elected from each ward of a city. Sec. 62.08 establishes standards for wards; however, each city establishes the actual boundaries of its wards. The variance in districts, assembly districts in the one case and ward, town and village districts in the other

case, was approved in *Scanlan v. Archibold*, *supra*, 369, 371, where the separate classification was held proper.

Proposed sec. 59.03 (1m) (b) 2, attempts to delegate legislative and administrative power to a citizens apportionment committee and to county courts in cases where the county board fails to act within a specified time. I am of the opinion that such attempted delegation would result in an invalid statute, insofar as subsection 2 is concerned, but that such subsection is severable from the remainder of the act so that the latter could stand without 59.03 (1m) (b) 2.

Except as it may confer local legislative powers on county boards and municipal corporations, the legislature cannot delegate legislative powers to any officer or to any body of persons, individual or corporate.

*State ex rel. Carey v. Ballard*, (1914) 158 Wis.  
251, 148 N.W. 1090;

*Clam River Electric Co. v. Public Service Comm.*,  
(1937) 225 Wis. 198, 202, 274 N.W. 140.

The legislature cannot confer legislative power on the judiciary.

*Clintonville Transfer Line v. Public Service Comm.*,  
(1945) 248 Wis. 59, 78, 21 N.W. 2d 5.

The question of whether, in the absence of a provision similar to proposed subdivision 2 of sec. 59.03 (1m) (b), apportionment of county supervisor districts could be done by judicial decree where a county board failed to apportion is neither discussed nor decided in this opinion.

RJV/JRW

*Income Tax—Constitutionality*—Bill No. 528, A., as amended, would create 71.09 (6) (cc) allowing additional exemption for nonpublic school attendance, and would be unconstitutional.

June 6, 1963

THE HONORABLE, THE ASSEMBLY:

By Resolution Number 21, A., an opinion has been requested as to the validity of Bill No. 528, A., if it were enacted into law. As amended by Amendment No. 1, A., which has been adopted, the bill would add to the personal income tax exemptions now provided by sec. 71.09 (6) a new and further exemption by another subdivision or subparagraph (cc) reading as follow:

“(cc) An additional exemption of not to exceed \$10 for each dependent of the taxpayer attending a nonpublic elementary or high school, the total of such additional exemption to be not in excess of the amount actually contributed by the taxpayer to the support of such nonpublic school in the form of tuition or other contribution.”

This proposed additional exemption would permit any taxpayer having a child or children who attended a nonpublic school during the income tax year to reduce his income tax upon income of that year by \$10 for each such child. Included in such nonpublic schools would be parochial schools operated by religious organizations. Thus, under this proposal a taxpayer with a child or children who attended such a parochial school at any time during the income year would be accorded the privilege of retaining out of his income taxes otherwise payable, \$10 for each such child, provided that during that income year the taxpayer had actually paid more than that to the support of such school in the form of tuition or other contribution.

Parochial schools operated by religious organizations are “religious seminaries” within the provisions of Art. I, sec. 18, Wis. Const. *State ex rel. Reynolds v. Nusbaum*, (1962) 17 Wis. 2d 148, 115 N. W. 2d 761. Although there may be

questions as to the validity of this proposal in relation to nonpublic schools which are not parochial schools operated by religious organizations, the primary question which presents itself is whether the proposal is violative of the provisions of Art. I, sec. 18. The number of such private schools in the state which are not parochial schools is so comparatively small as to be of no consequence.

The main objective of the proposal is obvious. It is to render financial support to parochial schools through the use of and at the expense of state finances. It is attempted to be accomplished by according monetary advantage in the payment of state taxes by permitting taxpayers with children who attend such school to reduce their tax payments by an amount specified that compensates or reimburses them in whole or in part for what they have paid "to the support" of such school. This purpose is made apparent by the very language of the proposal. It not only conditions the exemption tax credit or deduction upon actual attendance at such a school and the number of children the taxpayer had in attendance at such a school, but it specifically relates it to the amount which that taxpayer "contributed \* \* \* to the support" of the school by the payment of either tuition or a general contribution to the organization operating it. To the extent of such allowed reduction of taxes payable the burden of taxation is by such proposal shifted to or made to fall more heavily upon the other taxpayers.

The personal exemptions provided by sec. 71.09 (6), of which this new one would become a part, are amounts which an individual taxpayer may use as a credit against or in reduction of his income taxes otherwise payable as computed under the other provisions of the income tax statutes. Such exemptions are not amounts that may be deducted from gross income in the computing of the net taxable income upon which taxes payable are computed. Rather, they are amounts which are usable and available only after the amount of the net income which is taxed is arrived at and the taxes payable are calculated by applying to such net taxable income the tax rates of the applicable brackets. Such personal exemptions are thus amounts which a taxpayer

meeting the requirements specified may retain out of the taxes otherwise computed and have applied as a credit thereon to the same effect as if he had paid such amounts. He is allowed to retain such exemption amount out of the taxes otherwise payable by him.

It might appear that being only \$10 per pupil the amount involved is of no great significance. However, the fiscal note appended to the bill would indicate that the dollar amount of the potential depletion of state revenue attributable to this proposal would run into the millions. Also, in this connection it may be noted that the \$10 per pupil credit may represent, and as a practical matter in most instances, will reflect, the payment of a considerably larger sum as the tuition or general contribution to which it relates. For illustration, at the 1% tax rate applicable to the first \$1,000 of taxable income it could compensate for up to \$1,000 and the comparable amounts would decrease progressively with the increase in taxable income and in the 8th bracket it could reflect and compensate for a \$200 payment of tuition or compensation.

The according of this financial advantage to taxpayers to compensate them for their payment in support of such schools clearly encourages the sending of children to such schools and in turn increase in the payment by parents of tuition or other contribution to support such schools. This operates to the benefit of such schools by making more money available for their operation. Thus, the proposal would in effect channel public funds to support such schools. This is so because it is withdrawing funds from the state treasury as the effect of the subtraction of the amount of the exemption from the taxes that would otherwise be payable under the statutes as now provided would be exactly the same as if the taxpayers paid their taxes in full and then were refunded the amounts provided by this exemption. In many instances of withholding or overestimation of taxes it would provide for actual refund of funds in the state treasury. Clearly, such would definitely be violative of the provision in Art. I, sec. 18, Wis. Const.

The proposed exemption in my opinion is a legislative attempt to directly withdraw funds from the state treasury in a way that would operate to the benefit of parochial schools or the religious organizations that operate them. Art. I, sec. 18, of the constitution expressly prohibits the use of public funds of the state for the benefit of religious seminaries or organizations. Whether the proposal has the direct effect of benefiting either the parochial schools as religious seminaries or of benefiting the religious organizations operating them, both are prohibited by this provision in the constitution.

The situation appears parallel to that in respect to lotteries which are expressly prohibited by Art. IV, sec. 24. In *State v. Laven*, (1955) 270 Wis. 524, 71 N.W. 2d 287, the supreme court held invalid a statute removing a specific type of lottery from the statute imposing a penalty for conducting a lottery, as being an attempt by the legislature to "authorize a lottery" which said constitutional provision specifically says it may not do. So, in this instance the proposed exemption is an attempt to authorize the withdrawal of funds from the state treasury for the benefit of religious societies or religious seminaries contrary to the express provision in said Art. I, sec. 18.

In addition, to the extent that a taxpayer's support of a parochial school would be supplied by his general contribution to the religious organization operating the school, he is already accorded a deduction therefor by sec. 71.05 (6) (a) 6. Thus, this proposed exemption would effect a duplication thereof, in whole or in part. For that reason it would not, in my opinion, constitute a reasonable exemption within the provision of Art. VIII, sec. 1, which provides that the legislature may impose, among others, a tax on incomes and that "reasonable exemptions may be provided."

It is therefore my opinion that the exemption proposed by bill No. 528, A., would be violative of the provisions in Art. I, sec. 18, and in Art. VIII, sec. 1, Wis. Const.

HHP

*Legislature—Packaging*—Bill No. 541, S., relating to truth in packaging, would be a constitutional exercise of police powers reserved to the state, but would have to be adjusted to meet future federal legislation to avoid unconstitutionality.

June 6, 1963

THE HONORABLE, THE SENATE

You asked my opinion, pursuant to Resolution No. 27, S., as to the application of Bill No. 541, S., relating to truth in packaging.

Bill No. 541, S., creating sec. 100.45 of the statutes, is designed to prevent deceptive and fraudulent packaging practices in consumer products. Its main provisions prohibit the packaging of goods in Wisconsin and the retail sale of goods in this state contrary to standards to be established by the Wisconsin department of agriculture for labeling and packaging.

It also regulates the packaging of goods in Wisconsin for local or interstate shipment and also regulates the retail sale of goods originating both in local and interstate commerce as far as proper packaging and labeling is concerned. Thus, in its widest application it would subject goods packaged in other states to rules on proper labeling and packaging promulgated by the Wisconsin department of agriculture.

This bill parallels similar legislation pending in the United States congress. Bill S. 387, 88th Congress, First Session, incorporates truth in packaging provisions as an amendment to the Clayton Act, 15 U.S.C. §§ 12-27 (1958).

Since in part it attaches conditions to the distribution of goods flowing in interstate commerce, its constitutionality must be examined in light of the fact that ultimate power over interstate commerce lies in the United States congress. Art. I, sec. 8 of the U.S. constitution provides:

“The Congress shall have power

“\* \* \*

“To regulate commerce \* \* \* among the several states,  
\* \* \*”

Art. VI of the U.S. constitution provides :

“This constitution, and the laws of the United States which shall be made in pursuance thereof; \* \* \* shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.”

The commerce power of the U.S. constitution has been interpreted as allowing the several states “concurrent” jurisdiction where federal law or policy does not conflict. This “concurrent” power is in contrast to those “exclusive” powers of congress which permit no similar state jurisdiction. “Exclusive” congressional powers include among others the powers to declare war, to levy customs and to establish a uniform rule of naturalization. (Discussion in *Federalist No. 32.*)

The United States supreme court exhaustively reviewed the law applicable to the commerce clause of the U.S. Constitution and state regulation in *Southern Pacific Co. v. Arizona*, (1945) 325 U.S. 761, 65 Sup. Ct. 1515. The court stated at length on pages 766-770 :

“Although the commerce clause conferred on the national government power to regulate commerce, its possession of the power does not exclude all state power of regulation. Ever since *Willson v. Black-Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. Ed. 412, and *Cooley v. Port Wardens*, 12 How. 299, 113 L. Ed. 996, it has been recognized that, in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it: [Citing cases.] Thus the states may regulate matters which, because of their number and diversity, may never be ade-

quately dealt with by Congress. [Citing cases.] When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority. [Citing cases.]

“But ever since *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority. [Citing cases.] Whether or not this long recognized distribution of power between the national and the state governments is predicated upon the implications of the commerce clause itself [citing cases] or upon the presumed intention of Congress, where Congress has not spoken, [citing cases] the result is the same.

“In the application of these principles some enactments may be found to be plainly within and others plainly without state power. But between these extremes lies the infinite variety of cases, in which regulation of local matters may also operate as a regulation of commerce, in which reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved. [Citing cases.]

“For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests. [Citing cases.]

“Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either per-

mit the states to regulate the commerce in a manner which would otherwise not be permissible, [citing cases] or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce.

[Citing cases.]

“But in general Congress has left it to the courts to formulate the rules thus interpreting the commerce clause in its application, doubtless because it has appreciated the destructive consequences to the commerce of the nation if their protection were withdrawn, *Gwin, etc., Inc. v. Henn*—*ford*, supra, 305 U.S. 441, 59 S. Ct. 328, 83 L. Ed. 272, and has been aware that in their application state laws will not be invalidated without the support of relevant factual material which will ‘afford a sure basis’ for an informed judgment. *Terminal R. Ass’n v. Brotherhood of Railroad Trainmen*, supra, 318 U.S. 8, 63 S. Ct. 424, 87 L. Ed. 571; *Southern R. Co. v. King*, 217 U.S. 524, 30 S. Ct. 594, 54 L. Ed. 868. Meanwhile, Congress has accommodated its legislation, as have the states, to these rules as an established feature of our constitutional system. There has thus been left to the states wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern.”

Thus, a state regulation affecting interstate commerce is void if it substantially impedes the free flow of commerce between states regardless of the presence or absence of federal regulation, or where it conflicts with specific federal enactments. What constitutes an impediment to interstate commerce or a conflict with federal law is left to the courts for determination.

As a guide in determining what constitutes an impediment to interstate commerce the U.S. supreme court has established the following principle in *Kelly v. Washington Ex Rel. Foss Co.*, (1937) 302 U.S. 1, 10, 58 Sup. Ct. 87:

“\* \* \* The principle is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so ‘direct and positive’ that the two acts cannot ‘be reconciled or consistently stand together.’ [Citing cases.]”

Many state acts affecting interstate commerce have been held valid as legitimate exercises of the local police powers. In *Savage v. Jones*, (1911) 225 U.S. 501, 524-525, 32 Sup. Ct. 715, the court said:

“The State cannot, under cover of exerting its police powers, undertake what amounts essentially to a regulation of interstate commerce, or impose a direct burden upon that commerce. [Citing cases.] But when the local police regulation has real relation to the suitable protection of the people of the State, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by Congress pursuant to its constitutional authority. [Citing cases.]”

In the *Savage* case the court upheld an Indiana inspection statute which provided for the opening and analysis of stock food in their original packages by state authorities before sale in order to ascertain whether minimum standards of composition were met.

Similarly, in *Patapsco Guano Co. v. North Carolina*, (1898) 171 U.S. 345, 18 Sup. Ct. 862, the court held valid a North Carolina statute requiring accurate labeling of commercial fertilizer as to chemical composition and containing a provision that a 25 cent per ton state inspection charge could be levied.

*Plumley v. Massachusetts*, (1894) 155 U.S. 461, 15 Sup. Ct. 154, leads a long line of oleomargarine cases which uphold state statutes forbidding the sale of oleomargarine colored to look like butter since its justification is “to suppress false pretenses and to promote fair dealing in the sale of an article of food.” (Page 468).

In "The *Plumley* case the court concluded at page 479 by stating:

"\* \* \* A State enactment forbidding the sale of deceitful imitations of articles of food in general use among the people does not abridge any privilege secured to citizens of the United States, nor, in any just sense, interfere with the freedom of commerce among the several States. \* \* \*"

In a case arising in Wisconsin with regard to a Wisconsin statute prohibiting the sale of food which contained benzoates (Wisconsin statutes of 1913, § 4601; sec. 97.28, 1961 Stats.; see also note to sec. 97.28, Wisconsin Annotations 1960), the U.S. supreme court upheld the constitutionality of the Wisconsin statute. The court stated at page 288 in *Weigle v. Curtice Brothers Co.*, (1918) 248 U.S. 285, 39 Sup. Ct. 124:

"\* \* \* When objects of commerce get within the sphere of state legislation the State may exercise its independent judgment and prohibit what Congress did not see fit to forbid. When they get within that sphere is determined, as we have said, by the old long-established criteria. The Food and Drugs Act does not interfere with state regulation of selling at retail. *Armour & Co. v. North Dakota*, 240 U.S. 510, 517; *McDermott v. Wisconsin*, 228 U.S. 115, 131. Such regulation is not an attempt to supplement the action of Congress in interstate commerce but the exercise of an authority outside of that commerce that always has remained in the States."

In light of the above decisions, it is my opinion that Bill No. 541, S., relating to truth in packaging, is constitutional as a legitimate exercise of the police powers reserved to the states. In addition, it does not conflict with Bill S. 387, 88th Congress, First Session, now before congress. However, it should be noted that if the federal bill becomes law state standards will have to be adjusted to conform to those promulgated under the federal act since federal enactments under the commerce clause of the U.S. Constitution supersede conflicting state standards.

As to phrasing, it is my opinion that one sentence contained in subsec. 100.45 (5) of Bill No. 541, S., should be clarified. The sentence reads: "Such rules shall be enforced as provided in ch. 227." Since ch. 227 provides for review of administrative rules and decisions thereunder, rather than enforcement of rules, it is suggested that the sentence be rephrased as follows: "Such rules and decisions thereunder shall be subject to review as provided by ch. 227."

JPA

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*Legislature—Board of Regents—Students*—Neither the regents of the university of Wisconsin nor the board of regents of state colleges have statutory authority to restrict admission of students, resident or nonresident, because of budgetary shortages.

June 10, 1963

THE HONORABLE, THE JOINT COMMITTEE ON FINANCE

You have raised for consideration by this office the following three questions:

"1. May the University and the State College Regents curtail resident student enrollment because of a claimed anticipated insufficiency of operational funds for the 1963-1965 budgets for those institutions?

"2. May the Regents bar nonresident applicants upon the grounds stated in Question 1?

"3. If not, what is the procedure to be followed in securing funds to meet such deficiency, if, in fact, the appropriated funds should be insufficient?"

I.

While broad powers are vested by statute in the two boards in question, neither board has the statutory power to reduce or curtail enrollments of resident or nonresident students solely because of insufficient appropriations.

Sec. 36.06 (1) authorizes the university regents to determine the moral and educational qualifications of applicants for admission. Sec. 37.11 (7) authorizes the state college regents to prescribe rules for admission of students; "but every applicant for admission shall undergo an examination to be prescribed by the board, and shall be rejected if it appears that he is not of good moral character."

Neither of these statutes either expressly or impliedly authorize limitations on enrollment in accordance with available appropriations, and it has been held that the board of regents of the university, as a corporate body, has no powers except such as are conferred upon it by statute, either by express language or by fair implication. *State ex rel. Priest v. Regents of University of Wisconsin*, (1882) 54 Wis. 159, 11 N.W. 472. The same, of course, would be true in the case of the board of regents of state colleges.

## II.

The answer to the second question is substantially the same as the answer to the first question. There are a number of statutory provisions relating to nonresident tuition as well as resident fees for both the university and the state colleges. However, these do not reach the question of enrollment limitation by reason of budgetary problems.

## III.

If the appropriated funds are insufficient, curtailment of expenditures must necessarily follow.

Should the legislature have any strong convictions as to how these boards should "cut the coat to fit the available cloth," the predicament could be solved by whatever formula the legislature might enact by appropriate legislation.

In the absence of any such legislative directive it would appear as pointed out in the opinion from this office to you under date of June 3, 1963, that there is a responsibility on the director of the bureau of management of the department of administration to order a reduction of expenditures by all state departments out of the general fund to correspond with estimated revenue and that a somewhat

similar although more restricted power is vested in the board of government operations.

Assuming that the two boards of regents in question are faced with the necessity of operating on some reduced percentage of requested budgets as a result of action taken by the director of the bureau of management or board of government operations, the specific manner in which the available funds will be used is a matter for the two boards of regents to decide within the framework of their specific statutory obligations. As above indicated, direct action limiting enrollment is not permissible.

No attempt will be made here to go into specific suggestions as to detailed methods of cutting expenditures. That is a matter initially, at least, for consideration by the respective boards of regents. As stated above, if any particular legal problems arise in resolving these questions, they can be submitted to this office when, as, and if they arise.

WHR

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*Veterans—Housing Loans*—County veterans' service officer legally need not accept any application for a veteran's housing loan except as required by sec. 45.352 (10) (b) ; but should not reject application on basis of county residency of veteran.

June 10, 1963

HAROLD J. WOLLENZIEN

*Corporation Counsel, Waukesha County*

You have submitted the following question :

"If State Housing Funds are allocated to each county on the basis of each county's veteran population, is a County Veterans' Service Officer compelled to accept applications from a veteran having legal residence in another county but who desires to move into the Service Officer's county, and

thereby using the Veterans' allotment funds from the other county rather than from the veteran's own county?"

You further state that your county's veterans' service officer has adopted a policy of refusing to accept applications for veterans' housing loans from veterans having legal residence in another county.

It has been a long-standing practice in Wisconsin for a veteran to "process" his application for a housing loan through his county service officer. This practice is well-founded in administrative expediency, but is not required by law. The only statutory requirement germane to the issue is found in the last sentence of sec. 45.352 (10) (b), which reads as follows:

"\* \* \* The application shall be accompanied by a statement subscribed by the applicant's county veterans' service officer setting forth that he has read the application and after investigation believes it does or does not merit consideration and his reasons for such belief."

However, the cooperation between the Wisconsin department of veterans' affairs and the county veteran's service officer in administering the applications for housing loans and other veteran's benefits is contemplated by our legislature. Sec. 45.35 (7), provides:

"(7) The department shall maintain contacts with county service officers and local agencies, the American Red Cross and veterans' organizations concerned with the welfare of veterans and shall contact and co-operate with federal agencies in securing for Wisconsin veterans all benefits to which they may be entitled."

The corollary section, insofar as the county veterans' service officer is concerned, is found in sec. 45.43 (6), which provides:

"(6) CO-OPERATION. The county veterans' service officer shall co-operate with the several federal and state agencies which render services or grant aids or benefits to veterans and their dependents."

I can find no other statute directly relating to the problem. Therefore, in a strict and narrow legal sense, a county veterans' service officer does not have to "accept" or "process" the loan application of *any* veteran, other than to comply with sec. 45.352 (10) (b), *supra*, by giving the accompanying statement required.

However, in a practical sense, the county veterans' service officer cannot intelligently comply with sec. 45.352 (10) (b) without administratively having done that which is required to "accept" and "process" the loan application. The county veterans' service officer, in processing the application, renders a very valuable service to the state veteran and to the state itself. If the county veterans' service officer does not perform such services, the department of veterans' affairs would quite naturally have to perform this function and increase its staff, thereby increasing administrative costs, and, quite conceivably, result in there being less available funds for veterans' housing loans.

The veterans' housing loan program is a state-wide program, created by the legislature, administered at the state level by a state agency, and is a program of state-wide concern, all as opposed to local activity, administration, and concern. The monies needed to carry out this program are derived and appropriated at a state level as opposed to a local level. Therefore, a county, as such, has no protected interest or right to any portion of the funds.

A state veteran is a *state veteran* and not a county veteran. The Wisconsin department of veterans' affairs is charged with the administration of the home loan program on a state-wide basis, keeping in mind the need of the individual veteran himself.

Sec. 25.36 (2) provides:

"(2) The moneys appropriated from the veterans trust fund by s. 20.840 (81) shall be allocated on March 1, July 1 and November 1, in the several counties as nearly as practicable on the basis of veterans' population."

Pursuant to this section, the department of veterans' affairs issued, on February 27, 1962, a bulletin setting forth the number of veterans in each county based upon the 1960 federal census. This bulletin also stated that the funds would be distributed accordingly. Therefore, when the department of veterans' affairs allocates its funds among the counties as it does, it is merely attempting to make a fair distribution of its available funds. The statute does not give to a county any right to any portion of the funds, it merely provides for a guide for distribution.

In view of the applicable law, if a county veterans' service officer does not accept or process a loan application, the department of veterans affairs may accept the application directly and process it for the veteran.

WHW

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*Counties—Leases*—Under secs. 27.015 and 27.05 counties are authorized to acquire, by lease, lands located outside the county within three-fourths mile of county line for county park. County funds may be spent to improve parks and regulations may be established and enforced.

June 17, 1963

JOHN E. FLYNN

*District Attorney, La Crosse County*

You have informed me that an area known as Goose Island owned by the federal government, is located partly in La Crosse county and partly in Vernon county. La Crosse county has leased for park purposes that part of Goose Island which lies within La Crosse county. That county now wishes to lease for similar purposes the part which lies within Vernon county. This part is about 95 acres in size and extends into Vernon county about two-thirds of a mile from the La Crosse county line.

You ask whether La Crosse county is authorized to lease such land for park purposes, improve it with county funds, and direct the sheriff and highway patrol of La Crosse county to police such area. It is my opinion that the statutes authorize this to be done.

Sec. 59.07 (1) provides that the county board may acquire or lease land for public purposes including parks. Sec. 27.015 provides for the appointment of a county rural planning committee. Sub sec. (7) (f) reads:

“It [the county rural planning committee] may under the direction of the county board, operate a county park or parks for tourist camping and general public amusement, and may establish fees, concession privileges and grants and employ such help as is needed to operate the park or parks for the best county interests. The county board shall establish rules and regulations governing the conduct and behavior of patrons in and on any such park and shall provide for penalties for infractions of these rules and regulations. When such parks have bathing beaches in connection with them, the county board shall make rules and regulations governing the operation of motor boats in or near such beaches, and provide penalties for infraction of such rules and regulations. The board shall also establish rules, regulations and penalties for infractions thereof, for all roads in county parks and all such roads shall be part of the county highway system.”

This statute empowers the county board to establish regulations for the use of parks and the roads therein and to establish penalties for violations of such regulations.

Sec. 27.05, relating to the county park commission, provides in part:

“The said commission shall have charge and supervision of all county parks, and all lands heretofore or hereafter acquired by the county for park or reservation purposes; and shall have power subject to the general supervision of the county board and to such regulations as it may prescribe:

“(1) To lay out, improve, maintain and govern all such parks and open spaces; provide by contract with sanitary

districts, counties, or town, cities or villages, subject to the approval of the county board of supervisors, or in any other manner, for the disposal of sewage arising from the use of such parks and take all action necessary to prevent the pollution of park or parkway areas or any portion thereof by sewage emanating from upland areas; to lay out, grade, construct, improve and maintain roads, parkways, boulevards and bridges therein or connecting the same with any other parks or open spaces or with any municipality in the county, using such methods and materials as it may deem expedient; to determine and prescribe building lines along the same; and to make rules for the regulation of the use and enjoyment thereof by the public;

“\* \* \*

“(3) To acquire, in the name of the county, by purchase, land contract, lease, condemnation, or otherwise, with the approval and consent of the county board, such tracts of land or public ways as it may deem suitable for park purposes; including lands in any other county not more than three-fourths of a mile from the county line; but no land so acquired shall be disposed of by the county without the consent of said commission, and all moneys received for any such lands, or any materials, so disposed of, shall be paid into the county park fund hereinafter established.”

This statute authorizes a county to improve and govern parks and to improve roads therein, and to make regulations for the public use thereof. The necessary land may be acquired by lease and may include land in another county not more than three-fourths of a mile from the county line.

Under these statutes it is clear that La Crosse county may acquire by lease the Goose Island lands located in Vernon county within two-thirds of a mile from the county line and that such lands may be improved with county funds. La Crosse county may also make regulations for public use of such park and provide penalties for violation of such regulations. This power to establish regulations and penalties clearly implies the power to enforce such regulations

through appropriate law officers such as the county sheriff and traffic patrol.

Sec. 83.016 provides for the appointment of traffic patrolmen for the enforcement of laws relating to the highways or their use, or the maintenance of order upon or near the highways. They may arrest without warrant any person who, in their presence, violates any law relating to highways or the maintenance of order upon or near highways. Sec. 27.015 (7) (f) provides that all roads in county parks shall be part of the county highway system. This is clear statutory authorization for the county traffic patrol to enforce traffic regulations on county park roads and to keep peace and order upon or near such roads.

As to the duties of the county sheriff sec. 59.24 provides:

“Sheriffs and their undersheriffs and deputies shall keep and preserve the peace in their respective counties and quiet and suppress all affrays, routs, riots, unlawful assemblies and insurrections; for which purpose, and for the service of processes in civil or criminal cases and in the apprehending or securing any person for felony or breach of the peace they and every coroner and constable may call to their aid such persons or power of their county as they may deem necessary.”

Thus, the usual duties of the sheriff are confined within the limits of the county lines. 80 C.J.S., Sheriffs and Constables, § 36. However, it has been held that where authorized by statute a sheriff may make arrests beyond the limits of his own county but not outside the boundaries of the state. *State ex rel. Penrod v. French*, (1943) 222 Ind. 145, 51 N.E. 2d 858; *McLean v. Mississippi*, (1938) 96 F. 2d 741; *Brannin v. Sweet Grass County*, (1930) 88 Mont. 412, 293 P. 970.

Sec. 59.23 (7) provides that the sheriff shall:

“Perform all other duties required of him by law.”

Thus, if the county board, pursuant to the previously mentioned statutes, enacts ordinances for the regulation of

public use of parks, providing penalties for violation thereof, and providing for the enforcement thereof by the sheriff, it would seem clear that such duties, required of the sheriff by the ordinance, are clearly required by law as provided in sec. 59.23 (7). It has been held that the statutory language "required by law" includes a requirement made by a municipal ordinance, at least where such ordinance is clearly authorized by statute. *City of Newport v. Silva*, (1911) 144 Ky. 450, 137 S.W. 546; *City of Portland v. State Bank of Portland*, (1923) 107 Or. 267, 214 P. 813.

Since a county board is authorized by statute to establish parks outside the county and within three-fourths mile of the county line and to prescribe regulations for the public use of such county parks, it is my opinion that county sheriffs and county traffic patrolmen are authorized and required to enforce such regulations even where such parks are outside the county line.

AH

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*Powers and Duties—Department of Administration—*  
Powers and duties of the department of administration and the bureau of management in the event of a deficiency in revenues to meet budget requirements discussed.

June 20, 1963

HOWARD J. KOOP, *Commissioner*  
*Department of Administration*

By your letter of June 6, 1963 you have asked several legal questions which you believe must be resolved in order to aid you in preparing instructions to give the various state departments in regard to preparing the estimates required by sec. 16.50, in contemplation of a lack of state revenues which might necessitate an over-all cut of some 17 per cent in the general fund executive budget. In view of the conclusions which I have reached, it would appear simpler

if I rephrased your questions according to their general tenor and then give you a generic answer to the questions so stated.

At the outset, I must remind you that sec. 16.50 is intended and adapted to apply to emergency situations in which there are insufficient revenues to meet expenditures otherwise authorized under the appropriation sections of the statutes, or directed by other statutes affecting compensation of employes, conditions of employment, or a reduction in force. Subject only to the limitations expressed within sec. 16.50 itself, and constitutional requirements in case of need, sec. 16.50 would override any other statute.

#### I.

Your first question relates to the compensation of state employes. You have directed my attention to secs. 16.105 (2) (c) and 20.931, relating to merit increases; sec. 16.105 (2) (d), relating to increases at the end of a probationary period; sec. 20.932, relating to the so-called annual cost of living bonuses; and secs. 16.105 (4) and 20.550 (30), relating to standard salary ranges and the continuation of the 1961 compensation plan.

Implicit in your question, while you do not so state, is whether or not the payments directed by these specific sections must be made in full at the expense of some other payments or expenditures by the state.

As a matter of arithmetic, it is clear that if all salaries were continued in full at the 1961 level, plus the directed increases, the cut in the budget necessitated by the lack of revenue could not possibly be made. Nevertheless, I suggest to you that the spirit of all these quoted statutes can be complied with if you direct the respective state departments to prepare their estimates for the quarters of the fiscal year 1963-1964, giving effect to all of the quoted statutes on the assumption that sufficient revenues to meet the estimates will be available. Thereafter the budget so prepared can be reduced by the necessary percentage by the methods outlined below. -

## II.

Your second question in effect relates to the equality of treatment of all employes of the state, including both employes of departments whose revenues may be insufficient to meet the standard of payments in the 1961 budget, and the employes of departments operating out of segregated funds or revolving funds whose revenues may not be rendered insufficient by the failure of the 1963 legislature to adopt a new and sufficient revenue measure to meet the expenditures in the 1963 general fund executive budget.

You have particularly directed my attention to the statement of general policy in sec. 16.01, and to the direction in sec. 16.105 (1) which provides in effect that each class of employes should have the same qualifications as to skill and fitness and receive the same pay. In my opinion, these statutes are only general directives intended to operate under normal conditions when the revenues available to all of the various state departments are sufficient to meet the required expenditures.

Sec. 16.50 does not confer upon you any power to direct a diminution of spending by any state department if "there will be sufficient revenue to meet such contemplated expenditures." That is, you could not order a "sympathy" cut in the pay schedule of employes, for example, of the highway commission, which would have ample revenue to pay their salaries in full, merely because it has been found necessary to reduce the pay of employees paid out of general revenues in the general fund.

## III.

Your third question relates to the steps which a department must take when the revenues available to the department are insufficient to meet the salary budget computed in accordance with heading I, *supra*.

You have directed my attention to sec. 16.24 (1) (a), which indicates that no permanent employe may be reduced in pay except for just cause; sec. 16.24 (2), which

provides in effect that when a reduction in force is necessary because of lack of work or lack of funds such reduction must be accomplished in accordance with that section and in the case of permanent employes in accordance with rules established by the personnel board; and sec. 16.275 (7), which states that the standard basis of employment for the state service shall be 40 hours per week.

In my opinion when the revenues of a department are insufficient to meet the salary budget computed in accordance with heading I, supra, the department may reduce its expenditures in three ways. These are:

A. There can be a so-called vertical cut affecting all employes equally. That is, the salary of all employes would be uniformly reduced by a single flat percentage.

B. There could be a reduction in force upon compliance with the procedures outlined in sec. 16.24 (2).

C. There could be a combination of A and B. That is, the vertical cut would be less than the percentage required if all the employes were retained, and this lesser percentage would be compensated for by a reduction in force of provisional, emergency, limited term or seasonal employes, or by a reduction in the number of permanent employes in accordance with personnel board rules.

I find no statute that would authorize you to reduce the work week from 40 hours per week as compensation to the employe for his reduced pay. Sec. 16.275 (7) which prescribes the 40-hour week provides that the week shall be divided into 5 days of 8 hours each, with the proviso that "deviations may be permitted upon recommendation of the appointing authority and subsequent approval of the department of administration." In my opinion the quoted proviso is intended only to regulate the distribution of hours among the days of the week in some manner other than the statutory requirement of 8 hours for 5 days when the needs of the department might require more hours on one day and less hours on another day. I do not regard it as permission to decrease the number of hours of employment.

## IV.

In your fourth question you have directed by attention to various miscellaneous payments which by their nature may be considered at least quasi-contractual in nature, and are therefore entitled to special consideration, and further to various other appropriations apparently out of the general fund, such as the *apportionment* under sec. 20.552, and particularly secs. 20.552 (55) and 20.552 (56), which the director of your bureau of management has informed me had never been considered to be part of the general fund of the executive budget.

First, it is my opinion that you have power under the existing statutes to give special consideration to the social security payments to the federal government—that is, the old age and survivorship insurance for state employes, for teachers, and for Milwaukee county, in view of the fact that the actuarial soundness of these programs can be seriously affected if these payments are not made. Further, these payments are based on an agreement with the federal government and there is a 6 per cent per annum penalty for delinquencies. Similar considerations apply to the contributions to the retirement system for state employes and for teachers in the primary and secondary schools, and in higher education. While you have not raised the question, the same principle would apply to appropriations for building rentals paid by the state for space in the various state building corporations, such as the Wisconsin state agencies building corporation, and to our various group health and life insurance contracts.

Continuing, second, you inquire whether you can affect the sum sufficient appropriations to the courts and the legislature. In accordance with the first sentence in sec. 16.50 (1), the answer is clearly “no.”

Your final question under this heading is the treatment that should be accorded the portions of the normal income tax appropriated to counties, towns, villages and cities under sec. 71.14, together with the provisions for tax relief dictated by sec. 20.552 (55) and (56). Insofar as the shar-

ing of the normal income tax is concerned, I am informed by the director of your bureau of management that this sum is customarily apportioned for the benefit of the communities on receipt. This sum by statute, sec. 71.14, is not "a part of the general fund for the use of the state." This procedure appears to be in accordance with the spirit of the statute and should be continued. In view of the purpose and legislative history of sec. 20.552 (55) and (56), which were part of the general revision of the tax program of the state by the 1961 legislature, it would appear that these appropriations are more analogous to the sharing of the income tax than to the items ordinarily found in the general fund executive budget, and that you could properly allow them to continue in full. Nevertheless, you are cautioned that sec. 16.50 of the statutes is a measure intended to provide for emergency situations in any degree. If upon computation of a budget in accordance with the opinion rendered under this heading, IV, an impossible situation is arrived at, further consideration can be given to your powers and duties in the circumstances.

RGT

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*Stream Improvements—Counties*—Under sec. 59.07 (60) Wood county is authorized to appropriate money to the soil and water conservation district of Portage county for watershed protection project beneficial to Wood county but carried out in Portage county.

June 20, 1963

LAWRENCE R. NASH

*Corporation Counsel, Wood County*

You have informed me that in the 1930's Wood county purchased land and erected a dam on Four Mile creek. This created an artificial lake known as Lake Wazeecha, which is adjacent to a county park. Silt is washing down into this lake from Four Mile creek and its tributaries. The county

is dredging the lake but feels that water shed protection improvements should be made to these streams and their banks. These proposed improvements include the planting of shrubs and the placing of rip-rap along the stream bank to reduce erosion. This would be done on private property with the consent of the owners of such property. Structures similar to beaver dams would be built in the stream to reduce the velocity of the water. Some fallen trees would be removed from the stream. The lake is located in Wood county but the stream to be improved is located in Portage county. The improvements would be made in Portage county up to four miles upstream from the lake itself. However, the purpose of these stream improvements is to protect and improve the lake.

You ask whether Wood county is authorized by statute to protect and improve Lake Wazeecha by making these stream improvements in Portage county.

The general rule is that, unless specially authorized, a county board cannot exercise its constitutional jurisdiction within the territorial limits of another county. 20 C.J.S. Counties §81; *Green County v. Snellgrove*, (1913) 103 Miss. 898, 60 So. 1023. An example of such special authorization is found in sec. 31.38, which authorizes a county to construct a dam within or without the county limits, and for this purpose to purchase or condemn land within or without such limits. Another example is sec. 27.05 (3), which authorizes a county park commission to acquire lands for park purposes including lands in another county not more than three-fourth of a mile from the county line.

There is no statute which specifically authorizes a county to engage directly in acts of stream improvement and watershed area protection outside of the county limits. The authority of a county to appropriate money for watershed protection is found in sec. 59.07 (6), which provides that county board may:

“Appropriate money to assist in creating and developing watershed protection areas or projects beneficial to the county, which would include or benefit all or a portion of

such county, and to pay all or part of said money to any agency of the federal or state government or to a soil and water conservation district, to be expended for such purposes."

This statute was enacted to permit counties to participate in watershed protection activities of the federal government under the federal Watershed Protection and Flood Prevention Act, Public Law 566, 83rd Congress. For a discussion of this problem see 43 OAG 329. Under this statute a county is authorized to appropriate money for watershed protection projects beneficial to the county and to pay all or a part of said money to a state or federal agency or to soil and water conservation district to be expended for such purposes. It is my conclusion that this statute, authorizing the appropriation of money, does not authorize the county board to spend the money directly in works of watershed protection. The county board is only authorized to pay such money over to the several named agencies to be expended by them for such purposes.

One of the agencies authorized to receive such money and spend it on a watershed protection project is a county soil and water conservation district. Creation of such districts is authorized by sec. 92.05, which reads:

"When the board of supervisors of any county determines that conservation of soil resources and control and prevention of soil erosion are problems of public concern in the county, and further determines that a substantial proportion of the rural land occupiers of the county favors such a resolution, the said board of supervisors, by a resolution adopted at any regular or special meeting of the board, may declare the county to be a soil and water conservation district for the purpose of effectuating the legislative policy announced in s. 92.02. These determinations may be made through hearings, petitions, referenda or any other means which the county board deems appropriate."

The powers of such a district are provided in sec. 92.08, which reads in part:

“A soil and water conservation district shall constitute a governmental subdivision and a public body corporate and politic, exercising public powers, and such district, and the supervisors, shall have the following additional powers:

“(1) To carry out preventive and control measures and works of improvement for flood prevention or agricultural phases of the conservation, development, utilization and control of water within the district including, but not limited to, engineering operations, such as terraces, terrace outlets, desilting basins, floodwater retarding structures, floodways, dikes and ponds, methods of cultivation, the growing of vegetation, changes in use of land or lands owned or controlled by this state or any of its agencies, with the cooperation of the agency administering and having jurisdiction thereof, and on any other lands within the district upon obtaining the consent of the occupier of such lands or the necessary rights or interests in such lands.

“(2) To co-operate, or enter into agreements with, and within the limits of funds available to it, to furnish financial or other aid to any agency, governmental or otherwise, or any occupier of lands within the district, in the carrying on of erosion-control and prevention operations and works of improvement for flood prevention or agricultural phases of the conservation, development, utilization and control of water within the district, subject to such conditions as the committee may impose and the supervisors may deem necessary to advance the purposes of this chapter.

“\* \* \*”

Under the above statutes it appears that a county soil and water conservation district may carry out its projects only within its own county area. Thus, if the county board of Wood county appropriated money to the soil and water conservation district of Wood county, that district could not carry on a project in Portage county. Only the Portage county district could carry on such a project. This raises the question whether Wood county can appropriate and pay money to the soil and water conservation district of Portage county. It is my understanding that almost all counties

have established such districts and I therefore assume that Portage county has such a district. Sec. 59.07 (60) provides that the appropriation must be for a project beneficial to the county, and it seems clear that the proposed project would benefit Wood county. The second part of the statute provides that the money may be paid "to a soil and water conservation district, to be expended for such purpose." This broad language in no way limits Wood county to paying such money to the Wood county district only. The sole test is whether the project is beneficial to Wood county. I conclude that when the statute says the money may be paid to "a soil and water conservation district," this means any such district which can and will carry on a project beneficial to Wood county. I, therefore, conclude that Wood county is authorized to appropriate and pay money to the Portage county soil and water conservation district for a watershed protection project on Four Mile creek in Portage county.

If the authorities of Wood and Portage counties have any doubts as to whether such procedure is authorized, it is my suggestion that they enter into a contract for the joint exercise of such powers under sec. 66.30.

Your attention is also directed to sec. 30.195, which requires a public service commission permit for changing the course of a stream and sec. 31.05, which requires a permit for the construction of a dam in a stream.

AH

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*Legislature—Reapportionment—Ward Lines*—A state legislature can reset ward lines of a city if such is done as a part of a state-wide apportionment law.

June 24, 1963

THE HONORABLE, THE ASSEMBLY

You have inquired about the constitutionality of "a bill or joint resolution purporting to set ward lines in any city

for the purpose of reapportionment rather than following established ward lines.”

The leading case in this field is *State ex rel. Neacy v. City of Milwaukee*, (1912) 150 Wis. 616, 138 N. W. 76. Here the city of Milwaukee enacted a redistricting ordinance which changed the boundaries of wards and formed a number of new wards. The Milwaukee city council enacted this ordinance under the authority granted to it by ch. 436, Laws 1901.

The validity of the ordinance was attacked on the ground that the new wards were not made as nearly equal in population as practicable by the ordinance, and the test set up by ch. 436, Laws 1901, required the words “shall be as nearly equal in population as may be.”

In the *Neacy* case, *supra*, the court held that even if the redistricting ordinance did not meet the test established by ch. 436, Laws of 1901, and was therefore void, it could still be held valid if the legislature by a subsequent act recognized and ratified the ordinance. In this case the legislature did by a subsequent act recognize and ratify the ordinance by a state-wide reapportionment law, ch. 661, Laws 1911.

The constitutionality of ch. 661, Laws 1911, was attacked by the plaintiff on the ground that changing the ward boundaries of a city amounted to an amendment of its charter, and was prohibited by Art. IV, sec. 31, para. 9th, Wis. Const. In rebutting this argument, the court stated at page 620:

“\* \* \* The objection falls because the constitutional provision cited only prohibits the amendment of a city charter by ‘special or private’ law, and by no stretch of imagination can a statewide apportionment law be called either a special or private law.”

Thus, the *Neacy* case, *supra*, seems to stand for the rule that a state legislature can reset ward lines of a city if the resetting of these ward lines is done as a part of a state-wide apportionment law.

The municipal home rule provision of the Wisconsin constitution, Art. XI, sec. 3, was enacted in November, 1924. This was 12 years after the *Neacy* case was decided. The municipal home rule clause of the constitution would overrule the *Neacy* case, unless the rule of the *Neacy* case can fit into the exception to that provision, which reads:

“\* \* \* subject only to this constitution and to such enactments of the legislature of state-wide concern as shall with uniformity affect every city or every village. \* \* \*”

A state-wide apportionment is a law of state-wide concern. The rule stated in the *Neacy* case falls within the exception to the municipal home rule provision.

It is therefore my opinion that a legislature can reset ward lines if it does so as a part of a state-wide apportionment law, even though it cannot reset ward lines by a special act because of the provisions of Art. IV, sec. 31, para. 9th, Wis. Const.

RGT

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*Legislature—County Forest Lands—Forest Crop Law—*  
Changes proposed by Bill No. 160, A., in the forest crop law in relation to county forests do not violate the impairment of contract provisions of the United States constitution.

June 25, 1963

THE HONORABLE, THE SENATE

By Resolution No. 34, S., you have asked my opinion on the validity of Bills No. 95, S., and No. 160, A. These bills are identical and if enacted would accomplish a major revision of the law relating to county forest lands. Your question is whether the provision of the United States constitution, Art. I, sec. 10, clause 1, prohibiting the impairment of contracts, prohibits such changes in the law relating to county forests.

The forest crop law, Ch. 77, Stats., is designed to encourage a policy of preserving from destruction or premature cutting the remaining forest growth in this state. Entry of lands under this law is accomplished by order of the conservation commission upon a petition of the landowner as provided in sec. 77.02. Sec. 77.03 provides in part:

“\* \* \* The passage of this act, petition by the owner, the making and recording of the order hereinbefore mentioned shall constitute a contract between the state and the owner, running with said lands, for a period of fifty years, unless terminated as hereinafter provided, with privilege of renewal by mutual agreement between the owner and the state, whereby the state as an inducement to owners and prospective purchasers of forest crop lands to come under this chapter agrees that until terminated as hereinafter provided, no change in or repeal of this chapter shall apply to any land then accepted as forest crop lands, except as the conservation commission and the owner may expressly agree in writing. \* \* \*”

Sec. 77.13 (1) reads:

“(1) Any county which has title to any lands eligible to registration as forest crop lands shall be deemed an owner as this term is used in this chapter and may register and withdraw such lands under the provisions of this chapter in the same manner and on the same basis as other owners, except that any such county shall not be required to pay the acreage share prescribed in section 77.04 and the real estate tax prescribed in section 77.10 (2) on any of its lands registered as forest crop lands.”

Sec. 77.10 (2) provides the procedure under which a private person who owns forest crop lands may withdraw such lands and, further, provides that a county may withdraw county-owned lands from this chapter under sec. 28.12, which authorizes a county to withdraw its lands on certain conditions.

Bill No. 160, A., removes from Ch. 77, all references to county forests and repeals and recreates sec. 28.11, and

makes a number of substantive changes in the law relating to the administration of county forests. If enacted, these new provisions will govern the management of county forests previously entered under Ch. 77. For example, under existing law the county may withdraw lands from entry under the forest crop law without the consent of the conservation commission. Under Bill No. 160, A., such withdrawals by the county may be made only with the approval of the conservation commission.

Thus, the question arises whether existing agreements between counties and the state under the present law constitute contracts which the state is prohibited from changing under the impairment of contracts provision of the United States constitution. It is my opinion that this constitutional provision does not prevent the state from amending the forest crop law as it relates to county forest lands and thus altering the provisions of the agreement between the state and the counties.

We have recently considered a very similar question in 50 OAG 157 (1961). There we pointed out that the law is well established that subordinate agencies of the state, such as counties and municipalities, have no rights or privileges protected by the federal constitution as against the state itself, and that they do not have protection under the due process and equal protection clauses of the state constitution, except in extremely limited circumstances. *State ex rel. Martin v. Juneau*, (1941) 238 Wis. 564, 300 N.W. 187; *School District v. Callahan*, (1941) 237 Wis. 560, 297 N.W. 407; *Columbia County v. Wis. Retirement Fund*, (1962) 17 Wis. 2d 310, 116 N.W. 2d 142. We there quoted from the *Callahan* case as follows:

“ ‘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, condi-

tionally 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 opinion in 50 OAG 157, we concluded that any right or privilege of the county to withdraw county forest lands from registration under the forest crop law is not a property right which the legislature cannot alter.

The principle that counties and municipalities have no rights or privileges protected by the United States constitution as against the state itself has been applied in cases involving the impairment of contract provision of the constitution. 16 C.J.S., Const. Law, §300.

In *Alameda County v. Janssen*, (1940) 16 Cal. 2d 276, 106 P. 2d 11, 130 A.L.R. 1141, a statute authorized counties to require recipients of welfare aid to agree that they would not transfer or encumber their real property. The statute also gave the county a claim against the estate of such persons and all the rights of an unsecured creditor against such estate. A subsequent statute repealed these provisions authorizing such agreements. The statute declared that such agreements were "hereby cancelled and declared to be hereafter of no force and effect", and the county boards were directed by the statute to cancel such agreements. It was argued that this impairs the obligations of contracts, but at page 15 of 106 P. 2d the court held:

“\* \* \* Such cancellations in no way violate the provisions of the United States and California Constitutions prohibiting the passage of any law impairing the obligation of contracts. These provisions do not prevent the legislature from changing the contractual rights of its political subdivisions acting in a governmental capacity. \* \* \*”

In *Trenton v. New Jersey*, (1923) 262 U.S. 182, 43 Sup. Ct. 534, 67 L. Ed. 937, a city had acquired by statute a right to take unlimited amounts of water from a river for municipal purposes. A subsequent statute required the city to pay the state for water so taken in excess of certain amounts. The city argued that this latter statute impaired its constitutionally protected contract right to take water without any payment. The court held that the state is not prohibited by the impairment of contracts provision of the United States constitution from changing the city's rights in this respect, and that no law conferring governmental powers upon municipalities or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the United States constitution.

It is therefore my opinion that the changes made by Bill No. 160, A., in the rights and privileges of counties relative to the management, control, and withdrawal from registration of county forest lands under the present forest crop law, do not constitute an impairment of contract in violation of the United States constitution.

AH

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*Accident Reports—Confidential Reports*—Discussion of the confidentiality of various types of reports and records filed in public offices.

June 26, 1963

RICHARD OLK

*District Attorney, Langlade County*

Your predecessor in office asked my opinion on this question: What vehicle accidents reports are confidential under sec. 346.73, Stats.?

Sub. (1), sec. 346.73 reads:

“All required written accident reports, including those required by county and municipal authorities and reports supplemental thereto, are without prejudice to the individual so reporting. Reports made to the motor vehicle department are for the confidential use of the department and for the confidential use of the state highway commission for highway engineering purposes. Written reports made to county and municipal authorities are for the confidential use of such authorities. Notwithstanding the confidential nature of written accident reports, the motor vehicle department or county or municipal authority may disclose the identity of a person involved in an accident when such identity is not otherwise known or when such person denies his presence at such accident.”

Sec. 346.70 reads in part as follows:

“(1) IMMEDIATE NOTICE OF ACCIDENT. The operator of a vehicle involved in an accident resulting in injury to or death of any person or total property damage to an apparent extent of \$100 or more shall immediately by the quickest means of communication give notice of such accident to the police department, the sheriff’s department, or the traffic department of the county or municipality in which the accident occurred or to a state traffic patrol officer \* \* \*

“(2) WRITTEN REPORT OF ACCIDENT. Within 10 days after an accident of the type described in sub. (1), the operator of a vehicle involved in such accident shall forward a written report of the accident to the motor vehicle department. The department may accept or require a report of the accident to be filed by an occupant or the owner in lieu of a report from the operator. Every accident report required to be made in writing shall be made on the appropriate form approved by the department and shall contain all of the information required therein unless not available, including information sufficient to enable the department to determine whether the requirements for deposit of security under s. 344.14 are inapplicable by reason of the existence of insurance or other exceptions specified in ch. 44.

“(3) WHO TO REPORT WHEN OPERATOR UNABLE. Whenever the operator of a vehicle is physically incapable of giving the notice and making the report required by subs. (1) and (2), and there was another occupant in the vehicle at the time of the accident capable of giving the notice and making the report, such occupant shall give or cause such notice to be given and shall make the report. If there is no other occupant of the vehicle or if such occupant is physically or mentally incapable of giving the notice and making the report, the owner of the vehicle involved in the accident shall, as soon as he learns of the accident, give the notice and make the report required by subs. (1) and (2).

“(4) POLICE AND TRAFFIC AGENCIES TO REPORT.  
“(a) Every law enforcement agency investigating or receiving a report of a traffic accident resulting in injury to or death of a person or total property damage to an apparent extent of \$100 or more shall forward a report of such accident to the motor vehicle department within 10 days after the date of such accident.

“(b) Such reports shall be made on a uniform traffic accident report form prescribed by the committee created by par. (c) and supplied by the commissioner in sufficient quantities to meet the requirements of the department and the law enforcement agency.

“\* \* \*

“(f) All such reports shall be confidential as provided in sec. 346.73 (1) and (2)”.

It is my opinion that these vehicle accident reports are given confidential status by sec. 346.73 (1).

(a) The operator's written report of accident to the motor vehicle department, required under sub. (2), sec. 346.70.

(b) The occupant's written report to such department, in lieu of the above-described operator's report. Such occupant's report is required under the circumstances described in sub. (3), sec. 346.70.

(c) The owner's written report to such department in lieu of the above-described operator's report or occupant's report. Such owner's report is required under the circumstances described in sub. (3), sec. 346.70.

(d) The uniform traffic accident report submitted to such department by a Wisconsin law enforcement agency investigating or receiving a report of a traffic accident resulting in injury to or death of a person or total property damage to an apparent extent of \$100 or more. This report is required by sub. (4) (a), sec. 346.70, with sub. (4) (f) thereof providing that it shall be confidential “as provided in sec. 346.73 (1) and (2).”

(e) All written accident reports required by county and municipal authorities from individuals by virtue of their operation, occupancy, or ownership of the vehicle involved in an accident, whether or not such reports pertain to vehicle accidents resulting in injury to or death of any person or total property damage to the extent of \$100 or more.

(f) All written reports supplemental to the required written reports described in the preceding sub pars. (a) through (e).

(g) All reports submitted to city, village, town or county authorities by operators of motor vehicles involved in accidents pursuant to ordinances adopted under sec. 349.19.

It appears that many police departments and sheriffs' departments use what might, for want of a better description, be termed "intra-departmental vehicle accident reports." These are vehicle accident reports prepared by members of such departments investigating an accident, with the reports (hereinafter called "intra-departmental reports") being filed in such departments. Are such reports, made on forms prescribed by the police chief or sheriff, entitled to confidentiality under sec. 346.73 (1), or under any other statute? In my opinion, they are not, but are subject to public inspection as official records under sec. 18.01, except in certain situations hereinafter discussed.

My opinion on such question is based on these facts: (1) The intra-departmental reports are records "in the lawful possession or control" of sheriffs and police chiefs as such, and so come within the scope of sec. 18.01 (1); and (2) as records within such scope, they are subject to public inspection under sec. 18.01 (2), unless exempted therefrom by special statute, or by the operation of recognized limitations under the common law upon the right of the public to examine records, papers, etc. in the hands of public officers as such officers. In Wisconsin, no special statute exists to afford confidentiality to intra-departmental reports, but under certain circumstances they achieve confidential status through operation of the above-mentioned limitations under the common law on the right of the public to have access to public records.

#### A.

Subsecs. (1) and (2), sec. 18.01 read:

"(1) Each and every officer of the state, or of any county, town, city, village, school district or other municipality or district, is the legal custodian of and shall safely keep and preserve all property and things received from his predecessor or other persons and required by law to be filed, deposited, or kept in his office, or *which are in the lawful possession or control of himself or his deputies*, or to the possession or control of which he or they may be lawfully entitled, *as such officers*.

“(2) *Except as expressly provided otherwise, any person may with proper care, during office hours and subject to such orders or regulations as the custodian thereof may prescribe, examine or copy any of the property or things mentioned in sub-section (1).*”

The intra-departmental reports in question are not “required by law to be filed, deposited, or kept” in the office of sheriff or police chief wherein they are filed, but they are in the “lawful possession or control” of such police chief and sheriff as such officers (or in the lawful possession or control of their respective deputies in their official capacities) once made and filed. They thus come within the broad purview of those records subject to inspection by “any person” under sec. 18.01, (2), unless some statute expressly provides otherwise or common-law limitations above-mentioned operate to deny such inspection. Plainly, such intra-departmental reports are not “purely fugitive papers having no relation to the function of the office” of sheriff or police chief. See *International Union v. Gooding*, (1947) 251 Wis. 362, 370, 371. They are filed in the offices of such officials to inform them of the details of accidents within their jurisdictions, and to provide them with a record of such details prepared by departmental personnel investigating such accidents. Manifestly, such intra-departmental reports reach the sheriff or police chief in his official capacity, i.e., as such officer, and they therefore fall within the scope of those records described in sec. 18.01 (1), subject to public inspection under sec. 18.01 (2).

## B.

Such intra-departmental reports are subject to such public inspection regardless of the fact that they are vehicle accident reports in the hands of law enforcement officials. Such reports, merely by reason of their nature, occupy no privileged sanctuary, denied to other official or public records, in which they enjoy immunity from public inspection. Unless a special statute provides such immunity (as does sec. 346.73 (1), for the written accident reports cov-

ered by it, and hereinabove described), or unless the above-mentioned common-law limitations operate to deny the public access to it, the intra-departmental report is subject to inspection under sec. 18.01 (2). If sec. 18.01 did not exist, such report would be subject to the common-law right of public inspection of public records, absent any special statute making such report immune to the exercise of that right. "Generally speaking, any document which may properly be considered a public records is subject to [public] inspection \* \* \*." 76 C.J.S. Records, sec. 36, p. 137. In an annotation entitled "Right to examine and copy automobile records", 108 A.L.R. 1395, 1396, it is said: "The few cases which a comprehensive search has revealed as within the scope of this annotation indicate that automobile records are generally considered 'public records' which any citizen has the right to examine and copy, irrespective of his purpose in so doing, provided that he complies with the reasonable regulations of the custodian of the records, and examines and copies them in such a way as not to interfere with the work of the custodian or the equal rights of others to examine and copy such records."

The fact that the legislature found it advisable to enact sec. 346.73 (1) doubtless reflects the knowledge of that body that the reports thereby given confidential status under all circumstances had to derive that status from a special statute, else it would not exist in the face of the provisions of sec. 18.01 (2). (The above-mentioned common-law limitations operate to give intra-departmental reports confidential status only under *certain* circumstances.) The same knowledge is evident in the 1961 enactment of sec. 346.70 (4), (L. 1961, ch. 201, sec. 2) where the legislature was careful to provide that the uniform traffic accident reports thereby provided for should "be confidential as provided in s. 346.73 (1) and (2)."

Reported cases dealing with the right of the public to inspect vehicle accident reports in the hands of state or local law enforcement agencies or officials clearly show no disposition on the part of the courts to view vehicle accident reports as enjoying a peculiar immunity to public inspection,

merely by reason of their nature. With exceptions hereinafter noted, they have no such immunity unless it is provided by statute. In *People v. Harnett*, (1927) 226 N.Y.S. 338, it was held that where a report concerning an automobile accident was placed on file with the New York commissioner of motor vehicles, which report could provide the basis of proceedings to revoke the operator's license or certificate of registration, such report not only directly concerned the state and the parties making it, but might also concern a third person not a party to it, and such third person so concerned had sufficient interest to be entitled to an inspection of such accident report. In *Blandford v. McLellan*, (1940) 16 N.Y.S. 2d 919, it was held that a party to a motor vehicle accident was entitled to inspection of a report thereof in the possession and control of the police commissioner of the city of Buffalo. Such report was apparently of the same kind as the intra-departmental report here under consideration. In *Birenbaum v. Carey*, (1940) 22 N.Y.S. 2d 722, it was held that records, documents, and papers in the custody of a municipal department of sanitation, relating to an accident in which a truck of the municipality was involved, were subject to inspection by one allegedly injured as a result of such accident. The *Birenbaum* case does not clearly show that such records, documents, and papers included an accident report, but does show that if such a report was present among those items, it would be subject to inspection. In the very recent case of *Erenberg v. Brill*, (1960) 197 N.Y.S. 2d 518, it was held that a vehicle accident report prepared and retained by the New York thruway authority was not subject to inspection by one involved in the accident covered thereby. Such holding, however, was not based on the fact that the report dealt with the vehicle accident, but was grounded on conclusions that it was neither a public record subject to public inspection as such, nor a "police accident report" subject to such inspection under a New York statute relating to such reports enacted in 1941. (The New York statute defining public records, Education Law, sec. 144, is, it should be noted, much narrower in its wording than sec. 18.01 (1), and under it the intra-departmental reports here in question would not be public

record.) It is clear from the *Erenberg* holding that had the vehicle accident report there in question been held to be a public record, it would also have been held to be subject to inspection. The *Erenberg* case, then, is not in conflict with the earlier New York cases above-cited, but implies a recent re-affirmance of the position common to all such cases; that a vehicle accident report in the hands of state or local authorities is subject to inspection by the public, or at least by members of the public involved in the accident covered by such report. Case law in conflict with this position has not been found, and I view that position, taken by the courts of a great state, as one providing substantial support for my conclusion that the intra-departmental reports in question are subject to public inspection.

In reaching such conclusion, I am well aware of an opinion issued by one of my predecessors and reported in 41 OAG 237-245 (1952). A part of its caption is pertinent to this opinion and reads:

“Notwithstanding secs. 18.01 \* \* \* the public enjoys no rights of inspection of \* \* \* automobile accident reports \* \* \* in the office of a sheriff or a city police department. \* \* \*”

The “automobile accident reports” referred to in such caption are of the kind herein referred to as “intra-departmental reports”, as is shown by the language describing them in the above-mentioned opinion, drawn from the letter requesting it:

“The sheriff further maintains a file of automobile accident reports which contain reports made to the sheriff on forms compiled for that purpose, showing the nature of the accident, parties involved, descriptive diagrams, and information as to whether or not laws of the road have apparently been violated, and information as to the condition of the drivers and vehicles at the time of the accident, names of persons arrested, persons injured or killed in the accident, and names of witnesses. These accident reports are made to the sheriff by the particular deputy sheriff or

deputy sheriffs investigating the accident, and are not made by the parties involved in the accident.”

There can be no doubt that the above-mentioned opinion concluded that intra-departmental reports are privileged against public inspection. It apparently did so on the basis that it was in the public interest to withhold such reports—and other specified items in the possession of police chiefs and sheriffs—from public inspection. Pointing out that in *International Union v. Gooding, supra*, the court expressed the view that sec. 18.01 (2) did not extend the common-law right of the public to examine records and papers in the hands of public officers, the opinion then stated:

“\* \* \* The court then recognized the existence of common-law limitations upon the right of the public to inspect public records in the following words:

‘We shall not go into the scope of the common-law right exhaustively or attempt to document our observations upon it. It is enough to say that there are numerous limitations under the common-law upon the right of the public to examine papers that are in the hands of an officer as such officer. *Documentary evidence in the hands of a district attorney, minutes of a grand jury, evidence in a divorce action ordered sealed by the court are typical.* The list could be expanded, but the foregoing is enough to illustrate that in certain situations a paper may in the public interest be withheld from public inspection. \* \* \*’ (Emphasis supplied).

“It is apparent from the discussion at the beginning of this opinion, and from the court’s illustrative reference to ‘documentary evidence in the hands of a district attorney,’ that the common-law right of inspection does not extend to the papers and documents referred to in your letter.”

The opinion then stated:

“\* \* \* You are therefore advised that the sheriff is within his rights in withholding from inspection by the press or other members of the public of the radio and telephone logs, criminal complaints and investigation reports *including automobile accident reports*, and any other papers, docu-

ments, memoranda, records, exhibits, and physical evidence relating to his activities in the enforcement of the criminal law, except the jail register." (Emphasis mine).

It is clear that in the above-mentioned opinions, intra-departmental reports were looked upon as *necessarily* being reports of *criminal* investigations entitled to confidential status in the public interest. Such opinion does not expressly state the nature of that interest, but implies it, namely, the interest of the public in having crimes thoroughly investigated and efficiently prosecuted without hindrance from public inspection of the intra-departmental reports covering such crimes. I do not disagree with the conclusion of my predecessor, *if in fact an intra-departmental report does cover a crime, the investigation or prosecution of which would be hobbled by giving the public access to such report.* However, all traffic accidents do not necessarily involve crimes, as, e.g., the case of a driver observing all traffic laws and ordinances, who is stricken with a heart attack and loses control of his car as a result. Moreover, while many intra-departmental reports do involve a crime, it is often a minor offense, constituting a violation of a municipal ordinance as well as a crime. Most such offenses are not prosecuted as crimes, but instead form the basis for civil forfeiture actions which are frequently concluded within a short time following the filing of the reports on the accidents leading to such actions. Plainly, where an intra-departmental report covers an accident involving no crime, or covers an accident involving conduct treated and closed, not as a crime, but merely as an ordinance violation, it follows that no consideration of public interest or welfare obtains to deny public access to such a report, since that access will not interfere with investigation and prosecution of a crime.

As shown above, the court in *International Union v. Gooding, supra*, recognized limitations, non-statutory in character, on the right of inspection of public records under sec. 18.01. Consequently it is my opinion that if an intra-departmental report *is turned over to the district attorney,*

*who views it as documentary evidence of a crime, and so holds it, it is entitled to confidential status. If there is a crime involved or connected with the accident covered by the intra-departmental report and if the disclosure of such report to the public would interfere with the investigation or prosecution of such crime—then and then only—is such report entitled to confidentiality while in lawful possession or control of a police chief, a sheriff, or the deputy of either, in his official capacity. Under such circumstances, the overriding consideration of public policy above-mentioned comes into play to give the intra-departmental report an arcane character and to limit the broad right of public inspection of official records spelled out in sec. 18.01 (1) and (2). That consideration denies the public access to such report on the assumption that its confidentiality produces greater benefit to the public—by materially aiding the investigation and prosecution of a crime—than its disclosure to the public would produce.*

No statute grants confidentiality, in whole or in part, to intra-departmental reports. At first blush, it might be thought that the third sentence of sub. (1), sec. 346.73, provides such confidentiality, but it does not. It reads:

“\* \* \* Written [accident] reports made to county and municipal authorities are for the confidential use of such authorities. \* \* \*”

Are the intra-departmental reports in question “Written reports made to county and municipal authorities” within the meaning of such third sentence of sec. 346.73 (1), so as to be entitled to the confidential use of such authorities, i.e., immunity to public inspection? In my judgment, they are not. The first sentence of sec. 346.73 (1) reads:

“All required written accident reports, including those required by county and municipal authorities and reports supplemental thereto, are without prejudice to the individual so reporting. \* \* \*”

Reading this sentence and the third sentence of such statute in conjunction, it is clear that the “written reports

made to county and municipal authorities” of the third sentence are a portion of what is referred to in the first sentence as “All required written accident reports, including those required by county and municipal authorities, and reports supplemental thereto.” Does such language encompass an intra-departmental report which an investigating police officer or deputy sheriff is required to make under department practice? It might, were it not for the fact that such first sentence of sec. 346.73 (1) provides that, “All required written accident reports” are “without prejudice to the individual so reporting.” This provision is clearly intended to protect those individuals (operator, other occupant, or owner of a vehicle involved in an accident) making a written report of accident under subs. (2) and (3), sec. 346.70, or the same individuals making a written accident report required by county or municipal authorities. Such individuals could be prejudiced by those reports, hence the protective provision in sec. 346.73 (1). A police officer or deputy sheriff, however, making the intradepartmental report in question, could suffer no prejudice from it, so that it is clear that the phrase, “All required written accident reports” in the first sentence of sec. 346.73 (1), does not encompass the intra-departmental report; and it follows that such report is not within the scope of, “Written reports made to county and municipal authorities” referred to in the third sentence of such statute, and therefore acquires no status of confidentiality thereunder.

That the required written accident reports referred to in sec. 346.73 (1) are only those required of individuals who might be prejudiced thereby is further shown by ch. 201, Laws 1961, creating sec. 346.70 (4), with its requirement for the submission of uniform traffic accident reports to the motor vehicle department by local law enforcement agencies. The legislature desired to make such reports confidential, and therefore enacted sec. 346.70 (4) (f) providing:

“All such reports shall be confidential as provided in sec. 346.73 (1) and (2).”

Such provision need not have been enacted had the legislature believed that the required uniform accident report

would come within the compass of sec. 346.73 (1), as one of the "required written accident reports" referred to therein. The legislature obviously believed otherwise, and thought it necessary to confer confidentiality on the uniform accident report in the manner shown above.

D.

To round out this opinion, several additional comments seem advisable.

(1)

I am informed that police departments and sheriff departments, in addition to having the intra-departmental report completed on a prescribed form, sometimes have the investigating officer supplement such report with a more detailed report in narrative form, together with statements of witnesses, if any have been taken. Such supplemental report of the investigating officer and witnesses' statements, filed in a police department or sheriff's department, must be viewed as part of the intra-departmental report, subject to the right of inspection by the public provided by sec. 18.01, with such right, however, in turn being subject to the limitations above-discussed on the public right to inspect the intra-departmental reports here in question.

(2)

Is the right of inspection of intra-departmental reports under sec. 18.01, a right exercisable by all members of the public, including those motivated merely by curiosity? This precise question has not been answered by our supreme court, but it has intimated, in language quoted below, that its answer, if and when given, will be in the affirmative. *International Union v. Gooding, supra*. It is true that the right of inspection of public records at common-law was confined to a person who "had an interest therein, such as to enable him to maintain or defend an action for which the documents or records sought could furnish evidence or necessary information." *North v. Foley*, (1933) 265 N.Y.S.

780, 782; *State v. McGrath*, (1937-Mont.) 67 P. 2d 838, 841. Our legislature, however, in spelling out the right of inspection of public records in sec. 18.01 (2), gave such right to "any person"; and in the *International Union* case the court said:

"\* \* \* there is some authority to the effect that a member of the public is required to have some interest other than curiosity in order to investigate public records \* \* \* There is \* \* \* some question whether if this rule ever obtained in this state it was not changed by the type of statutes which were supplanted by sub. (2) [sec. 18.01]. In this connection see *Hanson v. Eichstaedt*, 69 Wis. 538, 35 N.W. 30."

It is my conclusion that any person, including one merely motivated by curiosity, has, under sub. (2), sec. 18.01, the right of inspection of official property and records described in sub. (2), sec. 18.01, Stats. It seems unlikely, however, that persons motivated by mere curiosity will often seek to exercise such right with reference to intra-departmental reports or other public records. The persons seeking access to intra-departmental reports, and surely having the right thereto under sub. (2), sec. 18.01, subject to the above-discussed limitations, will customarily be those having a natural interest therein, or their representatives: owners, operators, or other occupants of vehicles involved in accidents covered by these reports, and their attorneys; representatives of insurance companies insuring such vehicles, e.g., attorneys and adjusters; and representatives of the press.

(3)

The preparation of this opinion has suggested to me that many law enforcement officials and other persons concerned with vehicle accidents in this state, for a variety of reasons, might find interesting and thought-provoking the following New York statute, enacted in 1941, after several New York cases, herein-above cited, had ruled auto accidents reports subject to public inspection. Public Officers Law, sec. 66-a, (New York Laws of 1941, c. 839, sec. 2) reads:

"Notwithstanding any inconsistent provisions of law, general, special or local, or any limitation contained in the provision of any city charter, all reports and records of any accident, kept or maintained by the state police or by the police department or force of any county, city, town, village or other district of the state, shall be open to the inspection of any person having an interest therein, or of such person's attorney or agent, even though the state or a municipal corporation or other subdivision thereof may have been involved in the accident; except that the authorities having custody of such reports or records may prescribe reasonable rules and regulations in regard to the time and manner of such inspection, and may withhold from inspection any reports or records the disclosure of which would interfere with the investigation or prosecution by such authorities of a crime involved in or connected with the accident."

## (4)

Perhaps a word of caution at the close of this opinion is in order. This opinion is concerned *only with the confidentiality of vehicle accident reports used in Wisconsin, or their lack of such status*. It makes no attempt to pass on the confidentiality — or lack thereof — of other reports, records, properties, papers or things reaching the hands of public officials in this state in their official capacities. Any such attempt in this opinion would be both presumptuous and impractical. The precise scope of this opinion, then, should be borne in mind, so that no effort is made to employ it as authority on questions of confidentiality beyond that scope, *each of which must be decided on its own merits*.

JHM

*Uniformity—Constitutionality—Taxes*—Suggested deferment of payment of real estate taxes included in Bill No. 231, S., and substitute amendment No. 1, S., thereto, would violate the rule of uniformity provided by Art. VIII, sec. 1, Wis. Const.

July 10, 1963

THE HONORABLE, THE SENATE:

By Resolution No. 33, S., 1963, you have requested my opinion as to the validity of a statute enacted from Bill No. 231, S., Substitute Amendment No. 1, S., thereto, and two amendments proposed to the substitute amendment.

Section 74.03 (1) now provides that all personal property taxes shall be paid on or before the last day of February, and that all real estate taxes may be paid in two semiannual instalments. Bill No. 231, S., would amend sec. 74.03 (1) to provide *that such payments may be made*:

“\* \* \* in the case of property owners 65 years of age or over and living on fixed retirement incomes, at the time of the final probate or administration of their estates or at the time the title of property upon which taxes have been levied and deferred pursuant to this subsection is transferred to another if prior to probate or administration, as provided in this section.”

Bill No. 231, S., would also create sec. 74.03 (2) (b), to provide that notice of intent to defer the payment of taxes levied must be given to the treasurer of a taxing body no later than 30 days prior to the date when the first instalment of taxes for said year would be due.

Substitute Amendment No. 1, S., to Bill No. 231, S., is also concerned with deferment of taxes on dwellings owned and occupied by certain aged persons. Its provisions would establish qualifications as to a person or persons eligible to claim such deferment, would provide for interest on deferred taxes at 4/10 of one per cent per month and for application for deferment prior to July 1 of each year with a require-

ment that the governing body shall either grant or deny the application by January 10th following.

The substitute amendment provides for deferment:

“Sec. 74.034 (1) \* \* \*

“Where a person 65 years of age or over or husband and wife, one or both of whom are 65 years of age or over, own and occupy as their dwelling a tract or parcel of land, and which persons are living on fixed retirement incomes consisting principally of social security, pensions, interest or annuities, \* \* \* until the tract or parcel of land is sold or transferred by such owner or until the estate of such owner or of the surviving spouse, in case of husband and wife, is probated.”

Under such a provision deferment would be until an indefinite time in the future even where the owner or owners, if husband and wife, were over the age of 65 years. If we assume that a husband 65 years of age had a young wife of 20 or 30, deferment might be for a substantial number of years.

No further detailing of the provisions of these bills is deemed necessary inasmuch as it is my opinion that the basic provisions thereof are invalid.

The proposed legislation is evidently intended to give a certain amount of present tax relief to elderly and needy persons. However, it may be pointed out that an elderly person of substantial wealth might qualify for the deferment under the terms of the substitute amendment, and the value of the tract of land used as a “dwelling” might also be substantial in many cases.

The provisions of the bills would be difficult to administer. It would be almost impossible for local units of government to fairly estimate tax revenues if the legislation were passed.

The variance granted is certainly one related to the collection of real estate taxes. There is also a variance in the maturity of taxes; the date on which real estate taxes must be paid without penalty. It can also be argued that there may be variance as to the rate of taxation of like parcels of

property. The possibility of inflation over a period of years must be considered. Even though similar parcels were assessed on a common basis and a common rate of tax was levied on each parcel, there is the possibility that one taxpayer would be paying his 1962 taxes with present day dollars, while a taxpayer qualifying for deferment might pay his 1962 real estate taxes as some unknown future date with inflated dollars.

In order that units of government may operate, it is necessary that tax revenues be estimated to a reasonable degree of certainty. Once the property subject to taxation is determined, proper assessment made, and tax rate applied, uniform maturities and uniform collection procedures are necessary to insure that the units of government will have the necessary revenues to carry on governmental operations. In Wisconsin, taxation of real estate is on an annual basis.

"The fundamental rule is that all property, not exempted by law, is subject to taxation, and that all taxes must be paid in cash. \* \* \*" *Tigerton Lumber Co. v. Tigerton*, (1929) 198 Wis. 377, 379, 224 N.W. 124.

Art. IV, sec. 31, Wis. Const., provides in part:

**"Special and private laws prohibited.** SECTION 31. The legislature is prohibited from enacting any special or private laws in the following cases:

"\* \* \*

"6th. For assessment or collection of taxes or for extending the time for the collection thereof.

"\* \* \*"

Art. IV, sec. 32, Wis. Const., requires that general laws for assessment or collection of taxes, or for extension of time for the collection, shall be uniform in their operation throughout the state.

Art. VIII, sec. 1, Wis. Const., is the provision of main concern with respect to the conclusion reached in this opinion and provides in material part:

“The rule of taxation shall be uniform but the legislature may empower cities, villages or towns to collect and return taxes on real estate located therein by optional methods. Taxes shall be levied upon such property with such classifications as to forests and minerals including or separate or severed from the land, as the legislature shall prescribe. Taxation of merchants’ stock-in-trade, \* \* \* need not be uniform with the taxation of real property and other personal property, but the taxation of all such merchants’ stock-in-trade, \* \* \* shall be uniform, \* \* \*.”

Once property is selected to be taxed, it must be taxed entirely and the same rate applied to it as to other property in the district. The valuation must be uniform and the rate must be uniform and there cannot be any medium ground between absolute exemption and uniform taxation. *Knowlton v. Supervisors of Rock County*, (1859) 9 Wis. \*410.

The validity of the exception must be tested not only by the state constitutional requirements that “the rule of taxation shall be uniform”, but also by the “equal protection” clause of the 14th Amendment of the United States Constitution.

Uniformity of taxation has been held to refer to uniformity of dates of maturity and the time when interest, penalties, and costs may be imposed on a taxpayer. 84 C.J.S. 107-108:

“While there is authority holding that the rule of equality and uniformity may be applicable to the collection of taxes, it is generally held that the constitutional requirement of equality and uniformity is not applicable to statutes relating to the collection of taxes, and that at least in the absence of a constitutional provision requiring equality and uniformity, a statute cannot be held unconstitutional because it provides different methods for the collection of taxes. \* \* \*”

In *Puget Sound Power & Light Co. v. County of King*, (1924) 264 U.S. 22, 68 L. Ed. 541, 44 Sup. Ct. 261, it was held that the Fourteenth Amendment of the United States Constitution does not impose on state taxation a requirement

of equality so rigid that the legislature may not adjust its measures in view of the practical, as well as theoretical, incidence of taxation. In the *Puget Sound Case* the United States supreme court expressly referred to the Wisconsin case of *State ex rel. Owen v. Donald*, and at pages 27-29 stated:

“\* \* \* [that that case] and like cases, involved the application of somewhat stringent provisions of state constitutions as to equality of taxation on all kinds of property, which left but little room for classification. Such restrictions have much embarrassed state legislatures, because actual equality of taxation is unattainable. The theoretical operation of a tax is often very different from its practical incidence, due to the weakness of human nature and anxiety to escape tax burdens. This justifies the legislature, where the Constitution does not forbid, in adopting variant provisions as to the rate, the assessment, and the collection for different kinds of property. The reports of this court are full of cases which demonstrate that the 14th Amendment was not intended and is not to be construed, as having any such object as these stiff and unyielding requirements of equality in state constitutions. No better statement of the unvarying attitude of this court on this subject can be found than in the often quoted language of Mr. Justice Bradley in speaking for the court in *Bell's Gap R. Co. v. Pennsylvania* 134 U. S. 232, 237, 33 L. Ed. 892, 895, 10 Sup. Ct. Rep. 533:

“The provision in the 14th Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such

regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or of the people of the state in framing their Constitution. *But clear and hostile discrimination against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition.* It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject that would include all cases. They must be decided as they arise. We think that we are safe in saying, that the 14th Amendment was not intended to compel the state to adopt an iron rule of equal taxation.'” (Emphasis Added)

The provisions in the bill for deferment to an indefinite time by reason of age, nature of retirement income, and application and approval of exception might be so discriminatory as to be in violation of the equality provision of the federal constitution.

I am of the opinion that they are in violation of Art. VIII, sec. 1, Wis. Const.

In *State ex. rel. Owen v. Donald*, (1915) 161 Wis. 188, 195, 196, 153 N.W. 238, it is stated:

“\* \* \* ‘The rule of taxation’ does not, I think, extend to all steps in enforcing collection of the tax. But it does extend to those important steps which are essential parts of the tax proceedings. Collection by demand or collection by enforcement process are such, and it would be intolerable, for illustration, that a certain favored class should have six months in which to pay their taxes while others must pay in six days. \* \* \*”

Also see opinions at 22 OAG 35, 31 OAG 1, and my opinion to you dated April 25, 1963 regarding Bill No. 137, S.

In *Columbia County v. Wisconsin Retirement Fund*, (1962) 17 Wis. 2d 310, 325, 116 N.W. 2d 142, it is stated:

“\* \* \* the procedure under the pension system deals with the distribution of state aids and taxes and not with the

assessment or collection of direct taxes on real estate only to which the uniformity requirement applies. \* \* \*” (Emphasis added)

You are advised that the proposals contained in Bill No. 231, S., and in Substitute Amendment No. 1, S., thereto, would violate the requirement of uniformity of taxation set forth in Art. VIII, sec. 1, Wis. Const.

RJV

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*Discrimination—Trailer Parks*—Sec. 942.04 does not apply to operator of a trailer park who rents space upon which to park house trailers.

July 11, 1963

WILLIAM D. BYRNE

*District Attorney, Dane County.*

You have requested my opinion whether the criminal provisions of sec. 942.04, Stats., apply to a trailer park owner who rents spaces upon which one can park a trailer, or mobile home. You state that there exists a landlord-tenant relationship between the owner of the trailer park and the occupant of a space therein.

Subsec. (1) of that section provides a fine or imprisonment, or both, for any person who:

“(a) Denies to another or charges another a higher price than the regular rate for the full and equal enjoyment of any public place of accomodation or amusement because of his race, color, creed, national origin or ancestry; or”

Subsec. (2) provides:

“(2) A public place of accommodation or amusement includes inns, restaurants, taverns, barber shops and public conveyances.”

The answer to your question is “no”.

We are concerned with a criminal statute which, according to establish principles of statutory construction, must be strictly construed. In *State ex rel. Shinnors v. Grossman*, (1933) 213 Wis. 135 at 140, 250 N.W. 832, it was said:

“\* \* \* This is a criminal statute, and while criminal statutes, like any other, should be liberally construed to effect the obvious legislative purpose, they should be strictly construed to exclude from their penalties those acts which are not clearly within the legislative purpose \* \* \*”

In *State v. Evjue*, (1948) 253 Wis. 146 at 157, 33 N.W. 2d 305, in discussing a criminal statute, the decision stated:

“\* \* \* In a criminal statute there must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act or in regard to the applicable tests to ascertain guilt \* \* \*”

Certainly the language of sec. 942.04 (2) does not expressly include a trailer park. In fact, it expressly includes only inns, restaurants, taverns, barber shops and public conveyances. The present language of the statute may not be readily understood, however. That language stems from a revision enacted by ch. 696, Laws 1955, and is, under sec. 990.001 (7) “to be understood in the same sense as the original unless the change in language indicates a different meaning so clearly as to preclude judicial construction.”

Wisconsin's original denial of rights statute was enacted by ch. 223, Laws 1895, and applied to “the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, restaurants, saloons, barber shops, eating houses, public conveyances on land and water, theaters, and all other places of public accommodation or amusement \* \* \*”

The statute remained substantially unchanged, so far as here material, from 1895 to 1955, except that the word, “theaters,” was deleted when the provision became sec. 4398c, Stats. 1898.

The language now found in sec. 942.04 (1) (a) and (2) first appeared in Bill No. 100, A., 1953, in a proposed sec. 342.04 of the statutes. The notes of the revision committee which drafted that bill show merely that the proposed new sec. 342.04 was a restatement of the then sec. 340.75. Study of the files of the revision committee sheds no light on the intent of the draftsmen or the legislature in adopting the particular language used in the present law to define a public place of accommodation or amusement.

The prohibition of the older statute applied expressly to the several enumerated types of places and to "any other place of public accommodation or amusement." In the revised form of the statute the prohibition applies to "any public place of accommodation or amusement," and that term "includes inns, restaurants, taverns, barber shops and public conveyances."

In my opinion the present law is not restricted to inns, restaurants, taverns, barber shops and public conveyances but continues to apply to those places which were subject to the earlier version. That opinion is based upon sec. 990.001 (7)—previously quoted—and the fact that the change in the wording of the statute does not indicate a different meaning so clearly as to preclude judicial construction.

The foregoing serves merely to restore the *status quo ante* and to allow us to examine your question in light of the statute prior to 1955.

The only pertinent reported decision in Wisconsin is *Jones v. Broadway Roller Rink Co.*, (1908) 136 Wis. 595, 118 N.W. 170. The court there held that a privately owned roller skating rink which was open to the public for a fee was a place of public accommodation or amusement within the meaning of the statute. It should be noted that the statute there involved did not expressly apply to any particular type of amusement or entertainment establishment, except saloons, since the word, "theaters," had been deleted in 1898. At 136 Wis. 597 th decision states:

place of amusement. This, however, probably would not  
" \* \* \* A public roller skating rink is undoubtedly a public

suffice to bring it within the statute if it were entirely different in character from the places of accommodation or amusement specifically named therein, for by reason of the context the rule *noscitur a sociis* applies, and the other places of accommodation and amusement intended by the statute are only such as bear some resemblance to those specifically named \* \* \*

On the following page the decision continues:

“\* \* \* We find ourselves unable, however, to conceive any class of places of public accommodation or amusement which would not include a roller skating rink to which the public were generally invited upon no condition but the payment of a fixed charge; public in as broad a sense as is the common carrier or the innkeeper, the exclusion from which of an individual or a class must infer discrimination and denial of privileges which all other persons enjoy by virtue merely of their membership in the public or general community. Public accommodation or amusement is the test prescribed by our statute. The amusement offered by the usual skating rink is to the public as such and generally. It differs radically from the tender of accommodation offered by the ordinary merchant or professional man who, while he impliedly, by opening the door of his shop or office, invites every one to enter, does so only for the purpose of selling to each individually either service or merchandise \* \* \*

Although the decision states that the court was applying the rule *noscitur a sociis*, the last few sentences above quoted make it appear that the real basis for the decision is the difference between an amusement place such as a roller skating rink, on the one hand, and, on the other hand, the more personal relationship between a merchant and his customer or a professional man and his client or patient.

In the case of the trailer park, the owner of the park rents or leases space to an individual who may then park his own trailer upon the leased space. The relationship between the two parties to the transaction is closely akin to that of an apartment landlord and his tenant.

The opinion in the *Jones* case makes it clear that the retail merchant is not subject to the statute, although his relationship to his customer may be essentially the same as that of the saloon keeper to his customer. It is because of this similarity that it is difficult to base the decision in the *Jones* case upon the rule *noscitur a sociis*. Perhaps the true rationale of the case is that the court was looking primarily at the words, "any other place of public accommodation or amusement," without regard to the enumerated types of places expressly made subject to the statute. Interpreted in this way the decision still provides no clear guide as to the proper application of the phrase "place of public accommodation," to a myriad of establishments. Cases from other jurisdictions are similar in lacking any indication as to how the phrase should be construed as regards a trailer park.

In *Cecil v. Green*, (1896) 161 Ill. 265, 43 N.E. 1105 the court held that a statute almost identical to our denial of rights statute did not apply to a soda fountain in a drug-store. The court applied the rule *ejusdem generis*, saying that other places of accommodation included only those of the same general character as inns, restaurants, eating houses, barber shops, public conveyances and theaters. The court reasoned that restaurants, eating houses and barber shops are of a character that are resorted to necessarily by all classes of persons, from time to time, and that public conveyances, inns and theaters have long been subjected to police regulations. The decision states that a soda fountain is no more a place of accommodation or amusement than a dry goods store.

In *Alsberg v. Lucerne Hotel Co.*, (1905) 46 Misc. 617, 92 N.Y. Supp. 851, the court held that a similar denial of rights statute did not apply to an apartment hotel, where apartments were rented upon annual leases. The apartment hotel, under the decision, was not an inn or other place of public accommodation.

Whether one relies upon such rules for statutory construction as *noscitur a sociis* or *ejusdem generis* or merely seeks to give to the phrase, "place of public accommodation",

its commonly understood meaning, in my opinion the language would not apply to a trailer park such as you describe.

The individual who merely rents spaces upon which trailer owners may park their own trailers is not providing accommodations in the usual sense of the word. He is merely providing the land upon which the individual may park his trailer and is not providing the living accommodations, as does the innkeeper. Also, the trailer park does not have the same transient character as does the hotel or inn.

As applied to a place to live, the words, "public accommodations", ordinarily mean a room and a bed for a stay of short duration. It would require a liberal construction of public accommodations to make the words applicable to the rental of space upon which to park one's own trailer, and a criminal statute is not to be construed liberally to include acts not clearly within the legislative purpose.

EWV

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*Architects—Professional Engineer—Certificates*—An architect or professional engineer who has held a registration subsequent to 1931, which has expired, may have it renewed by paying required fee and penalty and need not qualify as new applicant.

July 12, 1963

WISCONSIN REGISTRATION BOARD OF ARCHITECTS AND  
PROFESSIONAL ENGINEERS

You have requested my opinion whether an architect or professional engineer, who held a registration subsequent to 1931, and whose registration has expired for several years, may renew his registration by paying the required fee and penalty, or whether such individual must be regarded as a new applicant for registration as an architect or professional engineer.

Sec. 101.31 (12) (j) provides:

“(j) Certificates of registration shall expire on the last day of the month of July of the second year following their issuance or renewal and shall become invalid on that date unless renewed. It is the duty of the secretary of the board to notify every person registered under this section of the date of the expiration of his certificate and the amount of the fee that shall be required for its renewal for 2 years; such notice shall be mailed at least one month in advance of the date of expiration of said certificate. Renewal may be effected at any time during the month of July by the payment of a fee of \$20. *The failure on the part of any registrant to renew his certificate every second year in the month of July as required above, shall not deprive such person of the right of renewal, but the fee to be paid for the renewal of a certificate after the month of July shall be increased 5 per cent for each month or fraction of a month that payment of renewal is delayed but the maximum fee for delayed renewal shall not exceed \$30.*”

We have reviewed the prior opinions of this office in 21 OAG 788, and 25 OAG 346, and find no conflict between the two. The statement in 25 OAG 346 to the effect that an architect registered prior to 1931, at the time this section was substantially amended, would have to be regarded as a new applicant if he failed to renew his registration on or before the 31st day of the second year following passage of the act, was based on the express language of the last sentence of the section as it appeared in sec. 101.31 (9) (g), Stats., 1931.

You are concerned with individuals who have been registered subsequent to 1931 and the interpretation as stated in 29 OAG 456, controls:

“In the light of the foregoing, it is clear that any architect or professional engineer who has once become registered under the law as enacted in 1931, either by renewal on or before July 31, 1933, of a registration existing prior to the passage of the 1931 law, or by having made application and having been registered subsequent to the passage of the

1931 law, has a right at any time thereafter upon the lapse of such registration to have such registration renewed by the payment of the renewal fee and penalty provided without making a new application.”

You also request to be advised as to the expiration dates of renewal registrations in the two hypothetical cases which follows:

1. A was registered until July 31, 1956. On April 2, 1963, he made application for renewal and paid the \$30 renewal fee.

2. B was registered until July 31, 1957. On April 2, 1963, he made application for renewal and paid the \$30 renewal fee.

As used in sec. 101.31 (12) (j) the word “year” means registration year from August 1 to July 31. The intent of the legislature is to establish a two year period as the life of a certificate of registration *if timely application is made*. See 21 OAG 788. The answers to your questions are controlled by the express language of the first sentence of sec. 101.31 (12) (j):

“Certificates of registration shall expire on the last day of the month of July of the second year following their issuance or renewal \* \* \*.”

The renewal date or date on which the certificate is to be effective is material to the determination of the expiration date, and an exact answer cannot be given in each case absent information as to whether immediate registration is being requested, or whether renewal is being requested to be effective on August 1st of the next registration year.

In the latter case, the expiration date of the renewal registrations in both of your questions would be on July 31, 1965.

If immediate registration were desired, the renewal registration would entitle the certificate holder to practice until July 31, 1964 in both instances.

RJV

*Land Surveyor—Certificate*—A land surveyor, previously registered and whose registration has expired for more than two years, may renew his registration by paying a fee of \$30 and does not have to qualify as a new applicant.

July 12, 1963

WISCONSIN REGISTRATION BOARD OF ARCHITECTS AND  
PROFESSIONAL ENGINEERS

You have requested my opinion whether a land surveyor, previously registered, but whose registration has expired for more than two years, may renew his registration by paying the required fee and penalty, without having to qualify as a new applicant.

Sec. 101.315 (6) provides:

“(6) FEES; RENEWALS. (a) Application for registration as a land surveyor shall be accompanied by a fee of \$10 which shall be retained by the division. Such application shall entitle the applicant to undergo the oral or written examinations for land surveyors the first time such examinations are held after such application is made, or subsequent examinations, and to a certificate of registration if the requirements of this section are met.

“(b) The division shall issue a certificate of registration as a land surveyor to any applicant who has met the requirements of this section. Such certificate shall expire on the second January 31 after the date of its issuance unless renewed. Such certificate may be renewed for a period of 2 years during the month of January in which it expires by the payment of a fee of \$20.

“(c) An expired certificate of registration may be renewed within 10 months, effective to the second January 31 after renewal, on payment of a fee of \$20 plus \$1 for each month or fraction of a month after its expiration. If the certificate has expired for longer than 10 months, it may be renewed to the second January 31 after renewal, by payment of a fee of \$30.

“(d) The secretary shall notify every registered land surveyor of the date of the expiration of his certificate and the fee required for its renewal, by mail at least one month in advance of such expiration.

“(e) The fee for re-examination of an applicant for registration shall be \$10.

“(f) The fee for the issuance of a new certificate to replace any certificate lost, destroyed, mutilated or reinstated, shall be \$3.”

The statute indicates an intent on the part of the legislature to establish a two-year period as the life of a certificate of registration *if timely application is made*. A registration year begins on February 1st and ends the following January 31st. In order to entitle a land surveyor to a full two-year renewal registration, application for renewal must be made and the \$20 renewal fee paid, during the month of January in which it expires. Under the statute renewal is a matter of right, even though more than two years have passed since a land surveyor's previous registration has expired. Application for renewal must be made and the larger renewal fee must be paid. Such an individual does not have to requalify as a new applicant.

You inquire as to the date of expiration of the renewal registration and as to the appropriate fee under the following set of facts:

1. A land surveyor, whose registration expired on January 31, 1961, makes application for renewal on June 10, 1963.

We assume that immediate registration is being requested.

The second sentence of sec. 101.315 (6) (c) controls:

“(c) \* \* \* If the certificate has expired for longer than 10 months, *it may be renewed to the second January 31 after renewal*, by payment of a fee of \$30.”

The renewal registration would expire on January 31, 1965. The fee would be \$30.

No re-examination of an applicant would be involved and the \$10 re-examination fee provided for in sec. 101.315 (6) (e) would not apply.

RJV

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*Airports—Aeronautics Commission*—State aeronautics commission has no authority under Ch. 114, to acquire, maintain, and operate airports.

July 15, 1963

#### STATE AERONAUTICS COMMISSION

You ask “whether the State of Wisconsin acting through the State Aeronautics Commission or independently of the State Aeronautics Commission is authorized under Chapter 114 of the Wisconsin Statutes as presently enacted and without statutory authority for any specific airport to acquire, establish, construct, own, control, lease, equip, improve, maintain and operate airports including buildings thereon for the use of the general public in this state or adjoining states, and to regulate the same provided such regulations shall not conflict with the rules and regulations made by the Federal Government.”

Determination of questions relating to authority of state agencies, such as the state aeronautics commission, is circumscribed by the rule summarized in *Nekoosa-Edwards Paper Co. v. P.S.C.*, (1959) 8 Wis. 2d 582, 593, 99 N.W. 2d 821:

“\* \* \* 184 Wis. 164, 198 N.W. 278. Administrative boards and commissions have no common law power. Their powers are limited by the statute conferring such powers expressly or by fair implication. \* \* \*”

The rule has been frequently repeated in adjudications of the Wisconsin supreme court, see, for example, *American Brass Co. v. Board of Health*, (1944) 245 Wis. 440, 448, 15 N.W. 2d 27:

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

Your question comprehends not only the authority of the state aeronautics commission, but the state “independently”. Perhaps it should be noted at the outset of this discussion that Art. VIII, sec. 10 Wis. Const. provides that the state may appropriate money for the “development, improvement or construction of airports or other aeronautical projects”. It is assumed for purposes of this opinion that the state might, through appropriate legislative action, authorize a state agency to acquire and operate an airport and appropriate money for that purpose. Since the state “independently” can act only through its officers, employes, or agents, your question must be considered, at least partially, on the basis whether the officers, employes or agents seeking to accomplish a certain result have the statutory authority to do so.

Sec. 1 of Art. IV of the constitution vests legislative power in the senate and assembly. Unless power of an officer or agency to perform a particular act stems from a specific provision of the constitution or from the common-law, the power does not exist without a basis in statute.

Our research discloses no legislative authority for the aeronautics commission, or for the state “independently”, to acquire and operate airports unless that authority can be read out of Ch. 114, Stats.; and so the question requires an analysis of the provisions of that chapter.

Under sec. 114.11 the legislature has expressly authorized the governing body of any county, city, village or town in the state to do precisely the thing specified in your question; but that section has not enumerated either the aeronautics commission or the state “independently” as agencies author-

ized to own and operate airports. It is a general rule of statutory interpretation that enumeration of certain things impliedly excludes those not enumerated. See 50 Am. Jur. 238, *et seq.* The rule, however, is used only as an aid in ascertaining legislative intent. If there were other clear indications of legislative intent that agencies additional to those enumerated may own and operate airports, the legislative intent would prevail in spite of the omissions in the enumeration contained in sec. 114.11. The problem is to determine from the law as a whole whether the legislature intended to authorize public agencies other than those designated in sec. 114.11, *et seq.*, to own and operate airports.

The provisions of Ch. 114, Stats., relating to acquisition and operation of airports, were adopted by ch. 348, Laws 1929.

The provisions relating to the aeronautics commission and its functions were added by ch. 381, Laws 1937, which was entitled by the legislature an act “\* \* \* relating to the regulation of aeronautics within the state, and for uniformity in certain regards with federal laws regulating aeronautics, and to make uniform the law with reference thereto.. \* \* \*”

The latter enactment corresponds roughly with the Uniform Aeronautical Regulatory Act, while the earlier enactment roughly corresponds with what later was adopted as the Uniform Airports Act, along with provisions on tort liability. The respective subject matter of the Uniform Acts is discussed as follows in the Commissioner's Prefatory Note, 11 U.L.A. 191:

“The Uniform Airports Act is the first of three acts on the law of aeronautics to be presented by the Committee on Uniform Aeronautical Code and adopted by the Conference. It provides for the acquisition, construction, operation, and regulation of airports and landing fields for the use of aircraft, by municipalities, counties, and other political subdivisions.

“It is important to the steady development of aeronautics in the United States that the primary step of providing

such facilities for the use of aircrafts be taken in every state as soon as possible. Many states have already enacted statutes for this purpose. Thus, during 1933, the State of Georgia enacted the Uniform Airports Act as it appeared in the first tentative draft.

“The two remaining acts on the law of aeronautics will contain respectively the regulatory provisions and the provisions concerning the right of flight and all aspects of tort liability.”

Whatever changes in the rule respecting governmental liability for tort were made by *Holytz v. Milwaukee*, (1962) 17 Wis. 2d 26, it was generally recognized at the time of adoption of ch. 348, Laws 1929 and ch. 381, Laws 1937, that there was a difference between the exercise of a governmental regulatory function and the exercise of a so-called proprietary function, in which a government agency enters into an enterprise such as the operation of transportation facilities, in which it assumes relations to individuals other than those of the government and the governed. See, for example, *Christian v. New London*, (1940) 234 Wis. 123, 290 N.W. 621.

The acquisition, maintenance, and operation of an airport involves a number of organizational and fiscal problems differing from problems of governmental regulation and supervision. Not the least of the former is the financing of specific projects. For the municipalities specified in sec. 114.11 (1) such problems are answered in ensuing sections, and in other statutes dealing with fiscal operations. (See, for example, secs. 114.11 (4), and 67.04.) We find no provision by which the aeronautics commission is authorized to finance acquisition of an airport, without further legislative action.

There are many potential conflicts between the regulatory functions of the aeronautics commission and the functions of owners and operators of airports, of which sec. 114.135 (9) provides one example.

The provisions of sec. 114.31, which enumerate the powers and duties of the aeronautics commission, do not include

the acquisition, maintenance or operation of airports. Sec. 114.31 (1) gives the commission "all powers that are necessary to carry out its policies". The "policies" which it has "power" to carry out, however, must necessarily be within the scope of the authority conferred in other provisions of the statute. The first sentence of sec. 114.31 (1) gives the commission "general *supervision* of aeronautics", and authority to "promote and foster a sound development of aviation in this state, promote aviation education and training programs, *assist* in the development of aviation and aviation facilities, safeguard the interests of those engaged in all phases of aviation, formulate and recommend and promote reasonable regulations in the interests of safety, and coordinate state aviation activities with those of other states and the federal Government." The term "assist" in the foregoing excerpt is indicative of a legislative intent that the role of the commission should be that of a supervisor, coordinator and promotor rather than of an owner and operator of airports.

The provisions of sec. 114.32, authorizing the commission to act as agent of "the state or any municipality thereof" with respect to airport projects is not of *itself* a grant of authority to any agency to operate an airport; but contemplates that the commission is authorized to act in behalf of any agency to which authority has otherwise been given as, in the case of municipalities, by sec. 114.11.

A more difficult question arises with respect to the last sentence of sec. 114.33 (1) which reads:

"\* \* \* Any state agency may initiate and sponsor an airport project in the same manner as a local governing body."

If that lone sentence be construed as an authorization to the aeronautics commission, it must likewise be construed as an authorization to every other state "agency", which could include *arguendo*, the more than one hundred agencies listed in the index to the statutes under the heading "State Boards and Commissions". It seems unlikely that the legislature intended, by a single sentence, to authorize the nu-

merous officials and bodies who might fall within the classification of a state "agency" to own and maintain an airport, without making provision for the many details involved in financing and operation.

To read the sentence as authorizing the aeronautics commission to own and operate an airport would create further incongruity under sec. 114.33 (2), which requires the "state agency" to file a petition with the aeronautics commission to initiate a project. If the statute were construed to authorize the aeronautics commission to acquire an airport, it would be required under subsec. (2) to file a petition with itself, and to pass upon its own petition.

It is not necessary to determine whether the legislature *could* make provision for the exercise by one agency of such inconsistent functions until it is decided whether it *intended* to do so by the single sentence quoted above. I believe that, if the legislature had intended the quoted sentence to confer authority on all state agencies, it would have provided more detail for the operation, as it has done in the case of municipalities. An interpretation of the sentence quoted from sec. 114.33 (1) which is more consonant with the plan outlined in Ch. 114, Stats., is that any state agency which has otherwise been given statutory authority to own and operate an airport may petition the aeronautics commission for the necessary permission. The functions conferred upon administrative agencies by the legislature vary from year to year, so that the legislature most probably included the provisions of sec. 114.33 (1) and (2) to provide procedure whereby a state agency would be subjected to the same regulation as municipalities in any case in which the legislature should otherwise authorize the agency to engage in such operational functions.

It is my opinion that under present statutes, your question must be answered in the negative. A negative answer to the main question implies a negative answer to your other questions about incidental and subsidiary powers.

BL

*Motor Vehicle—Accidents—Reports*—As required in sec. 346.70 (1) and (2) operator of motor vehicle involved in accident with more than \$100 damage to own vehicle only, must give notice and make report. Assessment of demerit points depends on interpretation of administrative rules.

July 16, 1963

DONALD L. GOODMAN,

*District Attorney, Monroe County*

You have asked several questions under varying fact situations, concerning the interpretation of sec. 346.70 (1) and (2) of the Wisconsin statutes. For ease of reference, they are quoted here:

**“346.70 Duty to report accident. (1) IMMEDIATE NOTICE OF ACCIDENT.** The operator of a vehicle involved in an accident resulting in injury to or death of any person or total property damage to an apparent extent of \$100 or more shall immediately by the quickest means of communication give notice of such accident to the police department, the sheriff’s department or the traffic department of the county or municipality in which the accident occurred or to a state traffic patrol officer. In this subsection, ‘injury’ means injury to a person of a physical nature resulting in death or the need of first aid or attention by a physician or surgeon, whether or not first aid or medical or surgical treatment was actually received; ‘total property damage’ means the sum total cost of putting the property damaged in the condition it was before the accident, if repair thereof is practical, and if not practical, the sum total cost of replacing such property.

**“(2) WRITTEN REPORT OF ACCIDENT.** Within 10 days after an accident of the type described in sub. (1), the operator of a vehicle involved in such accident shall forward a written report of the accident to the motor vehicle department. The department may accept or require a report of the accident to be filed by an occupant or the owner in lieu of a report from the operator. Every accident report required to

be made in writing shall be made on the appropriate form approved by the department and shall contain all of the information required therein unless not available, including information sufficient to enable the department to determine whether the requirements for deposit of security under s. 344.14 are inapplicable by reason of the existence of insurance or other exceptions specified in ch. 344."

You ask: Must the operator of a motor vehicle give notice and make a report of an accident wherein the total apparent damage is more than \$100 when the only damage is to his own vehicle? For example, when the vehicle hits an ice slick, skids out of control, and rolls into a ditch.

The answer is yes.

The clear and unambiguous language of these two sections is that the operator must give the notice and make the report where the *total* apparent damage exceeds \$100. There are no exceptions. To construe an exception, would be to read into the language of the section something that is not there. The sections do not require that the injury or damage must be to persons or property of others.

In 29 OAG 347 (1940), this office construed these two sections to mean that the apparent damage did not have to be to "the other vehicle" to require a report. This interpretation has survived twenty-three years and numerous sessions of the legislature without challenge or change. This earlier opinion, therefore, is entitled to considerable weight. *State ex rel. West Allis v. Dieringer*, (1957) 275 Wis. 208, 81 N.W. 2d 533. The statute has undergone some change since this earlier opinion, but its substance, insofar as this issue is concerned, has not changed.

You stated that attempts have been made to construe these sections to mean that no notice or report is required if all the damage was to the operator's own vehicle, by reading these two subsections in connection with secs. 344.08 and 344.14 (2) (e).

When the language of a statute is clear and unambiguous, it is not necessary, nor even proper, to construe the language

beyond its plain meaning or to resort to other rules in aid of construction, and the statute must be applied as it is written. There is an abundance of case law supporting this rule. See cases cited at 15 Callaghans, Statutes, §174, pp. 618-620.

Second, let us examine secs. 344.08 and 344.14 (2) (e). I quote them here for ease of reference:

**“344.08 Suspension for failure to report accident.** (1) The commissioner may suspend the operating privilege or registration of any person who fails to report an accident as required by s. 346.70 or to give correctly the information requested by the commissioner in connection with such report unless, in the judgment of the commissioner, there was excusable cause for such failure *or unless the accident did not result in injury or damage to the person or property of anyone other than the person so required to report.*

“(2) Any operating privilege suspended pursuant to this section, or suspended pursuant to any other section for failure to report an accident, shall be reinstated in accordance with s. 344.09 at the end of 13 months following the accident if, during such 13-month period, no notice of action instituted within one year from the date of the accident has been filed with the department in the manner specified in s. 344.18 (1) (d).”

**“344.14 Suspension for failure to deposit security; exceptions.**

“\* \* \*

“(e) To the operator or owner of a vehicle involved in an accident wherein no injury was caused to the person of anyone other than such operator or owner and wherein damage to property of any one person other than such operator or owner did not exceed \$100.”

These sections are found in Ch. 344, the motor vehicle financial responsibility code. The aims of this chapter are quite separate and different than those of sec. 346.70 (1) and (2). These two sections from the financial responsibility

code merely exempt from certain provisions of the code those operators of vehicles involved in an accident where no injury or damage was caused to person or property of others. The exception is germane to the financial responsibility code, but not to the requirements and aims of sec. 346.70 (1) and (2).

Third, the last sentence of sec. 346.70 (2) provides that the report submitted, pursuant to that subsection, shall contain the information necessary to determine if the cited exemptions of the financial responsibility code shall apply.

Fourth, these sections cannot be read in connection with each other, because the goals sought by requiring the report required in sec. 346.70 (2) are much broader than merely facilitating the administration of the financial responsibility code. These goals might include long-range traffic safety planning, regulation, highway design, and accident investigation.

Whether or not demerit points will be assessed by the motor vehicle department for a violation of these subsections upon receipt of a report of such violation, depends upon the published administrative rules of the motor vehicle department and its interpretation and application of those rules.

WHW

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**Menominee Indians—Constitutionality—**Statute enacted from Bill No. 526, S., providing special privileges to all members of Menominee tribe and issue would violate equal protection under the Fourteenth amendment to the U. S. Constitution.

July 23, 1963

THE HONORABLE, THE SENATE:

By Resolution No. 28, S., you have requested my opinion as to the constitutionality of a statute enacted from Bill No. 526, S.

Bill No. 526, S., would create sec. 29.095 of the statutes to read:

"29.095 MENOMINEE INDIAN RIGHTS. Because the members of the Menominee Indian tribe have long enjoyed the right, by treaty, to hunt, trap and fish on tribal lands without a license and because it is essential to their economic survival that this right and way of life be continued, the members of the Menominee Indian tribe may hunt, fish and trap on lands, lakes and streams within Menominee county without a license. Illegal methods of capturing game and fish are prohibited to the tribe. The conservation commission may on its own initiative and shall after petition and public hearing at which a clear majority favor the request, increase the open season and bag limits for members of the tribe in Menominee county. The rights of holders of land in Menominee county shall not be affected by this section. For purposes of this section, members of the Menominee Indian tribe shall be those who were proclaimed as such by the secretary of interior of the United States as of June 17, 1954, and their issue."

The bill proposes to grant special privileges to hunt, trap and fish within Menominee county to members of the Menominee Indian tribe now living, and their issue. There is no requirement that they live in Menominee county. We take notice that many members of this group reside outside Menominee county, and that some are in fact non-residents of this state. We also take notice of the fact that many residents of Menominee county are not members of the Menominee Indian tribe. The bill would permit members of the tribe to hunt, trap and fish without a license at the times other residents of the county, residents of other Wisconsin counties and non-residents would be required to have licenses to enjoy such privileges.

A second portion of the bill would empower the conservation commission to increase the open season and bag limits of fish and game for members of the tribe in such county. Such action would be mandatory after petition and public hearing at which a clear majority of some body favored the

request. The bill does not specify whether any vote shall be taken among members of the conservation commission, or whether all persons attending the public hearing shall be entitled to vote. No standards are included as to permissible variances in the open season or bag limits, nor is there any guide as to the conditions which must be present to enlarge the bag limits or open season periods other than the requirement for a majority vote.

A delegation of legislative power problem is present, but will not be discussed as it is my opinion that any such statute would be in violation of Art. I, sec. 1, Wis. Const., and the Fourteenth Amendment to the United States Constitution, both of which contain provisions which guarantee equal protection of the laws to all regardless of race, religion, ethnic background or color. *State ex rel. Steeps v. Hanson*, (1957) 274 Wis. 544, 549, 80 N.W. 2d 812. The statute would grant one class of citizens rights and privileges denied to another class. Reasonable classification is permissible in the granting of privileges or in the imposing of burdens of regulation under the police power but the classification in this case is unreasonable as it includes only the members of a single Indian tribe and is not germane to the evils, if any, sought to be remedied. The legal principle is so well established that no lengthy citations to state and federal opinions under the two constitutional provisions cited above need be given in this opinion.

The premise section of the bill stresses former freedom of activity under treaty rights and need of economic survival as justifications for the privileges sought to be granted.

In an opinion appearing in 51 OAG 103, (1962), my predecessor concluded that Wisconsin hunting and fishing laws apply to Menominee county and to the Menominee Indian tribe in the same manner and extent as they apply to any other person and area in the state. The opinion contains an extensive discussion of the history of this tribe including treaties and legislation, state and federal, concerning the problems of termination of federal control.

At page 110 of the opinion it is stated:

“\* \* \* As pointed out above, the Treaty of 1854 granted no hunting and fishing privileges to the Indians. Whatever privileges the Menominee Indian tribe may have enjoyed \* \* \* on such lands ended upon termination. *State v. Johnson* (1933), 212 Wis. 301, 309-313, 249 N.W. 284. \* \* \*”

At page 109 of the opinion it is stated:

“\* \* \* Indeed any such attempted reservation of hunting and fishing rights or privileges in favor of the Indians following termination would be of doubtful constitutionality. *State v. Johnson*, \* \* \* [supra].”

The stated justification of economic need is not a sufficient basis for the preferential variance sought to be accomplished. The cost of a resident fishing license is only \$2.00, and the cost of a resident sportsman's license is only \$10.00. Exemption from these small fees would be of direct benefit to those members of the tribe who might desire to exercise the privileges of taking fish and game. Value of fish or game, in amounts in excess of established bag limits or the right to take the same in extended seasons, would be of a greater monetary benefit to individuals exercising the privilege; amounts would vary depending upon fishing, hunting, or trapping skills. A Menominee tribe member, even though in dire economic need, might not be able to secure any fish or game to eat or furs to sell if he had no skill in these fields. We cannot assume that all members of the tribe, in Menominee county or wherever situated, are in economic need. Many members of the tribe are employed on a year round basis, own property and investments, adequately provide for their families and cannot be said to be in economic need. Others are not so fortunate and may be in dire economic need. Many other Wisconsin citizens, residing in Menominee county and other counties of the state (including members of other Indian tribes), who are not members of the Menominee Indian tribe may be in as great, if not greater need than the Menominee Indians. Nor can it be assumed that the future issue of members of the Menominee Indian tribe will be, by reason of birth alone, in a position of

dire economic need. It is a common hope that all of our citizens will prosper on an equal opportunity basis.

Lands which were formerly the Menominee Indian reservation now comprise Wisconsin's 72nd county governed by a county board and a town board. General laws of the state of Wisconsin are applicable to its citizens. The county has a full and complete welfare program and is receiving additional federal funds to aid in problems connected with termination. Its residents, including those members of the Menominee Indian tribe, are entitled to the benefits enjoyed by all Wisconsin citizens, including equal protection of the laws. There can be no unreasonable classification discriminating against members of a special class nor can there be any special privileges extended to members of a special class which are so unreasonable as to be discriminatory against other citizens in comparable situations not included within the class. 12 Am. Jur., Constitutional Law, pp. 227-228, secs. 530-531.

In *Christoph v. City of Chilton*, (1931) 205 Wis. 418, 421, 237 N.W. 134, it is stated:

“\* \* \* While the legislature, in proper cases, clearly has the right to classify persons, property, occupations, or industries, it must always be borne in mind that the equal protection of the laws is guaranteed, and that if any classification made by a statute grants to one class rights or privileges which are denied to another class under the same or substantially similar conditions, it offends against the principle of equal protection of the law. \* \* \*”

RJV

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*Teachers Retirement Fund—Beneficiary*—Discussion of beneficiary when member dies prior to action by board on application which specified date of annuity, such date prior to meeting of board.

July 23, 1963

## STATE TEACHERS RETIREMENT BOARD

You have asked for my opinion concerning the benefits which are payable from the state teachers retirement fund to the husband of a deceased teacher. On May 4, 1962 the teacher filed an application for a 15-year life annuity to become effective July 1, 1962. She died on July 31, 1962, before any annuity payment was made to her. The teacher had designated her husband as her beneficiary to receive the remainder of the 180 monthly payments in the event of her death prior to the expiration of 15 years from the date when the annuity became effective.

It is your opinion that this annuity went into effect on July 1, 1962, because that is the effective date specified by the member in the application, and that therefore, any benefits to the husband are governed by the terms of the annuity contract. These benefits would total \$4,188.60 in 180 monthly payments, or \$3,199.85 in a single sum, which is the present value of said monthly payments. The husband claims that since no annuity payment was ever made to the teacher no annuity contract had been entered into, and hence, a death benefit in the amount of \$4,739.71 is payable to him under sec. 42.50, Stats.

You ask whether you should pay benefits to the surviving husband in accordance with sec. 42.49 (2) (b) under which the annuity was applied for and approved, or under the provisions of sec. 42.50, which relates to the payment of death benefits. This raises the question of whether the annuity had become effective as of the date of the teacher's death.

Sec. 42.49 (2) (b) provides:

“(2) ANNUITY FROM MEMBER'S DEPOSITS. When a member has ceased to be employed as a teacher, and is not on a leave of absence from a teaching position, the accumulation from the member's deposits may be applied by the member as a net single premium at the rate certified by the state teachers retirement board, to the purchase of an

annuity, the first payment to be made in such month and year after the application for the annuity is received by the board as the member shall direct, which annuity may be:

“\* \* \*

“(b) An annuity payable monthly to the member during life, with a guaranty of at least 180 monthly payments; and in the event of the death of the member before 180 monthly payments have been made, the remainder of the 180 monthly payments shall be continued to one beneficiary or divided equally, or as the member otherwise specified, between 2 or more beneficiaries designated by the member until payments shall have been made for 180 consecutive months after such annuity began. \* \* \*”

Sec. 42.22 (7) provides:

“(7) The state teachers retirement board from time to time shall adopt such bylaws and make such rules for the \* \* \* payment of the benefits hereby provided as it shall deem necessary and proper \* \* \*.”

Said board adopted the following rules with respect to an application for benefits:

“TR 6.01 Date application for annuity may be made. A member may make formal application for an annuity at any time within 60 days prior to the date he desires his annuity to become effective.

“TR 6.02 Changing type of benefit. An annuitant may not change from one type of annuity to another after the effective date of his annuity.

“TR 6.03 Date annuity may become effective. An annuity cannot become effective prior to the first day of the month following the last day of teaching service, nor prior to the first day of the month in which a written application therefore is received in the office of the state teachers retirement system. An annuity shall be effective only on the first day of the month.”

As indicated above, the member specified in the application for the annuity that she wished to have the same become effective July 1, 1962, as she had a right to do. When said effective date came and passed and the member was then alive, certain rights were established. For example, under 42.49 (2) (b) the state teachers retirement board was obliged to pay the remainder of the 180 monthly payments to the person or persons designated by the member to receive them regardless of when the death of the member might occur. That statute makes no exception of a case where the member has not actually received any payment. The statute provides for the continuance of the annuity "for 180 months after such annuity began." The annuity rates are fixed upon the basis of a periodic payment at the end of the period which is a month. When the month of July expired a periodic payment was due to some one for that month—to the member if she was alive, and if not, to the beneficiary. In determining how long the annuity should continue after the death of the member, the 15 years or 180 months must be measured from the first day of July, 1962.

As stated by Circuit Judge Herman W. Sachtjen in a case involving the payment of a benefit under the Wisconsin retirement fund:

"\* \* \* Rights under the Retirement Fund, such as pensions, annuities or death benefits, are purely governed by statute and not by equity." *State ex rel. Susan Campbell Law, Petitioner, vs. Trustees of Wisconsin Retirement Fund*, Circuit Court for Dane County, decided January 5, 1954.

Under TR 6.02, even the member could not have changed from the 15 year life annuity to a straight life annuity if she had wished to do so during the month of July and before she received any annuity payment, because she was bound by her election. The beneficiary is likewise bound thereby.

It has been pointed out in this matter that the state teachers retirement board did not meet and approve the application until after the teacher had died and that consequently the annuity could not become effective. A similar

argument was made in the case of *State ex rel. Morse v. Christianson*, (1952) 262 Wis. 262, 255 N.W. 2d 20. The court ruled against this contention and said at page 270:

“In line with the defendants’ statement contained in their minutes of September 30, 1948, they could defeat the rights of applicants by failing to act or deferring action until an applicant died. This is not an intimation that these defendants would follow such a course, but in case some future board should do so mandamus should lie \* \* \*. The record contains data sheets prepared by defendants’ employees that show that the information contained in the application had been verified and it was ready for formal approval when Mr. Morse died. Their only duty was a ministerial one \* \* \*.”

In the case at issue, sec. 42.49 (2) (b) gave the teacher the right to apply for a 15 year life annuity. Her right to receive such annuity cannot be defeated either by a wilful failure of the board to meet and act on the application before the death of the member, or by the happenstance that said death occurred prior to a regular monthly meeting of the board at which the application would have been acted upon.

In the present case the foregoing interpretation would result in the payment of less money to the beneficiary under 42.49 (2) (b) than to the same beneficiary under 42.50. In other cases, such interpretation would operate to the advantage of the beneficiary. In any event, I am of the opinion that the foregoing construction, which is consonant with the administrative interpretation which has prevailed for many years, is correct.

JRW

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*Oleomargarine*—Bill 719, A., which would in effect prohibit manufacture, distribution, and sale of oleomargarine is probably unconstitutional.

July 24, 1963

THE HONORABLE, THE ASSEMBLY:

By Resolution No. 23, A., you have requested my opinion on the validity of Bill No. 719, A., which would create sec. 139.60 (16) of the Statutes to read:

"139.60 (16) No oleomargarine or other imitation dairy product shall be manufactured, distributed or sold in this state which contains flavorings, preservatives, chemicals or additives other than fats and oils, which are not permissible in the manufacture of butter or the dairy products for which they would normally be substituted."

It would appear from the face of this proposal, and I am so advised, that the effect and presumed purpose would be to prohibit the manufacture, distribution and sale of oleomargarine in this state, a factual situation quite similar to that involved in *John F. Jelke Co. v. Emery*, (1927) 193 Wis. 311, 214 N. W. 369, 53 A.L.R. 463. In that case the court considered a statute which, while not technically forbidding the manufacture and sale of all oleomargarine, would have so limited its ingredients as to produce that effect, causing the court to refer to the contention that the statute was not a prohibition as "a quibble".

After a discussion of the arguments and the authorities, the court stated (p. 321):

"It would seem that *decisions could not make plainer the fact that any law which prohibits the manufacture and sale of uncolored oleomargarine violates the constitution of the United States and of the state of Wisconsin*. In this connection we are moved to observe that the mandates of the constitution are just as binding upon the conscience of the legislator as upon the conscience of the judge. The constitution is the mandate of a sovereign people to its servants and representatives, and no one of them has a right to ignore or disregard its plain commands. Every officer, legislative and executive as well as judicial, is required by the constitution, as a condition of holding his office, to take a solemn oath

to support it. It was not intended that the whole burden of that support should fall upon the judicial department. As a matter of fact it rests equally upon every department, although it is in an especial way the concern of the judicial department because it is the duty of the courts to declare and apply the law. In a doubtful case the final responsibility is with the court, but in a case reasonably plain it is the duty of every officer to support it even though his act may have undesirable consequences to himself." (Emphasis supplied)

The court further stated (p. 323) :

"\* \* \* whatever the economics of the situation may be, from the standpoint of constitutional right the legislature has no more power to prohibit the manufacture and sale of oleomargarine in aid of the dairy industry than it would have to prohibit the raising of sheep in aid of the beef-cattle industry or to prohibit the manufacture and sale of cement for the benefit of the lumber industry. In some cases a proper exercise of the police power results in advantage to a particular class of citizens and to the disadvantage of others. When that is the principal purpose of the measure, courts will look behind even the declared intent of legislatures and relieve citizens against oppressive acts where the primary purpose is not the protection of the public health, safety, or morals. \* \* \*"

The legislative struggle between butter and oleomargarine has been long and bitter. There is much literature and many cases which mark its stages. We think it would serve no useful purpose here to recount it in any further detail, as it appears to us that the *Jelke* case is good law and is controlling.

Some confusion has arisen over the fact that bans on oleomargarine colored to resemble butter in order to avoid deception of the public have been upheld as have taxes whose rates have put it at a competitive disadvantage. It should be noted that these have been upheld strictly on their limited, correct bases, as (1) the exercise of the police power and (2) the proper exercise of the power to tax. See *Magnano Co. v. Hamilton*, (1934) 292 U.S. 40, 54 S. Ct. 599, 78

L. Ed. 1109, and also 48 OAG 143 (1959). The instant proposal appears to be unrelated to either raising revenue or to protecting the public from deception or from dangerous or deleterious products.

The proper conclusion to be drawn from this is that the legislature could prohibit the inclusion in oleomargarine of any substance which would be deleterious to public health or which would result in deception of the public, but cannot regulate or prohibit it for the purpose of increasing the sale of butter.

GFS

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*County Board—Official Proceedings*—Discussion of regulations governing publication of county board proceedings and type of media in which published.

July 25, 1963

MICHAEL G. EBERLEIN,

*District Attorney, Shawano and Menominee Counties*

You have requested my opinion with regard to publication of the official proceedings of the Shawano county board of supervisors.

You indicate that the Shawano county board of supervisors does not publish a copy of its official proceedings in pamphlet form as permitted by sec. 59.09 (3), which section specifically requires a letting of such publication to the lowest and best bidder. A certified copy of the official proceedings has been published in the Shawano County Evening Leader, a daily newspaper. It is generally agreed that such paper is a newspaper of general circulation in the county. The county, for several years, has requested bids only from such newspaper. You state that other newspaper owners in the county have questioned the procedure, claim to publish newspapers of general circulation, and have requested permission to bid.

Your first question is whether the county board must publish a certified copy of its proceedings in a newspaper published and having a general circulation in the county.

The answer to this question is in the affirmative if there is a newspaper published in the county which has a general circulation therein.

Sec. 59.09 provides in part:

“(1) Whenever any county board passes any ordinance under the provisions of this chapter the *county clerk shall immediately* cause the same to be published in some newspaper published in such county, and if there is none, then in the paper which he determines has the most general circulation therein; and such clerk shall procure and distribute copies of such paper to the several town clerks, who shall file the same in their respective offices.

“(2) *Said board shall*, by ordinance or resolution, provide for one publication of a certified copy of all its proceedings had at any meeting, regular or special, in one or more newspapers published and having a general circulation therein, said publication to be completed within sixty days after the adjournment of each session. If no such newspaper is published in the county, then such publication shall be made in some newspaper published in an adjoining county and having a general circulation in the county where such meeting was held; but the cost of any such publication under this subsection shall in no case exceed the rate per folio fixed by law for the publication of legal notices.

“(3) *Said board may* at any meeting, regular or special, provide by resolution for the publication in pamphlet form by the lowest and best bidder therefor, of a sufficient and designated number of copies of its duly certified proceedings for general distribution.”

Sec. 669a, Stats. 1889, was created by ch. 186, Laws 1880 and provided:

“1. It shall be the duty of the board of supervisors in each and every county in this state to provide for the publication

of a certified copy of its proceedings, in one or more newspapers published in such county, having a general circulation, said publication to be completed within sixty days after the adjournment of each and every session.

"2. If there be no newspaper published in such county having a general circulation, it shall be the duty of such board of supervisors to procure such publication in some newspaper published in an adjoining county, having a general circulation in the county where such proceedings are had."

The above statute was in effect at the time *Wentworth v. Racine County*, (1898) 99 Wis. 26, 30, 74 N.W. 551 was decided. The court held that the constitutional and statutory requirement for the publication of laws as a prerequisite to their validity does not extend to the publication of ordinances, resolutions and proceedings of local governing bodies, pursuant to a valid grant to such bodies of power to legislate in regard to such matters. The court stated at page 31:

"\* \* \* The statute in question delegated power to county boards to legislate. That was duly published in all respects as required by law. It does not contain any provision requiring the action of a county board under it to be published as a prerequisite to its validity. The claim that the general statutes, requiring the publication of the proceedings of county boards for the information of the public, applies, cannot be sustained. That is purely directory; compliance with it is not essential to the validity of the proceedings."

The variances in language between the statute in effect at the time of *Wentworth* and present sec. 59.09 (1), (2) and (3) are not great but we deem them significant. The former statute provided "It shall be the duty of" and present sec. 59.09 (2) states "Such board shall \* \* \*." In addition the words "shall" and "may" appear in various parts of present sec. 59.09.

The general rule is that the word "shall" is presumed mandatory when it appears in a statute and the word "may"

is permissive, especially if the word "shall" appears in close juxtaposition in other parts of the same statute. *Scanlon v. Menasha*, (1962) 16 Wis. 2d 437, 114 N.W. 2d 791.

In 17 OAG 611, the then attorney general was concerned with the provisions of the then sec. 59.09 (2), having identical wording as appears in the present subsection (2) and concluded that publication by the county board of its proceedings was mandatory. He specifically referred to the penalty provisions contained in sec. 59.10 applicable to any supervisor who refuses or neglects to perform any of the duties required of him by law.

Where a legislative provision is accompanied by a penalty for failure to observe it, its provisions are mandatory. In determining whether provisions are mandatory or directory in character, other factors to be considered are the objectives sought to be accomplished by the statute, its history, and consequences which would follow from one or the other construction. *Marathon County v. Eau Claire County*, (1958) 3 Wis. 2d 662, 89 N.W. 2d 271.

The presumption of regularity is given great weight when the courts consider the validity of given legislation. The *Wentworth* case at most holds that the ordinance of the county board would not be held invalid for failure of the board to publish a copy of its proceedings. The case is not authority which would permit the county board or member supervisors thereof to wilfully refuse or neglect to comply with the express mandate of the statute.

It should be pointed out that failure of a city or village to publish ordinances as required by statute where a penalty or forfeiture is involved or failure to publish notice of proposed adoption of an ordinance if required by statute may result in an invalid ordinance. In the latter case the defect is jurisdictional.

*Quint v. City of Merrill*, (1900) 105 Wis. 406, 81 N.W. 664;

*Herman v. City of Oconto*, (1899) 100 Wis. 391, 76 N.W. 364;

*Osceola v. Beyl*, (1919) 168 Wis. 386, 170 N.W. 252.

We are not here concerned with the necessity of publication of ordinances, which is provided for by sec. 59.09 (1), but with the publication of official proceedings of the county board prescribed by sec. 59.09 (2), which is a separate and distinct matter. I am of the opinion that the requirements of sec. 59.09 (2) are mandatory.

Your second question is whether the provisions of sec. 985.02, Stats., apply.

The answer to this question is in the affirmative.

Sec. 985.02, Stats., provides:

“985.02 Method of notification. Except as otherwise provided by law, a legal notice shall be published in a newspaper likely to give notice in the area or to the person affected.”

Sec. 985.01, Stats., provides in material part:

“(1) The term ‘legal notice’ is every notice required by law or by order of a court to be published in a newspaper and includes:

“(a) Every publication of laws, ordinances, resolutions, financial statements, budgets and *proceedings* intended to give notice in an area;

“\* \* \*

“(2) (a) ‘Proceedings’, when published in newspapers, mean the substance of every official action taken by a local governing body at any meeting, regular or special.

“(b) ‘Substance’ is an intelligible abstract or synopsis of the essential elements of the official action taken by a local governing body, including the subject matter of a motion, the persons making and seconding the motion and the roll call vote on the motion.

“(c) Ordinances and resolutions published as required by law need not be republished in proceedings, but a reference to their subject matter shall be sufficient.”

The newspaper selected would *also* have to qualify under the provisions of sec. 985.03, which provides:

**“985.03 Qualifications of newspapers.** (1) No publisher of any newspaper in this state shall be awarded or be entitled to any compensation or fee for the publishing of any legal notice unless, for at least 2 years immediately before the date of such notice, such newspaper has had a bona fide paid circulation to actual subscribers of not less than 300 copies at each publication, if in towns or villages or in cities of the third and fourth class, and 1,000 copies in cities of the first and second class, and further that such newspaper shall have been regularly and continuously published in such city, village, or town for at least 2 years immediately before the date of such notice. Suspension of publication resulting from the mobilization of troops or being called to active duty with the armed forces shall not count as an interval in publication. A newspaper in the contemplation of this subsection is a publication appearing at regular intervals, which shall be at least once week, containing reports of happenings of recent occurrence of a varied character, such as political, social, moral and religious subjects, and designed for the information of the general reader. Such definition shall include a daily newspaper published in a county having a population of 500,000 or more, devoted principally to business news and publishing of records, which has been designated by the courts of record of said county for publication of legal notices for a period of 6 years or more.

“(2) Any person charged with the duty of causing legal notices to be published, and who causes any legal notice, to be published in any newspaper not eligible to so publish under the requirements of sub. (1), or who fails to cause such legal notice to be published in any newspaper eligible under this section, may be fined not to exceed \$100 for each offense. Each day in which a legal notice should have been but was not published as required by law shall constitute a separate offense hereunder. A newspaper in order to be eligible under this section shall also file a certificate with the county clerk stating that it qualifies under this section.”

Also, see sec. 985.05, and definition of "municipality" there referred to which appears in sec. 345.05 (1) (a), and which includes "county".

Your third question is whether the Shawano county board has to call for bids if there is more than one newspaper published in Shawano county and whether such contract must be let to the lowest bidder.

The answer to this question is in the negative.

Shawano county has a population of less than 250,000 and, therefore, the mandatory bidding requirements of sec. 59.09 (5) do not apply.

Sec. 59.09 (2) does not require that there be a request for bids or that any contract be entered into with the lowest bidder. The only requirement insofar as cost is concerned is that the cost for publication shall not exceed the rate per folio fixed by law for the publication of legal notices. The legislative intent behind the statute is to give notice to the general public within the county of the proceedings had at various meetings of the county board.

The board could fix in advance a rate per folio which does not exceed the legal rate, and then, after publication, the publisher's compensation for the folios actually published at that fixed rate could be computed.

*State ex rel. Baraboo v. Page*, (1930) 201 Wis. 262, 229 N.W. 40.

The board may call for bids, but there is no requirement that the contract be let to the lowest bidder. In absence of statutory requirements municipal contracts need not be let under competitive bidding. If bids are called for the board may impose such terms as it deems prudent.

*Cullen v. Rock County*, (1943) 244 Wis. 237, 12 N.W. 2d 38.

The newspaper selected must be published in the county and have a general circulation therein, if such a paper exists. It must also meet the qualifications of sec. 985.03. If there

is more than one such newspaper the board may designate any one, or more than one, of the papers qualifying. It may consider price, numerical and geographical circulation within the county, and distribution among classes of citizens within the county. The primary purpose of sec. 59.09 (2) is to give notice to the people of the county of the proceedings of the county board.

Your fourth question is whether the Birnamwood News is a newspaper of general circulation within the county.

You also inquire as to whether the Wittenberg Enterprise is a newspaper of general circulation in the county but do not give sufficient factual information to permit an appraisal.

A newspaper may qualify under the provisions of sec. 985.03, and fail to qualify under the provisions of sec. 59.09 (2), which require the newspaper to be one having a "general circulation" within the county.

In *Bartlett v. Joint County School Committee*, (1960) 11 Wis. 2d 588, 593, 106 N.W. 2d 295, the court expressly declined to define the statutory phrase "general circulation", but held the contested publication of a legal notice sufficient since appellant failed to present sufficient evidence to rebut the statutory and common-law presumptions of validity of the publication of the notice of hearing. The opinion referred to the annotation at 68 A.L.R. 542. In 68 A.L.R. 542 the writer of the annotation concludes:

"It may be said generally that a newspaper is one of general circulation, even though it is devoted to interests of a particular class of persons, and specializes on news and intelligence primarily of interest to that class, if, in addition to such special news, it also publishes news of a general character and of a general interest, and to some extent circulates among the general public."

In *Ruth v. Ruth*, (1906) 36 Ind. App. 290, 293, 79 N.E. 523, it was stated:

"No fixed number of subscribers is required to constitute general circulation. A newspaper's circulation does not neces-

sarily mean that it be read by all the people of the county or the township.”

In 66 C.J.S. 26, 27, it is stated:

“*Newspaper of general circulation*’ is one that circulates among all classes and is not confined to a particular class or calling in the community, and is a term generally applied to a newspaper to which the public will resort in order to be informed of the news and intelligence of the day, editorial opinion, and advertisements, and thereby to render it probable that the notices or official advertising will be brought to the attention of the general public. The question whether a newspaper is of general circulation is manifestly a matter of substance, and not merely of size. The term ‘general circulation’ is a relative one, and its meaning must be determined by the process of inclusion and exclusion. That which will be of general circulation in a town of small population cannot be said to be general in a populous city. A newspaper in order to have the characteristics of a newspaper of general circulation does not necessarily have to be read by all people of the county. \* \* \* Whether a newspaper is one of general circulation must depend largely on the diversity of its subscribers rather than on mere numbers \* \* \*.”

The opinions in 19 OAG 298 and 23 OAG 408, concerned with sec. 59.09 (2), are in general agreement with the above statements. The first concludes that the requirement relates more to the character of the publication as a newspaper than to the number of papers actually circulated in the county. The latter opinion states that a newspaper of general circulation is one published for dissemination of local or telegraphic news of a general character having a bona fide subscription list and distributed among all classes in the county and that a weekly newspaper can qualify under sec. 59.09 (2). Also see 22 OAG 108.

The opinion at 22 OAG 295 was expressly concerned with the Birnamwood News. At that time (1933) said newspaper had a small localized circulation covering the village of Birnamwood and two or three towns in Shawano county, *with no circulation whatsoever* in the remaining portion of

Shawano county. The writer of the opinion concluded that a newspaper having no circulation in over eighty-five per cent of the area of the county could not qualify as a newspaper having a general circulation in the county.

Shawano county had a population of 34,351 according to the 1960 census. That figure included 3,704 persons now in separated Menominee county. Shawano county is now divided into 25 towns having varying populations of from approximately 400 to 1800 each. It includes 10 villages having varying populations of approximately 250 to 900 each and the city of Shawano having a population of 6,103. Wisconsin Blue Book, 1962, pp. 670, 671.

The Birnamwood News is a weekly paper published in the village of Birnamwood which is located on the west county line in the northwestern corner of the county. The village had a 1960 population of 568. According to the statement of the owner-publisher which you have included, this newspaper has 402 paid subscribers, of which 209 live in the following places in Shawano county:

City of Shawano .....	8
Village of Birnamwood .....	134
Village of Bonduel .....	1
Village of Tigerton .....	4
Village of Wittenberg .....	8
Town of Aniwa .....	20
Town of Almon .....	6
Town of Birnamwood .....	22
Town of Hutchins .....	6

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The circulation of the newspaper has not materially increased in numerical or geographical circulation within the county since the 1933 opinion was written. We are of the opinion that the Birnamwood News does not presently qualify under sec. 59.09 (2) as a newspaper having a general circulation *in the county*.

*Guardian—Words and Phrases—Beer Law—Discussion of interpretation of “guardian” and “ten-foot limit” in sec. 66.054 (24) as created by ch. 143, Laws 1963, relative to sale or possession of fermented beverages to minors.*

July 26, 1963

THE HONORABLE, THE SENATE:

By Resolution No. 38, S., you have requested my opinion regarding the interpretation of sec. 66.054 (24) created by ch. 143, Laws 1963, with respect to the following questions:

1. Whether the law prohibits the serving of fermented malt beverages at college and university functions.

2. Whether the law prohibits the serving of fermented malt beverages in the home of a minor if a parent or guardian is not physically present.

3. Whether the law prohibits the drinking of fermented malt beverages (by minors) more than 10 feet from the actual point at which such beverages are dispensed.

Sec. 66.054 (24), Stats., created by ch. 143, Laws 1963, provides:

“66.054 (24) OFF PREMISES SALE OR POSSESSION. Any person who sells or *furnishes* fermented malt beverages to any person *under 21 years of age not accompanied by his parent, guardian or spouse* for consumption *outside the building or permanent structure in which a license to dispense malt beverages is possessed* or any person under 21 years of age not accompanied by his parent, guardian or spouse who *possesses* fermented malt beverages outside a building or permanent structure in which a license to dispense malt beverages is possessed may be fined not less than \$50 nor more than \$500 or imprisoned not more than 90 days, or both, and the court also shall restrict or suspend the motor vehicle operating privilege as provided in s. 343.30 (6). *Whenever fermented malt beverages are dispensed for consumption outside a building or permanent structure by a licensed dispenser, the premises in which a*

person under 21 years of age may possess such beverages shall include all areas within 10 feet of the point at which such beverages are dispensed. It is the legislative intent hereof to require that persons under the age of 21 be permitted to consume fermented malt beverages only under the supervision of parent, guardian, spouse or properly licensed persons. As used in this subsection spouse means a husband or wife who is 21 years or over."

Question 1: *College and University Functions*

You do not state the nature of the functions referred to in the resolution. I assume that you mean social events sponsored by fraternities, sororities and other organizations associated with colleges and universities, conducted under official regulations and very likely chaperoned by appropriate persons. In my opinion, the statute prohibits the serving of fermented malt beverages to any minors present at such an event unless they are accompanied by their parents, guardians, or adult spouses, or unless the event is conducted on licensed premises and the fermented malt beverages are dispensed by or under the supervision of the licensee or a person holding an operator's license under sec. 66.054 (11). This is made clear by the statement of legislative intent in the second last sentence of the subsection.

It has been suggested that house mothers or other adult persons responsible to the college or university might qualify as "guardians" in the meaning of the statute. In my opinion the statute is not open to any such construction.

In 35 OAG 113 (1946) the attorney general was asked regarding the meaning of the word "guardian" in sec. 176.32 (1) prohibiting the presence of minors in premises licensed for the sale of intoxicating liquor unless accompanied by parent or guardian. The opinion discusses *State v. Johnson*, (1909) 23 S. D. 293, 121 N. W. 785, 787, 22 L.R.A. (n.s.) 1007, 1012-1013, and *People v. Samwick*, (1908) 111 N. Y. S. 11, 127 App. Div. 209, and concludes:

"It is our opinion that the South Dakota case above cited is a more reasonable interpretation of the law than the con-

trary view expressed by the intermediate New York court. By the application of the rule *noscitur a sociis*, the fact that the word 'parent' is used in connection with 'guardian' indicates a legislative intent that the guardian be a person occupying the relation toward the child normally occupied by the natural parent. The opposite construction would permit a minor to associate himself with an adult for the purpose of entering and remaining in a tavern without the consent or knowledge of his parent or other person charged with his care and custody. We do not believe that this was ever intended by the legislature.

"It is possible that there may be cases where the adult accompanying the minor is neither the natural or adoptive parent nor the legally appointed guardian and still is within the meaning of the statute, as, for example, in the case where an orphan lives in the home of his grandparent, aunt or uncle, older brother or sister or foster parents. Such persons standing *in loco parentis* might be held to come within the meaning of the word 'guardian' as used in sec. 176.32 (1). However, it should appear that the relationship is of some permanence and not entered into solely for the purpose of visiting taverns."

Since that opinion was rendered, the supreme court of North Dakota has decided a similar question in *State v. Johnson*, (N. D. 1958) 88 N. W. 2d 209, involving a statute prohibiting the presence at public dances of persons under the age of 18 unless accompanied by a parent or guardian. After discussing the cases of *State v. Johnson* (South Dakota) *supra*, and *People v. Samwick*, *supra*, the North Dakota court construed the statute substantially as the attorney general of Wisconsin did in 35 OAG 113. The court stated at p. 216:

"We believe that the better reasoning supports the view expressed by the South Dakota court. If the word 'guardian' as contended by the defendant, means an escort, chaperone, or any adult neighbor or friend over the age of 18 years, or any person with whom the parents may have made some arrangement for supervision of a minor at a public dance, it was inappropriately used in the statute. The word 'guard-

ian' has a technical, legal meaning. In law it constitutes one who has, or is entitled to the care and management of the person or property, or both, of another, as of a minor or of a person incapable of managing his own affairs. Black's Law Dictionary, 4th Ed., defines the word 'guardian' as:

“‘A guardian is a person lawfully invested with the power, and charged with the duty, of taking care of the person and managing the property and rights of another person, who, for some peculiarity of status, or defect of age, understanding, or self-control, is considered incapable of administering his own affairs.’

“\* \* \*

“It seems to be the supposition of the defendant that as to the children with whose parents he made arrangements for supervision at his dances, and as to the other minors who were present with persons over 18, that he and such adult persons were for the time being the guardians of the minors and stood in the place of parent or guardian, and that this was sufficient within the contemplated meaning of the statute. He further suggests that he and the adults who accompanied these minors were within the meaning of the phrase ‘in loco parentis’. A person who stands ‘in loca parentis’ is a person who stands in the place of a parent; charged, factitiously, with a parent’s rights, duties and responsibilities. Black’s Law Dictionary, 4th Ed., p. 896.

“The cases relating to the application of the terms ‘in loco parentis’ indicate that it does not refer to such a transitory arrangement as the defendant claims he had with some of the parents of the minors involved in this case. Nor does it refer to a temporary situation in which a minor is accompanied by someone over 18 to a public dance.”

In my opinion, a house mother, chaperone, or other adult person representing a college or university would ordinarily not be held to be a “guardian” whose presence would be sufficient to authorize serving of beer to minors on unlicensed premises. Whether a particular person might qualify as a guardian of a specific minor student would be a question of

fact depending upon the precise nature of the relationship, but certainly no general statement can be made that in all cases of house mothers, etc., such a relationship exists. On the contrary, the existence of such a relationship would certainly be a rare exception.

It follows that the new law will prevent service of beer to minors at social events conducted by college and university organizations on unlicensed premises.

It may be added that a sale of fermented malt beverages is not required for a violation of the statute. "Furnishing" is sufficient, and this does not require that the relationship of vendor and vendee exist. *State v. Graves*, (1950) 257 Wis. 31, 42 N. W. 2d 153. Moreover, the minor is prohibited from possessing the beverage under the forbidden circumstances.

#### Question 2: *Minor's Home*

The statute requires that a minor who possesses fermented malt beverages must be "accompanied" by his parent, guardian or adult spouse. The word "accompany" means to go along or in company with. I know of no way in which a parent, guardian or adult spouse can "accompany" a minor without being physically present. It follows that a minor cannot lawfully consume fermented malt beverages even in his own home unless his parent, guardian or adult spouse is present. This does not mean that the parent, guardian, or spouse must necessarily be in the same room at all times, but the statement of legislative intent in the second last sentence of the statute makes it clear that he or she must be sufficiently close to supervise consumption of the beverage.

In this connection it may also be pointed out that if a minor is in the home of a friend it is unlawful under the statute to serve him beer unless his parent, guardian or adult spouse is present. Compare *State v. Cummings*, (1957) 63 N. M. 337, 319 P. 2d 946, where a conviction of delivering alcohol to a minor by one not his parent, guardian, or spouse was sustained upon proof that a 14-year-old boy's foster mother sent him on an errand to the defendant, a neighbor, to pick up a package, which upon examination by a po-

lice officer was found to contain beer, even though the defendant knew it was to be consumed by an adult, citing *People v. Garrett*, (1888) 68 Mich. 487, 36 N. W. 234. A *fortiori*, furnishing beer to a minor for his own consumption in the absence of his parent, guardian, or spouse even in a friend's home, violates sec. 66.054 (24).

Question 3: *Drinking more than 10 feet from point of service*

The first sentence of the statute unconditionally prohibits selling or furnishing for consumption by an unaccompanied minor outside the licensed building or permanent structure. The second sentence says:

“\* \* \* Whenever fermented malt beverages are dispensed for consumption outside a building or permanent structure by a licensed dispenser, the premises in which a person under 21 years of age may possess such beverages shall include all areas within 10 feet of the point at which such beverages are dispensed. \* \* \*”

Since under the first sentence the licensee cannot lawfully permit consumption by an *unaccompanied* minor outside the building or structure, the second sentence must apply to cases where the minor is *properly accompanied* and the beverage is dispensed by a licensee for consumption outside such building or structure. This would apply, for example, to unenclosed portions of licensed tavern premises and at picnics licensed under sec. 66.054 (8) (b). It follows that the 10-foot restriction does not apply *within* a licensed building or permanent structure. Its effect is to prevent the minor from taking his beer away from the outdoor point of service where he was accompanied by his parent, guardian, or spouse when served. This is evidently intended to apply to beverages “dispensed” in glasses, mugs, or open cans or bottles for immediate consumption.

WAP

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*Corporate Name—Trade Mark—Application of sec. 180.809 relative to “Singer” trade mark.*

July 26, 1963

ROBERT C. ZIMMERMAN,

*Secretary of State*

"The Singer Company," a Delaware corporation, was organized in 1960 to take over the businesses of "The Singer Manufacturing Company," a New Jersey corporation which had been qualified to do business in Wisconsin between 1873 and 1905, and "The Singer Sewing Machine Company," a New Jersey corporation which has been qualified in Wisconsin since 1905 down to date.

"The Singer Company," a Delaware corporation, the one organized in 1960, has now applied to you for a certificate of authority to do business in this state. You have inquired whether you may properly grant such a certificate in view of the fact that there now is a Wisconsin corporation named "Singer, Inc." organized in 1942.

You base your inquiry on the possible application of sec. 180.809, Stats., 1961, which contains the following language:

**"180.809. Corporate name of foreign corporation.** No certificate of authority shall be issued to a foreign corporation which has a name \* \* \* deceptively similar to, the name of any domestic corporation existing under any law of this state \* \* \*."

The New Jersey Singer companies were engaged since 1851 down to October, 1915, almost entirely as a manufacturer of the well-known Singer sewing machine. Starting on October 19, 1915, the line of appliances manufactured and sold was successively expanded to include electric motors and controllers, vacuum cleaners, electric floor polishers, typewriters, and radios, which line was added in January, 1962.

The Wisconsin "Singer, Inc." at all times dealt solely in women's wearing apparel. At the time of its organization the controlling statute read:

180.02 Articles. (1) CONTENTS. The persons desiring to form a corporation shall sign and acknowledge articles containing:

“\* \* \*

“(b) The name of such corporation, but such name \* \* \* shall be such as to distinguish it from any other domestic corporation and from any corporation licensed in this state. \* \* \*”

The worldwide fame of the Singer sewing machine is well known. It was recognized in 1896 by the United States supreme court in the case of *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169, 16 S. Ct. 1002, 41 L. Ed 118 which held that the word “Singer” had acquired a secondary meaning to such an extent that the word had become in effect an unregistered, but valid, common law trade mark and trade name. The word “Singer” was first registered in the United States patent office in 1906, registration number 49,600; as a trade mark of the Singer Manufacturing Company; that registration was renewed in 1946 by the Singer Manufacturing Company and presently is in effect. The word “Singer” was again registered in 1956 as a trade mark of the Singer Manufacturing Company for sewing machines and a great variety of other products.

It would appear from the foregoing that such property rights as exist in the word “Singer” for the type of appliances and articles which it manufactures are vested in “The Singer Company” the Delaware corporation, which will hereafter be the controlling corporation for the two New Jersey “Singer” companies.

We need not consider now whether there was any impropriety or lack of judgment in the grant of articles of incorporation to “Singer, Inc.” the Wisconsin corporation in 1942, since in all that time the original Singer Company has made no complaint that its business was interfered with, nor has any member of the public made any claim that the businesses of the two companies were confused as indeed it would appear from their nature they cannot be.

We find that in the closely allied field of trade mark law it has been stated that identical trade marks may be used on a different class of goods by different persons so long as the trade mark for a broad class is not used on a particular species of such class. 87 C. J. S. p. 303, para. 77.

RGT

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*Words and Phrases—Interstate Compact—Mental Health*  
—Discussion of the adoption of the Interstate Compact on Mental Health and degree to which enabling legislation may vary.

July 30, 1963

THE HONORABLE, THE SENATE:

The legislature is considering the adoption of the Interstate Compact on Mental Health which has already been adopted in numerous other states. Your first question is whether the legislature may adopt an amended version of the compact or whether it must be adopted in the same form as in other states. Assuming the adoption of the compact in the same form as other states, your second question is whether additional legislation can be enacted simultaneously to implement the compact's operation in this state. You also ask whether the compact or the additional legislation would control (a) if there were a direct conflict between the two, and (b) if there were no direct conflict between the two.

In addressing ourselves to this problem it will be helpful to consider the precise nature of an interstate compact. Such a compact is a contract between two or more states. In "Administration of Interstate Compacts" by Leach and Sugg, published in 1959 by the Louisiana State University Press, at page 14, the authors state:

"\* \* \* an interstate compact is a contract; but because of the quasi-sovereign nature of the parties to an interstate

compact, this is regarded as a more formal and weighty commitment than a contract involving private persons. \* \* \*

As with other contracts there must be an offer and an acceptance. The enactment of the compact by the states which have already adopted it constitutes the offer. The enactment of the compact by this state constitutes the acceptance. Mutual assent and mutual obligation are necessary. There must be a meeting of the minds, a distinct intention common to all parties and without a difference. Until all understand alike, there can be no assent and therefore no contract. All parties must assent to the same thing. 17 C.J.S. Contracts §§ 1, 30, 31, and 100. For a general discussion of the law of interstate compacts see a previous opinion of this office in 40 OAG 43. If a state were to adopt the compact but substantially change the language so as to affect adversely the rights of the parties thereto, it is likely that a court would rule that the compact had not been validly enacted unless the other states had accepted and ratified the changes.

If the legislature were to adopt the compact and simultaneously enact legislation inconsistent therewith, it is probable that a court would hold that there was no valid compact, if the inconsistencies were such as to affect adversely the rights of the parties to the compact. No court has as yet passed on this point. If the statute were not in conflict with the compact it is probable that both would stand and the compact would be perfectly valid. Bearing this in mind, it will be helpful to examine the provisions of the compact and the changes which have been proposed.

The Interstate Compact on Mental Health originated in 1955 at the Governor's Conference in Chicago. At present, twenty-eight (28) states are parties to this compact and several more are considering it. The purpose and principal function of the compact is to assure mental patients the best possible care and to facilitate transfer of the patient to institutions in other states when such transfer would be in the best interest of the patient. The compact itself is enacted by a state legislature as a part of an enabling act.

The enabling act need not be uniform in all enacting states because the function of an enabling act is to gear the compact into the existing body of a state's laws and to take care of such implementing matters as are necessary to the administration of the compact in the state concerned. A recent publication by the council of state governments contains the following statement:

"The Interstate Compact on Mental Health consists of 14 Articles, necessarily drafted in careful legal language, but with easily identifiable substantive provisions. It is in the form of a legally binding agreement among the party states, to be adhered to by uniform ratification thereof by the legislatures. Accompanying the draft compact itself is a suggested legislative enabling act for the guidance of those who may be preparing the compact for introduction in bill form. The enabling act may vary from state to state in its provisions, although the drafters highly recommend that Section 1 and Section 5 be enacted without substantial change in order that a simple and effective method of exchanging documents among party states may be accomplished with the Council of State Governments acting as a clearing house. The text of the compact itself should be inserted within the enabling act *without any change or variation*. Since the subject matter of the compact lies entirely within the realm of state competency, it is not contemplated that Congress will be asked for any consent act except as it may be needed for the territories, possessions and the District of Columbia. Further information concerning the Interstate Compact on Mental Health may be secured from the Council of State Governments."

Bill No. 167, S., is the standard text of the mental health compact. Substitute amendment 1, S., to Bill No. 167, S., contains the standard text plus certain changes in the enabling act which it is considered will improve the operation of the compact in this state. A question has now been raised whether these enabling act changes may be made without invalidating the compact. I conclude that such changes can be made and the compact thus enacted will be valid.

The first change is the proposed enactment of sec. 51.76. This section requires the governor to designate the director of the state department of public welfare to be the compact administrator. This does not conflict with the compact and is consistent with Section 2 of the model enabling act proposed and approved by the council of state governments.

The second change is proposed sec. 51.77, which requires, where a patient is to be transferred, that notice be given to the patient and his relatives and that a court determination may be obtained upon the application of any interested party. This is entirely consistent with the compact and with Section 5 of the model enabling act of the council of state governments.

The third change is proposed sec. 51.79, which is consistent with Section 6 of the model enabling act, relating to transmittal of copies of the act.

The fourth change is proposed sec. 51.80, which reads:

“Nothing in the interstate compact on mental health shall be construed to abridge, diminish or in any way impair the rights or liberties of any patient affected by the compact.”

This is entirely consistent with Art. VIII, sec. (a) of the text of the compact and serves merely to emphasize that the purpose of the compact is to improve the service to mental patients while protecting their rights.

The fifth change is proposed sec. 51.81, which relates to the effective date of the compact. This is entirely consistent with Section 7 of the model enabling act of the council of state governments.

A sixth change has been proposed by Amendment No. 1, S., to Substitute Amendment No. 1, S., to Bill No. 167, S. This would prohibit the compact administrator in this state from promulgating any regulation affecting any county institution without the approval of the county board. This in no way conflicts with the compact or the model

enabling act approved by the council of state governments. Article X, sec. (b) of the compact reads:

“The compact administrators of the respective party states shall have power to promulgate reasonable rules and regulations to carry out more effectively the terms and provisions of this compact.”

Section 2 of the model enabling act authorizes the compact administrator to cooperate with all agencies of the state and its subdivisions to facilitate the proper administration of the compact. Section 3 of the model enabling act provides that when supplementary agreements made by the administrator contemplate the use of any institution or facility of this state, such agreement shall not take effect until approved by the agency which operates the institution. The change proposed to require county board approval of regulations affecting county institutions is entirely consistent with these provisions of the compact and model enabling act. The change would affect only the operation of the compact within this state, and would in no way conflict with any rights of other states which are parties to the compact. Thus, such change would not invalidate the compact.

It is, therefore, my conclusion that if the legislature decides to enact the Interstate Compact on Mental Health, the standard text proposed and approved by the council of state governments should be followed, since this is the language used by other states. The changes above discussed may be incorporated in the enabling act because they are not inconsistent with the compact itself. If this procedure is followed the compact will be a valid agreement conferring upon this state all of the rights of the other member states.

AH

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*Administrative Code—Publication*—Discussion of Ch. 227 relative to rule-making procedures by state agencies and correction of possible errors.

August 6, 1963

JAMES J. BURKE,

*Revisor of Statutes*

Under the rule-making powers granted to it by Ch. 227, Stats., a department has given notice of hearing, held a hearing, adopted new rules and filed a certified copy of such rules with you. Before you had an opportunity to publish the new rules as provided in Ch. 227 the department requested that the aforesaid certified copy of the new rules be returned to it without publication.

You have inquired whether under these circumstances the statutes permit the department to withdraw the certified copy of the rules which it has filed with you, or whether you are compelled to proceed with the publication of such rules. In the foregoing situation it appears that in at least some of the cases the department became convinced that it had made a mistake in adopting the new rules.

In other situations it appears that departments request permission to change the rules as actually adopted in order to correct a clerical error, or to make a minor change which may or may not result in a substantive change in the rule.

You wish to be advised whether a department which has completed the statutory requirements in the rule-making process provided for in Ch. 227 and has filed a certified copy of the rules adopted with you has exhausted its rule-making authority in the above situations.

Presumably a certified copy of the rules was also filed in the office of the secretary of state. Presumably, also, your questions do not relate to emergency rules.

Sec. 227.023 provides:

“227.023 **Filing of rules.** (1) A certified copy of every rule adopted by an agency shall be filed by the agency in the office of the secretary of state and in the office of

the revisor of statutes. No rule is valid until a certified copy thereof has been so filed.

“(2) The secretary of state shall indorse on the copy of each rule filed with him the date of filing. He shall keep a permanent file of such rules.

“(3) The filing with the secretary of state of a certified copy of a rule raises a presumption that:

“(a) The rule was duly adopted by the agency; and.

“(b) The rule was filed and made available for public inspection at the day and hour indorsed on it; and

“(c) All the rule-making procedures prescribed by this chapter were complied with; and

“(d) The text of the certified copy of the rule is the text as adopted by the agency.”

Sec. 227.025 provides in part:

“227.025 **Publication of rules.** All rules and other materials which agencies are directed or authorized by this chapter to file with the revisor of statutes shall be published in the Wisconsin administrative code or register in the manner prescribed by s. 35.93. \* \* \*”

“35.93 **Wisconsin administrative code and register.** (1)

Sec. 35.93 (1) and (3) provide in part:

The Wisconsin administrative code and register shall be printed in loose-leaf form and shall be hole-punched. \* \* \* The printing or other duplicating shall be handled by the director. \* \* \* He [the revisor] also shall supervise the arrangement of materials in the Wisconsin administrative code and register, including the numbering of pages and section. \* \* \*

“\* \* \*

“(3) The revisor shall monthly compile and deliver to the director for printing copy for a register which shall contain all the rules filed since the compilation of rules for the preceding issue of the register was made. The

register shall be printed in the same style as the original code and shall be so set up as to permit the changes to be inserted as pages of the original code in lieu of the pages containing superseded material. \* \* \* The revisor may include in the register such instructions or information as in his judgment will help the user to correctly make insertions and deletions in the code and to keep his code current."

Sec. 227.024 (6) provides:

"(6) An agency may include with its rules brief notes, illustrations, findings of fact, digests of supreme court cases or attorney general's opinions, or other explanatory material if such materials are labeled or set forth in a manner which clearly distinguishes them from the rules. The revisor of statutes may edit such materials before publishing them in the administrative code and register, may merely refer to the fact that they are on file, or may eliminate them or any reference to them in the administrative code and register if he feels that they would not, to any appreciable extent, add to an understanding of the rules. If the revisor of statutes edits such materials preparatory to publication, he shall submit the edited version to the agency for its comments prior to publication."

The procedure for adopting departmental rules and making them effective is purely statutory. After the newly-adopted rules have been filed with the secretary of state and you, pursuant to sec. 227.023 (1), certain effects flow therefrom under said statute and an obligation devolves upon you pursuant to sec. 227.025 which provides that such rules "shall be published in the Wisconsin administrative code or register in the manner prescribed by s. 35.93." The latter statute places upon you the duty of arranging the rules for publication and delivering such material to the director of the bureau who performs the printing function in the department of administration. No statute grants authority to you or such director to withhold such arrangement and publication; nor does any statute grant to an agency the authority to nullify the

effect of the filing of rules specified in sec. 227.023 or the rule-making procedure which has been followed up to that point by withdrawing the certified copy of the rules from you. In my opinion the agency has exhausted its power with respect to such rules except the right to change or rescind them by again following the procedure provided in Ch. 227.

However, after an agency has completed its rule-making procedure, if it discovers that an error of some kind has been made therein, sec. 227.024 authorizes an agency to "include with its rules brief notes, illustrations, \* \* \* or other explanatory material if such materials are labeled or set forth in a manner which clearly distinguishes them from the rule. \* \* \*" It is my opinion that such note or other explanatory material could be employed in an effort to rectify the mistake. Said statute grants you the right to edit or delete said note or explanatory material which is filed by the agency with its rules. No attempt can be made at this time to pass upon the legal effect of such note or other explanatory material as each case would have to be judged separately.

It is also noted that if the errors involve matters which relate to insertions or deletions in the code or keeping the code current, sec. 35.93 (3) empowers you to include in the register such instructions or information as in your judgment would rectify such error.

JRW

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*Constitutionality—Utilities—Interstate System—Sec. 59-965 (e), (g) and (h), which allows certain reimbursements for relocation of utility facilities in public ways because of county expressway constructions, is valid.*

August 8, 1963

V. L. FEDLER,  
*Secretary, State Highway Commission*

You ask my opinion on the validity of sec. 59.965 (5) (e), (g) and (h) of the Wisconsin statutes. You state that the bureau of public roads now requires either an attorney general's opinion or a court ruling on the constitutionality of the Wisconsin law in regard to payments for utility relocation costs under sec. 59.965 (5) (g) and (h) of the Wisconsin statutes.

You state that the state highway commission has programed the payment for the relocation of utilities on the interstate system pursuant to 46 OAG 58, which states that sec. 59.965 (5) (e), (g) and (h) and sec. 84.29 of the Wisconsin statutes, places a duty upon the state highway commission to program such expenditures for reimbursement with federal aid. However, you state that the bureau of public roads has withheld approval of the payments for utility relocation costs until the validity of the state law authorizing such payments has been passed on by the court or by the attorney general.

It has long been the law in this state that an act of the legislature is presumed to be constitutional, and it will not be declared unconstitutional unless its invalidity appears clearly, or unless there is a showing that beyond a reasonable doubt it violates some constitutional provision. *State ex rel. Thomson v. Giessel*, (1953) 265 Wis. 558, 61 N.W. 2d 903; *Nebbia v. New York*, (1934) 291 U.S. 502, 554 Sup. Ct. 505.

Sec. 59.965 (5) (g) provides for the payment to municipal utilities by a county through the expressway commission. The statute provides that the expressway commission must pay the costs of the replacement of the existing facility in kind or with equal materials or facilities, and provides further, that the commission shall pay such excess costs where the installation of such enlarged facility is caused by designed construction and use of the expressway.

Sec. 59.965 (5) (h) provides for the reimbursement to private utilities. The section provides that the expressway commission shall pay two-thirds of the net cost in-

curred by the utility in relocating their facilities after deducting reasonable and fair credit for items salvaged, for any betterments made at the option of the company, and for the value as carried on the utility's books of the used life of a facility retired from use if the service life of the new facility will extend beyond the expectancy of the one removed.

The statute requires the county to pay the relocation through the expressway commission in every case where the utility is lawfully within the right of way. Therefore, we must assume that the statute requires payments in those cases where the utility, by permit or contract, has contracted to move or relocate at their own expense when it was necessary to accommodate the highway.

In the cases where the utility has an easement, there would be no constitutional question involved since the county would be required to provide just compensation under Art. XI, sec. 2 of the Wisconsin constitution. We, therefore, will discuss those instances where the utility does not have an easement.

The first question involving the constitutionality would be whether or not this is an expenditure for a private purpose in violation of Art. VIII, sec. 2, which reads, "No moneys shall be paid out of the treasury except in pursuance of an appropriation by law." Appropriation by law implies a valid law and a public purpose for the expenditure. *State ex rel. Consolidated Stone Co. v. Houser*, (1905) 125 Wis. 256, 104 N.W. 77.

In order to answer this question, we must look to sec. 84.29 (3), which reads:

"(3) CHANGES IN EXISTING HIGHWAYS AND UTILITIES. It is recognized that in the construction of interstate highways in this state to modern standard and design, mutually agreed upon by the highway commission and the federal agency, to promote the public and social welfare, and benefit public travel of the state, and meet the needs of national defense, it will become necessary

for the highway commission to make or cause to be made changes in the location, lines and grades of existing public highways, railroads and public utility transmission lines and facilities.”

It would appear that the legislature has declared that the moving of the utilities is to promote the public and social welfare and to meet the needs of national defense.

Historically, the public utility lines have been placed upon the highway right of way and the statutes have provided means for utilities to obtain permits. Sec. 86.16 provides for permits to place utility lines on highways. In addition, it is common knowledge that utility lines generally follow the highways.

Some states have held that the use of right of way by utilities to locate their facilities is one of the primary purposes for which highways are designed. *Minneapolis Gas Co. v. Zimmerman*, (1958) 253 Minn. 164, 91 N.W. 2d 642. While the law in Wisconsin does not provide that the utility lines are a legitimate highway purpose, it does recognize the practicality of locating their facilities in highways by providing for permits.

It is also my opinion that the court would take judicial notice of the fact that in modern living, utilities are practically indispensable, and therefore, it is of primary public interest that in the construction of the highways, the utilities are in some manner provided for. The payment to the utilities is not a gratuity, because in the case of the municipal utility under sec. 59.965 (5) (g) the utility will be merely placed in the same position it was prior to the relocation. In the case of the private utility under sec. 59.965 (5) (h) the utility is paid only two-thirds of its cost of relocation.

When the question of gratuities was before the Minnesota court in the case of *Minneapolis Gas Co. v. Zimmerman*, *supra*, it was stated:

“It is argued, however, that since plaintiff utility, at common law and under the terms of the occupancy per-

mits issued to it by the state, was entitled to no reimbursement and was solely responsible for all costs of relocating its facilities on the highway, the Reimbursement Act, in authorizing payment of such relocation costs from the highway fund, confers upon the plaintiff a gratuity of public moneys in violation of Minn. Const. art. 9, §§1 and 10. This argument ignores the well established principle — followed by other jurisdictions with identical or similar constitutional provisions — that, although gratuities and benevolences of public moneys in aid of private undertakings are prohibited, the state constitution does not prohibit the legislature from, by prospective action (that is by an enactment prior to the ordering of a relocation of utility facilities or prior to the commencement of a great public work requiring such relocation), fixing the conditions of performance and making provisions for the future recognition of claims for damages founded on equity and justice, although such claims would otherwise be *danum absque injuria* and unenforceable against the state. Advance provisions for the recognition of anticipated relocation cost claims, founded on equity and justice, is *ex gratia* only in the sense that the constitution *does not require* the state to pay such costs."

In Wisconsin, we have many instances where statutes provide payments which would otherwise be non-compensable under the law. An example is sec. 86.05, which provides for reconstruction of driveways. In *Heimerl v. Ozaukee County*, (1949) 256 Wis. 151, 40 N.W. 2d 564, the court said that this was a payment provided by the legislature to compensate for property taken in the exercise of the police power. This is one example of payment when the constitution does not require it. It is not unconstitutional to make payments not required by the constitution.

The next constitutional question is whether there is an impairment of contract in violation of Art. I, sec. 12, Wis. const. It is my opinion that the state legislature has the power by statutory enactment to amend a contract entered into by the state. It may consent to release the

other party from part or all of its obligation thereunder. Therefore, it appears to me that the question is whether or not the rights of a third party are involved.

The Wisconsin court has consistently held that a county "is a governmental agency of the state, performing primarily the functions of the state locally." *Ferguson v. Kenosha*, (1958) 5 Wis. 2d 556, 93 N.W. 2d 460. The court has also held in governmental matters, the county is simply the arm of the state. The state may direct its action as it deems best and the county cannot refuse to obey. *McDougall v. Racine County*, (1914) 156 Wis. 663, 146 N.W. 794. In the *McDougall* case, *supra*, Racine County had entered into contracts to build a courthouse. Subsequent thereto, a statute was passed requiring certain restrictions and limitations in the construction of any courthouse. The courthouse, if built according to the contract, would have violated the statute. The court stated at pages 655-666:

"\* \* \* In governmental matters the county is simply the arm of the state; the state may direct its action as it deems best and the county cannot complain or refuse to obey. The arm is not to be heard to challenge the wisdom of the commands of the brain. We see no reason to question the validity of any of the provisions of the law.

"\* \* \*

"It is said that if the law be held to apply to the present case it will impair the obligations of the building contracts. Not so, however. The state may breach its contract if it will, subject to the payment of damages. This is not impairing the obligations of a contract. It is because the obligations of a contract are unimpaired that damages may be recovered for their breach \* \* \*."

In *Douglas County v. Industrial Comm.*, (1957) 275 Wis. 309, 313, 81 N.W. 2d 807, it is stated as follows:

"Counties, like other municipal corporations, are mere instrumentalities of the state, and statutes confer upon them their powers, prescribe their duties, and impose their

liabilities. *Frederick v. Douglas County*, (1897) 96 Wis. 411, 417, 71 N.W. 798; and *Commissioners v. Lucas*, (1876) 93 U.S. 108, 114, 23 L. Ed. 822. Because of this, the legislature may, with the consent of the other party, revoke any contract entered into by a county or other municipal corporation in performance of a governmental function, and in so doing there is no violation of the constitutional prohibition against a state taking action to impair the obligation of a contract. This rule is stated in 37 Am. Jur., *Municipal Corporations*, pp. 699, 700, sec. 89, as follows:

“A contract to which a municipal corporation is a party, relating to a public and governmental matter, may, however, be revoked by the legislature with the consent of the other party without thereby violating the right of the municipality.’

“The foregoing rule was clearly enunciated by the United States supreme court in *Worcester v. Worcester Consolidated Street R. Co.*, (1905) 196 U.S. 539, 25 Sup. Ct. 327, 49 L. Ed. 591. In that case the question before the court was whether a state legislature could abrogate the provisions of a contract between a city and a railroad company with the assent of the latter, and provide for a different method for the paving and repairing of city streets through which the tracks of the railroad were laid. The city endeavored to enforce the original contract, contending that the act of the legislature in abrogating it violated the impairment-of-contract clause of the United States constitution. The court in its opinion held that the legislature had the power to abrogate the contract with the consent of the railroad company, and pointed out that municipal corporations are mere instrumentalities of the state. Therefore, the state had the same right to terminate the contract with the consent of the railroad company that the city itself possessed.

“This court as recently as 1951 cited with approval *Worcester v. Worcester Consolidated Street R. Co.*, *supra*, in *Madison Metropolitan Sewerage Dist. v. Committee*, (1951) 260 Wis. 229, 247, 50 N.W. (2d) 424.

"In *Trenton v. New Jersey* (1923), 262 U.S. 182, 43 Sup. Ct. 534, 67 L. Ed. 937, the United States supreme court made this significant statement (262 U.S. at p. 188):

"The power of the state, unrestrained by the contract clause or the Fourteenth amendment, over the rights and property of cities held and used for "governmental purposes" cannot be questioned.'

"In keeping with this principle this court stated in *Holland v. Cedar Grove* (1939), 230 Wis. 177, 189, 282 N.W. 111, 282 N.W. 448:

"Municipal corporations have no private powers or rights as against the state. They may have lawfully entered into contracts with third persons which contracts will be protected by the constitution, but beyond that they hold their powers from the state and they can be taken away by the state at pleasure. *Richland County v. Richland Center* (1884), 59 Wis. 591, 18 N.W. 497; *Frederick v. Douglas County* (1897), 96 Wis. 411, 71 N.W. 798.'

"The contract rights arising under an agreement entered into by a municipality, acting in governmental capacity, and third persons, which are protected by the constitution against impairment by the legislature, are those of the third persons, not those of the municipality. *Worcester v. Worcester Consolidated Street R. Co.*, *supra*. This is because whenever a municipal corporation makes a contract in its governmental capacity with a third party it is the same as if the state itself were one of the two contracting parties, the municipality being but an arm of the state."

In view of the above cases, no rights of any third parties are involved, and the legislature may release the utilities from their contractual obligations, there is no impairment of contract, and Art. I, sec. 12 is not violated.

It is also my opinion that the statutes providing for the utility reimbursement does not grant a special privilege or franchise, nor does it become a special law in violation of Art. IV, sec. 31, Wis. Const. Sec. 59.965 provides for expressways in populous counties. Sec. 59.965

(2) creates a county expressway commission in any county having a population of 500,000 or more. Sec. 59.965 then provides for the payment of utility relocations, as previously discussed. The question of the classification for counties having a population of 500,000 or more, has been upheld by the Wisconsin court as not being in violation of Art. IV, sec. 23, Wis. Const. requiring uniform town and county governments.

See:

*Hill v. Am. Surety Co.*, (1902) 112 Wis. 627, 88 N.W. 642;

*State ex rel. Scanlon v. Archibold*, (1911) 146 Wis. 363, 131 N.W. 895;

*State ex rel. Milwaukee County v. Boos*, (1959) 8 Wis. 2d 215, 99 N.W. 2d 139.

The court will not interfere with the legislature's classification, unless it is so manifestly arbitrary as to evince a purpose of evading the constitution. Providing expressways in populated areas is, in my opinion, a proper classification and is germane to the purpose of the statute.

If this is a proper classification, then Art. IV, sec. 31, 2d, Wis. const., prohibiting special and private laws for laying out, opening or altering highways, is also not violated.

The classification providing for payment of utilities on expressways, separately from other routes, is based upon a substantial distinction which makes this class of highway different from the others. The distinction is based on differences in the circumstances of expressways through populated areas. The amount of disruption caused by a highway of this type, is considerable as compared to an ordinary highway. A similar highway through the rural areas causes a minimum amount of disruption to the utilities in the area in comparison to those in a populated area.

The statute applies to all utilities that are lawfully within any highway, street or alley that is required to

be relocated as a result of the construction of the expressway. Therefore, in my opinion, the classification is proper and we do not have a special law. It applies uniformly to all persons in the same class.

The opinion of this office, recorded in 46 OAG 58, at page 64, provides:

“\* \* \* The highway commission, however, has no authority to contract state funds or to contract in such a manner that state funds would have to be expended in case the federal aid were not available.”

Therefore, in discussing the constitutionality of the statute, the constitutional issue, usually discussed in relation to these problems of lending state credit, is not involved. The state is not lending its credit in violation of Art. VIII, sec. 3, Wis. const. I do not imply that if the state were to contract in such a manner, and that state funds would be used, the statute would be unconstitutional. I merely state that the issue is not before us. There is nothing in the law which allows the state to pay the expenses of relocation. The statute, however, provides that the county must pay the costs as provided in that section.

In view of the foregoing opinion that the legislature has the authority to require the counties to pay, even where they, by contract, are not obligated to pay, with the other reasons discussed, makes the state law authorizing such payments, valid.

AJF

*Assessor's Plat—Words and Phrases*—Costs and expenses of assessors' plats are distributable under sec. 70.27 (1) on the basis of the assessed valuation of both the land and the improvements of parcels included.

August 12, 1963

DONN H. DAHLKE,

*District Attorney, Marquette County*

You have requested an opinion as to the basis to be used pursuant to sec. 70.27 (1) in charging the costs and expenses of an assessor's plat to the land involved therein. It is provided in said section so far as here material, as follows:

“\* \* \* The actual and necessary costs and expenses of making assessors' plats shall be paid out of the treasury of the city, village, town or county whose governing body ordered the plat, and all or any part of such cost may be charged to the land so platted in the proportion that the last assessed valuation of each parcel bears to the last assessed total valuation of all lands included in the assessor's plat, and collected as a special assessment on such land, in the manner provided by s. 66.60.”

Your question is whether such costs and expenses are distributable by prorating them through using the assessed valuation of only the land of the several parcels involved or by using the assessed valuation of both the land and the improvements of such parcels.

Sec. 70.03 says that the word “land” when used in Ch. 70, “shall include not only the land itself but all buildings and improvements thereon, and all fixtures and rights and privileges appertaining thereto.” It is, therefore, my opinion on the basis of this definition of the word “land” that the basis for distributing the pro rata costs and expenses of an assessor's plat is the assessed valuation of both the land and the improvements of the parcels included in the plat.

HHP

*Student Loans*—The amendment of sec. 49.42 (1) by ch. 53, Laws 1963, extends eligibility for student loans to students in technical schools established by sec. 41.15 et seq. but does not include students in private technical schools.

August 15, 1963

WILBUR J. SCHMIDT,

*Director, Department of Public Welfare*

You have requested my opinion whether the language added to sec. 49.42 (1) by ch. 53, Laws 1963, extends the availability of student loans to students attending any school which could be classified as meeting the general provisions of vocational, technical or adult school, or whether it applies only to students attending schools of vocational, technical and adult education established under sec. 41.15.

Ch. 53, Laws 1963, amends sec. 49.42 (1) as follows:

“49.42 (1) The legislature finds that loans to needy students are for a public purpose in that the development of human resources is vital to a healthy state economy and that qualified residents of the state who are unable to continue their education may become additions to the number of unemployed. From the appropriation provided by s. 20.670 (47), the department shall make loans to qualified residents of the state who have good academic records to that point, are in financial need and possess qualities of leadership, and are desirous of attending or currently are attending the university, the state colleges, or other educational institutions in this state of like rank above the high school \* \* \*, county teachers' colleges *and full-time post high school, vocational and technical programs in schools of vocational, technical and adult education.*”

Sec. 41.15 (1) and (2) provide as follows:

“41.15 **Local programs of vocational, technical and adult education.** (1) **PURPOSE.** In order to establish, foster and

maintain a system of vocational, technical and adult education for instruction in trades and industries, commerce, agriculture, home economics, general and civic education in part-time and full-time day or evening classes, a system of vocational, technical and adult education is established. It is the intent of this section that every person 14 years of age or over who can profit thereby shall be eligible to attend such tax-supported instruction under the rules established by the state board of vocational and adult education.

“(2) SCHOOLS CLASSIFIED. In order to establish the requirements for the distribution of state aids, the determination of credits and other administrative processes, the state board shall establish criteria for and classify the schools of vocational, technical and adult education established by the local boards as:

“(a) Vocational evening schools;

“(b) Schools of vocational, technical and adult education.”

The balance of sec. 41.15 and secs. 41.155 to 41.215 provide for the organization of local boards of vocational and adult education, the establishment and administration of the schools, state and federal aid, and the like.

The following description of the technical program of these publicly operated schools appears in the article on the State Board of Vocational and Adult Education in the 1962 Wisconsin Blue Book, page 540:

“Post-High School Programs. The full-time post-high school technical programs are the newest responsibility of the schools. They have been established to serve those who do not wish to go into collegiate education, but are desirous of learning the specialized skills needed for employment in accounting, secretarial work, automotive technology, mechanical design technology, chemical and metallurgical technology, commercial art, electricity and electronics, printing, medical assistantship, telecasting, and other fields. Graduates of programs approved by the state board in this *full-time 2-year courses*, may be granted

the Associate's degree, the degree traditionally granted for such work past the high school level. These terminal technical courses are increasing in the state, as rapidly as the need arises and the schools can develop the programs on a quality basis, and without weakening the traditional programs." (Emphasis added.)

It is my opinion that the student loan provision of sec. 49.42 (1), as amended by ch. 53, Laws 1963, was intended to and does apply only to the schools established under sec. 41.15 and following, and does not apply to students in privately operated institutions.

It will be observed that sec. 49.42 (1), after referring to the university and the state colleges, says: "or other educational institutions in this state of like rank above the high school." If the legislature intended to include private institutions in the newly created provision of the statute, it would have used similar language after "schools of vocational, technical and adult education."

The inference that only the "schools of vocational, technical and adult education" established pursuant to sec. 41.15 and following were intended to be included in the student loan program is strengthened by the fact that the legislative reference library file shows that the source or sponsor of the bill was the state board of vocational and adult education, and that the instructions for drafting were submitted by Clarence Greiber, the state director and executive officer of the board. The file of the legislative reference library contains also an executive office release dated April 16, 1963 urging passage of the bill which became ch. 53, Laws 1963. In this release the governor stated in part:

"Bill 316A corrects an omission in Chapter 48.42 by extending the provisions of the loan fund to students in the full-time technical programs offered at the post-high school level by our vocational, technical, and adult schools.

"In the current school year, more than 7,500 full-time students have enrolled in these technical training programs in our State. \* \* \*

“\* \* \*

“Inasmuch as these technical training programs *involve only two years of full-time study*, rather than four, these are the students who are most quickly shifted from being learners to earners. Thus, loan funds available to these students not only help in providing skilled manpower the State needs most quickly, but the funds so used themselves will turn over faster, and thus be available to more students than would otherwise be assisted to the education they need to become useful, productive members of our State population.” (Emphasis added.)

It is apparent that the governor was referring to the publicly operated schools established under sec. 41.15 and following, not to privately operated technical schools.

WAP

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*Veterans' Service Commission—Constitutionality*—Statutory requirement that appointees to county veterans' service commissions be members of veterans' organizations is not violative of either the Wisconsin or federal constitutions.

August 22, 1963

THE HONORABLE, THE ASSEMBLY:

By Resolution No. 19, A., you ask my opinion as to the validity of Bill No. 354, A.

Sec. 45.12, Wis. stats., is entitled “County veterans' service commission,” and deals with the composition of such a commission (it has three members) and appointments thereto. Bill No. 354, A., reads in part as follows:

“45.12 (2) of the statutes is amended to read:

“45.12 (2) Such commission shall be organized by the election of one of their number as chairman. Said judge after the expiration of the terms of those first appointed shall annually appoint one person as a member of such

commission for the term of 3 years. *One commissioner shall be appointed from the representatives of each of 3 different veterans' organizations in the county, unless there are fewer than 3 such organizations, then the appointments shall be distributed among all existing veterans' organizations. \* \* \**

The italicized language from the above-quoted bill accounts for the fact that the above-mentioned resolution correctly describes such bill as one "which requires appointees to county veterans' service commissions to be members of veterans' organizations." However, it appears that Bill No. 354, A., prior to the request for this opinion, was amended by Amendment No. 1, A., thereto, and as so amended it has been passed by the assembly. In lieu of the italicized portion of Bill No. 354, A., above-shown, there is substituted in such amendment this sentence:

"No more than one member of a single veterans' organization in the county shall be appointed or serve at any one time, unless there is an insufficient number of such organizations from which members may be appointed, in which case, the appointments shall be distributed among all existing veterans' organizations."

By virtue of such amendment, an element of ambiguity is now present in Bill No. 354. To me, the language immediately above-quoted does not make it mandatory that all appointments to county veterans' commissions be made from the memberships of veterans' organizations. If there is an insufficient number of veterans' organizations in any given county, i.e., less than three, then it would appear that the three members of the commission, under Bill No. 354, A., as so amended, must be appointed from their ranks, since in that case "the appointments *shall* be distributed *among all existing veterans' organizations.*" If, however, a given county has three or more veterans' organizations, the amendment by no means makes it clear that the appointments to the commission must then be made from the ranks of veterans' organizations. The language, "No more than one member of a single veterans' organization in the

county shall be appointed or serve at any one time, \* \* \* certainly does not spell out such a requirement, nor is such requirement implied thereby. Plainly, what is lacking in Bill No. 354, A., as amended, is a simple statement that, "All commissioners must be appointed from the memberships of veterans' organizations." This deficiency could, of course, be remedied by amendment, and in giving this opinion I shall treat Bill 354, A., as if that deficiency had already been so remedied. I shall do so on what appears to be a sound assumption under the circumstances, namely, that the assembly, in adopting Bill No. 354, A., as amended, intended, despite the above-mentioned ambiguity arising out of its amendment, that all the above-mentioned commissioners were in the future to be appointed from the membership of veterans' organizations.

It is, then, my opinion that Bill No. 354 A., would be a valid law were it enacted after elimination of its above-mentioned deficiency.

A member of the county veterans' service commission clearly holds public office, for his position is one created by law and in it he exercises a portion of the sovereign power. See *Martin vs. Smith*, (1941) 239 Wis. 314, 330, 332; 50 OAG 6 (1961). In determining the right of certain persons to receive aid under sec. 45.10, the commissioners of a county service commission manifestly exercise a portion of the sovereign power of government. Sec. 45.14. As public officers, the qualifications of such commissioners are matters for the legislature to determine, and such qualifications will invalidate no law wherein they are prescribed so long as they are reasonable and not opposed to constitutional provisions or to the spirit of the constitution.

In *State ex rel. Williams vs. Samuelson* (1907), 131 Wis. 499, 514, 515, the court said:

"There is not in our constitution any general provision respecting eligibility to public office. We do not find any authority, in the numerous cases cited, to the effect that there is any implied limitation upon the right of the legislature to prescribe reasonable qualifications for public of-

fices, not contravening any constitutional provision on the subject. Especially is that true where the office itself was not in existence at the time of the adoption of the constitution, but is a mere legislative creation under the reservation of authority in that regard. \* \* \* In Throop, Public Officers, sec. 73, it is stated as a general rule that the legislature has full power to prescribe qualifications for public office in addition to those prescribed by the constitution, if any, provided that they are reasonable and not opposed to the constitutional provisions or to the spirit of the constitution. That certainly must be true as to offices created by the legislature having incident thereto peculiar duties."

See also *State ex rel. Tesch vs. Von Baumbach*, (1860) 12 Wis. \* 310, \* 313; *Fordyce vs. State ex rel. Kelleher*, (1902) 115 Wis. 608, 614, 615; *State ex rel. Gubbins vs. Anson*, (1907) 132 Wis. 461, 476, 477; *State ex rel. Bloomer vs. Cannevan*, (1914) 155 Wis. 398, 408; 73 C.J.S. Public Administrative Bodies and Procedures, sec. 10. In *State ex rel. Buell vs. Frear*, (1911) 146 Wis. 291, 301, the court stated: "The state may require of persons seeking to enter its service such qualifications as the legislature may deem appropriate for the maintenance of good government. Nor is this legislative power so restricted in its exercise as to require uniformity in the qualifications for admission to the service. It rests with the legislature to impose such conditions as the nature of the various kinds of services demands \* \* \*." These authorities are in accord that "qualifications such as the nature of the particular office may reasonably require" (the *Fordyce* case, 115 Wis. at p. 615) or those "reasonably germane to the duties which an officer must perform" (the *Gubbins* case, 132 Wis. at p. 477) may be imposed as conditions of eligibility for public office by the legislature, where the constitution has not exclusively imposed such conditions. See the *Fordyce* case, 115 Wis. at p. 608.

While it is conceivable that a veteran not a member of a veterans' organization might serve capably as a commissioner on a county veterans' service commission, I am

satisfied that a requirement that an appointee to such commission be a member of a veterans' organization is one "reasonably germane to the duties" he would perform once in office. Presumably, membership in such an organization would indicate an active and commendable interest in veterans' affairs, including the problems of needy veterans, which problems are, as above indicated, matters of concern to county veterans' service commissions, and call into play the exercise of their portion of the sovereign power of government. The veteran who is a member of a veterans' organization, all other things being equal, may make a better appointee to the commission in question, merely because he has a more intense interest in veterans' affairs and in being of service to fellow veterans than has the veteran who for some reason has not joined a veterans' organization. In any event, it seems manifest that membership in a veterans' organization is surely a reasonable qualification to demand of an appointee to public office whose chief duty will be to consider the rights of allegedly needy veterans and their dependents to aid under sec. 45.10. As a veteran, the holder of such office might be expected to bring to it some special knowledge and understanding of veterans' problems denied, perhaps, to the non-veteran; and as a veteran belonging to a veterans' organization, he might, to the benefit of the public and the commission on which he serves, reasonably be expected to bring to his tasks a somewhat keener interest in, and possibly a greater experience with, veterans' affairs, than would the veteran not a member of a veterans' organization.

Finally, I find nothing in the letter or spirit of the constitution of this state, or of the federal constitution, which would prohibit the legislature of Wisconsin from imposing the qualification above-mentioned as a condition of eligibility for the public office of commissioner on a county veterans' service commission.

JHM

*Parental Rights—Divorce Laws*—Laws and procedures governing the termination of parental rights discussed.

September 4, 1963

WILBUR J. SCHMIDT,

*Director, Department of Public Welfare*

As director of an agency which accepts guardianship of children and places children for adoption, you are concerned with the proper termination of parental rights of the natural parents of these children. Specifically, you inquire as to the necessity for notice to a husband or former husband in a proceeding to terminate parental rights where:

(1). A Wisconsin court has granted a divorce, which has not become final, and a child is born more than 300 days after the date of the judgment of divorce,

(2). Under the same circumstances as (1), except the child is born less than 300 days after the date of the divorce judgment, and

(3). The marriage is intact, but there is strong evidence of nonaccess on the part of the husband, and

(4). A child is born within 300 days after a divorce has become final and the mother has not remarried.

At the outset, it should be observed that under Wisconsin law, a husband and wife who have obtained a judgment of divorce are still husband and wife until the expiration of one year from the date of the granting of such judgment of divorce, although they are barred from cohabitation. Sec. 247.37 (1) (a).

Parental rights may be terminated by a juvenile court under the circumstances set forth in sec. 48.40, which provides:

**“Grounds for termination of parental rights.** The court may, upon petition, terminate all rights of parents to a minor in either of the following cases:

“(1) With the written consent of the parents to the termination of their parental rights; or

“(2) If it finds that one or more of the following conditions exist:

“(a) That the parents have abandoned the minor; or

“(b) That the parents have substantially and continuously or repeatedly refused to give the minor necessary parental care and protection; or

“(c) That, although the parents are financially able, they have substantially and continuously neglected to provide the minor with necessary subsistence, education or other care necessary for his health, morals, or well-being or have neglected to pay for such subsistence, education or other care when legal custody is lodged with others; or

“(d) That the parents are unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd and lascivious behavior or conviction and confinement for a felony (including hospitalization within the sex deviate statutes), which conduct or status is found by the court to be likely to be detrimental to the health, morals or the best interests of the minor; or

“(e) That the parents have been found mentally deficient under ch. 51 and the juvenile court finds that because of this mental deficiency the parents are, and will continue to be, incapable of giving the minor proper parental care and protection.

“(3) The parental rights of parents who have been found mentally ill under ch. 51 may be terminated if grounds for termination under sub. (2) (a) to (d) existed prior to the time of the finding of mental illness.”

The procedure to be followed by a juvenile court in terminating parental rights is governed by sec. 48.42 which provides:

“**Procedure in terminating parental rights.** (1) The termination of parental rights under s. 48.40 shall be made only after a hearing before the court. The court shall have

notice of the time, place and purpose of the hearing served on the parents personally at least 10 days prior to the date of the hearing; or if the court is satisfied that personal service, either within or outside the state, cannot be effected, then such notice may be given by registered mail sent at least 20 days before the date of the hearing to the last known address of the parent, if an address is known, and by publication thereof in a newspaper in the county once a week for 3 weeks prior to the date of hearing. A parent who consents to the termination of his parental rights under s. 48.40 (1) may waive in writing the notice required by this section; if the parent is a minor his waiver shall be effective only if his guardian ad litem concurs in writing.

“(2) In the case of any minor or incompetent parent the court shall appoint a guardian ad litem. No parental rights may be terminated on consent under s. 48.40 (1) unless the guardian ad litem, in writing, joins in the written consent of the parent to the termination of his parental rights.”

The significance of adhering to proper procedures under secs. 48.40 and 48.42 is emphasized by our statutes governing adoption, of which sec. 48.84 (1) (a) provides in part:

“\* \* \* consent shall not be required from one whose parental rights have been legally terminated; \* \* \*”

Most of the case law with respect to termination of parental rights has arisen in connection with adoption proceedings. In the leading Wisconsin case, *Lacher v. Venus*, (1922) 177 Wis. 558, 188 N.W. 613, the court said at page 568:

“Before such extinguishment of the rights of the natural parents and creation of rights in the adoptive parents there must be an abandonment thereof by the natural parents by conduct or written consent, or else due notice to them of the proceedings wherein such transformation is to take place. \* \* \*”

In this same case, at page 571, the court said:

“Under sec. 1, art. I, Wis. Const., which in its broad language includes the guarantee of due process of law in attempted judicial proceedings as much so as does the more specific language of the Fourteenth amendment to the United States constitution \* \* \* and under that provision of the federal constitution as well, rights shall not be taken from one and conferred upon another except by due process of law.

“Notice that some particular judicial proceedings are already instituted or proposed to be instituted; notice of the time and place where such hearings are to be had; reasonable opportunity to be heard, are the essentials of due process of law; anything short of this is absence thereof.  
\* \* \*”

Our supreme court has thus declared that parental rights are of such a nature as to be safeguarded by the state and federal constitutions and the constitutional requirements of due process must be observed in connection with the termination thereof.

In considering these questions, it is well to bear in mind that the question of paternity can be determined in a divorce action or in custody proceedings. See secs. 328.39 (1) (a) and (b), and 247.03, and *Limberg v. Limberg*, (1960) 10 Wis. 2d 63, 102 N.W. 2d 103.

Section 48.43 provides in part:

“(1) \* \* \* If the court terminates parental rights of both parents, of the mother, *if the child is illegitimate*, or of the only living parent, the court shall transfer guardianship and legal custody of the minor \* \* \*.”

The above quoted statutory language indicates that the legislature intended that the juvenile courts, under certain circumstances, would be called upon to decide the legitimacy of the birth of the child concerned.

There is, of course, the statutory presumption of legitimacy as set forth in sec. 328.39, which provides in part:

“(1) (a) Whenever it is established in an action or proceeding that a child was born to a woman while she was the lawful wife of a specified man, any party asserting in such action or proceeding that the husband was not the father of the child shall have the burden of proving that assertion by a clear and satisfactory preponderance of the evidence. \* \* \*

“\* \* \*

“(3) \* \* \* If the husband is a party to the action and the court makes a finding as to whether or not the husband is the father of the child, such finding shall be conclusive in all other courts of this state.”

The statutory presumption as to time of conception is of limited application. Sec. 328.395 provides:

**“Presumption as to time of conception.** In any paternity proceeding, where the child whose paternity is at issue weighed 5½ pounds or more at the time of its birth, the testimony of the mother as to such weight shall be presumptive evidence that the child was a full term child, unless competent evidence to the contrary is presented to the court. The conception of such child shall be presumed to have occurred within a span of time extending from 240 days to 300 days before the date of its birth, unless competent evidence to the contrary is presented to the court.”

There was no such rule or presumption at common law and rules of common law are not to be changed by doubtful implication. See *Estate of Ogg*, (1951) 262 Wis. 181, 191, 54 N.W. 2d 175.

As indicated in the opening words of the statute, this presumption is limited in its application to a “paternity proceeding,” i.e., a proceeding brought pursuant to sec. 52.21, et seq. Therefore, this presumption would not apply to a proceeding to terminate parental rights.

In view of the inapplicability of this statutory presumption, and in view of the absence of a specific presump-

tion at common law relating to a minimum or maximum period of gestation, (as indicated infra) the elapsing of any given number of days from a given event to the date of birth is not in itself significant. Notwithstanding that the form of your first, second and fourth questions indicates an assumption that the statutory presumption is applicable, there are several legal principles which I believe will be of assistance to you in dealing with these matters.

No principle of law is more firmly established than the principle that every child born in wedlock is presumed to be legitimate. It was a maxim of the Roman law, and one which the common law copied, that the presumption is that he is the father whom the marriage indicates, and Montesquieu, alluding to it, observed that "the wickedness of mankind makes it necessary for the laws to suppose them better than they really are. Thus, we judge that every child conceived in wedlock is legitimate, the law having a confidence in the mother as if she were chastity itself." 7 Am. Jur., *Bastards*, p. 636, sec. 14. The law is well established in Wisconsin that every child born or conceived in wedlock is presumed to be legitimate. Although this is one of the strongest presumptions known to the law, it may be overcome by sufficient proof. *Estate of Lewis*, (1932) 207 Wis. 155, 158, 240 N.W. 818. The fact that the parents of a child were formerly husband and wife does not make the child legitimate if it was begotten as the result of illicit relations between the parents after they had been divorced from the bonds of matrimony. On the other hand, the fact that the parents are divorced at the time of the birth of the child does not make it illegitimate if it was begotten while they were husband and wife. 7 Am. Jur., *Bastards*, p. 634, sec. 12.

It may be argued that once a divorce proceeding has been started, or a divorce judgment granted which has not become final, there is a presumption, or at least an inference, that the parties did not mutually engage in coition during the pendency of the divorce proceedings. Such a presumption would be in conflict with the presumption in favor of

legitimacy. In case of conflicting presumptions, that in favor of legitimacy will prevail. 10 C.J.S. *Bastards*, p. 16, sec. 3.

Courts generally have been reluctant to impose any arbitrary legal maximum upon the period of gestation. In *State ex rel Isham v. Mullally*, (1961) 15 Wis. 2nd 249, 256, 112 N.W. 2nd 701, our court said:

“\* \* \* An exhaustive review of medical facts concerning time of pregnancy will be found in *Estate of McNamara* (1919, 181 Cal. 82, 183 Pac. 552, 7 A.L.R. 313 (nonaccess three hundred and four days). In *Commonwealth v. Kitchen* (1937), 299 Mass. 7, 11 N.E. (2d) 482 (nonaccess of three hundred and five days), and *Boudinier v. Boudinier* (1947), 240 Mo. App. 278, 203 S.W. (2d) 89 (nonaccess of three hundred and sixteen days). See Anno. Degree of proof necessary to overcome presumption of legitimacy, in 128 A.L.R. 713, 717. A case in point is *Gillis v. State* (1931), 206 Wis. 150, 152, 238 N.W. 804, wherein there was evidence the pregnancy of the complaining witness was normal and her child was born three hundred and twenty days after her last act of intercourse with the defendant. This court held such evidence did not establish the defendant was the father beyond a reasonable doubt, saying (p. 153): ‘The most that can be said, and to say that taxes one’s credulity, is that such a thing was barely possible.’”

The extent of the period of gestation is therefore just one of the many factors which the court will take into consideration in making its determination of the child’s legitimacy or in determining paternity. Even in circumstances where the statutory presumption of sec. 328.395 applies, this does not exclude the possibility of a period of pregnancy beyond its limits. *State ex rel Isham v. Mullally*, supra, p. 256.

In answer to your first question, it is my opinion that, in view of the strong presumption that such a child had been conceived during wedlock, notice should be given the husband or former husband in a proceeding to terminate parental rights, where the child in question is born before

the expiration of one year from the date of the granting of the divorce judgment.

The same principle, just stated above, applies in response to your second question. Notice should be given the husband or former husband.

In response to your third question, which inquires as to the necessity of notice to the husband in a proceeding to terminate parental rights to a child born in wedlock, but where there is strong evidence of nonaccess, the rule is that in the case of children born in wedlock involving nonaccess by the husband, there is a strong public policy in favor of legitimacy, and the illegitimacy must be proved. *State ex rel Isham v. Mullally*, supra. Sec. 328.39, quoted above, prescribes the degree of proof necessary, i.e., a clear and satisfactory preponderance of the evidence. Again, it is my opinion that notice must be given the husband in a proceeding to terminate parental rights.

In response to your fourth question, inquiring as to the necessity of notice to the former husband in a proceeding to terminate parental rights to a child born more than one year after the date of a divorce judgment, the principles set forth above should be borne in mind. By virtue of sec. 247.37 (1) (a) the parties to the marriage are still husband and wife until the expiration of one year from the date of granting the divorce judgment, except in case of death. Further, the court having jurisdiction over the divorce proceedings has the power to vacate the judgment at any time within one year from the granting of such judgment, provided both parties are living. Sec. 247.37 (2). As the presumption in favor of legitimacy calls for presuming that a child born during the one year period following a divorce judgment is legitimate by reason of having been born in wedlock, so does this presumption call for the presuming that a child born during a certain period after the expiration of one year following a divorce judgment is legitimate by reason of having been presumptively conceived during wedlock. This is not to say, however, that this presumption may not be overcome by proper

proof and this is not to be construed as meaning a husband or former husband is foreclosed from successfully denying paternity under such circumstances. It is, however, because the law places the burden on him who challenges the legitimacy of a birth that the giving of notice in termination of parental rights proceedings must be attended with what might otherwise be termed an extraordinary degree of caution. Therefore, in the absence of special circumstances, it is my opinion that it would be advisable to give notice to the former husband in a termination of parental rights proceeding where the child is born within 300 days after a divorce has become final.

As I have indicated, the mere passage of a certain period of time is not in itself a controlling factor. Although one might readily concede that the possibility of an inordinately extensive gestation period would normally be beyond credibility, nevertheless the decision as to whether a former husband should be served with notice in a proceeding to terminate parental rights, where the child is born more than a year after the date of the divorce judgment, should be based on all the available facts and circumstances in the particular case.

JEA

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*Old Age Assistance—Liens*—Costs of sale may be deducted from proceeds from a sale of property subject to old-age-assistance lien, and claims enumerated in sec. 49.26 (5) (b), not to exceed \$400, may be allowed after such deduction.

September 24, 1963

WILBUR J. SCHMIDT,

*Director, Department of Public Welfare*

You have requested an opinion whether proceeds of real estate subject to a lien for old-age assistance under

sec. 49.26 (5) are subject to deduction for costs of sale in addition to costs of administration, funeral expense and the like, or whether the costs of sale must be included within the \$400.00 limitation specified in sec. 49.26 (5) (b).

Sec. 49.26 (5) gives a lien against realty of an old-age assistance recipient. The provisions of the section most pertinent to your inquiry are:

"49.26 (5) (a) \* \* \* The county court may order sale of such realty free and clear of the lien and the lien shall attach to the net proceeds of such sale after taxes, prior encumbrances and the costs of the sale have been deducted.

(b) Such lien shall take priority over any lien or conveyance subsequently acquired, made or recorded except tax liens and except that the amounts allowed by court in the state of any deceased beneficiary and remaining unpaid after all funds and personal property in the estate have been applied according to law, for administration, cost of terminating joint tenancies, or cost of proceedings to establish descent of real estate or to establish heirship, and for hospitalization, nursing and professional medical care furnished such decedent during his last sickness, not to exceed \$400.00 in the aggregate, shall be charges against all real property of such deceased upon which an old-age assistance lien has attached, and which in such order shall be paid and satisfied prior to such lien out of the proceeds derived from such real property upon liquidation of such old-age assistance lien. The certificate need not be recorded at length by the register of deeds, but upon the filing thereof all persons are hereby charged with notice of the lien and of the rights of the county."

Your question apparently relates to insolvent estates since, if there were enough assets to satisfy the lien as well as other claims, there would be no occasion to determine priorities.

Since the right to recoup out of property of a recipient of public assistance is dependent upon legislative will, the question of the extent to which other claims may supersede the government's lien depends upon statutory in-

terpretation. The legislature could by statute abolish the lien entirely, or could release it partially in favor of certain classes of claims.

The statutes above quoted appear to regard "costs of the sale" referred to in sec. 49.26 (5) (b), and the other costs enumerated in 49.26 (5) (b) as separate categories. If the property is ordered sold under sec. 49.26 (5) (b), the lien attaches only to "net proceeds \* \* \* after taxes, prior encumbrances and costs of the sale have been deducted."

The next paragraph provides for certain enumerated expenses, not including costs of sale, to be satisfied prior to "such lien"; that is, the lien on the "net proceeds."

Where the property is sold as provided in sec. 49.26 (5), the lien attaches only to proceeds *after* deducting costs of sale, so that the \$400.00 limitation in the following subsection could apply only after the amount of proceeds subject to lien has been ascertained.

Such interpretation accords with that given in 1960 in 49 OAG 115, 117, from which the following excerpt is taken:

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

To the same effect was the following provision of the opinion given in 1952 in 41 OAG 369, 371:

"\* \* \* The provision of sec. 49.26 (5), relating to a sale by order of the county court, was apparently not intended to apply to an action pursuant to ch. 278, Stats., which might be followed under sec. 49.26 (7), but rather to cases in which the sale is ordered as part of the process of administering insolvent estates.

"In the latter case, the costs of sale are an incident of the administration, subject to jurisdiction of the county court under secs. 316.23 and 49.26 (5).

“Since the statute expressly limits the county’s lien to proceeds remaining after deduction of ‘costs of sale,’ the actual costs of the sale are to be deducted before the remaining provisions of sec. 49.26 (5) are applied with respect to other items allowed by the court.”

The latter opinion has been superseded, so far as it relates to attorney’s fees, by the amendment of sec. 316.23 by ch. 322, Laws of 1955; but, otherwise, the statutes upon which the foregoing opinions were based have not been altered.

Perhaps it should be noted, in passing, that attorney’s fees should not be allowed as costs of sale, so as to reduce the county’s recovery, for services which are within the scope of the duty of county officials. See 36 OAG 469, 41 OAG 155 and 369.

BL

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*Old Age Assistance—Realty*—Under 49.26 (3) (c) as created by ch. 114, Laws 1963, the only county agency authorized to receive property subject to old-age-assistance lien is the county welfare agency.

September 25, 1963

KENT C. HOUCK,

*District Attorney, Richland County*

You ask an opinion of the legality of a resolution by the county board authorizing its public property committee to receive realty assigned by the county court under sec. 49.26 (3) (c), created by ch. 114, Laws 1963. That subsection reads:

“After probate or administration proceedings have been initiated and notice to creditors is given, as required by s. 313.03, and it appears from the inventory filed in said estate that the county claim for old-age assistance exceeds the value of estate assets, after deducting such expenses as

provided in sub. (5) (b) and (c), the court may order summary closing proceedings under s. 311.05 and assign the real estate, if any, to the county agency which has the claim against the estate."

It is my opinion that the resolution is contrary to statute and therefore invalid. The foregoing provision was incorporated into the general statutes in 1963; and since no special definitions were adopted for administration of the subsection at that time, the legislature apparently intended that the previously enacted definitions should apply. Sec. 46.206 (3) provides:

"The use of the words 'county agency' in any statute relating to old-age assistance, aid to dependent children, aid to the blind, and aid to totally and permanently disabled persons means the county department of public welfare as created by s. 49.51 (2) (a) or 46.22 (1), provided that the provisions of this subsection shall not deprive the juvenile court of any authority it otherwise has under the law."

Under sec. 49.25 funds recovered for payments of old-age assistance belong *pro rata* to the federal government, the state, and the county; but the last sentence of the section provides:

"The county agency of the county from which the deceased beneficiary received old-age assistance shall file the claim herein provided."

Where assignment of personal property is required to secure a claim, sec. 49.26 (1) provides for transfer to the "county agency". Sec. 49.26 (3) (b) provides that the "county agency" shall apply for administration where necessary to enforce the statutory claim.

With respect to real estate, sec. 49.26 provides for a lien without specifying the exact government unit in favor of which the lien exists; but clearly the lien is given to enforce the claim created by sec. 49.25.

Under secs. 49.26 (5m) and (8), the lien may be released only by the "agency".

Certain other officials or committees of the county are given specific functions in connection with collection of old-age assistance claims. For example, the district attorney is required under sec. 49.26 (3) to furnish legal services. The county board may, under sec. 49.26 (9), authorize "any" county agency to bid in property for liquidation "at foreclosure". The term "at foreclosure" might conceivably be construed to include transfer in administration proceedings; except that the contrast of language between sec. 49.26 (9) and 49.26 (3) (c) (as created by ch. 114, Laws of 1963) indicates that the legislature intended to distinguish between "any" county agency and "the" county agency, so as to particularize functions.

When proceedings have advanced to the state of sale "at foreclosure", *any* county agency may be authorized to bid for purposes of liquidation. When the property is assigned in administration proceedings in lieu of foreclosure and sale, the legislature has specified that the transfer must be to "the" county agency. The legislature may be presumed to have had some basis for the contrast in language.

In substance, the basis may well have been the greater degree of control exercised by the state under sec. 46.206 over the agency directly chargeable with administration of old-age assistance than may be exercised over agencies which have the primary purpose of dealing with county property generally.

Arguments as to which agency might prove most efficient should be addressed to the legislature.

As pointed out in *Reichart v. Milwaukee County*, (1914) 159 Wis. 25, 150 N.W. 401, powers of county agencies derived from the legislature cannot be enlarged or narrowed by the county board.

By statute, the only county agency authorized to receive an assignment of realty under sec. 49.26 (3) (c) is the county department of public welfare.

You also ask whether it would be necessary to go through a public sale and whether an appraisal other than that in probate court is needed before transfer of title.

The state's first concern in the transfer of any realty subject to the lien is the satisfaction of the lien out of proceeds, and the reimbursement of the governmental units which contributed to the assistance as provided in sec. 49.25.

The method by which the property should be transferred presents a question which is of primary concern to the grantee who will naturally desire a marketable title. The degree of formality required in a given case will depend in part on the opinion of the attorney who examines title on behalf of the vendee.

I find no specific statutory authority, either in ch. 114, Laws 1963, or elsewhere, for a county welfare department to transfer title to realty; but as the supreme court pointed out in *Kasik v. Janssen*, (1914) 158 Wis. 606, 609-610, 149 N.W. 398:

"In addition to power expressly conferred upon him by statute, an officer has by implication such additional powers as are necessary for the due and efficient exercise of the powers expressly granted or such as may be fairly implied from the statute granting express powers. Throop, Pub. Off. § 542, citing *Haynes v. Butler*, 30 Ark. 69; *Pennington v. Gammon*, 67 Ga. 456; *Sherlock v. Winnetka*, 68 Ill. 530, and many other cases, among them *State ex rel. Carpenter v. Hastings*, 10 Wis. 518. \* \* \*

If a purchaser is willing to accept a conveyance by the county welfare agency which receives an assignment under ch. 114, Laws 1963, such a transfer might be upheld under the principle of the *Kasik* case, on the theory that the efficient exercise of the powers of the agency to administer the old-age assistance laws requires liquidation of the lien.

Some purchasers, however, may feel that they are not protected unless the transfer conforms to sec. 59.67 and

sec. 59.07 (1) (c). The applicability of the sections is questionable; because the county does not own property assigned under sec. 49.26 (3) (c) in its proprietary capacity. The property is held for the enforcement of the governmental lien, in which the federal and state government have the predominant interest. Whatever title is assigned by the probate court under ch. 114, Laws 1963, is a naked legal title to effect collection on behalf of the state and federal governments as well as of the comparatively minor claim of the county.

To meet the demands of potential purchases in a practical manner, the county court's order or judgment under sec. 49.26 (3) (c) might well read:

"Pursuant to sec. 49.26 (3) (c), Stats., said real estate is hereby assigned to ..... County (county welfare department)."

This would make it clear that title is in the county subject to the jurisdiction of the county welfare department.

The practice so far as the state is concerned is similar to this. Unless the agency is a body corporate or has specific statutory power to hold and convey real estate it is customary to convey property to the agency in question by having the name of the grantee appear as "State of Wisconsin" with the name of the agency having jurisdiction added in parenthesis such as (state building commission) for example.

Perhaps another practical solution would be for the county welfare agency receiving an assignment under ch. 114, Laws 1963, to make a transfer of the property to the county upon payment of those portions of the lien representing the equitable interests of the state and federal governments, after which the county could give title to the purchaser as provided in sec. 59.67.

I find no statutory requirement for public sale nor for appraisal additional to that made in probate court. Under the provisions of sec. 49.26 (3) (c), as created by ch. 114, Laws 1963, the assignment is made only in cases

where assets are insufficient to cover the claim for old-age assistance; so that presumably the state and federal governments will be reimbursed less than they have paid. If the property were conveyed for less than its actual value so as to decrease the amount of reimbursement to which the state and federal governments are entitled, the state department of public welfare in its supervisory capacity would have authority to make audit adjustment under sec. 49.38 (1). See 42 OAG 193.

In practice I am informed that the state department of public welfare raises no question where realty is sold for the amount specified in a probate court appraisal; or even where it is sold for less, if the department is satisfied there is good reason.

BL

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*Constitutionality—Highways*—Bill 432, A., is invalid as it would provide for the taking of property without just compensation in violation of Art. I, sec. 13, Wis. const.

September 27, 1963

THE HONORABLE, SENATE:

By resolution 37, S., you have requested my opinion as to the validity of Bill No. 432, A., as amended by substitute amendment No. 1, A., which would create sec. 182.018 (4) of the statutes, which would read as follows:

“182.018 (4) When wires of any public utility or electric co-operative cross over a railroad right of way along or within the limits of any public highway and no pole, guy wire, anchor or other utility structure is located on railroad property, such crossing shall be deemed a proper highway use and no railroad may charge a rental or other fee, other than a reasonable fee for preparation of the original crossing license, for such crossing. All license fees or rental charges for location of wires and other utility facilities on or across railroad right of way at other locations shall be reasonable in amount. The public service commission may review all such charges

and fees made under this subsection and establish reasonable charges and fees if the charges and fees established by railroads are found by the commission to be unreasonable.”

The question of the validity of the proposed legislation is governed to a great extent by the case of *Green Bay & W. R. Co. v. Public Service Comm.*, (1955) 269 Wis. 178, 68 N.W. 2d 828. In that case, the state highway commission was seeking to build a road on new location, at grade, over the tracks of the railroad. The statutes provide that the public service commission makes the determination of the type of crossing and allocates costs. Among the several legal problems that was decided by the court was whether the railroad had a right to be compensated for the diminution in the value of its right of way because of the building of the new road. The court held that such damage could be recovered in an eminent domain action.

If a railroad can recover damages for the building of a new highway across its tracks as a matter of a property right, the legislature cannot pass a valid law eliminating such right as it pertains to a wire crossing even though the actual damages in the case of a utility would, in almost every case I can conceive, be negligible.

There would be situations where the rule in the *Green Bay & W. R. Co.* case would not apply. For example, if the highway commission had fee title to the crossing, the bill would be valid, since then the railroad would only exist there by permission of the legislature which has given the railroads permission to cross highways. (Subject to public service commission regulation and control.)

There are other situations of ownership or easements in highway—railroad lands which could arise, however, it is not necessary to discuss these here, since, as pointed out above, there would be instances where the proposed law would amount to a taking of property without paying just compensation in violation of Art. I, sec. 13 Wis. const.

It is, therefore, my opinion that the proposed statute is invalid.

REB

*County Board—Leases*—The county has the power to lease space to the D.H.I.A. for milk testing purposes under secs. 59.07 (1) and 59.875. Discussion of county office locations.

October 2, 1963

FREDERICK K. FOSTER,

*Corporation Counsel, Fond du Lac County*

You asked my opinion concerning powers of the county board to lease space in the county courthouse for milk testing purposes.

1. Is county participation in D.H.I.A. milk testing activities a proper function of county government?

You mention that the Fond du Lac county department of public welfare is located in the basement of the courthouse next to offices rented by the Fond du Lac County board to the National Cooperative Dairy Herd Improvement Program (commonly referred to as D.H.I.A.) for a milk testing laboratory. You state that the county welfare department now needs additional space and wishes to utilize the rooms used by the D.H.I.A. organization for several years when D.H.I.A.'s lease expires.

Under secs. 49.02 and 49.03 when the county establishes a county relief administration, such administration becomes a county governmental function replacing other municipal relief programs.

D.H.I.A. incorporates a national program of the United States department of agriculture extension service designed to promote higher production in the dairy industry and more effective management of dairy cattle. Its local unit is the county.

The D.H.I.A. local unit is part of cooperative undertakings among dairymen, the county agricultural service, the department of agriculture at the university of Wisconsin and the United States department of agriculture. The re-

sponsible supervising agency in Wisconsin is the cooperative extension service at the university which has engaged in D.H.I.A. activities since 1917.

The county D.H.I.A. unit is a voluntary association of local dairy farmers paying small annual membership fees. The county unit activities are supervised by a board of directors elected from the membership. In addition, the county agricultural agent serves as a director *ex-officio*.

The main function of the local D.H.I.A. unit is the collection of raw data pertinent to dairy farming which is then forwarded to the supervising bodies for analysis. The results of the analyses are published and distributed to dairymen generally throughout the state and nation.

The Wisconsin legislature has recognized the value and need of county participation in the cooperative extension service and therefore has given the counties broad authority to engage in extension programs.

Sec. 59.87 provides in part:

“(1) CREATION. Any county board, in accordance with this section, may establish and maintain a co-operative extension service in agriculture and home economics, referred to in this section as ‘co-operative extension service’.

“\* \* \*

“(6) FUNCTIONS. Such co-operative extension service is authorized, under the direction and supervision of the county committee on agriculture, co-operating with the college of agriculture of the University of Wisconsin, and within the limits of funds provided by the board and co-operating state and federal agencies, to:

“(a) Aid in the development and improvement of all phases of agricultural production, processing and marketing at the individual farm, community-wide and county-wide level.

“(b) Assist in the improvement of farm and home management and business methods and practices.

“\* \* \*

“(i) Carry out any extension work provided for in an act of congress approved May 8, 1914 (38 Stat. 372) and all acts supplementary thereto.

“(j) Take any action that will facilitate the accomplishment of any of the functions listed herein, including without limitation because of enumeration, the following:

“\* \* \*

“7. Guidance in the formation and operation of co-operative enterprises.

“8. Creation of citizens’ advisory committees.

“9. Dissemination of information by any appropriate means including press, radio and television.

“10. Co-operation with other local, state and federal agencies.

“(7) DEPARTMENT OF GOVERNMENT. For the purposes of s. 59.15 (2) (d) the co-operative extension service shall be a department of the county government and the committee on agriculture shall be the committee to which is hereby delegated the authority to direct and supervise such department. In co-operation with the college of agriculture of the University of Wisconsin, the committee on agriculture shall have the responsibility for the formulation and execution of the program of the co-operative extension service. The co-operative extension service shall annually report to the board its activities and accomplishments.

“\* \* \*”

Thus, the county board is authorized to set up a cooperative extension service administered by a committee on agriculture. When the county board so acts, the extension service becomes a department of county government which is responsible for the execution of the university cooperative extension service program. Sec. 59.87 (7). Fond du Lac county maintains such a cooperative extension service.

Since D.H.I.A. activities are within the program of the university cooperative extension service, such activities

can be properly included within the county cooperative extension service under sec. 59.87 (7).

2. What is the extent of county leasing powers?

Sec. 59.07 in part gives the county board powers in regard to leasing county property:

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

"(1) \* \* \*

"(b) *Control; actions.* Make all orders concerning county property and may commence and maintain actions to protect the interests of the county.

"(c) *Transfers.* Direct the clerk to lease, sell or convey or contract to sell or convey any county property \* \* \* on such terms as the board approves. \* \* \*

"\* \* \*"

Even though sec. 59.07 (1) is to be liberally construed and its language appears to be very broad in application, the power of the county board to lease, sell, convey, etc., county property is limited. It is only where a specific section of the statutes can be found granting the county board power to act in a certain area that the board can lease, sell, convey, etc., county property under sec. 59.07 (1) to effectuate that power. This conclusion is not to be interpreted as a restriction on the power of the county board to dispose of property, by sale for adequate consideration, which is no longer needed by the county for public purposes.

In *Spaulding v. Wood County* (1935) 218 Wis. 224, 260 N.W. 473, Wood county hired a cow tester. It was argued that the county, by implication under a general statute permitting the county board to maintain an "agrifurative representative," had the power to hire a cow tester. The court rejected this argument and stated at pp. 228-229:

"\* \* \* Counties are purely auxiliaries of the state and can exercise only such powers as are conferred upon them by statute, or such as are necessarily implied therefrom. \* \* \*

“\* \* \*

“\* \* \* It has been held that if there be a fair and reasonable doubt as to an implied power it is fatal to its being.”

In the instant situation, the county board is given specific power to aid in milk testing if it chooses. In fact, the board is given specific power to provide money, office and laboratory space for testing milk. Sec. 59.875, created originally by Ch. 224, Laws 1945, provides:

“The board may appropriate money and provide office and laboratory space for testing milk and soil and provide residents of the county with reports of such tests.”

Therefore, it is my opinion that leasing space to D.H.I.A. for its milk testing activities under secs. 59.07 (1) and 59.875. is within the authority of the Fond du Lac county board.

3. What are the county's obligations in regard to providing office space for its functions?

Sec. 59.07 provides in part:

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

“(1) \* \* \*

“(d) *Buildings; maintenance.* Construct, maintain and operate all county buildings and structures \* \* \* and if the buildings are insufficient, provide suitable rooms for county purposes.

“\* \* \*”

Sec. 59.14 (1), provides in part:

“Every sheriff, clerk of the circuit court, register of deeds, county treasurer, register of probate and county clerk shall keep his office at the county seat in the offices provided by the county or by special provision of law; or if there is none, then at such place as the county board

directs. The county board may also require any elective or appointive county official to keep his office at the county seat in an office to be provided by the county. \* \* \*

As interpreted in *Linden v. Babcock*, (1942) 241 Wis. 209, 211, 5 N.W. 2d 759, sec. 59.14 (1) requires that the enumerated offices be located at the county seat while other governmental offices may be located at the county seat or elsewhere in the county at the county board's discretion:

"There would be no meaning to ascribe to the words written into sec. 59.14 (1), Stats., by ch. 86, Laws of 1929, unless it was the intention of the legislature that officers other than the sheriff, the clerk of the circuit court, the register of deeds, county treasurer, register of probate, and county clerk were from time to time to be permitted to have their offices at such places as met with the approval of the county board."

It should be noted that sec. 59.14 (1) uses the term "county seat" rather than "county courthouse". Thus, the plain language of sec. 59.14 (1) indicates that the enumerated governmental offices can be located anywhere within the confines of the county seat. Such offices need not be restricted in location to the courthouse building.

It is my opinion that this language allows the county board necessary latitude in providing space for governmental offices whenever courthouse conditions become crowded. In this regard, sec. 59.07 (1) (a) permits the county board to acquire, lease or rent real and personal property "for public uses or purposes of any nature".

In addition, the space provided must be in "a proper, suitable and comfortable condition for the transaction of the business pertaining to each office." *County of Jefferson v. Besley*, (1856) 5 Wis. 134, 136.

Sec. 59.68 provides in part:

"(1) Each county shall provide a courthouse, jail, fire-proof offices and other necessary buildings at the county seat and keep them in good repair. \* \* \*"

Also, sec. 59.14 (1) further provides:

“\* \* \* All such officers shall keep such offices open during the usual business hours each day, Sundays excepted, and except that the county board of each county may permit said officers to close their offices on Saturday or on legal holidays for such time as the county board directs, and with proper care shall open to the examination of any person all books and papers required to be kept in his office and permit any person so examining to take notes and copies of such books, records, papers or minutes therefrom.”

In the early case, *County of Jefferson v. Besley*, (1856) 5 Wis. 134, 136, the court interpreted ch. 10, secs. 16 and 137 of the 1849 Revised Statutes of Wisconsin, sections parallel to present secs. 59.68 and 59.14 (1). In the *Besley* case, the defendant had furnished the Jefferson county court clerk with wood and candles for the heating and lighting of the clerk's offices. A dispute arose as to whether the county was liable for payment for such supplies. In ordering payment, the court said at p. 136:

“From these provisions the intention of the legislature is quite obvious. It was that suitable offices should be provided by the county for the various county officers and that they should be kept in a proper condition to accommodate the wants of the citizens who might desire to transact business therein. To require these officers to keep their offices open during business hours, for the convenience of the citizens having business to transact in them, and yet provide no means of warming or lighting them, would be simply absurd. The clerk is not required to keep a tavern, nor is there any provision of law requiring him to keep his office warm, yet it is clearly the object and intention of the statute that these county offices shall be kept open, and in a suitable condition to answer all the reasonable wants of the public, at the expense of the county. These offices are to be provided at the expense of the county, and to be furnished with all things necessary for the accomplishment of their respective objects. They are required to be kept open, which means that they are to

be in a proper, suitable and comfortable condition for the transaction of the business pertaining to each office.”

In conclusion, it is my opinion that the county has the power to lease space to the D.H.I.A. for milk testing purposes under sec. 59.07 (1) and sec. 59.875. When the county board elects to aid D.H.I.A., as Fond du Lac county has done, D.H.I.A. activities are properly supervised by the county cooperative extension service and such supervision becomes a function of that department under sec. 59.87. Under sec. 59.14 (1), certain county offices must be located at the county seat. Other county offices are located at the county board's discretion. However, the county is obligated to provide offices "suitable" for the transaction of public business. Within these general limits, allocations of available office space among the various agencies of county government is a policy matter for the county board.

JPA

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*Anti-Secrecy—WERB*—A rule of the WERB that mediator's functions under sec. 111.70 be confidential and that mediation meetings be non-public would not violate the anti-secrecy law contained in sec. 14.90.

October 3, 1963

ARVID ANDERSON,

*Commissioner, Wisconsin Employment Relations Board*

You ask whether proposed rules, by which you would require that functions of a mediator under sec. 111.70 be confidential, and that information obtained at mediation meetings should not be made public, would contravene sec. 14.90 (the so-called anti-secrecy law).

Under sec. 111.70 (2), employes of cities, counties, villages and other political subdivisions of the state are given the following rights:

“Municipal employes shall have the right of self-organization, to affiliate with labor organizations of their own choosing and the right to be represented by labor organizations of their own choice in conferences and negotiations with their municipal employers or their representatives on questions of wages, hours and conditions of employment, and such employes shall have the right to refrain from any and all such activities.”

Sec. 111.70 (3) (a) 1. prohibits municipal employers from:

“1. Interfering with, restraining or coercing any municipal employe in the exercise of the rights provoked in sub. (2).”

Sec. 14.90 (1) and (2) provide:

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

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

A number of exceptions to the latter provision are set out in sec. 14.90 (3); but the exceptions would be relevant only if it were first decided that mediation under sec. 111.70 would otherwise be within the scope of the general rule enunciated in sec. 14.90 (2).

The governmental bodies enumerated in sec. 111.70 (1) are agencies subject to the mandate of the anti-secrecy

law, as is the Wisconsin employment relations board. Sec. 14.90 (2), however, does not in terms apply to every act performed on behalf of a governmental agency. The first sentence applies only to "meetings" of the agencies, and the second sentence relates to "formal action". When the governing body of a county takes "formal action" to fix wages of county employes at a regular or special "meeting", it is undoubtedly subject to sec. 14.90 (2). The wording of sec. 111.70, with respect to the preliminary negotiations before a recommendation is made for formal action, differs from the language of sec. 14.90 (2). Sec. 111.70 (2) refers to "conferences and negotiations" rather than to "meetings". It also provides that employes' rights to negotiations may be satisfied by conferences with "representatives" of the municipal employer.

Decisions such as *Richmond v. Lodi*, (1938) 227 Wis. 23, 77 N.W. 620, leave a substantial doubt whether any "representative" of a municipal employer could come to a settlement of a dispute so as to bind the municipality, without further formal action of the governing body — in the case of a county, the county board. The discussion in the above-cited case indicates that there are limitations on the power to delegate authority to fix wages and working conditions. The legislature apparently recognized in sec. 111.70 (4) (i) a continuance of centralized authority in the bodies designated by statute to formulate policy for the governmental units. That subsection requires:

"Upon the completion of negotiations with a labor organization representing a majority of the employes in a collective bargaining unit, if a settlement is reached, the employer shall reduce the same to writing either in the form of an ordinance, resolution or agreement. Such agreement may include a term for which it shall remain in effect not to exceed one year. Such agreements shall be binding on the parties only if express language to that effect is contained therein."

The terms "ordinance" and "resolution", particularly, contemplate action by the county board when the unit involved is a county.

By the time negotiations have progressed to the point where a proposal is made to a county board, further consideration of the recommendation would be subject to sec. 14.90. Before that time, there may be many variances in the circumstances under which negotiations are conducted. Your question relates only to mediation; and so I will reserve until a specific situation arises the consideration of applicability of the anti-secrecy law to negotiations which do not involve mediation.

In authorizing mediation under sec. 111.70 (4) (b), the legislature adopted no special definitions or provisions to indicate an intent to refer to mediation in a different sense than that which has become commonly known in labor disputes between private employers and their employes. The function of mediation, and the need for confidential relations in its successful functioning, have been well described by one of the nation's most experienced labor relations agencies in *Tomlinson of High Point, Inc.*, 74 NLRB 681, 685:

"To execute successfully their function of assisting in the settlement of labor disputes, the conciliators must maintain a reputation for impartiality, and the parties to conciliation conferences must feel free to talk without any fear that the conciliator may subsequently make disclosures as a witness in some other proceeding, to the possible disadvantage of a party to the conference. If conciliators were permitted or required to testify about their activities not even the strictest factual adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side or the other. The inevitable result would be that the usefulness of the Conciliation Service in the settlement of future disputes would be seriously impaired, if not destroyed. The resultant injury to the public interest would clearly outweigh the benefit to be derived from making their testimony available in particular cases."

While the foregoing opinion dealt primarily with the question whether a conciliator or mediator should be compelled in legal proceedings to divulge information received

in performance of his functions, the reasoning with respect to disclosure in legal proceedings is equally potent with respect to other methods of publication.

The success of mediation depends to a considerable extent upon a relaxed atmosphere in which both parties may put out exploratory suggestions without being held to account either by their principals, their opponents, or the public generally, as might be the case if parties were required to declare themselves publicly for or against a given proposal.

As you have pointed out, the statement of legislative policy in sec. 14.90 (1), is to the effect that the most complete information be provided to the public "as is compatible with the conduct of governmental affairs and the transaction of governmental business." The exceptions enumerated in sec. 14.90 (3) (b), (d), and (f), are indicative of limitations the legislature intended as guides to what publicity is deemed compatible with effective transaction of public business. Where a bargaining system is adopted akin to that operating in private industry, it is not likely that the legislature intended a municipal employer to be more seriously handicapped than private employers.

It is my opinion that your proposed rules providing that mediation meetings under sec. 111.70 be non-public, and that the mediator's function be confidential, do not violate sec. 14.90.

BL

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*School Board—Contracts*—Discussion of sec. 946.13 relative to a school board member's activities concerning contract employing his wife as a teacher.

October 4, 1963

ANGUS B. ROTHWELL,

*State Superintendent, Department of Public Instruction*

You have requested an opinion on the following two questions:

"(1) May a school board hire, as a teacher in its schools, the wife of a member of such school board? If your answer to the above question is *no*,

"(2) Would the fact that the board member was not present at the making of the contract change your answer?"

Sec. 946.13 (1) and (3) part of the criminal code adopted in 1955, provide:

**"946.13 Private interest in public contract prohibited.**

(1) Any public officer or public employe who does any of the following may be fined not more than \$500 or imprisoned not more than one year or both:

"(a) In his private capacity, negotiates or bids for or enters into a contract in which he has a private pecuniary interest, direct or indirect, if at the same time he is authorized or required by law to participate in his capacity as such officer or employe in the making of that contract or to perform in regard to that contract some official function requiring the exercise of discretion on his part; or

"(b) In his capacity as such officer or employe, participates in the making of a contract in which he has a private pecuniary interest, direct or indirect, or performs in regard to that contract some function requiring the exercise of discretion on his part.

"\* \* \*

"(3) A contract entered into in violation of this section is void and the state or the political subdivision in whose behalf the contract was made incurs no liability thereon."

Subsec. (2) contains certain exceptions not material here. One of the exceptions is contracts not exceeding in the aggregate \$1,000 a year, but I assume that a teacher's contract would in all cases exceed that amount."

Prior to the adoption of the criminal code, sec. 348.28 (1), (1953) provided in part:

“(1) Any officer, agent or clerk of \* \* \* any \* \* \* school district \* \* \* who shall have, reserve or acquire any pecuniary interest, *directly or indirectly*, present or prospective, absolute or conditional, in any way or manner \* \* \* in any contract \* \* \* in relation to any public service \* \* \* shall be imprisoned in the county jail not more than one year, or in the state prison not more than 5 years, or fined not exceeding \$500.”

Under the former statute just quoted the attorney general had expressed the opinion that school boards were “probably” prohibited from contracting with the wife, husband or minor child of a member of the board on the ground that the board member had at least an indirect pecuniary interest in such a contract. 40 OAG 488; 24 OAG 113; 20 OAG 862. While it is true that the earnings of the wife are in law her separate property, sec. 246.05, it cannot be denied that except in the most unusual circumstances a husband receives at least an indirect financial benefit from his wife’s separate income. His obligation to support her is made easier by her earnings and consequent contribution to the household expenses, and by her payments for her own expenses which would otherwise have to be paid by the husband.

However, there is a distinct difference between old sec. 348.28 and present sec. 946.13. The old statute also covered cases included within sec. 946.13, but in addition it prohibited public officials from *having, reserving, or acquiring* any interest in any contract in relation to any public service, etc.

The new statute does not contain that clause. Subsec. (1) (a) prohibits an officer or employe from negotiating, bidding for, or entering into a contract in his private capacity if he is authorized or required by law to participate in his capacity as an officer or employe in the making of the contract, or to perform a discretionary official function in regard to the contract. Par. (b) prohibits him from

participating in the making of such a contract in his public capacity or performing in regard to the contract some discretionary function. Hence, unless, in his private capacity, he either negotiates, bids for, or enters into a contract or, in his public capacity, he participates in the making of the contract or performs a discretionary function in regard thereto, he does not violate the statute. Therefore, if in his public capacity a school board member refrains from voting on or debating the contract or any matter relating to the contract, and does not personally or by agent negotiate or enter into the contract in his private capacity, there is no violation.

He may have an interest when the contract is made or acquire such an interest later without thereby violating the statute, so long as he keeps himself totally aloof from the whole matter in both his private and his public capacities. To that extent the criminal code provision is more restricted than the old law.

It has been pointed out that the original criminal code bill of 1953, No. 100, A., contained a comment to the proposed section which finally became sec. 946.13, indicating that old sec. 348.28 was restated with only one change in substance (which change is not material here). This was incorrect, for the proposed law did make a substantive change with reference to having, reserving, or acquiring an interest in the contract. Elsewhere, the note stated:

"The officer or employe may be guilty under this section even though he does not actively participate on both sides of the transaction. However, he must actively participate on one side or the other. He is guilty under subsection (1) (a) if he acts in a private capacity and under subsection (1) (b) if he acts in his official capacity. Some transactions are excepted even though they fulfil the requirements of subsection (1). Those exceptions are listed in subsections (2) and (3). As to transactions which are not excepted, the section imposes strict liability, i. e., it is not necessary to prove criminal intent or corrupt motive."

Moreover, it must be pointed out that the legislature amended bill 100, A., by striking from it all the comments prepared by the draftsmen as well as proposed sec. 329.21 (2), which would have provided in part that "the official comments which accompany the Code are valid aids to interpretation of its provisions, but if text and comment conflict, text controls." The final draft of the criminal code as ultimately enacted by the 1955 legislature was bill No. 814, A., (1955), which contained no explanatory comments whatever.

It follows that the answer to your questions is that the board may not hire a member's wife if the board member participates in making the contract, either privately as his wife's agent or publicly as a member of the board, *unless* the situation is such that he receives no benefit direct or indirect, from his wife's earnings. The board member would violate the statute also if he were to perform in regard to the contract some official function requiring the exercise of discretion on his part.

WAP

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*Tax Lien—Drainage Assessments*—When a county forecloses a tax lien by an action in rem, per sec. 75.521, and later sells such land, distribution of proceeds is governed by sec. 75.36 and does not cut off drainage assessments under secs. 88.14 (1) and 89.37 (5).

October 7, 1963

A. W. PONATH,

*Corporation Counsel, Outagamie County*

You have requested my opinion regarding the effect of a tax title upon drainage taxes and special assessments. You have not given me the benefit of your own research or your conclusions as requested in the Foreword to 31 OAG and in a memorandum dated April 30, 1959, from

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this office to all district attorneys, with the result that the answers to your questions have been delayed.

You state that your county has taken title to several parcels of real property in the city of Appleton by actions in rem, pursuant to sec. 75.521. Special assessments had been levied by the city upon some of these parcels, and at the time the county acquired title there remained amounts due upon such special assessments. You first ask whether the county is required to pay to the city the amount due under these special assessments or only as much thereof as the county may receive over and above general taxes due to the county upon such properties. The answer is neither.

A judgment in favor of the county, entered in an action in rem brought pursuant to sec. 75.521 has the effect of a tax deed. The judgment vests in the county an estate in fee simple absolute, subject to unpaid taxes and charges which are subsequent to the latest dated valid tax lien appearing on the list accompanying the initial petition in the action in rem [Sec. 75.521 (8) and (13) (b)] and, as discussed subsequently, subject to drainage assessments.

Under sec. 75.36 (9), when a county takes title to land by tax deed, the liens of all nonoutlawed municipally owned tax certificates and taxes become merged in the county's title.

Taxes are defined in sec. 75.36 (1) (b) to include special improvement assessments, any other charge which may result in the issuance of a tax sale certificate and tax sale certificates, except as provided in sec. 77.04 and Chapters 88 and 89. Thus special assessments which are prior to the latest dated valid tax lien shown in the petition in the action in rem are merged in the county's title.

Drainage assessments, however, are different. Sec. 88.14 (1) provides for the insertion of unpaid farm drainage assessments in the tax roll and, if such assessments are not collected by the town, city or village treasurer, for their return to the county treasurer. If such assessments remain unpaid, they are to be sold by the county treasurer

in the same manner as general taxes. However, the subsection then provides:

“\* \* \* No drainage assessment deed shall cut off any unpaid or subsequent drainage assessment or tax nor shall any tax deed cut off any drainage assessment.”

The drainage district law, in sec. 89.37 (5), similarly provides:

“\* \* \* No tax deed shall cut off any drainage assessment. \* \* \*”

Under sec. 75.36 (3) a county taking a tax deed is not required to pay any delinquent taxes until the county sells the land. Subsec. (7) provides that upon the sale of the land by the county certain deductions from the sale price are to be made. Subsec. (8) then provides for the distribution of the remaining proceeds from the sale. The net proceeds,

“\* \* \* shall then be prorated between the remaining nonoutlawed municipally owned taxes outstanding on the date the tax deed was taken, including the tax certificate on which the tax deed was taken, and paid to the owners of such tax certificates and taxes. Such proration shall be in the ratio that the net balance of the proceeds of the sale, after making the deductions authorized in sub. (7), bears to the redemption value of such outstanding nonoutlawed municipally owned taxes on the date the tax deed was taken, provided that in no case shall the payment to the local municipality exceed such redemption value of its nonoutlawed outstanding taxes, except that for taxes of 1942 and subsequent years referred to in ss. 74.03 (7) (d) and 74.031 (12) (e) the payment shall not exceed the original amount of such taxes.”

Once the county has taken a tax deed, there are no more so-called trust specials, since the lien of any special assessment returned in trust has, by the tax deed, been merged in the county's title.

The proceeds of the gross sale price, after deductions authorized by sec. 75.36 (7), are to be distributed in ac-

cordance with sec. 75.36 (8). The latter subsection provides that for taxes of 1942 and subsequent years referred to in secs. 74.03 (7) (d) and 74.031 (12) (e) the payment shall not exceed the original amount of the taxes.

Secs. 88.14 (1) and 89.37 (5), previously quoted, make it clear that a tax deed does not cut off drainage assessments. Thus your second question — whether the county must pay past due drainage taxes — is answered in the negative. When the county sells the property, the purchaser takes it subject to drainage assessments.

EWV

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*State Highway Commission—Right-of-Way—Ch. 156, Laws 1963, creating sec. 66.941, discussed as it relates to duties and authority of state highway commission under sec. 66.941 (10).*

October 9, 1963

HARVEY GRASSE,

*Chairman, State Highway Commission*

Chapter 156, Laws 1963, creates sec. 66.941, establishing a transit right of way authority.

The "Transit Right of Way Authority", "is deemed a political subdivision, body politic and corporate entity of the state \* \* \*." Briefly, the purpose of the authority is to provide a means for acquisition of rights of way of mass transportation companies which have discontinued service after January 1, 1960.

The "authority" is given various powers, such as the right to exercise eminent domain. It may borrow money, and sue, and be sued. The legislative intent was to preserve existing transit rights of way for their best public purpose instead of allowing these corridors of transportation to be extinguished piecemeal, thus destroying their value for future public use.

Among other provisions of the statute, subsec. (7), which pertains to the state highway commission, reads as follows:

“(7) HIGHWAY COMMISSION. The state highway commission is authorized to expend such sums out of its funds as it determines to be appropriate for the purchase of rights of way of abandoned interurban railway or railroad property and shall hold such property for future highways or access to highways. If any such acquired land is in excess of that needed for highway purposes, the highway commission may convey the same to the authority on the basis of its fair market value. The highway commission may cooperate with the transit right of way board in such manner as may be within its legal powers in order to carry out the purposes of this section.”

You have asked several questions pertaining to this law which are here considered.

Your first question is whether it is necessary for the highway commission to officially lay out a highway, as required under existing state law (secs. 32.05 (1) and 84.09 (1)) or does the new statute grant authority to purchase the land for some future highway use regardless of whether such use is presently contemplated?

As stated, the basic legislative intent behind this law is to attempt to preserve an already existing valuable corridor for the future. If there were present needs for these lands to serve the public for transportation purposes, either for highways or for some other public transportation facility which is now feasible, I doubt that the legislature would have considered the enactment of the law in question.

I do not mean by this to imply that the highway commission has been empowered to purchase such rights of way without any thought as to future needs. The highway commission is not a land holding body and land which is acquired by them must have some reasonable relation to their present or future needs. I note that the statute on freeways and expressways contains similar provisions for

future acquisitions. See sec. 84.295 (10). Just where one draws the line as to what are reasonably foreseeable future needs has been left largely to the discretion of the highway commission by the legislature.

My answer to your first question, therefore, is that the powers given your commission as to land acquisition, by sec. 66.941 (10), are in addition to those which you previously possessed and the laying out of a road is not a prerequisite to acquiring land under the new statute.

Your second question is, what is meant by the statement that land may be held for future "access to highways"?

It is my opinion that this term was merely used to extend the reasons for which these lands may be acquired and held by the highway commission and has no other meaning of significance.

Your third question is whether land acquisitions by the highway commission, under the new section, are limited to land purchases, or whether the exercise of eminent domain is permitted?

It is my opinion that no power of condemnation is granted to the highway commission under sec. 66.941 (10). Condemnation is said to be a harsh remedy and not to be used unless an actual need exists. There is no language in the statute indicating that condemnation was intended, so no power can be said to exist. Such might not be the case however, if there was an actual present need for the property. This question is not before me and I withhold passing upon it at this time.

In your fourth question, you note that the new subsection provides in part, "The highway commission may cooperate with the transit right of way board in such manner as may be within its legal powers in order to carry out the purposes of this section."

You ask whether this language in any way limits the authority of the commission, and, if so, in what way?

In my opinion, the language quoted was included only to indicate that the highway commission has authority

to carry out necessary transactions with the "authority". It has no particular significance, and in no way imposes any restriction on the commission which does not otherwise exist.

This opinion is limited solely to the legal questions here asked and discussed. It is not intended to be an overall endorsement of the act.

REB

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*County Board—Sheriff*—Under sec. 59.07 (1) (d) county board may employ unused office space in county jail for personnel other than sheriff's subordinates, provided jail operation or security are no impaired. If such occurs, sheriff's sights are superior.

October 15, 1963

WILLIAM D. O'BRIEN,

*District Attorney, Chippewa County*

In your letter to this office of September 30, 1963, you state:

"The Chippewa county jail is a separate building and it includes living quarters for the sheriff and his family. At the present time the Chippewa County Traffic Patrol, which is not under the sheriff's jurisdiction but under the County Highway Committee, are occupying an office in the jail. In addition prior to January 1, 1963, the sheriff's accounts committee of the Board of Supervisors informed the deputy sheriff-investigator, a newly created position, that he could use the room on the second floor of the jail which was designed for the use of a matron, as his office. This room is located in the women's cell block and certain procedures were carried out among which was the blocking off of the windows into the cell block from the hallway, with the approval of the state jail inspector. In addition the civil defense director, who is also the

county zoning officer, has an office in the basement of the jail. The sheriff has hired a young lady and wants her to live in the quarters provided for the matron. He proposed to move his deputy sheriff-investigator to either the room now occupied by the County Highway Patrol officers or the room occupied by the Civil Defense Director. While not pertinent in my opinion, there is space for the Civil Defense Director in the courthouse with the recent removal of the local ASC office from the courthouse. The Buildings and Grounds committee of the Board of Supervisors has indicated to the sheriff that it does not approve of his shifting of the personnel which would include a move by the Civil Defense Director to the courthouse. The sheriff maintains that he can make whatever shifts are deemed necessary by him within the confines of the jail \* \* \*."

You refer to sec. 59.23 (1), claimed by the sheriff to sustain his position, and request my opinion thereon.

Sec. 59.23 (1) provides that the sheriff shall:

"(1) Take the charge and custody of the jail maintained by his county and the persons therein, and keep them himself or by his deputy or jailer."

Sec. 59.07 (1) (d) provides, however, that the county board shall:

"(d) \* \* \* Construct, maintain and operate all county buildings and structures \* \* \* and if the buildings are insufficient provide suitable rooms for county purposes."

Since the two statutory provisions appear to conflict, they should be harmonized, if reasonably possible, in order to give effect to both. *State v. Hackbarth*, (1938) 228 Wis. 108, 120, 279 N.W. 687.

Notwithstanding statutes similar to sec. 59.23 (1), a county board may, pursuant to statute, direct the use of space within the jail building for county purposes not administered by the sheriff, provided that such use does not interfere with proper jail administration by him. *State v. Cummins*, (1897) 99 Tenn. 667, 42 S.W. 880. This seems

to be the intent of sec. 59.07 (1) (d). It would be unreasonable, for example, to require the county board to rent needed office space for personnel because of an overcrowded courthouse, although sufficient unused office space exists in the jail building.

On the other hand, the sheriff's county-paid personnel are authorized by the county board, not by the sheriff. Sec. 59.15 (2). Proper jail administration requires that such personnel be furnished such quarters within the jail building as are necessary for jail purposes. This office has given an opinion that the county board may not require the sheriff to provide office space in the jail for personnel not under his control on any basis that would affect his operation of the jail or maintaining its security. 39 OAG 611 (1950). Thus, if office space in the jail is occupied by someone other than a subordinate of the sheriff, and it is needed for jail administration purposes, the county board must find quarters elsewhere for the occupant. This, we conclude, is the intent of sec. 59.23 (1). The sheriff's powers and duties as custodian and controller of the jail existed at common law and at the time of the adoption of the state constitution. *State ex rel. Kennedy v. Brunst*, (1870) 26 Wis. 412 (approved in *Schultz v. Milwaukee County*, (1945) 245 Wis. 111, 115, 13 N.W. 2d 580) ; 72 C.J.S., Prisons, sec. 8, 857. Since they are important attributes of that constitutional office, the county board may not effect any change in the substance thereof, because a statute cannot constitutionally empower the board to do so. *State ex rel. Kennedy v. Brunst*, supra. Hence, sec. 59.07 (1) (d) may not be construed as conferring such power.

Generally, on the powers of the sheriff and his independence of control by other county officials, see *Andreski v. Industrial Comm.*, (1952) 261 Wis. 234, 240, 52 N.W. 2d 135.

You are therefore advised that unused office space within the jail may be availed of by the county board for use by personnel not under the sheriff's control, if such use does not interfere with jail operation or security.

If, however, the space is or becomes necessary for jail purposes, or if such use should so interfere, then or thereafter, the board must find other quarters for such personnel. As between the sheriff and the board, the determination of that need or interference rests with the sheriff, since the board may not impede him in his duties prescribed by and encompassed within sec. 59.23 (1).

Additional facts received by this office subsequent to your request indicate that the new employe hired by the sheriff will act as jail matron. Whenever a female prisoner is in the jail, a matron must be on duty therein. Sec. 53.41; 45 OAG 31 (1956). Such employe is therefore absolutely necessary for jail administration while a female prisoner is confined in the jail, and the matron obviously must have office space or quarters there.

This opinion is not to be construed as a limitation upon the county board with respect to any county officer or employe other than the sheriff and his personnel, nor as in conflict with the opinion of this office dated October 2, 1963, and directed to the corporation counsel of Fond du Lac county, relating, in part, to the power of the county board to allocate office space among the various county agencies. Since that opinion did not involve the power of the sheriff regarding the charge and custody of the jail, sec. 59.23 (1) was not applicable thereto.

RDM

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*Conservation Commission—Committee on Water Pollution*—Discussion of ch. 218, Laws 1963, relative to permits for chemical treatment of waters described in such statute.

October 23, 1963

THEODORE F. WISNIEWSKI,

*Director, Committee on Water Pollution*

You ask my opinion on this question: Can a person, contemplating a chemical treatment of those waters de-

scribed in ch. 218, Laws 1963, obtain a permit for such treatment under ch. 218, Laws 1963, which would relieve him of any need to acquire a permit for such undertaking from the committee on water pollution, pursuant to certain provisions of sec. 144.53 (3), and Ch. WP 2, Wisconsin Administrative Code?

This question must be answered in the negative. It is my opinion that sec. 29.545, as amended by ch. 218, Laws 1963, does not empower the conservation commission to issue a permit authorizing the chemical treatment of the waters described in such statute. A permit authorizing such a treatment of those or other Wisconsin waters must be obtained from the committee on water pollution, the sole state agency having supervisory control over chemical treatment of Wisconsin waters "for the suppression of algae, aquatic weeds, swimmer's itch and other nuisance-producing plants and organisms." See sec. 144.53 (3).

Sec. 29.545, as amended by ch. 218, Laws 1963, reads:

"No person shall cut, harvest or remove wild rice, wild celery, sago or other aquatic plants of any variety whatsoever from Lakes Partridge, Partridge Crop, Poygan, Winneconne, Big Lake Butte des Morts, and the Wolf river from the mouth of the Rat river to its outlet from Big Lake Butte des Morts, \* \* \* and \* \* \* the Fox river from its junction with the Wolf river to where it empties into Lake Winnebago \* \* \* except that such growth of aquatic plants of any variety may be cut, removed or *controlled* in any portion of the above named waters on authorization from the conservation commission if the state board of health determines that they constitute a menace to public health, or by authorization from the conservation commission to such extent and during such periods of the time as the conservation commission may, \* \* \* with or without public hearing, determine that any such aquatic plants either are not reasonably necessary for propagation of fish or wildlife or that property or esthetic values are unreasonably impaired, provided that such cutting or *other control activities* are conducted in compliance with the rules of the public service commission so as not

to create an obstacle or hazard to navigation. Such cutting, removing, controlling or harvesting of aquatic plants in the above named waters shall be done only by persons after obtaining from the conservation commission a written permit therefor, which shall be issued without charge."

Sec. 144.53 reads in part:

"It shall be the duty of the committee on water pollution and it shall have power, jurisdiction and authority:

"\* \* \*

"(3) \* \* \* To supervise chemical treatment of waters for the supression of algae, aquatic weeds, swimmer's itch and other *nuisance-producing plants and organisms* \* \* \*."

To effectuate the purpose of the above-quoted portion of sec. 144.53, the committee on water pollution has adopted a body of rules, namely, Ch. WP 2 "Aquatic Nuisance Control", Wisconsin Administrative Code. Such rules require a sponsor of an aquatic nuisance control project to apply for and obtain a permit from the committee on water pollution for chemical treatment of an aquatic nuisance before such treatment is undertaken. An application for such a permit must be accompanied by a fee of ten dollars.

In considering the possibility of conflict between these statutes, it should be noted that the term "nuisance-producing plants" employed in sec. 144.53 (3), encompasses the "wild rice, wild celery, sago or other aquatic plants of any variety whatsoever" referred to in sec. 29.545. I view "nuisance-producing plants", as the term is used in sec. 144.53 (3), as meaning any aquatic plant producing or capable of producing a nuisance; and I am reliably informed that any aquatic plant, under certain circumstances, may be nuisance-producing or capable of producing a nuisance. It follows that the aquatic plants, including wild rice, wild celery and sago, referred to in sec. 29.545, are a portion of the "nuisance-producing plants" in Wisconsin waters referred to in sec. 144.53 (3). It further follows that chemical suppression of the aquatic

plants referred to in sec. 29.545 is a matter within the sole jurisdiction of the committee on water pollution under sec. 144.53 (3), unless the legislature, in enacting sec. 29.545, or in subsequently amending it, intended to place that matter within the jurisdiction of the conservation commission, thus diminishing the jurisdiction of the committee on water pollution over the matter of suppressing nuisance-producing plants in Wisconsin waters through chemical treatment. Did the legislature so intend? In my judgment, it did not.

The predecessor statute of sec. 29.545 (sec. 1, Ch. 222, Laws 1941) read:

“No person shall *cut, harvest or remove* wild rice, wild celery, sago or other aquatic plants of any variety whatsoever from Lakes Partridge, Partridge Crop, Poygan, Winneconne, Big Lake Butte des Morts, and the Wolf River from the mouth of the Rat River to its outlet from Big Lake Butte des Morts, except that wild celery and sago may be cut, harvested or removed from Big Lake Butte des Morts and from the Fox River from its junction with the Wolf River to where it empties into Lake Winnebago \* \* \*.”

The portion of sec. 144.53 here in question was also enacted in 1941, by sec. 1, ch. 307, Laws 1941, amending sec. 144.53 (3). Then as now it empowered the committee on water pollution, “to supervise chemical treatment of waters for the suppression of algae, aquatic weeds, swimmer’s itch, and other nuisance-producing plants and organisms.” Was there a conflict between these statutes? None, in my judgment. A conflict would have been present only if the terms “cut, harvest or remove”, employed in sec. 29.545 in 1941 and now, plainly means, “to reap or gather, as any crop, material or result.” Webster’s New International Dictionary, 2d Ed., Unabridged. Chemical suppression of aquatic plants involves no reaping or 29.545, included chemical treatment for the suppression of aquatic plants. Clearly, neither such terms collectively nor any one of them included such treatment. “Cut” would obviously not cover such treatment. “Harvest”, as used

harvesting of them, but rather, as you are well aware, a "killing in place", with the plant left where it dies under the impact of the chemical. As for "remove", it might in some contexts mean "eradicate", by chemical or other means. See Webster's Third New International Dictionary, Unabridged. In the context of sec. 29.545, however, it had in 1941 and now has no such meaning, but rather a meaning similar to that of "cut" and "harvest", and therefore signifies, not a "killing in place" of an aquatic plant, as in chemical suppression, but instead an actual separation or detachment of the plant from its seat, and/or the carrying off of such plant to another site, for whatever purpose. Such a construction of the word "remove", in the context of sec. 29.545 is justified and warranted under an application of the doctrine or rule of "noscitur a sociis", namely, that doubtful words and phrases used in statutes are construed in connection with, and their meaning is ascertained by reference to, words and phrases with which they are associated. See 82 C.J.S. Statutes, sec. 331; sec. 4908, Sutherland Statutory Construction, 3rd Ed., Vol. 2.

I turn now to the question of whether or not the amendments of sec. 29.545 — in 1953 and in 1963 — have broadened its scope so as to give the conservation commission jurisdiction thereunder in the matter of chemical treatment of the Wisconsin waters described therein.

Sec. 29.545 was first amended by ch. 234, Laws 1953. The pertinent part of the amended statute reads as follows:

"No person shall cut, harvest or remove wild rice, wild celery, sago or other aquatic plants of any variety whatsoever from Lakes Partridge, Partridge Crop, Poygan, Winneconne, Big Lake Butte des Morts, and the Wolf River from the mouth of the Rat River to its outlet from Big Lake Butte des Morts, except that wild celery and sago may be cut, harvested or removed from Big Lake Butte des Morts and from the Fox River from its junction with the Wolf River to where it empties into Lake Winnebago and except that such growth of aquatic plants of any variety may be cut, removed or *controlled* in any portion of the above named waters on authorization from the conservation com-

mission \* \* \* provided that such cutting or *other control activities* are conducted in compliance with the rules and regulations of the public service commission so as not to create an obstacle or hazard to navigation."

You will observe that the amended sec. 29.545 not only refers to authorization of the conservation commission permitting a growth of the aquatic plants therein described to be "cut" or "removed", but also refers to authorization of that agency to permit such growth to be "controlled", and refers, not only to the "cutting" of such plants but to "other control activities" with respect to them. The bill drafting file for ch. 234, Laws 1953, in the legislative reference library provides no clue to the reason for the appearance in such chapter of the words "controlled" and "other control activities", but for several reasons I have concluded that the "control of aquatic plants" concept evinced by such words does not embrace the idea of using chemical treatment to suppress nuisance-producing plants, i.e., aquatic plants producing or capable of producing a nuisance. My reasons for reaching this conclusion are these:

(1) As shown above, the amended sec. 29.545 closes with the words, "provided that such *cutting* or *other control activities* are conducted in compliance with the rules and regulations of the public service commission so as not to create an obstacle or hazard to navigation." This proviso of the statute strongly indicates that the "other control activities" with reference to aquatic plants, referred to therein, would, like cutting, be of such a nature that they might "create an obstacle or hazard to navigation" unless "conducted in compliance with the rules and regulations of the public service commission." In other words, those "other control activities" would, unless so conducted, cause or be likely to cause masses of aquatic plants to float free in the water, impairing or impeding navigation. Since, as above indicated, the "killing in place" of aquatic plants by chemical treatment produces no such impediment or hazard to navigation, it seems obvious that the legislature, in using the term "other control activities" in the context of the above-quoted proviso, did not have in mind

the suppression of aquatic plants through chemical treatment; nor did it have in mind such suppression when it used the term "controlled" in the amended sec. 29.545.

(2) An application of the rule or doctrine of "noscitur a sociis" appears justified in construing the meaning of the word "controlled" in the context of sec. 29.545, as amended in 1953. Construed, in accord with that rule, in connection with and with reference to the words "cut" and "removed", the word "controlled" must be viewed as meaning something akin to "cut" or "removed", i.e., as importing, at the minimum, a separation of aquatic plants from their place of growth, and possibly also a carrying away of such plants from that site. So construed, "controlled" does not, of course, cover the "killing in place" of aquatic plants accomplished by chemical treatment.

Sec. 29.545 was again amended in 1963, by ch. 218, Laws 1963, as is shown above. In the first sentence of such statute (prior to the 1963 amendment, a one-sentence statute) no changes material to this opinion appeared. Such chapter added a second sentence to the statute, reading:

"Such cutting, removing, *controlling* or *harvesting* of aquatic plants in the above named waters shall be done only by persons after obtaining from the conservation commission a written permit therefor, which shall be issued without charge."

"Controlling" as used in this context, has in my judgment the same meaning as "controlled" in the 1953 version of sec. 29.545, for the reasons hereinabove stated. Its meaning is not changed by the fact that the draftsmen of the statute, in preparing the second sentence thereof, evidently thought it advisable to insert the word "harvesting", apparently because the word "harvest" appears in the first sentence. Since "harvesting", as above noted, is similar in meaning to "cutting" or "removing" and clearly does not include chemical treatment for suppression of aquatic plants, its appearance plainly calls for no different construction of "controlling" under application of the doctrine "noscitur a sociis" than the construction given "controlled" under application of the same doctrine.

It is, then, my opinion that the amendments of sec. 29.545 in 1953 and 1963 gave the conservation commission no jurisdiction over the suppression of aquatic plants by chemical treatment in the Wisconsin waters described therein.

JHM

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*Words and Phrases—Taxes*—Discussion of certain items as constituting “merchants’ stock in trade, manufacturers’ materials and finished products, and livestock” for purposes of tax credit provisions of sec. 77.64.

October 24, 1963

COMMISSIONER,

*Wisconsin Department of Taxation*

An opinion has been requested by you whether the following items fall within the terms “merchants’ stock in trade” or “manufacturers’ materials and finished products” as used in sec. 77.64:

1. Seed potatoes raised and used by growers, a portion of which are held for sale to other growers;
2. Hay and grain raised by a farmer, but held for sale;
3. Ice cut and stored or made and stored and held for sale;
4. Dogs in commercial kennels;
5. Eggs in a commercial hatchery;
6. Boats and motors owned and kept by a resort for the purpose of leasing to patrons, but which are occasionally sold;
7. Golf carts owned by a pro shop and rented to golfers, but occasionally sold;
8. Junk cars and used parts taken therefrom sold to persons in need thereof;

9. The stock of "job tradesmen" (plumbers, carpenters, heating contractors, etc.) who stock a certain amount of goods which they sell to a property owner and usually (but not always) install;

10. The goods of service trades (shoe repair shops, beauty parlors, etc.) part of which is used in repairing items or rendering a service, and part of which is sold separately across the counter, as, for example, shoe polish, shoe laces, shampoo, etc;

11. Non-returnable bottles, cans, cartons or cases to contain manufacturers' or merchants' products;

12. Returnable bottles, cases and barrels, title to which is retained by a brewery.

The provisions in sec. 77.64 provide for credits on taxes on "merchants' stock in trade, manufacturers' materials and finished products, and livestock." Such credits are permissible by virtue of the language now in Art. VIII, sec. 1, Wis. const., that such items need not be taxed uniformly with real property and other personal property. The quoted words or phrases are not words of art so as to have a technical meaning, but are used in both the Constitutional provision and this statute in their ordinary sense and meaning in common usage. As respects their use in this statute, sec. 990.01 (1) so provides.

The word "merchant" is defined in Webster's New International Dictionary, in the Second Edition as:

"Anyone making a business of buying and selling commodities; a trafficker; a trader \* \* \*; one who carries on a retail business; a storekeeper or shopkeeper."

and in the Third Edition as:

"A buyer and seller of commodities for profit: TRADER, the operator of a retail business: STOREKEEPER."

There have been many court decisions interpreting the word. In *White v. Commonwealth*, 78 Va. 484, it is said that a merchant is a dealer in goods, wares and merchandise who has the same on hand for sale and immedi-

ate delivery. *Magnolia Petroleum Co. v. City of Broken Arrow*, 184 Okla. 362, 87 P. 2d 319, defines the words as meaning one who buys to sell and sells goods or merchandise in a store or shop. A merchant is defined in *City of Joliet v. O'Sullivan*, 303 Ill. App. 108, 24 N.E. 2d 751, as one engaged in the business of buying commercial commodities and selling them again for sake of profit or one whose business is the buying and selling of merchandise. It was indicated in *Com. v. Wytheville Knitting Mills Emp. Welfare Ass'n.*, 195 Va. 663, 79 S.E. 2d 621, that a merchant ordinarily does not resell to the same class of persons from whom he buys, and that he is a middleman in the distributing of goods. There are numerous other decisions, the composite of which is, that a merchant is one who is engaged in the business of buying commercial commodities for the purpose of and selling them at a profit, at an established location and maintains on hand a stock or supply thereof for immediate sale and delivery.

The term "stock in trade" as ordinarily used among businessmen includes the supply, inventory or stock of goods, wares and merchandise held and kept on hand by a merchant for sale. *Story v. Christin*, 14 Cal. 2d 592, 95 P. 2d 925. It is variously interpreted as meaning the goods kept on hand by a merchant or shopkeeper for resale. In my opinion it is in this sense that the term is used in this statute.

The word "manufacturer" as used in this instance is to be given its common and ordinary meaning, which is generally accepted to be one who engages in the business of making from, working up or changing materials into (usually raw materials) a different form or shape as an article or ware of use or value. *Sharpe v. Hasey*, (1908) 134 Wis. 618, 114 N.W. 1118.

As stated in *State v. Magnolia Packing Company*, 231 La., 661 La., 350 S.W. 2d 422, the cases on the subject are legion. However, in the *City of New Orleans v. Ernst & Co.*, (1883) 35 La. Ann. 746, a manufacturer was defined to be:

“\* \* \* one who is engaged in the business of working raw materials into wares suitable for use, who gives new shapes, new qualities, new combinations to matter which has already gone through some artificial process. A manufacturer prepares the original substance for use in different forms. He makes to sell, and stands between the original producer and the dealer, or first consumer, depending for his profit on the labor which he bestows on the raw material.”

A manufacturer is different from a merchant who buys articles and resells them for a profit. The manufacturer sells to realize a profit earned whereas a merchant sells to earn the profit. The manufacturer sells to realize a profit from his work upon raw materials or in producing the finished product but a merchant sells to realize a profit from his activities in the distribution of goods made or produced by others.

Upon the application of the above definitions, the following are my conclusions in respect thereto:

A grower raising seed potatoes and holding a portion of the crop for sale to other growers is not a merchant or manufacturer within the meaning of sec. 77.64. Although he sells potatoes for a profit, his primary occupation is the cultivation of the soil to produce a potato crop. He thus does not derive the potatoes from a manufacturing operation as it is from a cultivation of soil and he is not a merchant.

In my opinion a farmer raising hay and grain for sale does not come within this tax credit provision as a merchant or a manufacturer. He makes his living primarily by the tilling of the soil. The income derived from the sale of such hay and grain is not as a merchant as he does not buy and sell the same for the purpose of obtaining income. He is not a manufacturer. He does not work raw materials into wares suitable for use. Such farmer is a grower. To call a farmer who cultivates land and reaps and markets his crop a manufacturer would do violence to the common concept of a farmer. *Sharpe v. Hasey*, supra.

A dealer in ice in my opinion is a merchant within the meaning of this statute. The ice is either cut or made and stored for sale and is thus a dealing in goods, wares or merchandise. The ice is a commodity kept on hand for sale and for present delivery. The ice dealer does not till the soil and raise crops as does a farmer, grower or producer of agricultural products. Such ice dealer makes his primary source of income from the sale of the ice as a commodity and in doing so, he is acting in the capacity of a merchant. It was held in *Kansas City v. Vindquest*, 36 Mo. Ann. 584, that an ice dealer was a merchant within the meaning of the word as used in a city licensing ordinance.

Dogs in commercial kennels would not qualify for tax credit purposes as such dogs are not stock in trade, at least to the extent they are breeding stock. However, if a commercial kennel buys dogs for the purpose of immediate resale and it regularly engages in that activity, it could be that such dogs so held for resale would be stock in trade of a merchant. In order for such dogs to so qualify, it would be necessary that it be established that such kennel regularly and rather extensively engages in buying dogs for resale and selling them. Just an occasional instance would not be sufficient to make the commercial kennel a merchant. Such dogs clearly would not qualify as livestock as that term includes hogs and sheep, but not dogs. *Howard v. Herrin & Nashville C. & St. L. Ry. Co.*, 153 Tenn. 649, 284 S. W. 894. In *White Mountain Fur Co. v. Town of Whitefield*, 77 N. H. 340, 91 A. 870, it was held that one raising and selling foxes is not a merchant.

Eggs in a commercial hatchery would in general not qualify for the exemption. The eggs are not purchased for resale as such and they would not constitute stock in trade nor the owner of the hatchery a merchant. The eggs are products of the farm but are not livestock and therefore, would not be entitled to tax credit as such. The eggs which are to be hatched into baby chicks are not stock in trade of a merchant or a finished product or the material of a manufacturer. The method of operation by

which the owner of a hatchery derives income from conducting the same is the hatching of chickens and not the purchase and resale of a product.

Boats and motors owned and kept by a resort for the purpose of leasing to patrons and golf carts owned by a pro-shop and rented to golfers, although occasionally sold, are similar in classification. The primary purpose of both the resort owner and the operator of the pro-shop is the service of customers. Neither of such operations would qualify as a merchant as they do not buy such boats, motors and golf carts for the express purpose of resale at a profit.

Junk cars and used parts taken therefrom to be sold to persons in need thereof, in my opinion, qualify for the tax credit on the basis that the operator of such a business is a merchant and the cars and parts are stock in trade within the meaning of the provisions. The primary function of the junk cars and parts enterprise is one of purchase and resale for profit.

The stock of "job tradesmen" (plumbers, carpenters, heating contractors, etc.) who maintain a stock of a certain amount of goods which they sell to and install for a property owner, although not always, is a closer question. In my opinion such "job tradesmen" are contractors or sub-contractors to the extent that they maintain any parts or stock on hand to sell to a property owner and to be installed by the tradesmen as such. They are not in that respect merchants or manufacturers. Their main source of income is derived from the services they render in their trade. In order to render this service such tradesmen must stock a certain amount of goods and wares for which he charges the property owners when he installs it. Such goods are not purchased for resale as a merchant would do, but are purchased by the tradesmen only to complete the services rendered. However, if what the tradesman has is a complete unit or appliance which he might and could sell to a customer without being installed by the tradesman, then it would appear to that extent the tradesman is a merchant as respects those items. In order to qualify as a merchant and have sufficient materials of that char-

acter to qualify as stock in trade, he would have to be engaged substantially in maintaining on hand such complete units or appliances for resale without regard to whether he or someone else installs the same. If the tradesman specifically orders and has on hand goods or wares of this character for the express purpose of selling them to customers and they are designed for him to do so, it would appear that then such property would constitute stock in trade.

The goods of service tradesmen (shoe repair shops, beauty parlors, etc.) that are used in rendering a service are like similar goods maintained by a tradesman, not stock in trade within the application of sec. 77.64. However, items that are sold separately across the counter, as for example, shoe polish, shoe laces, etc., are purchased by the shop operator expressly for the purpose of resale at a profit. To the extent of the last type of merchandise, the shop operator in my opinion would qualify as a merchant and those mentioned items would be his stock in trade.

Nonreturnable bottles, cans, cartons or cases containing manufacturer's or merchant's products are sold as a part of the product. They are, therefore, manufacturer's materials which become a part of the finished product. The customer buys the entire container and all that is in it as the finished product. The complete and final product which is sold for use by the customer is the container and the substance in it and not just the container or just the substance but both of them. Such items would qualify for the tax credit.

On the other hand, returnable bottles, cases and barrels, the title to which is retained by a brewery, are in my opinion not stock in trade of a merchant since they are not sold nor are they manufacturer's materials or finished products since they are not sold. The containers are merely used to handle the manufactured product. The finished product is contained inside of the container and it is that which is purchased by the buyer. The customer may be charged for the loss or destruction of the containers either through the forfeit of a deposit or by a special billing. But the pay-

ment which he so makes for the containers that are not returned is at cost rather than at a sale price for profit. Any such payment for unreturned containers would not make the brewery qualify as a merchant in respect thereto within the meaning of sec. 77.64.

HHP

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*Board of Medical Examiners—Civil Action—Discussion of civil actions brought under sec. 147.205 (1) and responsibility for prosecuting such suits.*

November 5, 1963

#### STATE BOARD OF MEDICAL EXAMINERS

You inquire whether the state board of medical examiners, acting through an employe designated as attorney-investigator, may bring and prosecute an action in the name and on behalf of the state under sec. 147.205 (1), to enjoin a person from violating sec. 147.14 (3), regulating the use of the letters "doctor", "Dr.", "specialist", "M.D.", "D.O.", or any other title, letters, or designation which represents or may tend to represent an individual as a doctor in any branch of treating the sick.

The board has authority to bring the action. However, it should be commenced and must be prosecuted on behalf of the board and the state by the legal officials the statutes designate to commence and prosecute civil actions in the courts.

The board can investigate and request the proper officials to actually commence and prosecute the suit. The complaint can be signed by all members of the board or by a member or employe of the board designated to act for the board.

Actual commencement and prosecution of the suit is the responsibility of the district attorney or corporation counsel of the county of alleged violation, the attorney

general, or special counsel authorized by the governor to act in the matter.

Sec. 147.205 (1) provides:

“(1) If it appears upon complaint to the board of medical examiners by any person or it is known to the board that any person is violating any of the provisions of chapter 147, except sections 147.24 and 147.25, the said board or the district attorney of the proper county may investigate and may, in addition to any other remedies, *bring action* in the name and on behalf of the state of Wisconsin against any such person to enjoin such person from such violation or violations of this chapter.”

Chapter 147 does not refer to the position of attorney-investigator nor does any provision thereof authorize the board or one of its employees to prosecute civil or criminal actions in the courts which may have been initiated by it. This opinion is confined to civil actions. However, it could not be seriously contended that the state board of medical examiners has any authority to prosecute or control the progress of criminal actions commenced at its instigation.

The bureau of personnel advises that the job classification title of the employe referred to is “Attorney III”. The position is within the classified service and was apparently established under sec. 16.105 pursuant to authority of sec. 147.13, Ch. 16, and sec. 20.901.

The state board of medical examiners has only those powers which are expressly given by statute or which are necessarily implied from the statutory language used. A board employe is subject to the same limitation. The fact that the individual employe is a licensed attorney and is required to be by reason of his job classification has no bearing in the matter. The question is not what the individual employe is capable of doing, but what the statutes authorize him to do.

Sec. 147.12 provides in part:

“\* \* \* It shall from time to time from lists furnished by the state civil service commission, appoint such com-

petent and recognized experts as shall be necessary to assist in the examinations, and necessary clerks. \* \* \*

Sec. 147.13, which establishes the state board of medical examiners, provides in part:

“\* \* \*

“(4) The board shall employ necessary assistants and fix their compensation.

“\* \* \*

“(6) The board shall investigate complaints of violation of this chapter, *notify prosecuting officers, and institute proceedings.*”

Recognition of the difference between the bringing of an action and prosecution appears in sec. 147.195 relating to the powers of the state medical grievance committee. Sec. 147.195 provides in part:

“\* \* \* The committee shall have the power to warn and to reprimand, when they find such practice, and to *institute criminal action or action* to revoke license when they find also probable cause therefor under criminal or revocation statute, *and the attorney general may aid the district attorney in the prosecution thereof.* \* \* \*

Sec. 147.205 (1) authorizes the state board of medical examiners to “bring action”. It is my opinion that this language authorizes the board to initiate the necessary steps to cause an action to be commenced. It can request the appropriate district attorney, corporation counsel or attorney general to commence an action. Under the most liberal interpretation of the statute available, the board could itself, or through an employe, commence the suit by service of a summons and complaint. Its attorney employe would not, in such event, have authority to further prosecute the suit. It behooves the board to secure the cooperation of the legal officer who will have the duty of prosecuting the suit before any action is commenced. The better procedure would be to have such officer prepare or supervise the preparation of all suit papers and cause the summons and complaint to be served.

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

"The phrase 'to bring an action' has settled, customary, legal, as well as general, meaning, and refers to the initiation of legal proceedings in the suit." *Hames v. Judd*, (1890) 9 N.Y.S. 743, 744 note. Followed in *Brodsky v. Fiore*, (1949) 87 N.Y.S. 2d 844, 846.

To bring an action means to initiate or commence a suit. Prosecution of a suit is the further conduct of the suit, however, the power to prosecute usually includes the power to initiate an action. *Buecker v. Carr*, (N.J. 1900) 47 Atl. 34, 36. *State v. Osen*, (N.D. 1937) 272 N.W. 783, 784. *Segmon v. Commonwealth*, 200 Va. 258, 105 S.E. 2d 171, 178.

In *Wall v. Chesapeake & O. Ry. Co.*, (1919) 290 Ill. 227, 125 N.E. 20, the court interpreted a statute which read:

"No action shall be brought or prosecuted in this state to recover damages for a death occurring outside of this state."

At page 23, the court stated:

"\* \* \* The result is all the more clear when we consider that the act specifically prohibits the prosecution of the suit as well as the bringing of the suit. To prosecute a suit is to proceed against a party judicially. It is the act of conducting or waging a proceeding in court. \* \* \* To prosecute an action includes, not only the bringing, but the carrying on of the action. \* \* \* The bringing of an action is the beginning of a suit; the prosecution of the action is the further conduct of the suit. Whenever the Legislature declares that no action shall be 'brought' or 'prosecuted', it is presumed that it intended each phrase to have its distinct meaning; else there was no occasion to use both."

See *City of Champaign v. Hill*, (1961) 29 Ill. App. 2d 429, 173 N.E. 2d 839, for various definitions of the word "prosecute".

As a general rule the attorney general is required by statute to furnish all of the departments of state government with full legal services. With very few exceptions, employes of other departments in attorney positions are not authorized to make court appearances on behalf of the state in the capacity of attorney. The attorney general, absent specific statute to the contrary, and the district attorney or corporation counsel of the county concerned, have the right and duty to appear for the state, its departments and agencies, whenever court appearances are required. There is no statutory exception in the case of the state board of medical examiners.

Sec. 59.47 (1) provides that the district attorney shall:

“(1) Prosecute or defend all actions, applications or motions, civil or criminal, in the courts of his county in which the state or county is interested or a party; and when the place of trial is changed in any such action or proceeding to another county, prosecute or defend the same in such other county.”

Sec. 59.07 (44) is concerned with the powers of corporation counsels in counties other than Milwaukee county and secs. 59.455 and 59.456 are concerned with corporation counsel in Milwaukee county.

Sec. 59.456 (1) and (5) provides in part:

“(1) Prosecute and defend all civil actions, proceedings, applications and motions in any court, commission, board, tribunal or body in any jurisdiction of this or other states or of the nation in which his county or any board, commission, committee or officer thereof is interested or a party by virtue of such office; and shall in like manner represent or assist in representing the state, or any commission, board, agency or tribunal of the state, in such civil actions or proceedings when requested to do so by the attorney general or when the district attorney of said county is required by any statute to do so.

“(5) Perform all duties in connection with civil matters relating to his county or any agency, board, com-

mission or officer thereof or to the state within said county now or hereafter imposed by any statute upon the district attorney of such county and for such purposes the term 'district attorney' wherever it appears in the statutes relating to duties of a civil nature shall, with regard to counties containing a population of 500,000 or more, mean the corporation counsel. \* \* \*

Sec. 14.53 (1), (2) relating to the duties of the attorney general provide:

"(1) REPRESENT STATE. Appear for the state and prosecute or defend all actions and proceedings, civil or criminal, in the supreme court, in which the state is interested or a party, and attend to and prosecute or defend all civil cases sent or remanded by the supreme court to any circuit court in which the state is a party; and, when requested by the governor or either branch of the legislature, appear for the state and prosecute or defend in any court or before any officer, any cause or matter, civil or criminal, in which the state or the people thereof may be in anywise interested.

"(2) PROSECUTE BREACHES OF BONDS AND CONTRACTS. Prosecute, at the request of the governor, or of the head of any department of the state government any official bond or any contract in which the state is interested, deposited with any of them, upon a breach thereof, and prosecute or defend for the state all actions, civil or criminal, relating to any matter connected with any of their departments except in those cases where other provision is made."

The case of *State ex rel. Jackson v. Coffey*, (1963) 18 Wis. 2d 529, 118 N.W. 2d 939, involved a criminal proceeding, however, the statements of the court interpreting secs. 14.53 (1) and 14.531 are pertinent to this opinion. At pages 538, 539, the court stated:

"\* \* \* The state is interested \* \* \*. Ordinarily it is the duty of the district attorney to prosecute all criminal actions in the courts of his county. On the other hand, no statute gives the attorney general power to appear

and prosecute criminal actions generally except in the supreme court, and in this state the attorney general has no common-law powers or duties.

“Sec. 14.53 (1), Stats., however, requires that the attorney general shall ‘when requested by the governor or either branch of the legislature, appear for the state and prosecute . . . in any court or before any officer, any cause or matter, civil or criminal, in which the state or the people thereof may be in anywise interested.

“Sec. 14.53 (1), Stats., empowers the governor to require the attorney general to prosecute on behalf of the state matters which it would otherwise be the duty of the district attorney to prosecute on behalf of the state. We think it reasonably follows that the attorney general has the powers of the district attorney of the county or counties involved while acting within the scope of the governor’s request. This proposition is expressed in sec. 14.531, as follows:

“ . . . In any criminal action prosecuted by the attorney general, he and the deputy and assistant attorney general shall have the same powers with reference to such action as are vested in district attorneys.’

“The power to prosecute must involve the power to prepare the case and take the preliminary steps as well as to appear in the action after it has been commenced. We think that sec. 14.53 (1), Stats., contemplates that the attorney general shall have such power, and the sentence just quoted from sec. 14.531 should be read in the same light.

“‘Where authority is conferred upon the attorney general to prosecute criminal proceedings, he possesses all the powers of a prosecuting attorney, . . .’

“‘Where the authority of the attorney general and the district attorney is concurrent, their action should be coordinated, and, in the event of a conflict between them, the attorney general, being the superior officer, has control.’

“We conclude that in view of the governor’s request, the attorney general or his assistant could properly make the

motion for compulsion of testimony under sec. 325.34, Stats."

Sec. 14.531 provides:

**"Attorney general, powers.** Any civil action prosecuted by the attorney general by direction of any officer, department, board or commission, shall be compromised or discontinued when so directed by such officer, department, board or commission. Any civil action prosecuted by the attorney general on his initiative, or at the request of any individual may, in his discretion, on approval of the governor, be compromised or discontinued. In any criminal action prosecuted by the attorney general, he and the deputy and assistant attorney general shall have the same powers with reference to such action as are vested in district attorneys."

Sec. 14.13 is concerned with the appointment of special counsel in special situations. The language used indicates an intent in such cases to appoint qualified attorneys for special purposes by individual contract.

Sec. 14.13, provides:

**"Employment of special counsel.** (1) The governor, if in his opinion the public interest requires such action, may employ special counsel in the following cases:

"(a) To assist the attorney-general in any action or proceeding;

"(b) To act instead of the attorney-general in any action or proceeding, if the attorney-general is in any way interested adversely to the state;

"(c) To defend any action instituted by the attorney-general against any officer of the state;

"(d) To *institute and prosecute* an action or proceeding which the attorney-general, by reason of his opinion as to the validity of any law, or for any other reason, deems it his duty to defend rather than prosecute.

"(2) When special counsel is employed, a contract in writing shall be entered into between the state and such

counsel, in which shall be fixed the compensation to be paid such counsel by the state. The contract shall be executed in behalf of the state by the governor, and shall be filed in the office of the secretary of state. Such compensation shall be charged to the legal expense appropriation provided in s. 20.180 (2)."

In *Orton v. State*, (1860) 12 Wis. \*509, the court held that it was the duty of the attorney general, as law officer of the state, to appear for the state in all suits in which the state was interested and that the school land commissioners were not authorized to employ counsel at the expense of the state in an action brought against them.

Wisconsin has long benefited from the fact that the legal services of the state have been furnished through the office of attorney general, and through the various district attorneys and corporation counsels at the local level. Absent special statute with respect to individual departments, boards or commissions, or absent appointment of special counsel in appropriate matters, such officials are the only attorneys authorized to appear in the courts of the state in state matters. Sec. 20.905 is in accord with this conclusion and provides:

**"Attorneys' fees, allowance, charged to operation or administration. No department, board, commission, institution or officer of the state shall employ any attorney, or attorneys, until such employment has been approved by the governor; and the compensation of such attorney or attorneys so employed shall be charged to the appropriation for operation or administration of such department, board, commission, institution or officer."**

Nothing in this opinion is intended to preclude staff counsel of various departments from working on cases or appearing in court or before administrative agencies under the direction and with the consent of the attorney general. Section 20.904 expressly provides for such cooperation.

**"20.904 Co-operation of functions. (1) The several state officers, commissions and boards shall co-operate in the performance and execution of state work and shall inter-**

change such data, reports and other information, and, by proper arrangements between the officers commissions and boards directly interested, shall interchange such services of employes, or shall so jointly employ or make such assignments of employes as the best interests of the public service require. All interchanges of services and joint employments and assignments of employes for particular work shall be consistent with the qualifications and principal duties of such employes.

“(2) Whenever the employe of any state officer, commission or board is assigned or required hereunder to perform services for any other such officer, commission or board, such employe is vested with all powers and may enjoy all privileges necessary to perform the duties and execute the functions imposed upon and delegated to him and may perform such services and exercise such powers in the same manner, to the same extent and with like effect as though regularly appointed therefor.

“(4) Each officer, commission and board shall keep a record of all work done for or in co-operation with other officers, commissions and boards under this section.”

RJV

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*County—Leases—Hospitals*—A county may not construct a hospital for sale or lease to a private organization, except to a non-profit organization organized to provide a memorial to veterans. Religious society organized under Ch. 187 cannot qualify under sec. 45.055.

November 5, 1963

WALTER J. SWIETLIK,

*District Attorney, Ozaukee County*

You state that Ozaukee county desires to provide facilities for a home or hospital for elderly people, and that the county has a fund of approximately \$400,000 which

has been designated for the purpose of providing an old people's home for county residents.

Your further state that while the county board would like to provide the facility, it does not desire to have it managed and maintained by county employes.

You ask whether the county may construct a hospital and subsequently lease or sell it to a non-profit religious order. You state it is the intention of the county board to receive full fair market value for the property. It is my view that a county has no power or authority to construct a building, whether it be a hospital or something else, for the purpose of leasing or selling it to anyone, which would include a non-profit religious or charitable organization. A county is in neither the building or construction business, nor in the real estate business. In my opinion, the use of county funds to construct a building or structure for the purpose of being leased or sold to somebody else would be the use of public funds for a private purpose. That is unconstitutional. See *Heimerl v. Ozaukee County*, (1949) 256 Wis. 151.

You suggest that secs. 45.05, and 45.055 may be used to accomplish the county board's desired result. Sec. 45.05 provides that the county may provide memorial for veterans. The building of a hospital, such as you have mentioned, could be considered a memorial. In 8 OAG 604 it is stated that buildings suitable for hospital purposes could be erected as memorials to veterans. The statute further provides that the county board may by ordinance or contract provide for the management, contract or operation of any memorial and it may enter into a written lease for a term not exceeding 25 years with any duly chartered incorporated veteran's organization.

Sec. 45.055 provides that the county board may contract with or make an appropriation to any other unit of government, or any non-profit corporation without capital stock organized expressly for any of the purposes of sec. 45.05 or to any duly chartered and incorporated veterans' organization established for such memorial purpose.

These sections have been discussed in 46 OAG 226 and in 37 OAG 170. From the discussion in those opinions and from the statutory authorization, there is no question that the county could sell, lease, or give funds to any non-profit organization, if the express purpose of the said organization conforms to the requirements of these two sections.

But, the question you ask is whether a non-profit religious organization, organized under Ch. 187 could qualify to run the hospital as a memorial to the veterans. Ch. 187 provides for religious societies. Sec. 187.01 enables a religious society to be organized for religious, charitable and educational purposes.

It is my opinion that a religious society, under Ch. 187, could not qualify as an organization conforming to the requirements of sec. 45.055.

AJF

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*Real Estate Broker—Auctioneer*—Discussion of sec. 136.01 (6) (d) relative to auctioneer engaged by bank acting as executor and the need for a real estate broker's or salesman license.

November 7, 1963

#### WISCONSIN REAL ESTATE BROKERS' BOARD

You have inquired whether an individual participating in the negotiations for the sale of real estate under circumstances outlined below would be required to be licensed as a real estate broker.

"A bank employs auctioneers who are not licensed as real estate brokers or salesmen to call auctions on *real properties* which the bank is selling in its capacity as fiduciary (executor, trustee, guardian) under court order and control. The auctioneers are not full time employees of said bank. The bank does not pay them a wage or salary

but pays them per auction. The banking institution does not contribute to their social security nor pays withholding nor contributes to unemployment compensations on said individuals. The auctioneer's only function is to call the sale, which is usually in connection with a personal property auction, for a fee established in advance which is not a percentage of the sale price of the real estate. The terms of the sale are either read by a bank official, or by the auctioneer using a statement of terms prepared by the bank. The bids are received by a bank official, the down payment is made to the bank and the closing statement is prepared by the bank and the sale is subject to approval of the court. Each auction represents a separate temporary employment status for the auctioneer."

You state that the attorney representing the bank has questioned whether 24 OAG 735 is applicable. It is his position that the individuals you refer to as auctioneers are employes of the bank, and therefore, fall within the exceptions of sec. 136.01 (6) (c). You state that the individuals retained are qualified as auctioneers and that the advertisement of sale refers to them as such.

Sec. 136.01 (6) provides:

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

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

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

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

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

In 46 OAG 1, it was stated that an individual engaged as an auctioneer in selling real estate at a public auction is required to be licensed as a real estate broker. The opinion further states that in cases where a real estate broker lends his name to the sale and the auctioneer is employed by the broker and is paid for his services in conducting the sale, the auctioneer would have to be licensed as a real estate salesman. Sec. 136.01 (3) defines a real estate salesman as one who is *employed* by a real estate broker to perform any act authorized by Ch. 136 to be performed by a real estate broker.

The statutes provide that an employe of a real estate broker, engaged in the business of selling real estate, must be licensed as a salesman. Sec. 136.01 (6) establishes a number of exempt classifications and subsection (d) provides that:

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

There is no requirement that employes of such exempt persons need be licensed as real estate salesmen or real estate brokers. If they are in fact employes of the persons enumerated and if they are engaged in the specific performance of their duties as such employes, licensing is not required. When the two conditions are present, the exemption of the employer fully exempts the employe.

The only real question to be determined in the circumstances you describe is whether the individual is an employe of the bank, for if such a relationship does in fact exist it could hardly be contended that in asking for bids on the real estate he was not engaged in the performance of his duties as an employe.

In 24 OAG 735, it was stated that a person engaged by a building and loan association or court appointed receiver to sell or rent real estate on a commission basis must be licensed as a broker in absence of factors which would constitute him an employe engaged in the performance of his duties as such employe.

The opinion is helpful but not controlling. Determination of the question is dependent upon the facts in each instance.

The word employe is not defined in sec. 136.01 (6) (d), or in other provisions of Ch. 136 and accordingly must be given its common and ordinary meaning. There is no requirement that such individual must be a full time employe, or that he be paid a salary or wage rather than a commission.

Whether an individual is an employe for purposes of workmen's compensation, unemployment compensation, withholding of wages and certain other purposes may have some bearing in this matter but is not controlling. The question is whether such individual is an employe within the meaning of the word as used in sec. 136.01 (6) (d).

At 35 Am. Jur. 445, 446, it is stated:

"In law, the term 'master and servant' indicates the relationship which exists when one person who employs another to do certain work exercises the right of control over the performance of the work to the extent of prescribing the manner in which it is to be executed. \* \* \* The relationship of employer and employee is the same as that of master and servant. \* \* \*

"§3. **Existence of Relationship.** — While it is said that at common law there are four elements which are considered upon the question whether the relationship of master and servant exists, — namely, the selection and engagement of the servant, the payment of wages, the power of dismissal, and the power of the control of the servant's conduct, — the really essential element of the relationship is the right of control — the right of one person, the master, to order and control another, the servant, in the performance of work by the latter, and the right to direct the manner in which the work shall be done. It is, moreover, essential that the master shall have control and direction not only of the employment to which the contract relates, but also of all of its details, and if these elements of control and direction are lacking, no rela-

tionship of master and servant exists. The test of the employer-employee relation is the right of the employer to exercise control of the details and method of performing the work. It is the element of control of the work that distinguishes the relationship of master and servant from the independent contractor relationship, for the most important test in determining whether one employed to do a certain work is an independent contractor or a mere servant is the control over the work which is reserved to the employer."

At page 447, it is stated:

"The relationship most closely related to the master and servant relationship is, of course, that of principal and agent. Both relate to employment and express the idea of service, and both agents and servants are workers for another under an express or implied agreement. A master is a species of principal, and a servant a species of agent; 'master' and 'servant' are not, however, wholly synonymous with the terms 'principal' and 'agent.' An agent is not only employed by the principal, but represents him as well, and an agency contemplates contractual liability on the part of the principal arising from the acts of the agent, whereas the servant merely acts for the principal, usually according to his direction without discretion. \* \* \*"

In *Thurn v. La Crosse Liquor Co.*, (1951) 258 Wis. 448, 451, 46 N.W. 2d 212, the court said that the principal or dominant test to be applied in determining whether one rendering service for another is an employe or an independent contractor is whether the employer has the right to control the details of the work, although there are other things to be considered, such as the place of work, the time of employment, the method of payment and the right of summary discharge of the employe.

In the usual situation an auctioneer employed by a principal to sell property at auction is the agent of the seller until the hammer goes down and he can thereafter be the agent for both seller and purchaser for limited purposes. *Faultersack v. Clintonville Sales Corp.*, (1948) 253 Wis. 432, 435, 34 N.W. 2d 682, 7 Am. Jur. 2d 231.

If the individual here retained is an agent, the scope of his agency is extremely limited. In view of the facts given it is doubtful whether he exercises any discretion in calling a sale or whether he has power to bring about business relations between the bank and third parties. 3 Am. Jur. 2d 420.

Under the fact situation submitted it appears that the bank assigns or controls the place of work, the time and period of employment including the exact hour when the sale is to be called, and the method of payment of the individual's compensation. In addition, the bank appears to possess the power of summary discharge.

The bank also controls most of the details of the sale. The only purpose of using a person qualified as an auctioneer seems to be the hope of engendering more enthusiasm among potential bidders present. His function under the facts given is almost purely mechanical and his authority is strictly controlled by the terms of sale established by the bank and the court. In the special situation here, the approval power vested in the court should be adequate for the protection of the public.

It is my opinion that the individual, in the special situation outlined in this opinion, is probably an employe of the bank and does not have to be licensed as a real estate broker or salesman to perform the specific duties assigned by his employer which is exempt from licensing provisions by reason of sec. 136.01 (6). The question is a close one however, and it would be proper for the board after further investigation of the facts to authorize its staff counsel to petition the circuit court for an injunction under the provisions of sec. 136.08 (1) (a), as created by ch. 14, Laws 1963, for judicial determination if the board is of the opinion that continuation of such activity might cause injury to the public interest.

RJV

*Words and Phrases—Platting—Lands*—Ch. 236 discussed relative to subdivisional control of parcels or tracts of land and who are parties in interest.

November 13, 1963

WALTER K. JOHNSON,

*Deputy Director, Department of Resource Development*

You have asked a number of questions with respect to Ch. 236, Statutes, regulating the platting of lands.

Your first question involves sec. 236.02 (8) which refers to "parcel or tract of land" and you specifically inquire:

1. Where several contiguous, individually described parcels are under one ownership, is each one a "parcel or tract of land" or does the definition apply to the total holdings under one ownership?

It is my opinion that the total holdings in such case constitutes a single parcel or tract of land for the purposes of subdivisional control and platting requirements under Ch. 236, however, it should be pointed out that there can be parcels within a parcel, as is the case here, or, that a large parcel having a single description can be divided into smaller parcels. In such case the entire unit of land is properly a parcel of land as long as it remains under the same ownership and its parts remain contiguous. The smaller units which make up the whole are also parcels of land.

In *Ladd v. Teichman*, (1960) 359 Mich. 587, 103 N.W. 2d 338, 343, it was stated that a "parcel" is a generic term capable of many definitions.

Webster's Third New International Dictionary defines "parcel" as a component part of a whole or a continuous tract or plot of land in one possession no part of which is separated from the rest by intervening land in other possession, or a tract or plot of land whose boundaries are readily ascertainable by natural or artificial boundaries or markers.

Black's Law Dictionary, Fourth Edition defines "parcel" as a part or portion of land.

Webster's Third New International Dictionary defines "tract" as an area either large or small, a precisely defined or definable area of land.

"The terms 'tract or lot,' and 'piece or parcel of real property,' or 'piece or parcel of land,' mean any contiguous quantity of land in possession of, owned by, or recorded as the property of the same claimant, person, or company.' \* \* \*" *Griffin v. Denison Land Co.*, (1909) 18 N.D. 246, 119 N.W. 1041, 1043.

Other cases cited in 31 Words & Phrases, 76-80 and 42 Words & Phrases, 210-212 stress the necessity of contiguity and same ownership as to parcels, but not necessarily as to tracts of land when the latter term is not used in close conjunction with the word parcel.

"A 'tract' is defined as 'a lot, piece or parcel of land, of greater or less size, the term not importing, in itself, any precise dimensions.'" *Fleming v. Charnock*, (1909) 66 W. Va. 50, 66 S.E. 8, 9.

The same definition is given in Black's Law Dictionary, Fourth Edition.

Neither the word "parcel" nor the words "tract of land" are defined in sec. 236.02 (8), or other sections of Ch. 236, nor do they have any fixed meaning. They must be construed in a manner to carry out the legislative intent as expressed in the specific section and sec. 236.01, the purpose section of the chapter.

It would circumvent the purpose of the law if an owner of a block of ten lots could subdivide each of the lots into 4 parcels or building sites of  $1\frac{1}{2}$  acres each or less in area without meeting the platting and approval requirements of Ch. 236. The purpose of the law would also be circumvented if the owner of a 10 acre unit of land, having acquired the same over the years, each acre having a separate description, all contiguous, could subdivide each acre unit into 4 parcels or building sites of less than one

acre without meeting the platting and approval requirements of Ch. 236.

Sec. 236.02 (8) provides:

“(8) ‘Subdivision’ is a *division of a lot, parcel or tract of land by the owner thereof or his agent* for the purpose of sale or of building development, where:

“(a) The act of division creates 5 or more parcels or building sites of  $1\frac{1}{2}$  acres each or less in area; or

“(b) Five or more parcels or building sites of  $1\frac{1}{2}$  acres each or less in area are created by successive divisions within a period of 5 years.”

The subsection is concerned with the division of lands of a special nature. It applies where the division is by the *owner* or his agent and where the land to be divided is a lot, parcel or tract of land. The words lot, parcel or tract of land are closely associated in the statute. Usually a lot would be the smaller of the three, and *parcel or tract of lands* are the more general all inclusive terms used to insure that contiguous lands under common ownership will be covered by the platting requirements.

Sub. (a) and (b) are concerned with the divisions of the larger part into smaller parcels or building sites. For the purposes of determining whether a subdivision is created, only those resulting parcels or building sites which comprise  $1\frac{1}{2}$  acres each or less in area are counted.

In *Scheer v. Weis*, (1961) 13 Wis. 2d 408, 108 N.W. 2d 523, it was held that a lot, consisting of three platted lots, could be legally divided into two parcels or building sites without replatting pursuant to sec. 236.03 (1). The court said that only two parcels or building sites resulted from the division of the larger parcel which were to be counted under sec. 236.02 (8).

You furnish me with the following fact situations:

“Assume that an owner causes his lands to be surveyed and broken into several parcels, each of which has an area of more than one and one-half acres, occurring within a five-year period.”

2. Under the above facts is a subdivision created if the owner redivides each of the larger parcels into no more than four parcels or building sites of  $1\frac{1}{2}$  acres each or less?

The answer to this question is in the affirmative.

3. Under the above facts, and assuming that the owner conveys the larger parcels to a corporation in which he has majority ownership, does a subdivision result if the corporation immediately redivides each of the larger parcels into no more than four parcels or building sites of  $1\frac{1}{2}$  acres each or less?

The answer is in the affirmative. There would be common ownership of contiguous lands in the corporation and the corporation would have the duty of platting.

If the owner transferred one of the larger parcels to the corporation and retained the rest, both the owner and the corporation could divide the holdings they had without creating a subdivision so long as they did not create more than 4 parcels or building sites of  $1\frac{1}{2}$  acres each or less. The individual owner could create 4 parcels and the corporation could create 4 parcels if the latter were acting in its own behalf and not as agent of the former owner. While sec. 236.02 (8) covers acts of an owner or agent of an owner, a corporation is a recognized legal entity and there is no restriction as to corporations in the statute nor does there appear to be any real reason for piercing the corporate veil, at least under the circumstances outlined above.

4. Under the facts first outlined above, and assuming the owner conveyed the larger parcels to a bona fide purchaser, would a subdivision result if such purchaser redivided each parcel into not more than four parcels or building sites of  $1\frac{1}{2}$  acres each or less?

The answer to this question is in the affirmative for the reasons stated above. If the parcels were sold to separate bona fide purchasers, not acting as agent for the original owner, each purchaser could, however, divide his

parcel into four parcels or building sites of 1½ acres each or less without creating a subdivision.

5. Who are “parties in interest” under sec. 236.36, Stats.?

Sec. 236.36 provides:

“**Replats.** A replat of all or any part of a recorded subdivision may not be made or recorded except after proper court action has been taken to vacate the original plat or the specific part thereof; provided that such replat may be made and recorded without taking court action to vacate the original plat or the specific part thereof when all the parties in interest in writing agree thereto.”

“Replat” is not defined.

This section was created by ch. 214, Laws 1961. See 49 OAG 113.

Sec. 236.36 does not define “parties in interest” but a reading of the statute dictates that if court action is not taken to vacate the original plat or a specific part thereof, parties in interest would include at least all of those parties to whom notice must be given if vacation by court action were sought.

Under secs. 236.40 to 236.43, the court is given limited powers in connection with the vacation or alteration of a plat. The court is charged with the duty of protecting the interests of the public and consent of all authorities empowered to approve plats under Ch. 236 need not be secured before recordation. It is the duty of the court to ascertain that proper notice has been given to all interested parties before proceeding. If replat is made by consent under sec. 236.36, the extent of the replat would be limited to relief a court could give under secs. 236.40 to 236.43, unless the replat in all respects met the requirements of Ch. 236 for a new plat and had approval of the authorities listed in secs. 236.10 and 236.12.

Parties in interest would be, the municipality or town in which the subdivision is located, the county if located in a county having a population of 500,000 or more, sec. 236.40 (3); the owners of record of all lots in the sub-

division or part of subdivision proposed to be vacated or altered, sec. 236.40 (4); and the approving authorities listed in secs. 236.10 and 236.12.

Replat by consent would seem to have limited utility because of the difficulties in ascertaining all of the parties in interest and obtaining their consent.

RJV

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*County—Taxes—School Superintendent*—County has no power to distribute or refund excess of taxes collected to support county superintendency over the expenditure therefor.

November 14, 1963

DIETER H. NICKEL,

*District Attorney, Lincoln County*

Anticipating the continuation of a county superintendent of schools for the county and the functioning thereof as in the past, the county included in its budget for the next year an appropriation therefor in the amount of the estimated expenses thereof. This amount was levied and spread as a tax on only the territory of the towns in the county which comprised the county superintendent's district as provided in sec. 39.06 (4) (a).

However, thereafter a joint county superintendency was created for the county and two others pursuant to sec. 39.06 (3a). There were also substantial changes in the compositions of school districts. Consequently, the expenditures during the next year from the appropriations, including the share of the county of the costs of the joint superintendency, were nominal as compared to the amount of the appropriation. Accordingly, there remains in this county superintendency account an unexpended balance of about \$9,500 from this appropriation. It is estimated that the charge to be made against the county

each year in the future for its share of the joint superintendency expense will be about \$150. Because of the several school district reorganizations which have been made, the joint superintendency now serves only territory in two towns in the county.

It is urged that application or use of the balance in the account to defray the charge made each year against the county in the future for its share of the joint superintendency expenses until used up is unfair as the territory benefited would be only that in the two towns which now are served by such joint superintendency and it would be relieved of taxation in the future, all at the expense of the other territory in the towns in the county which was also taxed to raise this fund. You request an opinion on whether the inequity in the situation can be remedied by the county making return or refund of this unexpended balance to the towns in which the property taxed therefor was located, upon the basis of the equalized valuations thereof at the time the taxes were collected.

There is nothing in the statutes anywhere which provides for or authorizes any refund or distribution of unexpended tax collections in such situation, either to the towns in which the property taxed therefor was located or to the taxpayers whose property was taxed to raise the fund. The tax so levied by the county to raise the fund was perfectly valid in every respect at the time when so imposed and collected. Before any refund or distribution of tax collections can be made there must be some statutory authorization therefor. There is none which covers this situation.

It is therefore my opinion that a county has no power or authority to make a refund as suggested.

HHP

*Detergents—Words and Phrases*—Proposed sec. 144.14 (2) would be invalid if enacted as it would grant the state board of health unlimited legislative powers without limitations set by legislature. Amendment setting forth standards could be a remedy.

November 14, 1963

THE HONORABLE, ASSEMBLY

By Resolution No. 57, A., you ask my opinion as to the validity of Bill No. 404, S., as amended.

Such bill reads in part:

“SECTION 3. 144.14 of the statutes is created to read:

“144.14 CERTAIN DETERGENTS PROHIBITED. (1) Prohibition. On and after December 31, 1965 the sale and use of nondegradable detergents is prohibited in this state.

“(2) Exclusions determined by rule. The state board shall establish by rule the contents of a nondegradable detergent. After December 31, 1965, no detergent may be distributed, sold or used in this state unless it has been classified as degradable by the state board of health. It is the responsibility of the manufacturer, distributor or seller to submit any detergent dealt in to the state board of health for classification. The board shall assess each submitter a fee for such classification determined by the actual cost of such classification.

“(3) Penalties. Any person who distributes, sells or uses a nondegradable detergent in this state after December 31, 1965 may be fined not more than \$500. Each day on which such detergent is used or sold shall be a separate offense.

“(4) Exceptions. This section shall not apply to lubricants, lubricating oils, concrete plasticizers and petroleum fuels or to detergent foams utilized by fire departments in fire fighting operations.”

You will note that sub. (2) of proposed sec. 144.14 would confer on the state board of health the power to “establish

by rule" the contents of a "nondegradable detergent". Under such proposed statute, no detergent could be distributed, sold, or used in Wisconsin after December 31, 1965, unless classified by the state board of health as "degradable". In effect, sub. (2) of proposed sec. 144.14 would give such board the power to classify detergents as nondegradable or degradable, with only the latter class to be distributed, sold or used in Wisconsin after December 31, 1965. This power may readily be recognized as one legislative in character; and the grant of such power is within the competence of the legislature, and lawful, only if such power would be exercisable in accordance with standards and limitations fixed by the legislature. "It is not competent for the legislature, even in a circumscribed field, to grant to an administrative agency *unlimited* legislative power. The power granted must be exercised *in accordance with standards and limitations fixed by the legislature.*" (Emphasis mine) *Clintonville Transfer Line v. Public Service Comm.*, (1945) 248 Wis. 59, 69. See also *Olson v. State Conservation Comm.*, (1940) 235 Wis. 473, 481; 1 Am Jur 2d, sec. 113, 73 C.J.S. Public Administrative Bodies and Procedure, secs. 30, 31 and 32. For reasons presented hereinafter, it is my belief that such standards, if they exist, must be found within the four corners of proposed sec. 144.14. If they do not exist there, then the grant of power in question is manifestly invalid. Since the exercise of this grant of power is obviously essential to carrying out the intent and purpose of proposed sec. 144.14, it follows that if sub. (2) thereof is invalid as containing an unlawful grant of such power, the balance of such statute would also be affected by that invalidity. See sec. 990.001 (11).

It is my opinion that the grant of power in question, contained in sub. (2) of proposed sec. 144.14 is unlawful because no standards are prescribed therein guiding and limiting the exercise of that power. It would appear that the first step in its exercise would be for the state board of health to establish by rule the contents of a "nondegradable detergent". Detergents thereafter found to have different contents than those specified by such rule would appar-

ently be classified as "degradable". "Detergent", as used in proposed sec. 144.14, clearly means a so-called "synthetic detergent", defined as follows in Webster's Third New International Dictionary, unabridged:

"\* \* \* any of a large number of synthetic water soluble or liquid organic surface-active agents for use in washing that resemble soaps in the ability to emulsify oils and hold dirt in suspension but differ in other respects (as in nonprecipitation of calcium and magnesium salts from hard water and in chemical composition)—called also synthetic detergents \* \* \*"

This is a noun of definite, fixed meaning. If combined with an adjective of fixed meaning such noun and adjective would perhaps, in and of themselves, provide a standard or norm to guide an administrative agency designated by law to determine whether or not a detergent was the type or kind of detergent described by such adjective of fixed, definite meaning. But "degradable" — and "nondegradable", too—are not adjectives of fixed, definite meaning. Instead, they are relative terms. I am reliably informed that to some extent *all* synthetic detergents are degradable in the normal course of their usage and disposition, as, for example, when used by a housewife in a sewered community having a sewage treatment plant from which the effluent proceeds into a stream. Any synthetic detergent passing into a sewer, and thence into such plant and stream, will undergo *some* degradation or degeneration, i.e., will undergo some progressive deterioration. Without venturing into the scientific complexities of the subject, it may fairly be said that the so-called "soft" synthetic detergents degrade at swifter rates than do the so-called "hard" synthetic detergents. All, however, degrade in varying degrees, and therefore no such thing as a truly "nondegradable" synthetic detergent exists in the sense of a synthetic detergent not at all degradable. It seems reasonable to assume that the senate was aware of this in enacting Bill No. 404, S., and probably viewed the term "nondegradable detergent" as meaning a synthetic detergent slower to degrade than a "degradable" detergent, but not *absolutely* nondegradable. Be that as it may,

it is clear to me that the term "nondegradable detergent" does not, for reasons above shown, provide a sufficient standard or guide to validate the grant of power to the state board of health here in question, nor does the term "degradable", as applied to synthetic detergents and as used in proposed sec. 144.14, do so. A noun of definite meaning, combined with an adjective of the same stamp, has been held to provide an adequate standard to guide the exercise of administrative discretion. *Chapel v. Commonwealth*, (1955) 197 Va. 406, 89 S.E. 2d 337, 341. Not so, however, in the case of a noun of definite meaning combined with an adjective described as "a relative term", having "no fixed meaning". See *New Jersey Used Car Trade Ass'n v. Magee*, (1948-N.J.) 61 A. 2d 751, 756.

In giving the above-stated opinion I am well aware that in some jurisdictions the general rule, requiring an express standard to guide the exercise of administrative discretion, has been held inapplicable to an act relating to the administration of a police regulation and necessary to protect the general welfare, morals, and safety of the public. See 1 Am Jur 2d, Administrative Law, sec. 116; 92 A.L.R. 410-415. Wisconsin, however, is not among the jurisdictions so holding, and does not appear likely to join them if I read rightly the decisions of our supreme court relative to the exercise of legislative power by state agencies.

In giving this opinion I am aware, too, that some jurisdictions have held that a law other than that conferring a given power on a state administrative agency may contain the standards guiding the exercise of such power. See 1 Am Jur 2d, Administrative Law, sec. 115. Wisconsin has so held, but only in a case where the power-conferring statute made express reference to the statute containing the standard for the governance of such power and expressly provided that such power should be exercised subject to the standard-containing statute. *Olson v. State Conservation Comm.*, (1940) 235 Wis. 473, 482. It seems evident that in Wisconsin standards contained in one statute can guide the exercise of power conferred on a administrative agency by another statute only if the latter statute expressly so provides. Proposed sec. 144.14 contains no ex-

press provision that the power conferred thereby be exercised subject to standards set forth in another statute, nor is there even an implication provided by such proposed statute that the power it would provide the state board of health be so exercised. It is clear that the necessary standards, had they been provided, would have been set forth in the body of proposed sec. 144.14, logically in sub. (2) thereof.

The defect of proposed sec. 144.14 is not, of course, irremediable. It could be made sound by the insertion therein of the necessary standards, and might also benefit by insertion therein of a statement of legislative policy. Proposed amendments to the Federal Water Pollution Control Act (33 U.S.C.A. sec. 466), now before the United States Senate, entitled "Federal Water Pollution Control Act Amendments of 1963", contain language which, with appropriate changes, might well be employed in an amended version of proposed sec. 144.14 to set forth the necessary standards and to state legislative policy. Assuming that proposed sec. 144.14, if further amended, might include language authorizing the state board of health to create by rule "standards of decomposability" for synthetic detergents, the following language from Sec. 12.(c) of the above-mentioned Amendments might be helpful in setting forth criteria to guide the state board of health in establishing such "standards of decomposability". It reads:

"The standards of decomposability \* \* \* shall be based on the latest scientific and technical knowledge available with respect to the manufacture of (foreign or domestic) detergents and the operation of sewage treatment systems, which will assure that detergents conforming to such standards will decompose reasonably quickly and completely after use, and including specific methods by which detergents shall be tested to determine if they conform to such standards."

In Sec. 12.(a) of such amendments appears language which would possibly be helpful in creating a statement of legislative policy for inclusion in proposed sec. 144.14. It would, of course, require certain changes for use in a Wis-

consin statute. It reads: "The Congress finds that the surface and underground waters in the United States are being polluted through the ever-increasing discharge into such waters of synthetic detergents which decompose slowly or do not decompose at all. The Congress further finds that to prevent the further pollution of such waters in the public interest it is necessary to assure that the decomposition of detergents which may eventually be discharged into such waters and which are offered for introduction or delivery into interstate commerce in the United States or imported into the United States will not cause or contribute to such pollution."

JHM

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*Legislature—Constitutionality*—Suggested amendment of sec. 227.041 (4) (a) by Bill No. 724, A., would possibly be unconstitutional as it would violate Art. IV, sec. 17, and Art. V, sec. 10. Wis. const., by giving committee power to void rules of administrative agencies.

November 19, 1963

THE HONORABLE, ASSEMBLY

You ask my opinion as to the constitutionality of Bill No. 724, A., which would amend sec. 227.041 (4) (a) by delegating to the committee for review of administrative rules the power to void any rule of an administrative agency by the affirmative vote of at least four members of such committee.

Sec. 227.041 reads in part as follows:

"(4) (a) The committee shall have advisory powers only and its function shall be the promotion of adequate and proper rules by agencies and an understanding upon the part of the public respecting such rules. It may investigate complaints with respect to rules that it considers meritorious and worthy of attention, and thereupon recommend to the rule-making agency responsible for the rules com-

plained of, such changes in, deletions from or additions to the rules as they believe would make the rules to which objection was raised more equitable, practical and more in conformity with the public interest. It shall make a biennial report to the legislature and governor of its activities and include therein its recommendations."

Bill No. 724, A., proposes to amend the above provision to read:

"(4) (a) The committee shall promote adequate and proper rules by agencies and an understanding upon the part of the public respecting such rules. It may investigate complaints with respect to rules that it considers meritorious and worthy of attention, and by the affirmative vote of at least 4 members void any rule complained of. If any rule is so voided, it shall not be promulgated again without the approval of 4 members of the committee. It shall make a biennial report to the legislature and governor of its activities and include therein its recommendations."

In a 1954 opinion it was concluded that a proposal for the repeal of administrative rules by joint resolution of the legislature would be invalid. 43 OAG 350. It was there reasoned, that since duly adopted administrative rules have the force and effect of law, any legislative action which changes or obliterates a departmental rule constitutes the making of law. Since Art. IV, sec. 17, of the Wis. const., requires that any legislative act which constitutes law must be enacted by a bill and Art. V, sec. 10, provides that any bill must be presented to the governor for approval or disapproval, the proposal was stated to be invalid as violative of both said constitutional provisions.

The proposed amendment of sec. 227.041 (4) (a) by Bill No. 724, A., would likewise violate said constitutional provisions in attempting a change in law by repeal of or change in administrative rules by other than the enactment of a bill.

Generally, the principal purpose and function of a legislative committee is to make necessary investigations for

the ascertainment of such facts as are a necessary predicate for the enactment of law. 49 Am. Jur. 260. The purpose and function of the committee for review of administrative rules as provided by the present provisions of sec. 227.041 (4) (a) clearly fall within this principle.

It is my opinion that Bill No. 724, A., if enacted into law, would be invalid.

GBS

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*Public Service Commissioner—Appointments*—Discussion of appointment to and salary of public service commissioner when member of legislature which enacted statutes is given appointment.

November 21, 1963

THE HONORABLE, SENATE

By Resolution No. 41, S., the senate has requested an opinion regarding the validity of an appointment by the governor to the public service commission.

The Resolution reads :

“Resolved by the senate, That the attorney general be and he hereby is requested to supply an opinion as expeditiously as possible as to the constitutionality of the recent appointment by the governor of Senator Richard J. Zaborski to the public service commission, regarding the question of whether the office to which he was appointed was created during the term of office for which he was elected, and the constitutionality of section 13.36 of the Wisconsin statutes as it may apply to his appointment, in that the pay for such position was increased during the 1963 session of the legislature while Mr. Zaborski was a member of the legislature.”

The records in the office of the secretary of state show that Senator Zaborski was appointed to the public service commission on October 10, 1963.

The annual salary for a member of the public service commission was increased from \$14,000 to \$15,000 by sec. 20.930 (1) (a) Line 36, as amended by sec. 3, ch. 225, Laws 1963, which became effective September 1, 1963.

We will consider first the constitutionality of sec. 13.36, which so far as material here reads:

“Any member of the legislature who, during the term for which he was elected, is appointed or elected to any other civil office, the emoluments of which were increased during his term of office as a member of the legislature, shall be eligible to appointment or election to such office but shall be entitled to compensation only at the rate in effect prior to such increase. \* \* \*”

Art. IV, sec. 12, Wis. const., provides:

“No member of the legislature shall, during the term for which he was elected, be appointed or elected to any civil office in the state, which shall have been created, or the emoluments of which shall have been increased, during the term for which he was elected.”

In approaching the question of the constitutionality of any statute certain basic considerations must be kept in mind.

We start with a well recognized presumption in favor of validity.

In *State ex rel. Kellogg v. Currens et al.*, (1901) 111 Wis. 431, 87 N.W. 561, it was held that only in a clear case — clear beyond a reasonable doubt — will the courts venture to assert that a law is invalid. Or as it was said in *Madison Metropolitan Sewerage Dist. v. Committee on Water Pollution*, (1951) 260 Wis. 229, 253-4, 50 N.W. 2 424, it is well established in Wisconsin as in most states, that any repugnance between a legislative act and the provisions of the constitution must be “clear and irreconcilable” to establish invalidity. Also in this same case the court stated at p. 254.

“If there is any choice as to construction the court should adopt the construction which will sustain the stat-

ute. *Petition of Breidenbach* (1934), 214 Wis. 54, 252 N.W. 366; *Petition of State ex rel. Attorney General* (1936), 220 Wis. 25, 264 N.W. 633."

Another very significant case is that of *State v. Stehlek*, ute is unconstitutional. The burden does not shift. because said at pp 645-646 :

"It is a fundamental principal of statutory construction that a regularly enacted statute, or an order of an administrative body, made pursuant to statuory authority will be presumed to be constitutional until it has been declared to be otherwise by a competent tribunal. Such presumption is raised by the fact of the enactment of the statute by the legislature, and it extends to everything in the act on which it is based. The party attacking the statute has the burden of overcoming the presumption and showing that the stat- (1952) 262 Wis. 642, 56 N. W. 2d 514, where the court of the difficulty in proving it. 16 C.J.S., Constitutional Law, pp. 250-260, sec. 99.

"The exercise of the power to declare laws unconstitutional by inferior courts should be carefully limited and avoided if possible. The authorities are to the effect that unless it appears clearly beyond a reasonable doubt that the statute is unconstitutional, it is considered better practice for the court to assume the statute is constitutional, until the contrary is decided by a court of appellate jurisdiction. That is especially true where, as in this case, the statute has been in effect for nearly eight years, and has been enforced in innumerable cases."

The *Stehlek* case has been followed a number of times by our court but it would unnecessarily prolong this opinion to go into a discussion of these cases.

With these preliminary observations we next approach the article of the constitution in question, Art. IV, sec. 12, and call attention to judicial guides which have been furnished for its construction.

In *State ex rel. Zimmerman v. Dammann*, (1930) 201 Wis. 84, 228 N.W. 593, the court said at p. 92 :

“\* \* \* Sec. 12 has been under consideration by this court a number of times, and in each instance it has been held, where the question has been presented, that the section should be strictly and narrowly construed in favor of eligibility. *State ex rel. Johnson v. Nye*, 148 Wis. 659, 135 N.W. 126. *State ex rel. Ryan v. Boyd*, 21 Wis. 208. \* \* \*”

This case is an interesting one in which question was raised as to whether this constitutional provision would prevent a member of the legislature who voted for a salary increase for legislators from being a candidate to succeed himself.

For good and sufficient reasons which are well set forth in the opinion the court concluded that the framers of the constitution did not intend the provision to apply in this situation despite the literal wording of the constitution.

In discussing the purposes of the constitutional provision the court said at pp. 95-96.

“It may be true that the framers of our constitution had more prominently in mind than anything else the experience of the English people under acts of parliament. By controlling the salaries of judges and civil officers parliament was able to take unto itself almost unlimited power. The primary purpose of the framers of our constitutions, state and national, was to vest the three primary powers of government in the three primary branches of government and then by a system of checks and balances preserve so far as possible the powers of each coordinate department. It was foreseen that if the power to fix salaries was left in the hands of the legislature without limitation, it might be so exercised as to destroy the balance of the constitutional structure. However, it is equally true that the experience of the country had demonstrated that one of the growing evils was that whereby members of the legislature procured the creation of offices, fixed the emoluments thereof, and increased the emoluments of others with the hope and expectation that they might by way of appointment or election enjoy the fruits of their legislative labors.”

We turn next to sec. 13.36. This was created by ch. 594, Laws 1947, and as we are informed has been followed in several instances. We will not itemize these cases but for purposes of illustration will refer to one of them, the case of Grover L. Broadfoot, a former attorney general, later associate justice and then chief justice of the Wisconsin supreme court.

The salary of the attorney general was raised from \$5,000 to \$6,500 by ch. 332, sec. 20, Laws 1947, on July 1, 1947 (effective date). Assemblyman Grover L. Broadfoot, republican from Pepin and Buffalo counties in 1947-48, requested the legislative bill drafting section to prepare a bill (Draft #2937) to permit a legislator to accept an appointment to another civil office, the emoluments of which were increased during his term of office at the rate in effect prior to the increase.

Senator Warren Knowles requested the bill drafting section to prepare an amendment (Draft #3380) to the above bill. Both the bill and the amendment were adopted and became ch. 594, Laws 1947, and sec. 13.36 of the Wisconsin statutes. The bill became law on August 28, 1947.

Assemblyman Broadfoot was appointed to the office of attorney general to fill the unexpired term of the former Attorney General John E. Martin, who was appointed to the supreme court by former Governor Rennebohm. Mr. Broadfoot accepted the appointment on June 5, 1948, and the salary in effect prior to the raise which occurred during his term of office. He served until November 15, 1948, when he was appointed an associate justice of the Wisconsin supreme court and was succeeded as attorney general by Thomas E. Fairchild who also later became a supreme court justice.

It would indeed come as a great shock at this late date to learn that this honored former member of the court had been illegally appointed and compensated as attorney general.

Attention is also called to a memorandum from former Attorney General Stewart G. Honeck to Governor Vernon

W. Thomson under date of September 30, 1957, in which Mr. Honeck discussed Art. IV, sec. 12, Wis. Const., and sec. 13.36 concluding:

“In my opinion this last quoted section of the statutes is clearly constitutional since it eliminates the evil to which the constitutional provision is addressed and at the same time leaves a legislator free to vote for an increase which would be applicable to all except members of the legislature, even though he might desire to remain eligible for appointment and serve at the old salary.”

The fact that ch. 225, Laws 1963, when read together with sec. 13.36 has the effect of providing for increased compensation for persons other than members of the legislature appointed to the positions in question is not controlling.

Art. IV, sec. 12, is applicable only to members of the legislature. It was these persons and these persons only that concerned the framers of the constitution, and it does not appear to be in keeping with their apparent intent to hold that a legislator is ineligible for an office because a raise has been made available to a non-legislator.

In other words it would appear that both Art. IV, sec. 12, and sec. 13.36, have the same over-all objectives, — namely to bar legislators from receiving the increased emoluments which such legislators have provided, with such restriction being limited to the first term of the newly accepted office.

In view of the foregoing considerations it cannot in my judgment be said that sec. 13.36 is clearly and irreconcilably in conflict with Art. IV, sec. 12, so as to be beyond a reasonable doubt, which is the test that should be met before concluding that a statute is unconstitutional.

However, it would indeed be presumptuous for the attorney general to usurp the prerogative of the courts on constitutional questions and it is impossible to forecast with 100% accuracy the probable result on such a question were it to be submitted to the courts. Frequently the justices differ among themselves. For example, in *Lathrop v.*

*Donohue*, (1960) 10 Wis. 2d 230, 102 N.W. 2d 404; (1961) 367 U.S. 820, 81 S. Ct. 1826, on the question of whether integration of the Wisconsin bar resulted in violation of Amendments 1 and 14 of the U.S. constitution there were 5 separate opinions filed, ranging from clear validity to clear invalidity.

In our search and yearning for complete certainty in the answers to constitutional questions we can only lament as did the prophet Jeremiah:

“Is there no balm in Gilead?” 8 Jeremiah 22.

The answer seems to be, No.

So much for the constitutional question. The other question is whether the particular office with which we are here concerned was created during the term of office of Senator Zaborski.

Sec. 195.01 (1) was amended by sec. 13, ch. 225, Laws 1963, but that portion of the old law which provided for the creation of a public service commission was not amended. Neither was it repealed or recreated. What ch. 225 did was to change the dates of the terms of office of the commissioners. The terms were changed so as to expire on the effective date of ch. 225. The statute goes on to provide: “\* \* \* Thereupon appointment shall be made of 3 successor commissioners for terms commencing on the date of appointment, one term to end on October 1, 1963, one term to end on the first Monday in March, 1967, and one term to end on the first Monday in March, 1965.”

No office was abolished or recreated. You are therefore advised that the office in question was not created during Senator Zaborski's term of office as senator.

WHR

*Sales Tax—Electricity*—Ways and means of determining taxable electrical service when single meter is used discussed. Uniform percentage methods would be invalid.

December 18, 1963

THE HONORABLE, THE SENATE:

Sec. 83a, ch. 224, Laws 1963, created a new subdivision 5 of sec. 77.52 (2) (a), thereby adding the furnishing of electricity for certain purposes to the services upon which the section imposes the 3 per cent selective sales tax. Such new subdivision 5 was effective August 15, 1963, and reads:

“5. Electricity for residential use except for space heating charged at a specified rate.”

The department of taxation has issued a statement as to the application which will be given to said subdivision 5. By Resolution No. 39, S., an opinion has been requested on the constitutionality and validity of such application of this statutory provision.

The statement of the department of taxation was issued August 27, 1963 as follows:

“As stated in my letter of August 5, 1963, recently enacted legislation imposes a 3% selective sales and use tax, effective August 15, 1963, on electricity for residential use except for space heating charged at a specified rate. My letter further states that our interpretation of residential electric service is the same as that of the Public Service Commission, provided the customers are properly classified. For those utilities that do not have their customers classified as to residential and nonresidential users, it is necessary that they classify their customers for purposes of imposition of the sales tax. In order to assist these utilities in making a determination as to which of their customers are taxable and which are not taxable, ‘residential service’ has been interpreted by this department to have the following meaning:

“‘Residential service means the furnishing of electricity for lighting and ordinary appliances in households. How-

ever, where a household is situated on a farm, or on premises where both commercial and household service is billed through the same meter, the entire service is deemed to be non-residential unless the farming or commercial activity is incidental to use of the premises as a residence.'

"It will be necessary for each utility to make a determination as to which of their customers are taxable and which are non-taxable within the above definition.

"Although it is the practice of some utilities to separately meter and charge at a specified rate the electricity consumed exclusively for home heating, it is also common practice to furnish all electricity, including home heating, through a single meter at the regular residential rates or special rates. Since we believe that it was the intention of the legislature to *tax* all electricity for normal residential use and to *not tax* electricity used for heating, it is necessary that some equitable method or formula be devised to tax only that portion of electricity used for residential service, other than space heating, where both types of service are furnished through one metering device and charged according to a residential or special rate schedule.

"In order to achieve the desired legislative intent without placing an undue burden on each utility, this department will allow the use of *either* of the following two methods in arriving at the taxable portion of the electric bill of customers who heat their homes electrically but do not have separate meters for the heating services:

"1. Where the rate schedule of the utility has been so constructed that a residential user without electric heating would not consume enough electricity to obtain the benefit of the lowest rate per kilowatt, the utility should impose the sales tax on all consumption up to the point at which the lowest rate goes into effect. The utility would have to be able to demonstrate to the satisfaction of the department that very few, if any, residential users without electrically heated homes consumed enough electricity to obtain the benefit of the lowest bracket. Where the rate struc-

ture of the utility does not lend itself to this method, it should not be used.

"2. Each utility shall compute a percentage, based on their own experience and data, which shall be applied uniformly throughout the year to the monthly bills of all customers who heat their homes electrically to determine the amount of taxable electricity used each month and the 3% sales tax will be imposed on this portion of the bill. The percentage shall be computed by each utility and be based on recent data of service sales to residential users. If the percentage is based on the ratio of average annual sales to residential users *without* space heating, to average annual sales to residential users *with* space heating, a weighing factor should be introduced to reflect the fact that an electrically heated home is normally an *all electric home* and the taxable portion of service used by these customers would be higher than the average consumption of the non-heating customer. If the percentage is based on an analysis of sales made only to residential customers with electrically heated homes, weighing would not be required.

"Either of the methods described above should be reviewed annually or any time when changes in rates, service or other factors affect the validity of the method or accuracy of the percentage being used.

"We have received several inquiries from electric utilities concerning the taxability of electric service furnished for water heaters installed in homes. This service would be taxable under our definition of 'residential service' set forth above."

This request does not inquire whether the furnishing of electrical service for residential use, that is not space heating charged at specific rates, is subject to the 3% selective sales tax. The enactment of the provisions in subdivision 5 of sec. 77.52 (2) (a) is a clear legislative expression that thereafter the tax is to be paid in respect to the furnishing of such service. The question raised is whether the application which the department of taxation

states it will give to such imposition under certain circumstances is in conformity to the provisions thereof.

It is obvious that there is no problem in applying the statute where the electrical current supplied by a single meter service connection is only used for residential purposes other than space heating. There is an accurate measuring of the amount of the taxable service furnished. But, where a residential household is located on a farm or other premises and electricity furnished through a single meter connection is used for both taxable residential use therein and commercial or other nontaxable purposes, there arises a problem of applying the statute. There is no separate metering of the amount of electricity used for any of the respective purposes and thus the amount of the electrical service which is taxable is not measured. The problem is how to determine the amount of electrical service that is taxable under such circumstances.

It is readily apparent that the only precise method of measurement is by separate metering. If accurate measurement of the amount of taxable electrical services is required, then installation of separate meters would be necessary. However, it is well recognized, both in fields of taxation and in other fields, that due to circumstances there are situations where by the very nature of things it is not possible to make a division into specific parts and yet some allocation is necessary. Where it is either impossible to accurately divide something, or it is wholly impractical to do so, an allocation or assignment may be made as an estimation by the use of a formula or other method that reaches a fair and reasonable result. In view of the expense involved in a requirement of separate metering as compared to the size of the tax payable by a customer, if there is some reasonable practical method of allocating the electrical service furnished between taxable and nontaxable purposes in such a situation, it would seem logical that it be permitted if the result is reasonably calculated to arrive at the amount of taxable service furnished.

It is established that it is constitutional for a state to tax a business with multi-state operations on the basis of

the business or income therefrom attributable to the state and arrive at the amount so attributed through the use of a formula, provided the method used is reasonably calculated and designed to produce a fair and reasonable result. *Butler Bros. v. McColgan*, 315 U. S. 501, 62 S. Ct. 701, 86 L. E. 991. Such formula or method must have a reasonable relation to actualities. If it is purely arbitrary, it is invalid. Our state supreme court recently, in *Department of Taxation v. Blatz Brewing Co.*, (1961), 12 Wis. 2d 615, 108 N.W. 2d 319, gave approval to the use of a formula or an accounting allocation in the determination of one of the factors used in the application of the income tax statutes. In *Commonwealth v. Union Trust Co.*, (1942) 345 Pa. 1008, 27 A. 2d 15, court approval was given to the determination of the amount of tax payable by the use of a formula method of allocating the securities held by the corporate taxpayer between those which were considered investments of its capital stock, surplus and undivided profits and those which were treated as investments of moneys received from its depositors, the tax being measured by only the value of the securities held which represented investment of its capital stock, surplus and undistributed profits.

It is said in 61 C. J., p. 672, in respect to the valuation for tax purposes of franchises of a corporation, as follows:

"The legislature may prescribe, as the manner of arriving at the value of franchises for taxation or computing the tax to be assessed thereon, any rule or method which is reasonably fair and just in its operation, and a statute setting up such a rule or method must be complied with; but it has no power to establish an arbitrary rule or standard having no relation to the ascertainment of the true value. In the absence of statute, it has been said that it is beyond the province of the Court to lay down any exclusive rule, applicable to all cases, for valuing franchises, and that any reasonable method of so doing may be chosen by the assessing officer or board, although the use of an unreasonable method or one which has no proper relation to the ascertainment of the franchise value renders the assessment void. \* \* \*"

The above would furnish support of the use of a reasonable method of allocation to determine the proper amount of electrical service supplied that is subject to the tax where there is no separate metering to furnish an accurate measurement of the taxable portion. However, as the foregoing indicate, whatever method of allocation or division is used to separate into allotted parts something which either is not accurately divisible or is impractical of division, must be pointed toward accomplishing the terms of the statute and conform thereto. The inquiry here therefore must be whether the applications which have been set forth in the August 27, 1963 statement of the department of taxation satisfy these requirements.

First to be considered is the application that, where a household is situated on a farm, or on premises where both commercial and household service is billed through the same meter, the entire service is nonresidential unless it is established that the farming or commercial activity is incidental to the use of the premises as a residence. Under this recited situation, it cannot be successfully denied that some part of the total electrical service which is so supplied and measured by a single meter connection, is used for taxable purposes and therefore subject to the tax. Such application of the statute does not ascertain the part of the electrical service which is to be assigned or allocated as the amount used for taxable purposes. It makes no attempt to do so. Rather, it provides that, because such single metering does not show what portion is taxable and what is not taxable, no part of the service is subject to the tax, notwithstanding that factually some part of the total electrical service has a taxable character. It therefore does not implement the statute, but negates it. Such application of the statute on its face shows it is not correlated to actuality. Accordingly, it would not qualify as one which produces a reasonable result.

Either this tax statute must be administered and applied in said circumstances by the use of some formula or method that will determine an estimated amount of the total electrical service furnished which, under the facts, bears a reasonable relation to such of said electrical

service as would have a taxable character, or there must be some accurate measurement by the supplier of the amount of electrical service which is taxable or nontaxable, as the case may be. The statute imposes the tax and the supplier has the obligation of collecting and paying the amount of tax so imposed. The utility cannot thwart the legislative imposition by asserting that although factually it has supplied taxable electrical service, it is unable to determine how much of the total electrical service which it furnished was not of that character. Where electrical service supplied is used for taxable residential purposes, if the supplier claims that any portion of such electrical service is not used for taxable purposes, the burden rests upon such supplier to show the amount which was not used for taxable purposes. Sec. 77.52 (13).

It is therefore my opinion that this application of the statutes is not valid as a formula or method for determining the amount of electrical service that is taxable under the stated circumstances. This is not to say that there may not be some formula or method which could be properly applied to ascertain a fair estimate of the amount of electrical service furnished that is attributable to taxable purposes.

Next, upon consideration of the two stated methods which are to be permissible for use in respect to residential space heating, it is my opinion that the first alternative method is proper and valid. There the rate structure of the particular supplier of the electrical service lends itself to a determination of the amount of the electrical service furnished through a single meter service that may be fairly and equitably attributed as used for residential space heating. It has a correlation to the fact as it will reasonably measure the amount of the electrical service furnished that is used for residential space heating. Because of the particular applicable structure, such method will conform to the statute, as the amount of electricity furnished for space heating will fall within specified rates applicable thereto.

However, the second alternative method applicable for determination of the amount of electrical service used for

residential space heating does not appear to be supportable. Space heating consumption is obviously not uniform throughout the year. It does not vary from month to month on any twelve-month straight-line basis. Therefore, a single percentage uniformly applied each month throughout the year to an electrical bill would not conform to the facts and would be discriminatory. Only by accident would such a straight-line percentage achieve the same result as a percentage adjusted monthly or by seasons to relate to the actual space heating load. Thus, this second alternative method would appear to be not in accord with actualities and therefore not in conformity with the statute. It is unreasonable on its face as it does not take into account the variance in consumption throughout the year for space heating requirements. In my opinion it constitutes an invalid application of the statute.

As previously indicated by the expression herein of the conclusion that the two stated applications in the statement by the department of taxation are not valid applications of the statute, it is not meant that it is impossible to use a formula if it will fairly assign a reasonable portion of the electrical service furnished in those situations as used for taxable purposes. The designing or ascertaining of such a formula or method is an administrative matter and not a legal one. If a formula is used, it must find support in some analysis of data or other information which demonstrates its reasonability.

HHP

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*County Treasurer—Words and Phrases*—The county treasurer has the power to adopt a rule or policy that he will accept only cash or a certified check from county officers or department heads. Such units may maintain separate checking accounts. Treasurer has no authority to require county public welfare department to maintain checking account and has responsibility for mailing aid payments.

December 20, 1963

HAROLD J. WOLLENZIEN,

*Corporation Counsel, Waukesha County*

You ask my opinion on several questions, hereinafter stated and answered in the order in which you have presented them to me.

## A.

(1) *Can the county treasurer adopt a rule refusing to accept for deposit from county department heads, specifically, the Welfare Director, anything but cash or certified checks? (As used in this question, "rule" means a practice or policy of a county officer in carrying out his duties, but does not mean, of course, an administrative rule, defined by sec. 227.01 (3), and issuable only by a state agency.)*

Yes. The county treasurer, under sec. 59.20 (1) has the duty to, "receive *all moneys* from all sources belonging to the county, and *all other moneys* which by statute or county ordinance are directed to be paid to him \* \* \*." Sec. 59.73 provides in part: "Every county officer and employe and every board, commission or other body that collects or receives moneys for or in behalf of the county, shall: \* \* \* (3) Pay all such moneys into the county treasury \* \* \*." It is clear to me that the term "moneys" as used in the above-quoted statutes is not subject to an interpretation so narrow as to include only cash and certified checks within its scope. While our supreme court has never defined the term in that context, it has in several cases made plain its view that the term "money" (no different than "moneys" in my judgment) includes not only legal-tender coin and currency, "but also any other circulating medium, or any instruments or tokens in general use in the commercial world as the representatives of value." *The State v. McFetridge and others*, (1893) 84 Wis. 473, 513, 514. See also *Ellis v. State* (1909) 138 Wis. 513, 521. Absent any statute or decision of our supreme court empowering a county treasurer to adopt a rule such

as that above-mentioned, it would be my opinion that such a rule could not be adopted, or would be invalid if adopted, since it would (a) make it impossible for a county treasurer to carry out the duty imposed on him by the above-quoted portion of sec. 59.20 (1), and (b) would make it impossible for county officers to carry out the duty imposed on them by sec. 59.73 (3). However, while no statute authorizes the making of the proposed rule, a decision of our supreme court does, in my opinion, confer on a county treasurer the power to adopt a rule that he will accept only cash or a certified check (the virtual equivalent of cash) from county officers or department heads. This power would, in effect, qualify or make non-absolute the duty on the part of the county treasurer to, "receive *all moneys etc.*" under sec. 59.20 (1); and the duty of county officers under sec. 59.73 (3) to, "pay *all such moneys* into the county treasury" would also be subject to such power. County treasurers derive such power, in my judgment, from the statement made in *Forest County v. Poppy*, (1927) 193 Wis. 274, 279. One question there under consideration was whether or not the defendant-appellant county treasurer and his surety were liable to the plaintiff county for a check received by the treasurer from the district attorney "and accepted by him in payment of forfeited bail bond" which "was not paid by the drawee bank." Said the court:

"The county treasurer accepted such check as cash and receipted therefor. *He had a right to refuse the check and demand cash instead*, but he did not do so. The county treasurer, in accepting the check of Dawson, receipting therefor as cash, entering it on his books as cash, and giving the county clerk a duplicate receipt as required by law, cannot now be heard to deny his liability therefor. He became responsible to the county for money thus collected, and he is relegated to his rights against the maker of the check." (Emphasis mine)

At least one authority has viewed the italicized sentence in the above-quoted language as constituting a holding — apparently unique — that, "A county treasurer is entitled

to refuse to receive a check, and to demand cash." 20 C.J.S. Counties, sec. 136 (b) and Footnote 97 at p. 949. Whether obiter dictum or, as I believe it to be, a decision or holding of the court on a point necessarily involved in the determination of the cause, such italicized statement shows that the supreme court viewed a county treasurer as having an absolute power to demand cash in lieu of something else submitted to him as public money which he was obligated to receive under statute. There has been no repudiation or qualification of such view by any subsequent decision of such court, and I am therefore satisfied that it is the law of this state. As such, it is my opinion that it authorizes a county treasurer to adopt a rule constituting, in effect, a policy of accepting, in his official capacity, only cash or certified checks as public moneys from so-called "county department heads" or any one of them. It might be argued that what was said in the *Poppy* case gives a county treasurer the right to reject a given check upon its being tendered to him, and then demand cash or a certified check in lieu thereof, but that it does not give him the right to reject any and all tenders of public moneys, before they are made to him, unless they are in the form of cash or a certified check. Argument on this point seems needless, however, since a county treasurer, denied the right to make the above-mentioned rule, could one-by-one lawfully reject all tenders of public moneys in any form other than cash or a certified check, with the same effect, of course, as if the rule had existed. In my judgment, the view of the *Poppy* case that a county treasurer can demand cash instead of a check is not limited to a situation where actual tender of the check is made, and such power in the treasurer may be exercised through a rule or policy of the kind here in question, designed to eliminate a time-wasting process of submitting checks to the treasurer bound to be rejected by him if he desired to do so.

It should here be noted that when the view of the *Poppy* case, leading to this answer, was expressed in 1927 there existed in full force and effect the predecessor statute of sec. 59.20 (1) in substantially the same form as the

current sec. 59.20 (1); and there also existed sec. 59.73 in its present-day form. It should here be observed, too, that the justification for such view in the mind of the court, though none was presented by it, may well have been the public policy which "requires that every depository of the public money should be held to a strict accountability" — a policy discussed at length in the *Poppy* case. See *Forest County v. Poppy*, 193 Wis. at pp. 276, 277. Perhaps the court thought that a county treasurer, subject to such "strict accountability" should have as his first line of defense for his own purse the power to refuse a check and demand cash instead in receiving public moneys in the discharge of his official duties.

In giving this answer to the above-stated question, it is neither my intention nor my desire to encourage any county treasurer to adopt a policy of rejection for all uncertified checks tendered him by county department heads. It seems to me that perhaps a more reasonable and realistic policy for a county treasurer to adopt would be one which, while clearly spelling out his power to reject any and all uncertified checks so tendered him, would not close the door against acceptance by him of *some* checks. If in doubt as to some uncertified checks, but not so much in doubt as to reject them outright, a county treasurer could give a "qualified" or "conditional" receipt — a receipt so worded as to constitute a receipt only for the check itself, rather than for its amount, until such time as the check was honored by the drawee bank, whereupon the receipt would become one for the amount thereof.

#### B.

(2) *Do the various county departments, particularly, the welfare department, have authority to maintain separate checking accounts in which they deposit county funds as received by them, remitting to the county treasurer only on a monthly basis?*

Such departments have no express statutory authority to maintain separate checking accounts for the purpose above mentioned or any other purpose. It is my opinion,

however, that the various departments and offices of county government, other than that of the county treasurer, receiving public moneys in the discharge of statutory duties and functions, which moneys must be turned over to the county treasury, have the necessarily implied power to maintain separate checking accounts in which to deposit such moneys pending their delivery to the county treasury. It should be pointed out that there is an element of risk involved in the exercise of this power, as a failure of the depository wherein such a checking account was maintained would impose liability on the head of the department there maintaining it. See 41 OAG 160 at pp. 161, 162 (1952).

The fact should not be overlooked that under sec. 59.73 (3) every county officer and employe and every board, commission or other body that collects or receives moneys for or in behalf of a county shall pay all such moneys into the county treasury "at such times as is prescribed by law, or if not so prescribed daily or at such intervals as are prescribed by the county board." If no time is prescribed by law for payment of a certain category or portion of such moneys, or if an interval for its payment has not been prescribed by the county board, then such category or portion of those moneys must be turned over daily to the county treasury. In the case of a county department maintaining a separate checking account, the payment of any moneys subject to daily payment to the county treasury could be made by one check drawn on such account, without need to turn over such moneys to that treasury in the precise form received, e.g., checks or cash.

County departments, then, maintaining separate checking accounts for the purpose in question can pay over public moneys deposited therein to the county treasury "on a monthly basis" only if specifically directed to do so by the county board. If a county department is headed by an elective county official "on a salary basis or part fees and part salary", the payment intervals prescribed by the county board under section 59.73 (3) might be once a month or oftener, but at no interval greater than one

month. See sec. 59.15 (1) (b) and 41 OAG 160, 161. For a department such as the county public welfare department headed by a non-elective county official the payment interval can be greater than one month, as sec. 59.15 (1) (b), which is the source of the one-month limitation above mentioned, is inapplicable to such officials or to their departments.

## C.

(3) *Does the county treasurer have the authority to require the welfare department to operate a checking account as discussed in Question 2 above if the welfare department does not desire to do so?*

No. As you are well aware, a county treasurer, as a public officer, has only those powers expressly granted him by statute or those necessarily implied from his powers expressly granted. See *Kasik v. Janssen*, (1914) 158 Wis. 606, 609, 610; 20 C.J.S. Counties, sec. 136 (a). "The treasurer of the county is a ministerial officer. He has no authority other than that conferred on him by statute, either expressly or impliedly \* \* \*." *Rosebud County v. Smith* (1932—Mont.) 9 P. 2d 1071, 1073. I find in our statutes no express grant of power to a county treasurer authorizing him to require a county public welfare department or its director to maintain a separate checking account for the purpose described in Question 2; nor do I find in our statutes any express grant of power to a county treasurer which necessarily implies the existence of a power in him to require such welfare department to establish and maintain a separate checking account for any purpose.

## D.

(4) *Does the county treasurer have the responsibility for the actual mailing of welfare payments which have been authorized by the welfare department pursuant to Section 49.18 (6) (b), 49.19 (3) (b), 49.37 (1) and 49.61 (7), Stats., or is his responsibility limited to only the preparation of such checks?*

It is my opinion that a county treasurer does have the above-described responsibility.

Sec. 49.18 deals with aid to the blind. Sub. (6) (b) thereof reads in part:

“If the county agency finds a person eligible for aid under this section, it shall on a form to be prescribed by the state department of public welfare, *direct* the payment of such aid by *order upon the county clerk or county treasurer of the county.* \* \* \*”

Sec. 49.19 deals with aid to dependent children. Sub. (3) (b) thereof reads:

“If the county agency finds a person eligible for aid under this section, such agency shall on a form to be prescribed by the state department of public welfare, *direct* the payment of such aid by *order upon the county clerk or county treasurer of the county.* Payment of aid shall be made monthly, except that the director of the county agency may, in his discretion for the purpose of protecting the public, direct that the monthly allowance be paid in 2 or more installments.”

Sec. 49.61 deals with aid to totally and permanently disabled persons. Sub. (7) thereof, except for differences in punctuation and one change in wording of no importance, is identical with the above-quoted sec. 49.19 (3) (b).

Each of these statutes, in my judgment, clearly imposes a duty on the county treasurer to pay the particular aid to which it relates, where such payment is directed by order upon him emanating from the county agency, i.e., the county public welfare department. The “payment” of aids covered by these statutes is manifestly not made until the checks to the recipients are prepared *and mailed*. It is obvious to me that when the legislature enacted these statutes, empowering county agencies to “direct” the “payment” of the aids above-mentioned by “order” issued to either the county treasurer or county clerk, it was *not* the intention of the legislature that the county treasurer receiving such an order should perform only half the task

required thereby (the preparation of the checks), then turning the checks over to the county agency to carry out the balance of the duty imposed by its own order. Such may be the administrative practice or procedure followed in some of our counties, but if so, it is unwarranted by the statutes above-quoted and does not relieve the county treasurer of the duty so plainly imposed on him by each of these statutes when he receives an order thereunder. Administrative custom or usage can afford a public officer no excuse for performing something less than his full statutory duty. "It is a generally accepted rule that custom or usage does not so enlarge a public officer's statutory powers as to enable him to perform his duties in a manner other than that prescribed by statute." 65 A.L.R. 813. "It is a generally accepted rule that usage or custom cannot be availed of to enlarge the statutory powers of a public officer to include acts otherwise unauthorized or contrary to established law." 65 A.L.R. 11.

Sec. 49.37 relates to county appropriations for carrying out old-age assistance. Sub. (1) thereof reads:

"The county board shall annually appropriate a sum of money sufficient to carry out the provisions of ss. 49.20 to 49.38, taking into account the money expected to be received during the ensuing year as state and federal aid. *Upon the orders of the county agency, the county treasurer shall pay out the amounts ordered to be paid as old-age assistance.*"

The duty of the county treasurer, under this statute, to mail as well as to prepare the checks covering "amounts ordered to be paid as old-age assistance" is, in my judgment, beyond dispute. The county treasurer could not "pay out" such amounts, upon order of the county agency, if he were merely to prepare the checks therefor and then turn them over to the county agency for mailing to the payees.

JHM



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County board chairman and mayor — compatible .....	15	172
County board forestry committee secretary and county treasurer — incompatible .....	48	217
County board member and assembly member — compatible .....	17	261
County board member and bridge commissioner .....	1912	757
County board member and city weed commissioner — compatible .....	39	90
County board member and constable — incompatible ..	18	99
County board member and county board of education member — incompatible .....	3	709, 741
County board member and county clerk .....	16	680
County board member and county highway commissioner .....	2	775
	4	1068
	6	658
	11	813
	18	152
County board member and county drought relief committee — incompatible .....	26	78
County board member (chairman of town) and county highway commissioner .....	12	108
County board member and county highway commissioner (assistant) .....	13	641
County board member and county highway committee member .....	4	328
	9	569
	15	318
	16	372
	17	45, 531
	20	241

County board member and county pension dept. — incompatible .....	24	698
County board member and county pension director — incompatible .....	26	52
County board member and county pension investigator — incompatible .....	28	6
County board member and county public welfare dept. employee — incompatible .....	46	215
County board member and county radio operator — incompatible .....	30	433
County board member and county school committee — incompatible .....	37	42
County board member and county service officer — compatible .....	28	265
County board member and county surveyor .....	20	299
County board member and county treasurer — incompatible .....	3	751
	17	466
	18	92
	21	800
County board member and county veterans' service commissioner — incompatible .....	35	148
County board member and custodian of public property .....	18	651
County board member and dance hall supervisor .....	14	494
	20	1193
County board member and deputy sheriff — incompatible .....	28	32
County board member and fireman (assistant) .....	17	244
County board member and grain and warehouse commissioner — compatible .....	17	198
County board member and highway commissioner (state) — incompatible .....	17	164
County board member and highway patrolman .....	10	416
	12	353
	13	164
	19	258
	21	209, 410
	22	308
County board member and highway patrolman — incompatible .....	26	349
County board member and humane office (county) .....	14	494
County board member and inspector of building construction .....	11	408
County board member and inspector of county highway work — incompatible .....	17	237
County board member and investigator — compatible .....	44	159
County board member and justice of peace — incompatible .....	19	510
County board member and legislature member (assemblyman) — compatible .....	17	261
	21	439
County board member and mayor — compatible .....	1912	788
	9	230
	28	138
County board member and probation officer — incompatible .....	21	400
County board member and quarry foreman — incompatible .....	24	394

County board member and relief director — incompatible .....	23	655
	28	516
County board member and relief investigator — incompatible .....	24	762
County board member and school board, common — compatible .....	35	371
County board member and sheriff (deputy) .....	1904	421
	1908	783
	16	139
See .....	10	783
Contra .....	16	3
County board member and soldiers relief commission — incompatible .....	17	393
County board member and state employe — compatible .....	28	516
County board member and superintendent of county home .....	21	1020
County board member and superintendent of county hospital for insane .....	1910	610
County board member and superintendent of county institution — incompatible .....	14	534
County board member and superintendent of poor .....	2	756
County board member and supervisor of assessments .....	1908	763
County board member and town attorney — compatible .....	45	285
County board member and trustee of county asylum .....	1908	732
	10	470
County board member and trustee of county institutions — incompatible .....	14	534
See .....	1908	732
	10	470
County board member and trustee of poor farm .....	1	497
See .....	10	470
County board member and undersheriff — incompatible .....	3	796
County board member and U.S. employe (CWA laborer) — compatible .....	23	150
County board member and U.S. Officer (CWA certifying) — incompatible .....	23	150
County board member and village board member — compatible .....	19	569
County board member and village employe (utility commission) — compatible .....	40	133
County board member and weed commissioner .....	20	212
County board member. See also supervisor.		
County board member. See also town chairman.		
County bridge commissioner and county board member .....	1912	757
County bridge commissioner. See also county highway committee.		
County clerk and alderman — compatible .....	8	512
County clerk and county board member .....	16	680
County clerk and county board of canvassers .....	21	809
County clerk and county highway commissioner — compatible .....	17	641
County clerk and county pension dept. — incompatible .....	25	189
County clerk, county purchasing agent and janitor of court house .....	1910	581

County clerk and county purchasing agent .....	20	196
County clerk, deputy, and justice of peace — com- patible .....	29	143
County clerk and deputy register of deeds — com- patible .....	1910	578
County clerk, deputy, and county board chairman .....	21	235
County clerk, deputy, and county treasurer (deputy) — incompatible .....	22	707
County commissioner and town chairman — incom- patible .....	23	121
County coordinator and municipal civil defense di- rector — incompatible .....	45	100
County dance supervisor and sheriff — incompatible .....	43	228
County dance supervisor and undersheriff — com- patible .....	43	228
County drought relief and county board member — incompatible .....	26	78
County fair association secretary and agricultural agent — compatible .....	17	389
County judge and county pension dept. — incom- patible .....	24	765
County park commission and city councilman — compatible .....	25	698
County pension dept. and county board member — incompatible .....	24	698
County pension dept. and county clerk — incom- patible .....	25	189
County pension dept. and county judge — incom- patible .....	24	765
County pension dept. and district attorney — incom- patible .....	25	178
County pension dept. and justice of peace — com- patible .....	25	55
County pension dept. and soldiers and sailors relief commissioner — compatible .....	29	71
County pension dept. and town clerk — compatible .....	26	136
County pension dept. and trustee county asylum — incompatible .....	24	771
County pension dept. and U.S. officer (WPA) — com- patible .....	25	172
County pension director and county board member — incompatible .....	26	52
County pension investigator and county board mem- ber — incompatible .....	28	6
County physician and mayor — compatible .....	17	498
County public welfare dept. and county board mem- ber — incompatible .....	46	215
County purchasing agent, county clerk and janitor of court house .....	1910	581
County purchasing agent and county clerk .....	20	196
County purchasing agent, county highway commis- sioner's assistant, county auditor .....	12	212
County purchasing agent and county treasurer — in- compatible .....	26	621
County radio operator and county board member — incompatible .....	30	433
County school committee member and bus operator — compatible .....	40	433
County school committee and county board member — incompatible .....	37	42

County school committee and school board — incompatible .....	37	42
	37	620
County service officer and county board member — compatible .....	28	265
County state road and bridge committee. See highway committee county.		
County superintendent and superintendent of school for deaf .....	8	40
County surveyor and city assessor — compatible .....	5	240
County surveyor and town supervisor and/or member of county board .....	20	299
County training school board member and principal of such school .....	1908	727
County treasurer and agricultural society president ..	17	466
County treasurer and city councilman — compatible ..	37	624
County treasurer and clerk of election .....	9	426
County treasurer and county board member — incompatible .....	3	751
	17	466
	18	92
	21	800
County treasurer and county purchasing agent — incompatible .....	26	621
County treasurer and secretary of county board forestry committee — incompatible .....	48	217
County treasurer and town chairman — incompatible .....	20	1217
County treasurer and town clerk .....	5	786
County treasurer, deputy, and county clerk (deputy) — incompatible .....	22	707
County veterans service commissioner and county board member — incompatible .....	35	148
County veterans service commissioner and county veterans service officer — incompatible .....	35	148
County veterans service officer and county veterans service commissioner — incompatible .....	35	148
Court commissioner and U.S. conciliation commissioner — compatible .....	25	22
Court commissioner (U.S.) and court reporter .....	8	800
Court commissioner (state) and district attorney — incompatible .....	16	4
Court commissioner (U.S.) and district attorney — incompatible .....	7	636
Court commissioner and district attorney, assistant — incompatible .....	5	520
Court commissioner and judge (county) — compatible .....	1906	756
Court commissioner and judge (municipal) .....	1908	741
Court commissioner and justice of peace — incompatible .....	5	582
	16	4
Court reporter and register in probate .....	3	739
Court reporter and U.S. court commissioner .....	8	800
Custodian of public property, county, and county board member .....	18	651
Dairy and food commission chemist and chemist for U.S. department of agriculture .....	1908	739
Dairy and food commission chemist and university professor .....	1910	604

Dairy and food inspector, assistant, and sealer of weights and measures .....	1912	792
Dance hall supervisor and county board member .....	14	494
	20	1193
Dance hall supervisor and sheriff .....	15	156
Dance hall supervisor and sheriff (deputy) — compatible .....	15	156
District attorney and city attorney — incompatible .....	1908	769
	1912	501, 772
But see ch. 298, L. 1919		
District attorney and city attorney (assistant) .....	12	605
District attorney and city attorney — compatible .....	42	14
District attorney and county highway committee member — incompatible .....	11	875
District attorney and county pension dept. — incompatible .....	25	178
District attorney and court commissioner (state) — incompatible .....	16	4
District attorney and court commissioner (U. S.) — incompatible .....	7	636
District attorney and director of joint school district — compatible .....	22	677
District attorney and divorce counsel — compatible .....	28	624
District attorney and family court commissioner — incompatible .....	48	296
District attorney and income tax assessor — incompatible .....	7	484
	8	69
District attorney and income tax board of review member — incompatible .....	21	431
District attorney and judge (municipal) .....	12	198
District attorney and mayor — incompatible .....	1912	786
District attorney and public administrator — incompatible .....	1910	602
See .....	2	768
District attorney and village attorney — incompatible .....	6	489
District attorney and village board member — incompatible .....	26	11
District attorney, assistant, and court commissioner — incompatible .....	5	520
District attorney, assistant, and justice of peace — incompatible .....	31	230
Division of markets employee and officer in U.S. reserve corps .....	9	22
Divorce counsel and county judge — incompatible .....	17	480
Divorce counsel and county supervisor — incompatible .....	27	296
Divorce counsel and district attorney — compatible .....	28	624
Election clerk and county treasurer .....	9	426
Election clerk and town clerk .....	14	186
Election inspector and town chairman .....	12	326
	13	139
	15	173
Election inspector and town clerk .....	13	139
Election inspector and town supervisor .....	13	138
	14	134, 186
	16	60
Election officer and candidate for any office .....	17	318

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Election officer and civil service employee .....	3	729
Election officer and town officer (candidate) .....	14	186
	18	218
Family court commissioner and district attorney — incompatible .....	48	296
Fire chief and village president — incompatible .....	28	21
Fire chief, assistant and village clerk — compatible ..	28	21
Fire chief, volunteer, and city councilman — incom- patible .....	39	421
Fire marshal, assistant, and member of legislature ..	4	886
Fire warden, emergency, and town chairman — com- patible .....	23	229
Fireman, assistant, and county board member .....	17	244
Fireman, town, and town board member — incom- patible .....	45	30
Fireman, volunteer, and city councilman — com- patible .....	23	363
Fireman, volunteer, and mayor — compatible .....	23	363
Fireman, volunteer, and village board member — in- compatible .....	23	278
Grain and warehouse commissioner and member of county board — compatible .....	17	198
Health commissioner, city, or city health officer and city school board member — incompatible .....	20	462
Health commissioner and mayor — incompatible .....	1902	211
Health officer, city, or city health commissioner and city school board member — incompatible .....	20	462
Health officer and city park board member — com- patible .....	24	344
Health officer and town clerk — compatible .....	24	344
Highway commissioner, county, and county board member .....	2	775
	4	1068
	6	658
	11	813
See .....	18	152
Highway commissioner, county, and county board member (town chairman) .....	5	762
	6	666
	12	108
Highway commissioner, county, and county clerk — compatible .....	17	641
Highway commissioner, county, and county highway committee member .....	18	152
Highway commissioner, county, and town chairman ...	5	762
	6	666
	12	108
Highway commissioner, county, and town chairman — compatible in counties under commission gov- ernment .....	15	439
See .....	12	141
Highway commissioner, county, and village president — compatible if president is not at same time supervisor .....	14	135
Highway commissioner, county (assistant), county auditor, county purchasing agent .....	12	212
Highway commissioner, county (assistant), and coun- ty board member .....	13	641

Highway commissioner, county (assistant), and county highway committee member .....	10	1115
Highway commissioner, state, and county board member — incompatible .....	17	164
Highway commissioner, state, and town chairman — incompatible .....	17	164
Highway committee member, county, and county board chairman .....	16	372
Highway committee member, county, and county board chairman or county board member .....	17	45, 531
Highway committee member, county, and county board member .....	4	328
	5	339
	9	569
	15	318
	16	372
Highway committee member, county, and district attorney — incompatible .....	11	875
Highway committee member, county, and highway commissioner .....	18	152
Highway committee member, county, and highway commissioner (assistant) .....	10	1115
Highway committee member, county, and inspector of highway construction .....	5	468
	17	237
Highway committee member, county, and village supervisor .....	16	709
Highway inspector, county. See inspector.		
Highway patrolman and county board member .....	10	416
	12	353
	19	258
	21	209, 410
	22	308
Highway patrolman and county board member — incompatible .....	26	349
Highway patrolman and town board member .....	13	164
Highway patrolman and town chairman .....	12	193
	13	164
	19	258
Highway superintendent and assessor (town) — compatible .....	11	391
Humane officer, county, and county board member .....	14	494
Income tax assessor and district attorney — incompatible .....	7	484
	8	69
Income tax assessor and village president — compatible .....	5	562
Income tax board of review member and county supervisor .....	1912	226
Income tax board of review member and district attorney — incompatible .....	21	431
Inspector of building construction, county, and county board member .....	11	408
Inspector of county highway work and county board member .....	17	237
Inspector of highway construction and county highway committee member .....	5	468
	17	237
Inspector of county highway work and mayor .....	5	628

Insurance department examiner and member of legislature .....	4	1107
Internal revenue collector, deputy, and supervisor ....	5	886
Investigator and county board member — compatible .....	44	159
Investigator of fraudulent advertising and special treasury agent .....	15	246
Janitor of court house, county clerk and county purchasing agent .....	1910	581
Judge of civil court and school director (Milwaukee) ..	13	203
Judge, county, for full term and for unexpired term ..	1906	275
Judge, county, and court commissioner — compatible ..	1908	756
Judge, county, and director of common school district — incompatible .....	14	332
Judge, county, and director of municipal library board — incompatible .....	20	592
Judge, county, and divorce counsel — incompatible ..	17	480
Judge, county, and military exemption board member ..	6	469
Judge, county, and municipal judge .....	7	402
Judge, county, and school board members — incompatible .....	1912	756
.....	4	771
Judge, county, and school board secretary — incompatible .....	1904	360
Judge, county, and supervisor of assessors — incompatible .....	1902	168
Judge, county, and village president .....	12	183
Judge of inferior court may preside as judge of superior court .....	10	781
Judge, municipal, and city assessor, — incompatible ..	21	970
Judge, municipal, and city attorney — incompatible ..	1910	667
.....	19	188
Judge, municipal, and county judge .....	7	402
Judge, municipal, and court commissioner .....	1908	741
Judge, municipal, and district attorney .....	7	198
Judge of superior court — judge of inferior court may preside as .....	10	781
Jury commissioner and justice of peace — compatible .....	3	732
Justice of the peace and alderman .....	1912	840
.....	13	123
Justice of the peace and appraiser of condemned animals .....	1	542
Justice of the peace and city assessor — compatible ..	3	738
Justice of the peace and city clerk — incompatible ..	3	957
.....	12	41
Justice of the peace and city treasurer .....	1912	322
.....	15	184
Justice of the peace and coroner — incompatible .....	14	374
Justice of the peace and county board member — incompatible .....	19	510
Justice of the peace and county clerk, deputy — compatible .....	29	143
Justice of the peace and county pension dept. — compatible .....	25	55
Justice of the peace and court commissioner — incompatible .....	5	582
.....	16	4
Justice of the peace and district attorney, ass't. — incompatible .....	31	230

Justice of the peace and jury commissioner — compatible .....	3	732
Justice of the peace, legislature, and school district clerk — compatible .....	8	17
Justice of the peace and mayor .....	17	327
Justice of the peace and police justice — incompatible .....	1902	138
.....	1908	787
.....	11	559
Justice of the peace and oil inspector, deputy — incompatible .....	37	474
Justice of the peace and school district attorney — compatible .....	25	458
Justice of the peace and school district clerk — compatible .....	8	17
Justice of the peace and town assessor — compatible .....	13	132
Justice of the peace and town chairman — compatible (commission government county) .....	22	293
Justice of the peace and town clerk — incompatible .....	4	600
.....	12	41
Justice of the peace and undersheriff — incompatible .....	11	242
Justice of the peace and village clerk .....	12	41
Justice of the peace and village president — incompatible .....	4	322
.....	5	562
.....	8	276
Justice of the peace and village trustee — incompatible .....	12	126
Justice of supreme court and messenger under soldiers voting law .....	7	461
Lake Superior and Mississippi River Canal commission member and member of legislature — compatible .....	2	773
Legislature, member, and census enumerator .....	19	241
Legislature, member, and census supervisor .....	19	241
Legislature, member and chief examiner civil service commission (Milwaukee) .....	6	498
Legislature, member and city councilman — compatible .....	25	254
Legislature, member and code committee, local — compatible .....	24	784
Legislature, member, and county board member — compatible .....	17	261
.....	21	439
Legislature, member — employment in another capacity .....	20	1271
Legislature, member, and assistant fire marshal .....	4	886
Legislature, member, and insurance commissioner (deputy) .....	4	886
Legislature, member, and insurance department examiner .....	4	1107
Legislature, member, justice of peace and school district clerk — compatible .....	8	17
Legislature, member, and Lake Superior and Mississippi River canal commission member .....	2	773
Legislature, member, and livestock sanitary board member .....	1	367

Legislature, member, and office created during his term .....	1	365, 453
Legislature, member, and office created during term — incompatible .....	32	265
Legislature, member, and oil inspector — compatible .....	10	726
Legislature, member, and postmaster — incompatible .....	1906	206
Legislature, member, and supervisor of inspectors of illuminating oils — compatible .....	10	116, 726
Legislature, member, and U.S. employee .....	22	1032
Legislature, member, and U.S. officer .....	22	1032
Legislature, member, and U.S. officers reserve corps — compatible .....	28	292
Legislature, member — service on committee after resignation .....	4	897
Legislature, member, and town chairman — compatible .....	1	485
.....	8	159
.....	10	305
Legislature, member, and town supervisor — compatible .....	7	642
Legislature, member, and undersheriff — compatible .....	1910	596
Legislature, member, and Veterans recognition board — incompatible .....	32	265
Legislature, member and Vicksburg commission member .....	1908	724
Librarian of town library and town clerk — incompatible .....	1912	808
Live stock sanitary board member and board of agriculture member .....	1912	804
Live stock sanitary board member and member of legislature — compatible .....	1	367
Marshal and alderman .....	1912	785
Mayor and board public works — incompatible .....	23	497
Mayor and clerk of circuit court .....	18	48
Mayor and county board chairman — compatible .....	15	172
Mayor and county board member — compatible .....	1912	788
.....	9	230
.....	28	138
.....	17	498
Mayor and district attorney — incompatible .....	1912	786
Mayor and health commissioner — incompatible .....	1902	211
Mayor and highway inspector .....	5	628
Mayor and justice of peace — incompatible .....	17	327
Mayor and municipal utility board — incompatible ..	23	497
Mayor and school district treasurer .....	17	296
Mayor and volunteer fire dept. — compatible .....	23	363
Messenger under soldiers voting law and justice of supreme court .....	7	461
Metropolitan sewerage district commissioner and municipal utility commissioner — compatible .....	26	267
Military exemption board member and county judge ..	6	469
Municipal civil defense director and county coordinator — incompatible .....	45	100
Municipal utility commissioner and metropolitan sewerage district commissioner — compatible .....	26	267
Municipal utility commissioner and municipal utility manager — incompatible .....	28	44
Municipal utility board and city councilman — incompatible .....	23	497

Municipal utility board and mayor — incompatible .....	23	497
Municipal utility manager and city councilman — incompatible .....	23	67
Municipal utility manager and municipal utility commissioner — incompatible .....	28	44
Municipal utility manager and village president — compatible .....	24	519
National guard captain and agricultural agent .....	9	8
Normal regents, member, and school director — compatible .....	16	183
Office created during term and legislator — incompatible .....	32	265
Oil inspector, deputy and justice of peace — incompatible .....	37	474
Oil inspector and legislator — compatible .....	10	726
Oil inspector, deputy, may be chairman of party campaign committee .....	1912	808
Oil inspector, deputy, and town supervisor — compatible .....	14	152
Oil inspectors, supervisor, and city supervisor — compatible .....	21	337
Oil inspectors, supervisor, and state senator — compatible .....	10	116
Police commissioner and alderman, in 4th class city — compatible .....	1912	774
Police justice and appraiser of condemned animals .....	1	542
Police justice and city councilman — incompatible .....	27	478
Police justice and justice of peace — incompatible .....	1902	138
.....	1908	787
.....	11	559
Police justice, school board clerk, village clerk — compatible .....	1912	265
Police officer and sheriff, deputy (special) — compatible .....	24	132
Police officer and coroner — incompatible .....	33	227
Poor commissioner and town chairman — incompatible .....	10	470
Poor commissioner and town clerk .....	17	291
Presidential elector and member of congress .....	1	231
Principal of county training school and member of county training school board .....	1908	727
Principal. See school principal.		
Probation officer, county, and county board member — incompatible .....	21	400
Prohibition commissioner, deputy, and constable — compatible .....	17	321
Public administrator and district attorney — incompatible .....	1910	602
See .....	2	768
Public welfare, county dept., and county board member — incompatible .....	46	215
Quarry foreman and county board member — incompatible .....	24	394
Regional planning director and U.S. chairman regional committee — compatible .....	27	509
Register of deeds and village clerk — compatible .....	21	1033

Register of deeds, deputy, and county clerk — compatible .....	1910	578
Register in probate and clerk of circuit court — compatible .....	3	772
Register in probate and phonographic reporter .....	3	739
Relief director and county board member — incompatible .....	23	655
	28	516
Relief director and city supervisor — incompatible ..	25	48
Relief investigator and county board member — incompatible .....	24	762
School board clerk (high), police justice and village clerk — compatible .....	1912	265
School board member and alderman .....	11	192
School board member, city, and city health commissioner or health officer — incompatible .....	20	462
School board member and county board member — compatible .....	35	371
School board member and county judge — incompatible .....	1912	756
	4	771
School board member and county school committee — incompatible .....	37	42
	37	620
School board member and supervisor (town) — incompatible .....	19	353
School board member and supervisor (village) — incompatible .....	19	368
School board member and village board member — compatible .....	12	442
School board member and village clerk — incompatible .....	22	43
School board secretary and county judge — incompatible .....	1904	360
School bus operator and county school committee — compatible .....	40	433
School director and board of normal regents member — compatible .....	26	183
School director and city supervisor — compatible ..	37	470
School director in joint school district and district attorney — compatible .....	22	677
School director and judge of civil court .....	13	203
School director and judge (county) — incompatible ..	14	332
School director and town chairman — compatible ..	13	493
School director and town treasurer — compatible ..	10	740
School director and town treasurer — compatible ..	23	839
School district attorney and justice of peace — compatible .....	25	458
School district clerk, member of assembly and justice of peace — compatible .....	8	17
School district clerk, union high, and city clerk — incompatible .....	8	190
School district clerk and town chairman — compatible .....	18	604
School district clerk and town clerk — compatible ..	5	852
	27	549
	29	384
School district clerk and U.S. Farmer (on Indian Reservation) .....	17	537

School district clerk and village assessor — compatible .....	11	4
School district clerk and village clerk — compatible ..	27	549
	29	384
School district clerk and village treasurer — compatible ..	17	493
School district treasurer and city treasurer — incompatible .....	7	558
School district treasurer and mayor .....	17	296
School district treasurer and town clerk — compatible .....	23	605
School district treasurer and town supervisor — incompatible .....	19	125
School district treasurer and town treasurer — incompatible .....	7	424
	22	293
School district treasurer and village trustee — incompatible .....	24	567
School principal and alderman — compatible .....	7	105
School teacher and city councilman — incompatible ..	26	582
Sealer of weights and measures and dairy and food inspector (assistant) .....	1912	792
Secretary of soldiers' relief commission, assistant, and member of commission .....	21	437
Sheriff and county dance supervisor — incompatible ..	43	228
Sheriff and county dance hall supervisor .....	15	156
Sheriff and deputy sheriff — incompatible .....	29	247
Sheriff and superintendent of county home — incompatible .....	39	543
Sheriff, deputy, and clerk municipal court — incompatible .....	36	483
Sheriff, deputy, or undersheriff and constable — compatible .....	20	296
Sheriff, deputy, and county board member — incompatible .....	1904	421
	1908	783
	16	139
	28	32
See .....	10	783
Contra .....	16	3
Sheriff, deputy, and county dance hall supervisor — compatible .....	15	156
Sheriff, deputy, and mail carrier — compatible .....	10	21
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