OPINIONS

OF THE

ATTORNEY GENERAL

OF THE

STATE OF WISCONSIN

VOLUME 53

January 1, 1964 through December 31, 1964

GEORGE THOMPSON
Attorney General

MADISON, WISCONSIN
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ATTORNEY GENERAL

ATTORNEYS GENERAL OF WISCONSIN

FROM THE ORGANIZATION OF THE STATE

JAMES S. BROWN, Milwaukee from June 7, 1848, to Jan. 7, 1850
S. PARK COON, Milwaukee .... from Jan. 7, 1850, to Jan. 5, 1852
EXPERIENCE ESTABROOK, Geneva ..... from Jan. 5, 1852, to Jan. 2, 1854
GEORGE B. SMITH, Madison from Jan. 2, 1854, to Jan. 7, 1856
WILLIAM R. SMITH, Mineral Point ..... from Jan. 7, 1856, to Jan. 4, 1858
GABRIEL BOUCK, Oshkosh .... from Jan. 4, 1858, to Jan. 2, 1860
JAMES E. HOWE, Green Bay .. from Jan. 2, 1860, to Oct. 7, 1862
WINIFIELD SMITH, Milwaukee ..... from Oct. 7, 1862, to Jan. 1, 1866
CHARLES R. GILL, Watertown ..... from Jan. 1, 1866, to Jan. 3, 1870
STEPHEN S. BARLOW, Dellona ..... from Jan. 3, 1870, to Jan. 5, 1874
A. SCOTT SLOAN, Beaver Dam from Jan. 5, 1874, to Jan. 7, 1878
ALEXANDER WILSON, Mineral Point ..... from Jan. 7, 1878, to Jan. 2, 1882
LEANDER F. FRISBY, West Bend ..... from Jan. 2, 1882, to Jan. 3, 1887
CHARLES E. ESTABROOK, Manitowoc ..... from Jan. 3, 1887, to Jan. 5, 1891
JAMES L. O'CONNOR, Madison ..... from Jan. 5, 1891, to Jan. 7, 1895
WILLIAM H. MYLREA, Wausau ..... from Jan. 7, 1895, to Jan. 2, 1899
EMMET R. HICKS, Oshkosh .. from Jan. 2, 1899, to Jan. 5, 1903
LAFAYETTE M. STURDEVANT, Neillsville ..... from Jan. 5, 1903, to Jan. 7, 1907
FRANK L. GILBERT, Madison from Jan. 7, 1907, to Jan. 2, 1911
LEVI H. BANCROFT, Richland Center ..... from Jan. 2, 1911, to Jan. 6, 1913
WALTER C. OWEN, Maiden Rock ..... from Jan. 6, 1913, to Jan. 7, 1918
SPENCER HAVEN, Hudson .... from Jan. 7, 1918, to Jan. 6, 1919
JOHN J. BLAINE, Boscobel ... from Jan. 6, 1919, to Jan. 3, 1921
WILLIAM J. MORGAN, Milwaukee ..... from Jan. 3, 1921, to Jan. 1, 1923
HERMAN L. EKERN, Madison from Jan. 1, 1923, to Jan. 3, 1927
JOHN W. REYNOLDS, Green Bay ..... from Jan. 3, 1927, to Jan. 2, 1933
JAMES E. FINNEGAN, Milwaukee ..... from Jan. 2, 1933, to Jan. 4, 1937
ORLAND S. LOOMIS, Mauston from Jan. 4, 1937, to Jan. 2, 1939
JOHN E. MARTIN, Milwaukee from Jan. 2, 1939, to June 5, 1948
GROVER L. BROADFOOT, Mondovi ..... from June 5, 1948, to Nov. 15, 1948
THOMAS E. FAIRCHILD, Milwaukee ..... from Nov. 15, 1948, to Jan. 1, 1951
VERNON W. THOMSON, Richland Center ..... from Jan. 1, 1951, to Jan. 7, 1957
STEWART G. HONECK, Madison ..... from Jan. 7, 1957, to Jan. 5, 1959
JOHN W. REYNOLDS, Green Bay ..... from Jan. 5, 1959, to Jan. 7, 1963
GEORGE THOMPSON, La Crosse ..... from Jan. 7, 1963, to

ATTORNEY GENERAL'S OFFICE

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LYLE E. STRAHAN[2]	Deputy Attorney General
WALTER J. COLE[5]	Deputy Attorney General
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WALTER A. YOUNK[8]	Special Agent
DONALD R. SIMON[9]	Special Agent
HERBERT L. KRUSCHE[10]	Special Agent

1. Leave commencing October 1, 1963
2. Terminated March 9, 1964
3. Appointed February 3, 1964
4. Appointed July 1, 1964
5. Appointed March 26, 1964
6. Appointed December 19, 1963
7. Appointed January 2, 1964
8. Appointed January 13, 1964
9. Appointed February 12, 1964
10. Appointed March 2, 1964

OPINIONS

OF THE

ATTORNEY GENERAL

Volume 53

Business Costs—Dealers—Discussion of secs. 100.30 (2) and (6) relative to dealers doing business below cost. Necessity to provide proof when provisions of the statutes are not followed.

January 10, 1964

DONALD N. MCDOWELL, *Director*

State Department of Agriculture

You ask about the validity of a number of automobile transactions which may violate sec. 100.30 (2) (a) of the Wisconsin Statutes. This section requires that, with exceptions not pertinent here, a retailer must sell his goods at a price no lower than the invoice cost plus a markup of 6% for his cost of doing business unless he can prove his cost of doing business is less than 6%. It reads as follows:

"(a) 'Cost to retailer' means the invoice cost of the merchandise to the retailer within 30 days prior to the date of sale, * * * and a markup to cover a proportionate part of the cost of doing business, which markup, in the absence of proof of a lesser cost, shall be 6 per cent of the cost to the retailer as herein set forth after adding thereto freight charges and cartage but before adding thereto a markup."

Section 100.30 (2) (d), helps to explain the term "cost to retailer". It reads as follows:

"(d) 'Cost to retailer' and 'cost to wholesaler' as defined in paragraphs (a) and (b) of this section mean bona fide costs; and purchases made by retailers and wholesalers at prices which cannot be justified by prevailing market conditions within this state shall not be used in determining cost to the retailer and cost to the wholesaler."

The transactions about which you inquire are those where dealers submit sealed bids to a utility company which is interested in buying trucks or automobiles. Usually the specifications for the vehicles are such that only the model of one manufacturer will meet all the specifications. In these transactions, no trade-ins are involved; also the vehicles are delivered by the manufacturer to the purchaser directly, and the dealer does not have to service the vehicles. The dealer's only function in these transactions is to submit his bid and, if successful, write up the order and mail it to the manufacturer.

On this type of transaction, the dealers who are successful in getting the bid, bid at a price lower than their invoice cost plus the markup of 6% required by sec. 100.30 (2) (a). Since the invoice cost to all the dealers of the same manufacturer is *presumably* the same, the dealers justify this lower bid by taking the position that their cost of doing business in this type of transaction is less than the 6% markup required by statute.

The question you ask is whether a seller can take an isolated sale and allocate to it only those direct costs involved in that particular sale so as to be able to prove a lesser cost of doing business than the 6% markup, or whether he must allocate a proportionate part of his overall cost of doing business to such sale?

This question may be restated as: "How can a party prove that his cost of doing business is less than the markup of 6% required by sec. 100.30 (2) (a)?"

THE PROBLEMS OF A COST JUSTIFICATION STUDY

A party attempting to establish his cost of doing business is faced with three fairly difficult problems. **First,** he must define cost of doing business, so as to determine what cost items must be included in his cost study. **Second,** he must determine how he will allocate these different cost items among his different goods or transactions. **Third,** he must determine how precise to make his cost study to satisfactorily prove his cost of doing business.

The supreme court of Colorado in *Flank Oil Co. v. Tennessee Gas Transmission Company,* (1960) 349 P. 2d 1005, was faced with the problem of interpreting a statute similar to sec. 100.30 (2) (a). The court, on page 1008, defined cost of doing business as:

"* * * The 'cost of doing business' or 'overhead expense' is defined as all cost of doing business incurred in the conduct of such business. * * *"

The court also stated, that the provision in the Colorado statutes, which listed the cost items which were to be included in determining "cost of doing business," was a mandatory one. This list of cost items is similar to the list presented in Vol. 9, U. of Chi. Studies in Bus. Adm. No. 2, 1939, on pp. 17-36. This article stated that, whenever a person was attempting to prove his cost of doing business, he had to consider the following items:

1. *Labor* — including salaries of executives

2. *Rent — Real Estate* — If owned you must consider property tax, maintenance, depreciation, etc. on it.

3. *Interest* — on borrowed capital

4. *Depreciation*

5. *Selling Costs*

6. *Delivery Costs*

7. *Credit Losses*

8. *Maintenance* — of equipment.

9. All types of licenses, taxes, insurance and advertising.

10. Light, heat, power, water and fixed and incidental expenses.

These are the items which a seller should consider when he is attempting to determine his cost of doing business. The problem which he next faces, is how to allocate these cost items among the different goods. The weight each cost item will have, and hence the cost of any particular good, depends upon the method of allocation of cost the seller uses.

Under the unfair sales acts, there are two acceptable ways which can be used to allocate costs in trying to determine a party's "cost of doing business". There is a practical one and a theoretical one (U. of Chi. Studies in Bus. Adm. Vol. 9, No. 2, 1938, p. 17).

The practical method is called the "average allocation of total overhead". Here, the percentage relationship between the total overhead and the total cost of merchandise sold by a firm for a given period of time is determined and then the percentage or markup thus determined is applied to the purchase price of each product in order to determine the price below which sales cannot be made. (Ibid. 36)

The theoretical method is called the "specific allocation of total overhead". This method attempts to make each item bear only the share of the overhead for which it is directly or indirectly responsible. (Ibid. p. 17)

The average allocation of total overhead achieves the same result which the 6% markup requirement in the statute achieves. In both cases, the same proportion of overhead is added to the cost base of each product sold. Here, each item bears the same proportion of the total cost of doing business, regardless of what the actual cost of selling that particular item might be. (11 Vanderbilt Law Review 105, 123.)

In the specific allocations of overhead method, the relationship between the overhead and the cost base of items will vary. It will vary between different products and between different units of the same product handled by the

same firm. (U. of Chi. Studies in Bus. Adm. Vol. 9, No. 2, pp. 37-38.)

If you use the specific allocations of total overhead method, you must first separate the *direct* from the *indirect* costs. The direct costs are those costs incurred by that product alone, whereas, the indirect costs are those costs incurred jointly between two or more products. After the direct costs are separated from the indirect costs, you then allocate the direct costs among the items which incur them. The indirect costs are then allocated among the several items which incur them.

Once the seller selects which method of cost allocation he wants to use, he is faced with the problem of how accurate his cost survey must be.

In *The Borden Company v. Don Thomason,* (1962) 353 S.W. 2d 735, the Missouri supreme court was dealing with a state statute similar to our sec. 100.30 (2) (a). When faced with the problem of how accurate the seller's cost study had to be, the court stated, on p. 752:

"* * * 'Hence, in the absence of provisions to the contrary, we must presume that the legislature did not intend to prescribe that the cost must be absolutely exact, and that it must be based upon the precise method of accounting which any one merchant might adopt, but meant, by "cost," what business men generally mean, namely, the *approximate cost* arrived at by a reasonable rule. Hence, if a particular method adopted by a merchant cannot, under the facts disclosed, be said to be unreasonable, and does not disclose an intentional evasion of the law, the method so adopted should be accepted as correct. In other words, all that a man is required to do under the statute is to act in *good faith.* * * *' " (Emphasis supplied.)

The above view was also expressed by the supreme court of Maine in *Farmington Dowell Products Co., Inc. v. Forster Manufacturing Co., Inc.,* (1957) 153 Me. 265, 136 A. 2d 542. The court said that the proving of a lesser cost under a statute similar to sec. 100.30 (2) (a) meant determin-

ing the approximate cost by a reasonable rule — in other words the cost arrived at by the seller in good faith.

Thus, when a seller attempts to prove his cost of doing business, he must act in good faith. He must also use an acceptable system of accounting. The seller, under sec. 100.30 (2) (a) is not required to determine his exact cost of doing business but is required to determine his approximate cost of doing business.

THE SPECIFIC PROBLEMS AN AUTOMOBILE DEALER IS FACED WITH WHEN HE ATTEMPTS A COST JUSTIFICATION STUDY

Under sec. 100.30 (2) (a) the dealer is given the opportunity to prove that he has a lesser cost of doing business than the 6% markup. When he attempts to prove his cost of doing business, he must use one of two methods mentioned above. (However, the possibility of a reasonable alternative is not excluded.)

If the dealer decides to use the specific allocations of total overhead method, he will be faced with the same problems which the defendant in *Dikeau et al v. Food Distributors Ass'n.*, (1940) 107 Col. 38, 108 P. 2d 529 met. The defendant tried to use the specific allocation of total overhead method to prove he wasn't selling below cost as defined by a statute similar to sec. 100.30 (2) (a). He tried to justify his low price by dividing his business into two departments, service and cash-and-carry. He then attempted to allocate his total overhead between the two departments and determine the cost of doing business for each department.

The Colorado supreme court first rejected the defendant's separation of his business into the two departments. On page 532 it stated:

"* * * His survey was based on a *theoretical separation* of the service and cash-and-carry departments, although no such *actual separation* of the business existed. * * * Relative to the survey for the period between January 1 and February 10, 1939, he testified on cross-examination that this survey was prepared for the purposes of this case only, and he declined to say that the facts as found would be good

for the entire year. * * * No records of any kind were kept to show the actual expense of the theoretically separated departments. * * *" (Emphasis supplied.)

The court also rejected his allocation of overhead to the two departments as being *unreasonable.* Then the court treated his business as one unit and used the average allocation of total overhead method to determine his cost of doing business. This figure, when added to his invoice cost, turned out to be greater than the price at which the defendant had sold his goods. The court found a violation.

The dealers, in your example, assert that they can sell these vehicles at less than the invoice cost plus the 6% markup because of the absence of service and maintenance on these vehicles in contrast with the service and maintenance required by vehicles sold off the show room. In trying to justify their price they divide their business into two categories; bid sales and show room sales. They conclude that the cost of doing business for the vehicles sold by bid is less than the statutory markup of 6%.

Under the *Dikeau Case, supra,* this division of the dealer's business must be actual and not merely theoretical. He must keep books in such a manner as to show that there is in fact a division of the business of the dealer into two departments.

Once he has established that in fact he has divided his business into two departments, he will then allocate the costs between the two departments. He *cannot* allocate only the direct costs to one department and then apply all the remaining costs to the other department. Examples of indirect costs in this situation are: the agency franchise cost (if a person didn't have the franchise he couldn't sell any vehicles); maintenance of his place of doing business (for various functions), such as light, heat, rent or taxes, etc.

The next question you ask is how a dealer qualifies under the exception granted to him in sec. 100.30 (6) (g). This section allows the seller to set the price of his goods below his cost, if he acts in good faith to meet the competition of his competitor. It states:

"(6) EXCEPTIONS. The provisions of this section shall not apply to sales at retail or sales at wholesale where:

"* * *

"(g) The price of merchandise is made in good faith to meet competition;

"* * *"

The situations about which you inquire as to whether a dealer can qualify under sec. 100.30 (6) (g), raise two questions. **First,** can a dealer set his price below cost as defined in sec. 100.30 to meet an illegal price of a competitor? **Second,** where a competitive offer is set forth in a sealed bid and a seller has no actual knowledge of what that offering price is, can the seller guess at the competitive price and fix his price below cost to meet what he anticipates the competitor's price will be?

THE MEANING OF THE PHRASE "IN GOOD FAITH TO MEET COMPETITION" IN SEC. 100.30 (6) (g), STATS.

To best answer these questions we should first examine the meaning of sec. 100.30 (6) (g), and sections similar to it in the unfair sales acts of other states.

Thirty states in addition to Wisconsin have exceptions in their unfair sales acts which are similar to sec. 100.30 (6) (g). In nineteen states, these exceptions require that the seller not only has to act in good faith but also that he can meet only the *legal* price of his competitors. Seven states have sections which are exactly like sec. 100.30 (6) (g), in that they make no reference as to whether the price of a competitor which they attempt to meet is a legal price or not. In the four remaining states, the seller can meet only the legal price of his competitor (the statutes made this an absolute requirement). Cf. *State of Minnesota v. Harry K. Wolkoff, et al.,* (1957) 250 Minn. 504; 85 N.W. 2d 401, 406.

The statutes which provide that a seller can meet only the legal price of his competitor with no good faith proviso have been generally held to be unconstitutional. The New Jersey supreme court in *State v. Packard-Bamberger Co.,*

Inc., (1939) 123 N.J.L. 180, 8 A. 2d 291, rejected this type of statute. It stated on page 294:

"* * * There is no requirement of criminal or illegal intent or purpose. Indeed, the act may be violated without guilty knowledge. A retailer may not only ordinarily not sell below cost to him, but, if he seeks to meet competition, he must expertly study and determine that he is buying under market conditions that are justified, or that the price of a competitor, which he must meet, is 'legal'. It is apparent that the statutory inhibitions are uncertain and indefinite. The elements of the proscribed conduct it attempts to penalize are not so clearly expressed that a person is informed of the course it is lawful for him to pursue. Action against an alleged offender thereunder would be arbitrary and unreasonable."

The Pennsylvania supreme court in *Commonwealth of Pennsylvania v. B. P. Zasloff*, (1940) 338 Pa. 457, 13 A. 2d 67, 128 A.L.R. 1120, also overturned such a statute. On page 1126, it stated:

"* * * And how could a merchant know whether a selling price which he proposed to fix was *legal* because it met 'the price of a competitor for merchandise of the same grade, quantity and quality?' How could such 'legal price of a competitor' be ascertained without examining the competitor's books in order to determine whether his price was legal? The standard set by the act to differentiate criminal from legitimate sales is so vague, indefinite and incapable of practical application that this in itself would make its enforcement a violation of the due process clause. * * *" (Emphasis supplied.)

This type of statute has been rejected because of the requirement that a seller can meet *only* the *legal* price of his competitor. The result of such a requirement is that a seller who lowers his prices to meet his competitor's prices, which he believes in good faith to be legal prices, would violate the statute if in fact the competitor's prices were illegal. This the courts feel is unjust because it is almost impossible for a seller to determine whether his competitor's prices are legal or illegal. The courts hold that such statutes fail to

establish a workable standard which the seller may use to guide his conduct.

In contrast, the statutes which state that a seller can sell below cost if he acts in good faith to meet the legal price of his competitor have usually been upheld, the reason being that the courts have considered the real standard in this type of statute to be the good faith of the seller. The term *legal price* is given no separate meaning by the courts. An example of this type of statutory construction is presented in the two following cases.

The court in *McIntire v. Borofsky,* (1948) 95 N.H. 174, 59 A. 2d 471, upheld the above type of statute. The reasoning of the court was stated on page 474:

"One of the exceptions to the Act is 'where the price of merchandise is made in good faith to meet legal competition' § 3 (h). If this required the retailer to examine his competitors books to ascertain whether the competition was legal, it would be of doubtful validity. * * * All that is required of the retailer, however, is an endeavor 'in good faith' to meet the legal prices of his competitor. * * *"

The Minnesota supreme court in *State v. Wolkoff,* (1957) 85 N.W. 2d 401, attempted to determine what the term "to meet legal competition" meant. Did it mean that the seller was obligated to determine his competitor's price? Or did it mean what the seller in good faith believed was a legal price of his competitor? On page 407, the court stated:

"We are of the opinion that such an interpretation is the practical and correct one. If a merchant in good faith sets the price of an article on the basis of a competitor's price, which price he in good faith believes to be a legal one, there is no violation."

If the courts gave a separate meaning to the term legal competition, then these statutes would probably have been struck down the same as the statutes which stated a seller could only meet the legal price of his competitor. The reason again being that it is difficult for a seller to determine whether his competitor's price is a legal or illegal one.

The courts have interpreted these statutes as requiring only that the seller establish his good faith belief in the legality of his competitor's price. (44 Minn. L.R. 1186, 1192). Thus, if a seller believes in good faith, that his competitor's price is a legal price and if in fact it is illegal, the seller would not be held in violation of this statute. But, if his belief in the legality of his competitor's price was not made in good faith, then he would be held as violating the statute. This implies the existence of a basis for the belief.

An example of a situation where the seller acted in bad faith was present in the case of *Safeway Stores v. Oklahoma Retail Grocers Ass'n.*, (1957) 70 AL. 2d 1068, 322 P. 2d 179. Here the court found that Safeway violated the unfair sales act and did not qualify under the exemption of selling below cost in good faith to meet the legal price of a competitor.

The state, in *Safeway,* contended that the defendant did not act in good faith when it lowered its prices to meet competition. Safeway, however, contended that its actions were justified because of the wrongful acts of its competitors and thus Safeway was only acting in good faith. The court in holding against Safeway stated on page 181:

"* * * In the instant case, Safeway obviously and admittedly did not, in good faith, set the prices of its articles which were subject to the Unfair Sales Act on the basis of its competitors' prices, which it in good faith believed to be legal prices under the Unfair Sales Act, but on the contrary it set *illegal* prices for the sole purpose of meeting prices of its competitors, *which it thought to be illegal.*" (Emphasis supplied.)

The court in *Safeway* based its findings upon the fact that Safeway believed that its competitor's prices were illegal. This the court felt was an indication of Safeway's bad faith and thus excluded them from coming under the exemption.

Sec. 100.30 (6) (g) and similar statutes have the same meaning as those which provide that a seller can only in good faith meet the legal competition of a competitor. Both

types of statutes require that the seller establish his *good faith* when he lowers his prices to meet competition. The only difference is the use of the word "legal". This, however, makes no difference because the courts have interpreted the phrase "legal competition" in such a way as to divest it of any separate meaning. Thus, the standard under both types of statutes is the good faith of the seller when he attempts to meet his competitor's prices.

WHEN AND HOW A DEALER CAN QUALIFY UNDER SEC 100.30 (6) (g), WISCONSIN STATUTES.

A person who sells below cost will be held in violation of sec. 100.30 unless he can come within one of the exemptions listed in sec. 100.30 (6). These exemptions are defenses which a person can assert but upon which he as defendant bears the burden of proof. See *State v. Ross*, (1951) 259 Wis. 379, 48 N.W. 2d 460. Thus, a dealer who relies upon this must prove that he acted in good faith when he sold below cost to meet his competitor's price.

To summarize, the answer to your first question will depend upon whether the dealer knew he was meeting an illegal price of a competitor. If the dealer can prove that he in good faith believed that he was meeting a legal price of his competitor, then he would be able to come under sec. 100.30 (6) (g) even if his competitor's price turned out to be illegal. If the dealer cannot prove his belief in the legality of his competitor's price was made in good faith, he cannot qualify under sec. 100.30 (6) (g).

The answer to the second problem you present under sec. 100.30 (6) (g) is a little bit more difficult. Sec. 100.30 (6) (g) only exempts the dealer from the requirements imposed upon him by sec. 100.30 when he in good faith *meets* his competition. If his competitor's price is $100, the dealer cannot sell his goods for $99. This would be a violation because he went below his competition.

In the example you submit, the competition between the dealers takes place through sealed bids. No one dealer knows what the other dealer's bid price will be. The problem which arises is what happens to the dealer who bids below his

cost to meet what he believes to be the price of his competitor, when the dealer's price goes below his competitor's bid? Does this prevent the application of sec. 100.30 (6) (g) and thus constitute a violation of sec. 100.30?

The term *good faith* qualifies the term *meet competition.* In this statute, the seller must in good faith attempt to meet not beat competition. All that is required of the seller is that he act in good faith. If he in good faith believes he is only *meeting* competition, and if in fact his price is lower than his competitor's price, it is my opinion that he would still qualify under sec. 100.30 (6) (g).

This interpretation of the term *meet competition* is similar to the interpretation the courts have given the term *legal competition.* It construes the word *meet* so that it is consistent with the good faith requirement. If the court gave the term "meet competition" its literal meaning, when a seller who in good faith lowers his prices to meet what he believes is the price of his competitor would be liable under sec. 100.30, if in fact his price was lower than his competitor's price. Giving the term "meet competition" its literal meaning would destroy the good faith standard present in sec. 100.30 (6) (g). Thus, to make the two terms consistent with each other, you have to construe the term "good faith" as a qualification of the term "meet competition".

Under the above interpretation of sec. 100.30 (6) (g), a dealer who bid on these jobs would be exempt under sec. 100.30, if he could prove the following: That he in *good faith* believed that the price of his competitor, which he was attempting to meet, was a legal price; that he believed in good faith that he was only meeting the price of his competitor and not underbidding that price. (Good faith implies a factual basis for such a belief.)

The dealer can use either of the two following methods to prove his cost of doing business: Specific allocation of total overhead method; average allocation of total overhead method. If the dealer chooses the specific allocation of total overhead method to prove his cost of doing business, he has to have his business actually divided into different departments, each taking care of different types of sales. He also

has to separate his direct and indirect costs so as to be able to charge the direct costs to the departments which incur them and allocate the indirect costs among the several departments. If the dealer chooses the average allocation of total overhead method, he has neither of the above problems.

When the dealer relies upon sec. 100.30 (6) (g) to avoid liability, he has the burden of proving that he at all times has acted in good faith. This means that every time a dealer lowers his prices to meet competition, he has to prove that he has acted in good faith. He must show that he in good faith believed he was meeting a *legal* price of his competitor. If the price which the dealer sets happens to be below his competitor's price, the dealer also must prove that he attempted in good faith only to *meet* his competitor's price and did not *intend* to sell below his competitor.

GFS

Words and Phrases—Permits—Discussion of sec. 139.50 and permits necessary to sell cigarettes by means of vending machines.

January 14, 1964

GEORGE W. CORNING

Commissioner of Taxation

You ask my opinion as to whether a person purchasing cigarettes for resale and vending them through cigarette vending machines on less than five retail premises is required to have a subjobber's permit under sec. 139.50 (1) (f).

Sec. 139.50 (1) (f) is found in the chapter covering beverage, cigarette and oleomargarine taxes. Sec. 139.50 gives the department of taxation control over collection of taxes on tobacco products by placing certain requirements

on those persons dealing in the wholesale market. Subsecs. (8) and (21) of sec. 139.50 allow the commissioner of taxation to promulgate rules and regulations "as may be necessary to carry out the provisions" of sec. 139.50.

As used in sec. 139.50, the term "wholesaler" has both a general and specific meaning.* In its general sense the term includes all those persons doing business in the wholesale market. Sec. 139.50 (1) (d) provides:

" 'Wholesaler' means any person holding a wholesaler, subjobber, cash and carry subjobber, vending machine operator or operator of 10 or more retail outlets permit."

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* For purposes of this opinion, when the term "wholesaler" is placed within quotation marks it is being used in its general sense rather than its specific sense.

In effect, the term "wholesaler" means anyone other than a retailer. 28 OAG 637 (1939).

In its specific sense the term wholesaler has a definite meaning directly corresponding to a particular function performed in the wholesale market. Such use of the term relates to the classification of "wholesalers" for permit purposes. Classification as to function is required by sec. 139.50 (4). Sec. 139.50 (4) (a) provides in part:

"* * * Distinct types of permits shall be issued to each class of wholesalers in accordance with the definitions of such classes contained in paragraphs (e) to (i) of subsection (1) of this section. * * *."

The term wholesaler in its specific sense is defined by sec. 139.50 (1) (e), Stats.:

" 'Wholesaler' shall mean any person who shall:

"1. Ship, transport or import into this state and sell, offer for sale or have in possession with intent to sell, stamped or unstamped tobacco products acquired and received by him directly from the manufacturer thereof.

"2. Sell, offer for sale, or have in possession with intent to sell stamped or unstamped tobacco products acquired by

him within the state directly from the manufacturer thereof.

"3. Ship, transport or import into this state and sell, offer for sale or have in possession with intent to sell, exclusively to retailers or other wholesale permittees from premises described in the permit or through their salesmen agents, stamped or unstamped tobacco products acquired by him other than directly from the manufacturer thereof.

"4. Sell, offer for sale or have in possession with intent to sell exclusively to retailers or other wholesale permittees from premises described in the permit or through their salesmen agents tobacco products acquired within the state other than directly from the manufacturer thereof."

The term wholesaler defined by sec. 139.50 (1) (e) has been interpreted by the department of taxation to mean a person who purchases unstamped tobacco products directly from the manufacturer. Such person must purchase tax stamps and affix them to the tobacco products before resale to another wholesaler or retailer. Such person must obtain a wholesaler's permit.

The department of taxation's interpretation of the term wholesaler in sec. 139.50 (1) (e) corresponds to the requirements of sec. 139.50 (18). Sec. 139.50 (18) provides in part:

"It shall be unlawful * * * for any * * * wholesaler * * * to sell * * * offer or expose for sale * * * or give away tobacco products within this state, except for shipment in interstate commerce * * * without having first affixed to the package or other container in which same shall be placed, the stamps required by this section."

Sec. 139.50 (18) requires that tax stamps be affixed to tobacco products as soon as the tobacco products come to rest within the state at the end of their journey in interstate commerce and before resale to other "wholesalers" or retailers. Sec. 139.50 (18), therefore, maximizes control over the collection of taxes on tobacco products by requiring the tax to be paid at one point—after importation into Wisconsin, but before resale to anyone within the state.

A subjobber is a "wholesaler" who performs a specific function in the wholesale market. Sec. 139.50 (1) (f) provides:

" 'Subjobber' shall mean any person other than a foreign or Wisconsin wholesaler or cash and carry subjobber, who shall sell, barter, exchange, offer for sale, have in possession with intent to sell tobacco products for the purpose of resale to retailers only, and who, in addition, shall maintain a service delivery for tobacco products to retailers and shall render a true and correct invoice for each and every sale."

The administrative interpretation of sec. 139.50 (1) (f) corresponds to the statutory definition. A subjobber is a person who purchases tax paid cigarettes for sale only to Wisconsin retailers and who must render invoices for such sales and maintain a delivery service. Such person must purchase a subjobber's permit.

A vending machine operator is another class of "wholesaler" operating in the wholesale market. Sec. 139.50 (1) (h) provides:

" 'Vending machine operator' shall mean any person other than a foreign or Wisconsin wholesaler, subjobber, or cash and carry subjobber, who shall sell, barter, exchange, offer for sale, have in possession with intent to sell tobacco products exclusively to retailers through the medium of a vending machine or any mechanical device used for dispensing cigarettes and who shall own, operate or service vending machines or mechanical devices on 5 or more premises."

Again, the department of taxation's administrative interpretation corresponds to statutory requirements. A vending machine operator is a person buying Wisconsin tax paid cigarettes and selling them to retailers through the medium of vending machines on five or more premises. Such person must purchase a vending machine operator's permit.

A person dealing in the wholesale market may perform several wholesale functions. If this occurs, that person then is required to purchase permits for each function. For instance, a person who purchases unstamped cigarettes di-

rectly from the manufacturer to sell through the medium of vending machines on five or more premises must obtain both a wholesaler's permit and vending machine operator's permit. Similarly, any person selling cigarettes through the medium of vending machines on five or more premises and also selling directly to retailers must have both a vending machine operator's permit and a subjobber's permit.

Administrative interpretation and practice require that persons operating cigarette vending machines on four or less premises have a subjobber's permit allowing them to sell to retailers. Quite clearly, such persons are not vending machine operators under sec. 139.50 (1) (h) for permit purposes. Yet, are such persons then subjobbers within the meaning of sec. 139.50 (1) (f) ?

The legislature specifically exempted those persons operating cigarette vending machines on less than five premises from the definition and permit requirements concerning vending machine operators. The reason for this exemption lies in the nature of a person who "owns, operates or services" vending machines on less than five premises. Such person more closely resembles a retailer than a "wholesaler". Typically, such person is an individual with a few machines which he services himself. He purchases tax paid cigarettes from a "wholesaler" and places the cigarettes in his machines himself. In practice he is like a retailer selling directly to the consumer. Sec. 139.50 (1) (ia) defines retailer:

" 'Retailer' means any person, firm or corporation that sells, exchanges, offers, or exposes for sale or exchange, or has in his possession with intent to sell or exchange to consumers, any tobacco products."

Therefore, the legislature has excluded him from the "wholesaler" category. It must be noted, however, that such person must obtain a wholesaler's permit if he purchases unstamped cigarettes directly from the manufacturer.

Therefore, it is my opinion that a person selling cigarettes through the medium of vending machines on four or less

premises is not a subjobber within the meaning of sec. 139.50 (1) (f), and is not required to purchase a subjobber's permit under sec. 139.50 (4).

JPA

Wisconsin Retirement — Reimbursements — Reimbursement by the state to a county pursuant to sec. 66.902 (6) (b) 1 should go into the general fund of the county.

January 22, 1964

WILBUR J. SCHMIDT, *Director*

Department of Public Welfare

You ask my opinion on this question: Should a reimbursement by the state to a county, made pursuant to sec. 66.902 (6) (b) 1. go into the general fund of such county?

It is my opinion that it should, in accord with what I believe to be the intent of the leigslature as evinced by section 66.902 (6) (b) 1., 2., and 3.

The alternative to deposit of such reimbursement in the general fund of the county would be to prorate it as a credit among the budgets of the departments and offices of the county, with the pro-rata share of such reimbursement for each such budget being the proportion that the amount of such budget covering municipal contributions to the Wisconsin retirement fund is of the total of such contributions made by the county for the budget year. In my judgment no such disposition of the reimbursement in question was ever intended by the legislature.

Section 66.902 (6) was enacted in 1961. ch. 459, Laws 1961. It reads as follows:

"(6) (a) Notwithstanding the provisions of this section every county having a population of less than 500,000 which has not hitherto elected to become a participating municipality shall on January 1, 1962, be a participating municipality. Each such county may elect to provide prior service

credits at rates equal to 2, 1½ or one times the rates of county credits for current service. If any county fails to certify to the director of the fund the prior service credit rate which it has elected on or before January 1, 1962, the applicable rate for such county shall be 2 times the rate of county credits for current service.

"(b) 1. If the municipality contributions paid by any county as a participating municipality under the Wisconsin retirement fund shall in any calendar year exceed by more than 50 per cent the average mill tax levy imposed in such year by all counties under said fund for contributions to said fund the state shall reimburse that county for the cost in excess of such 150 per cent.

"2. In determining the average county mill tax levy for any calendar year for said fund the executive director of the fund shall base such computation upon a certification by the department of taxation as to the total equalized valuation for general property taxes in each county under said fund collected in the calendar year for which municipality contributions are paid. Such average county mill tax levy shall be computed by comparing the aggregate municipality contributions for such year to the aggregate equalized valuation of such counties as above indicated and the rate for retirement purposes for each county shall be determined by dividing its municipality contribution by the equalized valuation for general property taxes of such county.

"3. The executive director of said fund shall annually certify to the department of administration for payment to the counties out of the appropriation provided by s. 20.890 (5) such amounts as each county is entitled to receive pursuant to this subsection for excess costs incurred for said fund contributions in the preceding calendar year, but no county shall be entitled to reimbursement for any calendar year prior to 1962."

The primary purpose of this statute is obvious: to make every county in Wisconsin, Milwaukee county excepted, a "participating municipality" included within the provisions of the Wisconsin retirement fund. Prior to enactment of sec.

66.902 (6), a substantial number of Wisconsin counties (31 as of 1959), in the exercise of the privilege enjoyed by counties under the then law, opted in favor of non-participation in the Wisconsin retirement fund program. When the legislature decided that all counties, except Milwaukee, should participate therein, it clearly sought to soften the impact of that decision on county finances by enacting section 66.902 (6) (b) 1., with its measure of relief, under certain specified conditions, for county taxpayers newly burdened with the cost of county participation in the above-mentioned program. It is clear to me that the reimbursement for counties provided for in section 66.902 (6) (b) 1. was intended for the sole benefit of county taxpayers. If such reimbursement goes into the general fund, the only beneficiaries thereof are such taxpayers. If, however, such reimbursement were disposed of in accord with the "alternative" above-described, it would produce, in addition to a benefit to county taxpayers, a benefit to the United States, i. e., a benefit to the taxpayers of the entire country. As you point out, your department, pursuant to law, "reimburses the counties in the administration of social security aid programs, child welfare and other related welfare programs." Such reimbursement by your department, you note, "includes the costs of retirement payments made in behalf of employees performing those duties in the county." I am informed that such reimbursements by your department, made to counties, are in turn the cause of federal aids or reimbursements paid over to your department. If a reimbursement made by the state to a county under section 66.902 (6) (b) 1. were disposed of under the "alternative" above-mentioned, there would be a reduction in county cost for the administration of "social security aid programs, child welfare and other related welfare programs." In turn, this would produce a reduction of the reimbursement of the county by your department for such costs; and this would mean a reduction in federal aid or reimbursement of the character above-mentioned coming to your department. Absent any statutory instruction or authorization, express or implied, to employ the above-mentioned "alternative" with reference to a reimbursement made to a

county under section 66.902 (6) (b) 1., and present the obvious legislative purpose to procure relief for county taxpayers through such statute, it is my opinion, as above-stated, that a reimbursement received by a county, by virtue of section 66.902 (6) (b) 1., should go into the general fund of the county, and be disposed of in no other manner.

JHM

Register of Deeds—Birth Certificates—Register of deeds furnishing certified copy of birth certificate under sec. 69.23 should omit confidential medical section and certification accompanying copy should show that non-confidential portion only is being provided.

January 24, 1964

C. E. MACOMBER, *District Attorney*

Juneau County

You have requested an opinion on the problem which registers of deeds face in issuing certified copies of birth certificates made on Form No. VS1-100M of the Wisconsin state board of health.

This form is on one sheet. The upper two-thirds of the sheet contains items 1 to 18 inclusive. The lower portion of the sheet containing items 19 to 30 inclusive is headed by the wording: "Health and Medical Section (confidential) (This section MUST be filled out for each birth)."

In a directive to local registrars under date of December 28, 1962, the bureau of vital statistics of the state board of health stated that no certified copy of a birth certificate should include the confidential data noted above and that while such data might be used for statistical purposes it should not be given out except by court order.

This poses the question of whether a register of deeds may properly furnish a certified copy of a birth certificate

when the copy certified is not a true and correct copy of such document.

Sec. 59.51 (8) provides that the register of deeds shall:

"Make and deliver to any person, on demand and payment of the legal fees therefor, a copy duly certified, with his official seal affixed, of any record, paper, file, map or plat in his office."

Sec. 327.08 (1) provides:

"(1) Whenever a certified copy is allowed by law to be evidence, such copy shall be certified by the legal custodian of the original to have been compared by him with the original, and to be a true copy thereof or a correct transcript therefrom, or to be a photograph of the original; such certificate must be under his official seal or under the seal of the court, public body or board, whose custodian he is, when he or it is required to have or keep such seal."

Obviously a copy of a portion of a document cannot be certified to as a true copy of the original document.

However, reference must be made also to the special statutory provisions relating to vital statistics contained in ch. 69 of the statutes.

With reference to the form of a birth certificate, sec. 69.29 (1) provides in part:

"69.29 **Standard birth certificates.** (1) The certificate of birth shall contain such items as the state board of health determines are necessary and shall agree in the main with the standard form recommended by the U.S. public health service. * * *"

Sec. 69.23 (1) and (2) provide:

"69.23 **Certified copies furnished.** (1) The state registrar, register of deeds or the local registrar of any city shall, upon request, furnish any applicant a certified copy of a record in their possession of any birth, fetal death, death, marriage or divorce.

"(2) Any officials authorized to issue birth certificates may issue a short form certificate in such form as shall be prescribed by the bureau."

Subsec. (1) standing alone would require a complete copy of the record, but subsec. (2) contemplates that there may be a birth certificate form that is shorter than the standard form.

The so-called "short" form is defined in sec. 69.29 (2) as follows:

"(2) The standard short form certificate of birth shall contain only the following information: The name of the person whom it concerns as origially recorded, or as subsequently changed pursuant to law, the sex of the person, the date on which he or she was born, the name of the town, village or city, and county in which he or she was born, and the date when the record was filed; no court order shall be required for the issuance of this certificate, whether for legitimate or illegitimate births."

This excludes the health and medical data called for in the lower part of Form No. VS 1-100M mentioned above, and as a matter of fact does not include all of the data called for in the upper part of that form.

In this connection it should be noted that Item 24 of the confidential portion of the form states: "Mother married to Father of Child Yes [ ] No [ ]."

Sec. 69.30 (1) provides among other things that: "A copy of an illegitimate birth record shall be furnished only upon the order of any county judge or judge of the juvenile court." Thus if Item 24 were answered "No" the register of deeds could not furnish a certified copy of the complete birth certificate without a court order despite any general statute such as sec. 59.51 (8) quoted above. However, this provision would not prohibit a certified copy of the entire certificate if this item were answered "Yes".

There are also other limitations which must be observed.

For instance, under sec. 69.33 (6) relating to new birth certificates in the case of adoption it is provided:

"69.33 Adoption; birth certificates. * * *

"* * *

"(6) The state registrar shall send a copy of each new certificate to the register of deeds or city health officer where a copy of the original was filed. Such register of deeds or city health officer and state registrar shall file this new record in their regular file, and impound the original which shall not be examined except upon court order or request of the state registrar."

The fact that there are exceptions of one type or another to the general law on public records and certified copies thereof is recognized in sec. 18.01 (2) relating to public records and which reads:

"18.01 **Custody and delivery of official property and records.** * * *

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

Reference might also be made to sec. 69.24 relating to fees for records such as birth certificates. Sec. 69.24 (1) (d) provides:

"69.24 **Fees.** (1) * * *

"* * *

"(d) A fee of 25 cents for a short form certificate, except that such certificate for a person under 18 years of age shall be issued free."

Another provision which should also be considered is sec. 325.21 relating to communications to doctors and with certain exceptions not material here provides that:

"325.21 **Communications to doctors.** No physician or surgeon shall be permitted to disclose any information he may have acquired in attending any patient in a professional character, necessary to enable him professionally to serve such patient, * * *."

The confidential medical section has a number of items which might come under this prohibition such as use of

prophylactic in eyes, length of pregnancy, cause of premature birth, congenital malformations, birth injury to infant, previous deliveries, complications related to pregnancy, complications not related to pregnancy, complications of labor, methods of delivery, e.g., spontaneous, manipulation without instruments, forceps, other surgical or instrumental procedures, Caesarean, etc.

While sec. 325.21 is a part of Ch. 325 entitled "Witnesses and Oral Testimony" and comes under Title XXX of the statutes relating to "Provisions Common to Actions and Proceedings in All Courts," it has nevertheless been generally regarded as a bar to the disclosure of medical information by a physician whether in or out of court, subject to the exceptions noted in the statute. See 17 OAG 385, 35 OAG 116. While *Casson v. Schoenfeld,* (1918) 166 Wis. 401, 166 N.W. 23, did involve court testimony of a physician, there is some very broad language in the opinion at pp. 412-13 where Justice Eschweiler, who wrote the opinion, stated:

"We therefore hold that the public official who, as a physician or surgeon, learns in that capacity information concerning a patient committed to his care or to him for examination in order that such physician or surgeon may be able to determine what treatment, if any, should be had or whether any treatment is possible tending to cure, benefit, or alleviate that patient, shall not be permitted to give such information to any one unless by consent of the patient.

"That a public record is required to be kept by such physician or institution does not affect the rule. A legislative provision for the filing of certain documents as public reports by physicians is not a legislative declaration that the secrecy of sec. 4075 [now sec. 325.21] as to physicians has been relaxed. *Cohodes v. Menominee & M. L. & T. Co.,* 149 Wis. 308, 313, 135 N.W. 879."

See also *Lindner v. First Nat. Bank and Trust Co.,* (1950) 9 N.J. Super. 569, 76 A. 2d 49, 51, where it was pointed out that the public policy of such statutes requires that these confidences shall not be revealed to third parties, without consent, at any time, in court or out of court.

The prohibition of the statute is directed to the physician, but the object of the statute would be defeated if information required to be furnished by the physician for public records could be handed out promiscuously by the keeper of the public record upon receipt of a request for a certified copy of the record including the confidential medical information.

From all of the foregoing it is apparent that the special provisions of the various statutes mentioned above applicable to birth certificates are controlling over any general statutory provisions relating to the furnishing of certified copies of public records generally. Where there is a conflict between a general statute and a special statute, the special statute prevails. *Jones v. Broadway Roller Rink Co.*, (1908) 136 Wis. 595, 118 N.W. 170.

However, this still poses a problem so far as the certification is concerned. We do not have before us the form of the certification which your register of deeds is using, but he obviously cannot furnish a part of the form only and certify that it has been compared by him with the original and that it is a true copy thereof as is provided in sec. 327.08. Nor if a photostatic copy of the top of the form is used with the bottom or confidential portion masked out can he correctly certify that it is a true and correct reproduction of the birth certificate.

No public official is required to certify to a falsehood, and indeed his conscience should not permit him to do so.

It would seem that the proper answer to the dilemma is to certify that he has compared the copy furnished with the non-confidential portion of the original and that it is a true copy thereof or in the case of a photostatic copy of that portion to certify that it is a true and correct reproduction of the non-confidential portion of the record.

This should be adequate for all normal needs of one seeking a certified copy of his birth certificate. Usually these are requested in connection with matters such as applications for employment, passports, and pension or social security applications and the like. Whether there was a high

or low forceps delivery, surgery, or complications related to pregnancy or labor or otherwise is not germane to the usual purposes intended to be served by a certified copy of a birth certificate, although such information may be of statistical value to the state board of health and U.S. public health service or in furthering research in the subjects of gynecology and obstetrics.

The only other suggestion we have to offer would be the introduction of a bill in the legislature with provisions in the bill which would expressly spell out the policy to be followed on requests for certified copies of birth certificates.

WHR

Legislature—Words and Phrases—Discussion of sec. 20.530 (1) (f) relative to expenses for legislators during recesses when the legislature is not actually in session.

February 5, 1964

C. A. REUTER, *Director*
Bureau of Finance

You have asked my opinion of the proper interpretation of section 20.530 (1) (f) as created by ch. 225, Laws of 1963, published August 30, 1963 insofar as it provides an expense allowance "for each full calendar month during which the legislature is not actually in session." Your inquiry relates to periods of time in which the legislature is "in recess" under the recent ruling of the supreme court in the case of *State ex rel. Thompson v. Gibson et al.*, (December 20, 1963).

In my opinion the legislators are entitled to the expense allowance provided by sec. 20.530 (1) (f) for each full calendar month during which the legislators are in recess.

Your problem arises out of the fact that in the *Gibson* case the court reaffirmed its ruling in *State ex rel. Sullivan*

v. Dammann, (1936) 221 Wis. 551, that the legislature was "in session" during a period of recess which amounted in the *Sullivan* case to some seven days. In the *Gibson* case the court held that a much more extended period of time, that is from August 6, 1963 to November 4, 1963, was also a period of recess and hence could not properly be described as a period when the legislature was "not in session" as that term is used in sec. 14.22.

However, the statute under construction states that the legislators are entitled to the expense allowance provided therein for each full calendar month when the legislature is "not *actually* in session."

I emphasize the word "actually" because in the *Sullivan* case the court repeatedly used the phrase "actually in session" in contradistinction to the phrase "in session" which could include periods when the legislature is constructively in session, but is in fact in recess. It seems clear in the *Sullivan* case that the court used the phrase "actually in session" to refer to the periods of time when the legislators were actually present in Madison and carrying out the business of the legislature.

Moreover, since this particular legislature must have had in mind the experiences of the 1961 legislature which had extended periods of "recess", it clearly intended, as part of a reorganization of its pay plan to include such periods of recess as periods when expenses were allowable. That is, for all extended periods of time when the legislator was at home in his district and carrying out his business as legislator by personal contacts and correspondence with his constituents or in related manners, he should receive an allowance for expenses incurred during the period. This intention of the legislature is clearly discernable from the purpose of the enactment and is consistent with the use of the phrase "actually in session" in the *Sullivan* case.

Accordingly, to answer your questions as you specifically raised them, I state the following:

(1) Legislators are entitled to the expense allowance provided by ch. 225, Laws 1963, for each full calendar month when the legislature is in recess.

(2) The expense allowances for September and October, 1963 were properly and legally paid.

(3) In my opinion, the expense allowance may be paid for the month of January, 1964 and for subsequent months until the legislators are again actually in session.

RGT

Words and Phrases—Huber Law—Prisoners—Under sec. 56.08 (4) "board" for Huber law prisoners is limited to reasonable cost of meals and may be charged only when prisoner is gainfully employed. Reimbursement may be required for personal items furnished prisoners.

February 12, 1964

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

In your letter of November 19, 1963, addressed to this office, you state:

"Our attention increasingly is being called to the fact that several Wisconsin counties appear to be in violation of the provisions of the 'Huber Law,' specifically Section 56.08 (5) (a). One county, for example, has been charging Huber Law prisoners $4.94 per day for board and it is our understanding that this charge is to be increased by approximately $1.00 beginning January 1. This charge is admittedly the total daily per capita cost of operating the jail, including provisions for the salaries of jail employees.

"Section 56.08 (5) authorizes the sheriff to disburse from the wages or salaries of employed prisoners amounts to cover certain stated obligations, the first of which is 'the board of the prisoner.' Over the years this has been generally interpreted to mean the actual out-of-pocket cost of food. This has been our understanding of the meaning of the phrase 'the board of the prisoner' and with but two ex-

ceptions has been the understanding of the counties. Most counties establish the charge for board on the basis of actual meal costs including preparation where the county maintains a commissary, or the charge made by restaurants where meals are purchased, or the amount for which the sheriff is reimbursed for the furnishing of meals where the fee system is in effect.

"Under the circumstances, we are requesting an opinion with respect to the following questions:

"1. What is the meaning of Section 56.08 (5) (a) 'the board of the prisoner?'

"2. Does a county board have the authority to fix a charge for 'board' of Huber Law prisoners which will permit the county to recover the total per capita cost of the operation and maintenance of the county jail?

"3. In some counties prisoners working under the Huber Law on a five-day week basis are charged board for the entire seven days. In other counties the charge is based only on meals actually provided during days on which the prisoner is employed. What does the statute authorize?

"4. Is it proper for a county to charge a prisoner for the cost of board during periods when the prisoner is unemployed?"

The answers are summarized at the conclusion hereof.

As used in sec. 56.08 the term "board" of a prisoner refers, in our opinion, to meals only, nothing else. The noun "board" in the sense here employed is a word which has a definite, well-known popular meaning, and is not a term of art, as illustrated by the phrase "room *and board*" — noting that "board" is not understood to include room or lodging.

Webster's New International Dictionary (2d Ed.) 298 states one definition of the noun "board" as:

"A table; now, a table for food, esp. when spread. * * * Hence, what is served on a table as food; stated meals; provision; * * *." See also 5 Words & Phrases (Perm. Ed.) Supp. 109, 110.

Sec. 56.08 (the "Huber Law") is designed not only for the benefit of the county by reimbursement, but also and primarily for that of the prisoner's dependents, if any, and his judgment creditors and those persons acknowledged in writing by the prisoner to be his creditors.

Sec. 56.08 (5) provides:

"By order of the court, the wages or salaries of employed prisoners shall be disbursed by the sheriff for the following purposes, in the order stated:

"(a) The board of the prisoner;

"(b) Necessary travel expense to and from work and other incidental expenses of the prisoner;

"(c) Support of the prisoner's dependents, if any;

"(d) Payment, either in full or ratably, of the prisoner's obligations acknowledged by him in writing or which have been reduced to judgment."

Had the legislature intended that "board" as used in sec. 56.08 was to include items other than meals, it could easily have so provided. See, e.g., 41 OAG 41 (1954), in which this office gave its opinion upon the question of what items were included in the term "expense" contained in sec. 62.24 (2) (b), which then provided, and still provides:

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

This office there stated its opinion to be that "expense" under sec. 62.24 (2) (b) included only out-of-pocket expenses for food, medical care, laundry and like items, and did not justify a "lodging" charge based upon any cost accounting share of salaries, heat, light, gas, water, insurance, supplies, etc. That opinion has not been nullified by any subsequent legislation or court decision. Consequently, no such additional charges may be attributed to "board", which is clearly much more limited than "expense".

The question whether a county may charge for all meals furnished a prisoner, or only for those furnished him on his days of employment, presents some difficulty. However, since there is nothing in sec. 56.08 providing any limitation of board charges to meals furnished only on the days of a prisoner's employment, a county should require the sheriff to collect for all meals furnished a prisoner during the term of his employment. Otherwise, a prisoner gainfully employed under the Huber Law would be free of meal expense on his "off" days, whereas if he were not a prisoner, he would still have to pay for his own meals on such days, as well as on his days of employment. This is just what sec. 56.08 contemplates. Again, if the legislature had intended that "board" should be charged and collected only for the prisoner's days of actual employment, it could have so stated.

On the other hand, sec. 56.08 does not mean that a Huber Law prisoner may be charged the cost of board during periods of unemployment. This is clearly provided by the first sentence of sub. (4), which states:

"Every prisoner *gainfully employed* is liable for the cost of his board in the jail as fixed by the county board. * * *"

During a period of unemployment in the sense here used, a person cannot properly be said to be then "*gainfully employed.*" *Slocum Straw Works v. Industrial Commission,* (1939) 232 Wis. 71, 286 N.W. 593. Hence, the statute must be construed to mean that a Huber Law prisoner is liable for the cost of his board only while he is "gainfully employed."

Sec. 56.08 (4) provides that the *cost* of such board is to be the cost as fixed by the county board. No criteria with respect thereto are provided by the statute, but citation of authority is unnecessary for the rule that such cost must be reasonable in amount. Your letter states that such charges are in practice arrived at by charging actual cost of meals (including preparation) in counties maintaining a commissary, or the actual restaurant charges where such meals are purchased, or the amount allowed to the sheriff

for furnishing meals to prisoners. Upon the basis that in all such cases, the charges must in fact be reasonable, the practical interpretation of the statute by those officials charged with its administration is entitled to considerable and perhaps controlling weight, especially if such interpretation has prevailed for a long period of time. *Trczyniewski v. Milwaukee,* (1961) 15 Wis. 2d 236, 112 N.W. 2d 725. Therefore, the cost of board under sec. 56.08 may properly be determined in accordance with the above interpretations. Certainly the county is not entitled to make a profit on the prisoner's meals at the expense of his dependents or creditors or both. The statute, sec. 56.08 (4), permits a charge for the *cost* of his board only, not cost plus a profit.

Your questions are therefore answered as follows:

1. "Board" of a prisoner under sec. 56.08 refers solely to meals furnished, and includes no other items.

2. The charge for such board may not include per capita cost of operation and maintenance of the jail. Such charge must be reasonable and may be based on actual cost and preparation of meals, charges made by restaurants for meals purchased, or amounts allowed to the sheriff for furnishing such meals.

3. Huber Law prisoners gainfully employed are to be charged the cost of board furnished during the entire period of such employment, including non-work days.

4. If such a prisoner ceases to be so employed, he may not be charged for his board during the period of unemployment.

We should mention that sec. 56.08 (5) (b) directs reimbursement of "necessary travel expense to and from work and other incidental expenses of the prisoner." We believe that reimbursement for the cost of items such as laundry, shaving supplies, and other personal items furnished to a Huber Law prisoner is proper under that provision of the statute, subject to the limitations above expressed.

RDM

Land Surveying—A corporation or partnership can practice or offer to practice land surveying through persons duly registered with the board, even though such corporation or partnership cannot be registered.

February 21, 1964

WISCONSIN REGISTRATION BOARD OF
ARCHITECTS AND PROFFESSIONAL ENGINEERS

You have requested an opinion whether a corporation or partnership can practice or offer to practice land surveying.

The answer to your question is in the affirmative providing that such practice is accomplished for the corporation or partnership by land surveyors duly registered by the registration board.

Such corporation could be, but would not have to be organized under the provisions of sec. 180.99, "The Service Corporation Law", which is applicable to persons licensed, certified or registered pursuant to any provisions of the statutes and who are engaged in carrying on a particular profession, calling or trade for which licensure, certification or registration of individuals is required. For a discussion of this law, see 51 OAG 157.

You also inquire whether such corporation or partnership can advertise that it is a land surveyor.

The answer to this question is in the negative. However, the corporation or partnership can advertise that it offers land surveying services through individuals registered with the board.

Sec. 101.31, regulating architects and professional engineers and sec. 101.315, regulating land surveyors are administered by divisions of the board. Sec. 101.31 provides for the registration of qualified individuals as architects or professional engineers. Sec. 101.31 (7) provides that a firm, copartnership, corporation or joint stock association may engage in the practice of architecture or professional engineering, without registration, provided that such

practice is carried on under the responsible supervision of one or more registered architects or professional engineers and provided that the executive director and holders of the majority of the capital interest or stock are registered.

Sec. 101.315 contains no counterpart permitting a firm, partnership or corporation to practice land surveying. However, it may be added that such section does not contain an express prohibition against such practice.

Sec. 101.315 (1) (a) provides:

"(a) No person shall, after January 31, 1956, practice land surveying in this state or use or advertise any title or description tending to convey the impression that he is a land surveyor unless he has been issued a certificate of registration or granted a permit to practice as provided by this section."

Since the words "no person" are not defined in the section, the definition provided in sec. 990.01 (26) would apply, the word person would include partnerships, firms, or corporations, and the general prohibition would be applicable unless there is some valid reason why the statute should be construed so as to permit corporations or partnerships to engage in the activity through registered persons. The pronoun "he" used in the section includes the neuter gender. Sec. 990.001 (2).

While a corporation is in some sense a person and for many purposes is so considered, yet, as regards the learned professions which can only be practiced by persons who have received a license to do so after an examination as to their knowledge of the subject, it is recognized that a corporation cannot be licensed to practice such a profession, absent specific statutory authority. 13 Am. Jur. 838.

The majority of the decisions on the subject hold that neither a corporation nor any other unlicensed person or entity may engage in the practice of medicine, surgery or dentistry through licensed employes. The basis for such decisions is generally that the specific statute in question permits issuances of licenses only to those passing certain per-

sonal examinations and having specified personal qualifications.

103 ALR 1240;

Rust v. State Board of Dental Examiners, (1934) 216 Wis. 127, 256 N.W. 919.

Corporations act through employes and agents, and the corporation itself is incapable of possessing the necessary qualifications and of taking the required examination.

Many states have statutes which either permit or prohibit corporations to practice architecture, which in some states is recognized as a learned profession. The cases cited in the annotation at 56 ALR 2d 726 are not pertinent here as the statutory language is controlling in each case.

There is a split in authority as to whether optometry may be practiced by an unlicensed person or corporation through the employment of licensed persons or lease arrangements with them. Most states prohibiting such practice treat optometry as a learned profession. 88 ALR 2d 1294-1302.

In an opinion to the Wisconsin assembly dated April 8, 1963, it was stated that optometry is a professiona and that the legislature could prohibit the practice of optometry by corporations.

Whether, apart from charter limitations, if any, a corporation may be licensed to act as an auctioneer, broker, embalmer, plumber, pharmacist, or etc., through licensed employes is largely a matter of the terms and construction of the licensing statutes. Such statutes are frequently so drawn as to indicate that the draftsman had principally in mind the licensing of individuals, *notwithstanding which they have often been construed by the courts as extending to corporations. State v. Winneshiep Co-op. Burial Assoc.,* 237 Iowa 556, 22 N.W. 2d 800, 165 ALR 1092.

We have been unable to find any cases which accord the practice of land surveying professional status. It is a skilled trade or calling requiring registration after a showing of educational attainment and passing of oral and written or

written examination, or a record of experience in land surveying of a satisfactory character. See sec. 101.315 (2) and (3).

The provisions of sec. 101.315 as to personal, educational, and experience requirements of applicants, are indicative of an intent on the part of the draftsman to limit the right of registration and the right to practice to individuals. However, I am of the opinion that the courts would construe the statute so as to permit corporations and partnerships to practice land surveying through registered agents or employes.

The statutes involved are penal in nature and are to be construed in favor of the person sought to be penalized provided such construction does not defeat the obvious intention of the legislature.

One of the purposes of the statute is to insure competent service to the public and such purpose may be fully accomplished although the land surveyor rendering the service is an employe of a corporation or a member of a partnership.

There may be valid reasons for prohibiting or at least regulating the practice of land surveying by corporations or partnerships even where the services are performed by registered individuals and even though the board has disciplinary powers over the individuals concerned. If such is the case it is suggested that the area is in need of specific legislation.

RJV

Juvenile Court—When the juvenile court acquires jurisdiction over a child, it does not lose juirsdiction by virtue of the fact that the child attains the age of eighteen during the course of the proceedings and before the juvenile court makes a disposition of the case.

February 24, 1964

WILLIAM J. MCCAULEY
District Attorney, Milwaukee County

You ask, "Does the Juvenile Court lose jurisdiction in traffic cases when the juvenile attains the age of eighteen prior to an adjudication for a violation having occurred before the age of eighteen years.?"

Your question assumes that the juvenile court has already acquired jurisdiction. Once the juvenile court acquires jurisdiction, it does not thereafter lose jurisdiction merely on account of the child having attained the age of eighteen years during the time proceedings are progressing.

In *State ex rel. White v. District Court,* (1951) 262 Wis. 139, 54 N. W. 2d 189, our supreme court said:

"* * * In a case in which two courts are given concurrent jurisdiction over a particular subject matter, and one of such courts has assumed jurisdiction, it is reversible error for the other to also assume jurisdiction. *Kusick v. Kusick,* (1943) 243 Wis. 135, 9 N.W. 2d 607; and *Cawker v. Dreutzer,* (1928) 197 Wis. 98, 129, 221 N.W. 401. * * *"

In light of this language, the supreme court would, in my opinion, hold that once the juvenile court acquires jurisdiction, it would not lose it by virtue of the fact that the child reached the age of eighteen years before disposition by the juvenile court.

I may be remiss if I did not discuss sec. 48.39, which provides:

"48.39 **Disposition by juvenile court bars criminal proceeding.** Disposition by the juvenile court of any violation of state law coming within its jurisdiction under s. 48.12 shall bar any future proceeding on the same matter in criminal court when the child reaches the age of 18. This provision does not affect proceedings in criminal court which have been transferred under s. 48.18."

The argument might be advanced that an implication arises from the language of this section that if there has been no disposition by the juvenile court in a pending matter before the child reaches the age of 18, a proceeding on the same matter is permissible in criminal court once the child reaches the age of 18. However, I believe that the language and cases cited in the *State ex rel. White, supra,* decision would bar this conclusion.

The same reasoning and rule apply to the disposition of other delinquency cases as to traffic violations, in that I do not believe that the language of Ch. 48 warrants a distinction.

Because ch. 48 does not now provide a clear answer to the question answered herein, it is my further opinion that legislation clarifying the matter would serve a useful purpose.

WHW

Minors—Fermented Malt Beverages—Minors who are members of the armed services station in Michigan may not be furnished with fermented malt beverages in Wisconsin by reason of sec. 66.054 (22) regardless of where their permanent residence is located.

March 2, 1964

DANIEL J. MIRON
District Attorney, Marinette County

You have requested an opinion regarding whether Wisconsin taverns holding fermented malt beverage licenses may serve beer to minors 18 years of age whose permanent residence is not in a border state but who are members of the armed services stationed at bases in upper Michigan. Sec. 66.054 (22) provides:

"(22) FURNISHING TO NONRESIDENT PERSONS UNDER 21. No person shall sell, dispense, give away or

furnish any fermented malt beverages to any person under the age of 21 years who is not a resident of this state and is a resident of any state bordering on Wisconsin which prohibits the sale of fermented malt beverages to any person under the age of 21 years, and no such person shall possess any fermented malt beverages, unless he is accompanied by parent or guardian or spouse. For the purposes of this subsection, students may be deemed residents of the municipality in which they reside while attending school and members of the armed services may be deemed residents of the municipality in which they are stationed at the time."

All 4 of the states bordering Wisconsin prohibit selling or furnishing beer to minors. 43 Smith-Hurd Ill. Ann. Stats., §§ 131, 134a; Iowa Code Ann. § 124.20; Mich. Stats. Ann. § 28.336 (1); Minn. Stats. Ann. § 340.14 subd. 1. Minnesota also restricts the sale or furnishing of beer of not more than 3.2% alcoholic content to minors accompanied by parent or guardian. Minn. Stats. Ann. § 340.03. The beer ordinarily sold in Wisconsin taverns is not restricted to 3.2% alcoholic content and its sale or furnishing to minors is prohibited absolutely in Minnesota by sec. 340.14 subd. 1.

The purpose of sec. 66.054 (22) is to prevent the invasion of Wisconsin border counties by minor residents of neighboring states who are unable legally to obtain fermented malt beverages in their home states by reason of age limitations imposed there by law. It was enacted in part to cooperate with the neighboring states in preventing the policy of their laws from being frustrated, but primarily to prevent disorders and other misconduct by such nonresident minors which frequently created police problems in the border counties.

Because the legal residence of students and members of the armed services is ordinarily not at the location of the school or military base, it was necessary to make special provision for them in accordance with the purpose of the law.

Thus a minor student who has a legal residence in a border state but who actually lives in Wisconsin is deemed to be a resident of Wisconsin whether the school which he is

attending is in Wisconsin or outside of it, and a minor member of the armed forces who has a legal residence in any other state but who is stationed in Wisconsin is deemed to be a resident of Wisconsin; and likewise a minor who has a legal residence in Wisconsin or in any other state who is actually living in a border state and attending school (whether in Wisconsin or elsewhere) or is in the armed forces and stationed in a border state, is deemed to be a resident of the municipality (and hence of the border state) where he is living or stationed respectively. This is necessary in order that the legislative purpose in enacting the statute will be carried out. It is irrelevant to that purpose where the minor's legal residence is located. The question is, where is he actually residing at the time of the proposed purchase of beer.

The last sentence of the statute above quoted makes it clear that the minor members of the armed services referred to in your letter may not be served or furnished beer in Wisconsin.

WAP

County Board—Certificates—Under sec. 331.35 a trial judge's certificate, when required, may be issued subsequent to county board resolution authorizing payment of reasonable expenses incurred within purview of the statute.

March 6, 1964

FRANK W. CARTER, JR.
District Attorney, Vilas County

You have asked this office for an opinion as to whether sec. 331.35 authorizes the payment by Vilas county of legal expenses incurred by a county officer (presumably a defendant in a legal proceeding of the type included within the statute) if, at the time the county board adopts a resolution directing such payment, the certificate of the trial judge,

mentioned in the last sentence of sec. 331.35, had not been issued. You indicate that such certificate was issued about a week after the resolution had been adopted by the board.

The statute provides:

"Expenses in actions against municipal officers. (1) Whenever in any city, town, village, or county charges of any kind shall be filed or an action be brought against any officer thereof in his official capacity, or to subject any such officer, who is being compensated on a salary basis, to a personal liability growing out of the performance of official duties, and such charges or such action shall be discontinued or dismissed or such matter shall be determined favorably to such officer, or such officer shall be reinstated, or in case such officer, without fault on his part, shall be subjected to a personal liability as aforesaid, such city, town, village, or county may pay all reasonable expenses which such officer necessarily expended by reason thereof. Such expenses may likewise be paid, even though decided adversely to such officer, where it shall appear from the certificate of the trial judge that the action involved the constitutionality of a statute, not theretofore construed, relating to the performance of the official duties of said officer."

Sec. 331.35 does not appear to have been construed either by the courts or this office with respect to your question.

I find no requirement in the statute that the certificate must have been issued prior to the adoption of the authorizing resolution. The statute merely provides that the reasonable expenses may be paid if the proper certification is made by the trial judge.

In my opinion, therefore, the issuance of the certificate is prerequisite only to actual payment, not to the resolution authorizing the same, although the disbursing officers must, of course, be authorized by the county board to make the payment, and should disburse no funds therefor until the authorizing resolution has been adopted and the certificate has been issued.

I must advise, however, that in our opinion, sec. 331.35 applies only in cases involving county officers who are legal officers, and does not apply to county personnel who are not officers in point of law. Certain circumstances, of which this office is aware, lead us to the belief that your question refers to the county forester of Vilas county. If so, sec. 331.35 does not, in our view, apply since the county forester is not an officer, nor does he perform official duties, both of which elements are required by the last sentence of sec. 331.35. The county board has no power to establish a county office unless it has been created by the constitution or by statute. Sec. 59.15 (2) and (3), Stats.; 35 OAG 474 (1946); 37 OAG 221 (1948). We find no statute creating the office of county forester. Therefore, payment of expenses incurred by the county forester may not, in our opinion, lawfully be made under sec. 331.35.

RDM

Mileage Allowance—Sheriffs—Under sec. 59.28 (2) (a) a sheriff, in other than a county having population of 500,000 or more, can charge for mileage while serving civil process only when he is successful in making service. Fact situation would govern individual cases.

March 11, 1964

LOUIS F. GERARD
Corporation Counsel, Racine County

Your recent letter raises question about sec. 59.28 (2), Stats. 1961. Sec. 59.28 (2) was amended by ch. 37, Laws 1963, and now provides:

"(2) (a) Except in counties having a population of 500,000 or more, traveling in making service of any summons, writ or other process, except upon criminal warrants, ten cents per mile for each mile actually traveled going and returning. The sheriff shall serve *all process,* orders and

papers in *any one action or proceeding* which may then be in his hands for service, which can be served at the *same time* and upon *all persons* upon whom service is required who can be served in the *same journey*, and he shall be entitled to one mileage for the greatest distance actually traveled by him to make such service, and no more. For summoning grand and petit jurors no traveling fees shall be charged for more than the distance actually and necessarily traveled in summoning such jurors."

You state that the sheriff attempts to serve all persons to be served in a particular action or proceeding on one trip, but that this is not always possible. The question is then posed, "If it is necessary to make two or more trips to serve all defendants, is it proper to charge mileage for the *total* mileage actually traveled, assuming each trip is successful in obtaining service on one or more persons?"

A sheriff is entitled to only those fees and mileage charges which are specifically provided for by the statute. 21 OAG 39 (1932). The few cases in this state on the subject of sheriff's mileage have uniformly held that a sheriff cannot charge for mileage if he is unsuccessful in making service. Even if on a subsequent trip he succeeds in making service, he cannot charge mileage for the prior unsuccessful trip.

Northern Trust Company v. Snyder, (1902) 113 Wis. 516, 89 N.W. 460;

Schneider v. Waukesha County, (1899) 103 Wis. 266, 79 N.W. 228;

21 OAG 39 (1932).

Although the above cases involve mileage for service of papers in criminal actions or proceedings, the rule is no different in civil cases. "In a majority of jurisdictions a sheriff is not entitled to, as a matter of right, and cannot recover, mileage for travel in attempting to serve process or make an arrest which was not actually or lawfully served or made and even though he ultimately served the process or made the arrest he cannot charge mileage for previous

unsuccessful attempts." 80 Corpus Juris Secundum, Sheriffs and Constables, § 251, p. 541.

The apparent reason for not allowing a sheriff mileage when unsuccessfully attempting to make service was stated in *Ex Parte Wyles,* 1 Denio 658, where Justice Beardsley wrote:

"The rule is probably without exception that no fees are allowed to any officer for traveling in order to serve process unless the service is actually made. I think the principle is entirely settled and it is, moreover, one of sound policy. It excites to vigilance and fidelity, whereas the opposite would afford a strong temptation to remissness and fraud."

This language was quoted with approval by our court in *Northern Trust Company v. Snyder, supra.*

The only exception to the rule appears to be in those states, such as Minnesota, where the statute expressly allows for mileage in instances where the officer, acting in good faith, attempted to make service.

The language in sec. 59.28 (2) (a) directs the sheriff to serve all process in any one action or proceeding on all parties on one journey, if this is at all possible. There is then only one mileage for the greatest distance actually traveled. Whether the sheriff can charge for *total* mileage when on one journey he is successful in serving some parties, but unsuccessful in serving others to the same action, would depend on the individual fact situation.

For example, suppose the sheriff is attempting to serve three defendants in an action. Defendant "A" lives five miles from the courthouse on highway X, north of the city. Defendant "B" lives on the same highway in the same direction, but ten miles from the courthouse; and Defendant "C" lives five miles beyond Defendant "B". The sheriff unsuccessfully tries to serve "A" and then proceeds to serve "B" and "C" at their respective homes. The next day he is successful in serving "A" at his home. Under such circumstances, the sheriff would be entitled to 30 miles of travel for the first day and 10 miles on the second day. In such an

instance, this would constitute the *total* mileage actually traveled by him even though he was unsuccessful in serving "A" on the first day.

On the other hand, if in the same situation the sheriff successfully served "A" and "B", but after driving out to "C's" house was unable to make service on him, under the Wisconsin cases the sheriff could only charge 20 miles for travel. He could not charge for the extra 10 miles actually traveled by him because he was unsuccessful in making service on "C". If, the next day, the sheriff drove out to "C's" house and did make service he could charge 30 miles of travel, but he could not then charge for the 10 miles he traveled the previous day.

One can, of course, think up many hypothetical situations. In some of them the sheriff would be able to claim his total mileage and in others he would not. The thing to remember is that there can be no charge for mileage for that portion of a journey which did not culminate in service while on the journey, unless it was necessary to undertake the same travel to accomplish service on another party to the same action, as in our first example.

As a result of the passage of ch. 37, Laws 1963, the former 59.28 (2) was renumbered 59.28 (2) (a) and was made to apply only to counties having a population of less than 500,000. This chapter also created sec. 59.28 (2) (b) relative to counties having a population of 500,000 or more. The above opinion is in respect only to counties having a population of less than 500,000.

BRB

Outdoor Recreation Act—Statutes—Discussion of secs. 20.703 (41) and (42) and 15.60 (1) (b) relative to the continuing appropriation to the State Recreation Committee.

March 19, 1964

WAYNE F. MCGOWN, *Director*
Bureau of Management, Department of Administration

You have raised several questions concerning the administration of the Outdoor Recreation Act of 1961, ch. 427, Laws 1961, in the event that the 1963 legislature does not give renewed specific instructions to the state recreation committee created by that act. These questions are:

(1) Does the appropriation made by s. 20.703 (41) continue during the life of the State Recreation Committee as specified in s. 15.60?

(2) Specific maximum allocations to participating agencies were listed in s. 20.703 (41) for the 1961-1963 biennium. In the absence of any specific maximum allocations for the 1963-1965 biennium, is it the responsibility of the State Recreation Committee to determine those allocations, and if so, should that determination be made in accordance with the proportional distribution described in 15.60. If not, what method should be used to arrive at the allocations for the 1963-65 biennium?

(3) Once the allocation of funds to be assigned to the participating agencies from s. 20.703 (41) has been determined for the 1964-1965 year, may those agencies proceed to expend the funds during the 1964-1965 fiscal year from their respective expending sections delineated in s. 20.703 (41), according to the purposes specified therein?

(4) What is the status of s. 20.703 (42) as of July 1, 1964?

The answer to your first question is "Yes". This section, 20.703 (41), creates a continuing appropriation which is effective until altered, amended or repealed by the legislature. *Holmes v. Olcott,* (1920) 96 Oregon 33, 189 Pac. 202; *People ex rel. Millner v. Russel,* (1924) 311 Illinois 96, 142 N.E. 537-540; 81 C.J.S., at page 1224 states:

"In the absence of a specific constitutional prohibition, the legislature may make continuing appropriations. The

effect of adopting such a continuing appropriation is the same as if its terms were written into the successive appropriations bills as and when they are passed, and a continuing appropriation once effectively made and not containing any time limitation will stand until annulled by some constitutional statute. * * * It has been held that a tax levied for a certain object is a continuing appropriation of the proceeds of the tax for that object.

"A continuing appropriation may be repealed, as by the subsequent adoption of legislation conflicting in provisions with that establishing such appropriations; but this result does not follow unless there is an irreconcilable conflict between the earlier and the later legislation. * * *"

In answer to your second question, in the absence of specific legislative instructions or limitations such as were created for the 1961-1963 biennium by secs. 15.60 (6) which reads in part, "Projects for the biennium July 1, 1961 to June 30, 1963, shall be limited to the following list of high priorities * * *", and 20.703 (41) (b) which is headed with the statement, "The moneys available in the 1961-1963 biennium shall be transferred in accordance with the following allocations: * * *" it is the responsibility of the state recreation committee to determine the allocations in accordance with the legislative intent as set forth in sec. 15.60 (1) (b).

The simplest procedure for the state recreation committee to follow would be to make proportional allocations in accordance with the allotments as set forth in sec. 15.60. In the event the state recreation committee does not make proportional allotments, it would be highly advisable for it to adopt a long-range program which would insure that at the termination of the ten-year period the goal set forth in sec. 15.60 as to the allotment of funds would be met.

The answer to your third question is "Yes". The funds have been appropriated to the state recreation committee specifically by sec. 20.703 (41) which states that the said funds "are appropriated therefrom to the state recreation committee for the purposes specified in s. 15.60" [and other

statutes] and by implication by the continuing appropriation contained in secs. 139.50 (2) (b) and 139.51 (2) (b). When the funds have been allocated by the state recreation committee for any of the purposes specified in sec. 15.60 (1) (b) the agency to which the funds are allocated may spend them in accordance with the terms of the allocation.

In answer to your fourth question sec. 20.703 (42) creates a continuing appropriation identical with that established by subsec. (41) discussed in answer to your first question. The appropriation for the expenses of the state recreation committee will continue until altered, amended or repealed.

RGT

Words and Phrases—Chiropractic License—Under sec. 147.23 (3) preliminary education consisting of two years of college must precede enrollment in school of chiropractic to permit taking of examination for license.

March 23, 1964

D. N. LAMOUREX, *Secretary*
State Board of Examiners in Chiropractic

You have requested my opinion whether the preliminary education at the college level, required of an applicant for a license to practice chiropractic under the provisions of sec. 147.23 (3), must have been completed by the applicant prior to his entry into chiropractic college.

You state that contention has been made that the two years of study may be completed any time before the student graduates from an accredited chiropractic school. You indicate, however, that ever since the two year college requirement was enacted in 1955, the board has been consistent in requiring applicants to produce evidence of two years of college level attainment preliminary to enrollment at a chiropractic school for professional training, and that prior to 1955, when the statutory requirement was prelimi-

nary education equivalent to graduation from an accredited high school, evidence of such successful completion prior to enrollment at a chiropractic school was consistently required over a long period of years.

The answer to your question is in the affirmative.

Sec. 147.23 (3), so far as material, provides:

"(3) Application for a license to practice chiropractic shall be made to the board of examiners in chiropractic, accompanied by sufficient and satisfactory evidence of good moral character, *preliminary education* consisting of the first 2 years of study in a regularly prescribed course for a bachelor of arts or science degree in a college accredited by the north central association of colleges and secondary schools, graduation from a reputable school of chiropractic, approved and recognized by the board of examiners in chiropractic, having a residence course of not less than 36 months, consisting of not less than 3,600 60-minute class periods, certificate of registration in the basic sciences, and a fee of $25. * * *"

The word "preliminary" as used in the statute means exactly what it says. "Preliminary" means preceding the main business, preparatory. *McComb v. C. A. Swanson & Sons,* (DC Neb. 1948) 77 F. Supp. 716, 732; *Hostetter v. Muskingum Watershed Dist.,* (1938) 58 Ohio App. 161, 16 N.E. 2d 428, 431.

See, Webster's Third International Dictionary to the same effect.

Statutes which are plain and unambiguous on their face are not subject to interpretation or construction by resort to cannons of statutory construction. *Estate of Riebs,* (1959) 8 Wis. 2d 110, 115, 98 N.W. 2d 453. Even if the statute is unclear on its face, application of the rules of statutory construction leads us to the same interpretation.

The conclusion here reached is emphasized by the placement of the language in the statute. The word "preliminary" immediately precedes and modifies the word "education". The words "preliminary education" also precede the re-

quirement of attendance at and graduation from a reputable school of chiropractic. Attendance at a school of chiropractic also constitutes education. However, it is at the professional level and is not preliminary education within the meaning of those words as used in sec. 147.23 (3).

An argument could be made that the "main business" is achievement of licensing in chiropractic, and that while the 2-year college requirement and graduation from a school in chiropractic are both preparatory to such licensing, the 2-year college requirement need not precede enrollment in a chiropractic college.

The administrative interpretation of this statute by the licensing board concerned, however, is to the contrary, and must be given considerable weight if the statute is unclear and this is especially true where the agency involved has relied upon the advice of the attorney general as is the case here.

State ex. rel. Brunkhorst v. Krenn, (1959) 8 Wis. 2d 116, 98 N.W. 2d 394.

It cannot be disputed that the purpose of the former statute requiring preliminary education equivalent to graduation from an accredited high school in this state was to improve the profession. It has never been contended, under the former statute, that an applicant for a chiropractic license could make up any deficiencies in his high school preliminary education after he had entered chiropractic school.

In 1955, members of the profession sought to further improve the profession by requiring more preliminary education at the college level before enrollment in chiropractic college. The legislative history of ch. 517, Laws 1955, clearly bears this out.

The purpose of the additional requirement was sought to be obtained by screening out prospects who were barely able to get through high school, and who were not of college caliber. It was also recognized that by doing two years of work in an accredited college, the student would not only

have demonstrated his capacity for college work, but would have received valuable training in study habits and would have acquired some essential background in the basic cultural subjects which should form part of the equipment of any professional man. While the college level requirements of this statute are general, these objectives would be largely defeated if the required 2-years of preliminary college training were permitted after enrollment in the chiropractic school.

Ch. 517, Laws 1955, was an outgrowth of Bill No. 244, A. Its stated purpose was to increase the educational requirements for a license to practice chiropractic.

As originally drafted, Bill 244, A., retained the language of sec. 147.23 (3), Stats. 1953, as follows:

"* * * evidence of good moral character, preliminary education equivalent to graduation from an accredited high school of this state, graduation from a reputable school of chiropractic, * * *"
and added new language at the end of said section as follows:

"From and after January 1, 1959, it shall be required that an applicant for a license shall present sufficient and satisfactory evidence of education equivalent to the first 2 years of study in a regularly prescribed course for a bachelor of arts or science degree, in an accredited college granting such a degree."

Substitute Amendment No. 1, A., to Bill No. 244, A., placed the additional college requirement up in the body of the subsection and deleted reference to the high school educational requirement, which was also required by sec. 147.05, relating to applicants for registration in the basic sciences, which chiropractic applicants must also meet. Substitute Amendment No. 1, A., was adopted by the legislature and became law and provided in part:

"* * * evidence of good moral character, preliminary education *substantially equivalent to the first 2 years of study in a regularly prescribed course for a bachelor of arts or*

science degree accredited by the North Central Association of Colleges and Secondary Schools, graduation from a reputable school of chiropractic, * * *." (Indicating language deleted and new material.)

The drafting record in the legislative reference library to ch. 517, Laws 1955, shows that Substitute Amendment No. 1, A., to Bill No. 244, A., 1955, was requested by H. M. Mickler, Merrill, Wisconsin and Dr. L. J. Murphy and the record contains the following instructions:

"Amend 244, A. Want to prescribe college work before student enters chiropractic school. See the attached proposed section 147.23 (3) like which Bill 244, A. shall be amended."

The intent of the legislature is the controlling factor in the interpretation of a statute and great consideration should be given to the object sought to be accomplished. Legislative acts must be construed from the language used and while it is improper to introduce testimony of a framer of an act to prove what he meant by the language used, a court may take judicial notice of the legislative history of acts which are public records, and while such material is not determinative, it is helpful in construing legislative acts. *Nekoosa-Edwards P. Co. v. Public Serv. Comm.,* (1959) 8 Wis. 2d 582, 591, 99 N.W. 2d 821.

In some respects licensing boards have wide discretion in determining whether an applicant is qualified under general statutes which require the board to determine trustworthiness and competency. *Wall v. Wisconsin R. E. Brokers' Board,* (1958) 4 Wis. 2d, 426, 430, 90 N.W. 2d 589.

Section 147.23 (3), however, uses the word "shall" in connection with the preliminary college education requirement. The general rule is that the word "shall" is presumed mandatory and it is our opinion that in view of the legislative history, the legislature intended it to be mandatory rather than directory. *Scanlon v. Menasha,* (1962) 16 Wis. 2d 437, 114 N.W. 2d 791.

In *State ex rel. Ballard v. Vest,* (1951) 136 W. Va. 80, 65 S.E. 2d 649, 652, 653, the court held that under a sta-

tute requiring that an applicant for a license to practice chiropractic "shall be a graduate of a chiropractic school * * *, and shall be a graduate of an accredited high school * * *, and shall have attended for at least two years an academic college equal in standing to the West Virginia University, as preliminary education," attendance at the academic college must precede chiropractic training:

"Realtor asserts that the order in which the educational requirements are stated in Section 2, Article 16, is determinative that the words 'as preliminary education', mean that the entire education must be preliminary to examination by the medical licensing board and not preliminary to the professional education at a chiropractic college. In this regard it is to be noted that section 2, Article 16, does not provide in the following order for: (1) Graduation from an accredited high school or the equivalent thereof; (2) attendance for at least two years at an academic college equal in standing to West Virginia University; and (3) graduation from a chiropractic school or college recognized by the American Chiropractic Association, or other recognized national chiropractic society, 'as preliminary education'. If it did, realtor's position would be clearly tenable.

"* * *

"Moreover, if the Legislature intended that the words 'as preliminary education' were indicative that the three requirements were prerequisite to the taking of the examination, the words 'as preliminary education' would have been entirely unnecessary, and the statement of the three requirements in the several provisions of said Section 2 alone would clearly indicate that the order in which the educational requirements were preliminary to the examination, no matter how or when complied with. We cannot assume in the absence of wording clearly indicating contrariwise that the Legislature would use words which are unnecessary, and use them in such a way as to obscure, rather than clarify, the purposes which it had in mind in the enactment of the statute.

"From a careful consideration of the language employed in Section 2, Article 16, now before us for interpretation, we are of opinion that graduation from high school or the equivalent thereof, and attendance at an academic college equal in standing to West Virginia University must precede attendance at a chiropractic school or college. In reaching this conclusion, we are supported to a large extent, as respondents' answer discloses, by the fact that there has been an unbroken administrative interpretation of long standing by the chiropractic board of examiners and its successor, The Medical Licensing Board of West Virginia, that Section 2, Article 16, provides that a high school and academic college education shall be had before attendance at and graduation from an accredited chiropractic school. In State v. Davis, 62 W. Va. 500, pt. 4 syl., 60 S.E. 584, 14 L.R.A., N.S., 1142, this Court held: 'A contemporary exposition of a statute, uncertain in its meaning, recognized and acquiesced in for a long period of time by the officers charged with the duty of enforcing it, the courts, the Legislature, and the people, will be adopted unless it is manifestly wrong.' * * *"

You are advised that you are correctly administering the statute.

RJV

Delegates—Ballots—Votes—Under secs. 5.39 and 6.42 only delegates and not candidates may be voted for and "write-in" candidates does not void the ballot, only deletion of pledged delegates invalidates ballot.

March 26, 1964

ROBERT C. ZIMMERMAN
Secretary of State

You request my opinion on the following questions pertaining to the presidential primary election, which will be answered in order:

"1. If a ballot for a presidential slate of delegates is marked at the top in the proper circle and a vice presidential candidate is also 'squeezed in' and the name also marked in the same column, does this throw the whole ballot out?"

This question must, in my opinion, be answered "No".

Sec. 5.39, which governs the form and use of such ballot, provides no authority for either "write-in" votes or a voter's addition to the ballot of either a presidential or vice-presidential candidate. Sec. 6.42 (4), Stats., provides:

"When the elector shall have written the name of a person *in the proper place for writing the same* he shall be deemed to have voted for that person, although he shall have omitted to erase the name printed in the same column for the same office, or shall have made a mark against the same or against any other name for the same office, or omitted to mark against the name written."

The ballot prescribed by sec. 5.39 contains no "proper place for writing" the name of a candidate not printed on the presidential primary ballot; hence, "write-ins" on such ballot may not legally be counted.

The fact that a voter may make such addition to the presidential primary ballot does not, however, render the ballot void as to the elector's otherwise proper vote for other candidates. The first sentence of sec. 6.42 provides:

"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. * * *"

I find nothing in sec. 5.39, or in any other statute, providing for the invalidation of such ballot if the voter inserts thereon the name of a vice-presidential candidate. Such action does not constitute the write-in nominee as a *delegate* candidate. The voter is therefore not voting for more delegates than permitted by sec. 5.39.

My firm opinion is that in case of doubt, if any exists, the question must be resolved in favor of the voters, not against them. The constitutional and statutory right of the

people to express their will at the polls must not be restricted beyond limits properly estabilshed by law in the interest of orderly elections. While that interest has, in my opinion, been declared by the legislature to require that candidates at a presidential primary must comply with statutory provisions in order to be placed legally on the ballot, and that write-in votes are not authorized for that reason, the same interest does not demand that a voter must be denied the right to have his ballot counted for those delegate candidates properly voted for, notwithstanding that he may have written in the name of a vice-presidential "candidate" on the ballot. The statutes do not, in my view, provide otherwise.

I am therefore of the opinion that a voter's addition to such ballot of the name of a vice-presidential candidate is surplusage, which is to be disregarded by the election officials, but that the ballot is not void as to other candidates for whom the elector properly voted.

Question number two asks:

"2. What if there is no mark after the Vice President nominee's name?"

In view of the answer to the first question, it is immaterial whether a mark is or is not placed after the name of a "write-in" vice-presidential candidate. In either case, the fact of the "write-in" is to be disregarded, but the ballot is to count for all candidates otherwise properly voted for thereon.

Question number three asks:

"3. If the slate is marked at the top and one or two of the delegates are crossed out, does this throw the whole ballot out?"

In my opinion, this question must be answered "Yes".

The form of the ballot prescribed by sec. 5.39, and the statute itself, require in my opinion that since the only proper place for marking the ballot for pledged delegate candidates is in the circle at the top of the slate pledged to

the named presidential candidate, the elector must necessarily vote for the entire slate, if he wishes to vote for any candidate thereon. This view is supported by the last sentence of sec. 5.39 (1) (b), which provides:

"Voting for individual candidates shall not be permitted except in the case of uninstructed delegates and squares for individual voting shall be placed on the ballot only after the names of the uninstructed delegates."

In other words, the "scratching" of one or more names of candidates appearing on a pledged slate is an attempt to vote, in effect, for individual candidates whose names are not deleted, which, as above stated, is not permissible as to pledged candidates. The statute is, in my opinion, clear on that question.

RDM

Federal Aid—Governor—Statutes—Sec. 16.54 does not authorize the creation by executive order of a commission to administer federal funds for higher education.

April 15, 1964.

HONORABLE JOHN W. REYNOLDS
Governor

You have inquired whether under sec. 16.54, Stats., the governor may create a commission to accept and administer the benefits made available to public and private institutions of higher learning under Public Law 88-204, the Higher Education Facilities Act of 1963 (H.R. 6143).

Without going into the federal act in detail it is to be noted that the state has the responsibility for designating an existing state agency which will be broadly representative of the institutions to be benefitted. If no such agency exists, the state has the responsibility for establishing one. On the date of the enactment of P.L. 88-204 the secretary of the department of health, education, and welfare sent a letter to all governors describing the provisions of the law and inviting attention particularly to sec. 105 (a) relating to the designation of a state commission. The secretary requested that he receive certification from legal counsel deemed appropriate by the governor that the commission designated has the authority to perform the functions required by the Act.

On January 3, 1964, Mr. Francis Keppel, Commissioner of Education, Department of Health, Education and Welfare, sent to all governors a letter and memorandum providing some guidance as to the composition of the agency designated for the state commission. The memorandum reads in part:

"The State has the responsibility for designating an existing State agency which is 'broadly representative' as described above, or if no such agency exists, for establishing one. Such State Commission will be the agency

designated in the State Plan to administer Title I of this Act. Before a State may participate in this Act, its State Plan must be approved by the U. S. Commissioner of Education. In approving the State Plan, the Commissioner has a responsibility to assure that it is submitted and will be administered by a State Commission that can reasonably be considered 'broadly representative of the public and of institutions of higher education (including junior colleges and technical institutes) in the State.' In order to enable this determination to be made promptly when the Plan is submitted, it will be helpful for the Commissioner at the time the State Commission is designated to have the benefit of a statement of the basis on which the conclusion has been reached that the Commission is 'broadly representative.' "

In further clarifying his request, with particular regard to assurance that the commission be broadly representative of institutions of higher education, the commissioner has suggested that the statement might include a conclusion based either (1) upon some stated present or prior official connection of the individual members of the commission with the various kinds of institutions of higher education in the state, or (2) upon the governor's judgment after such consultation as he believes appropriate that it is the general sentiment that each of the categories of higher education in the state serving a substantial segment of the college and university student body that the commission is "broadly representative" of it. He also indicated that some other reasonable basis for determining the "broadly representative" nature of the commission would be acceptable.

You have indicated that existing state agencies are not broadly representative of private institutions and hence there is a need for the creation of a new commission.

Sec. 16.54 to which you refer as a possible source of authority for executive creation of a new commission provides so far as material here:

"16.54 Acceptance of federal funds. (1) Whenever the United States government shall make available funds for the education, the promotion of health, the relief of indigency, the promotion of agriculture or for any other purpose other than the administration of the tribal or any individual funds of Wisconsin Indians, the governor on behalf of the state is authorized to accept the funds so made available. In exercising the authority herein conferred, the governor may stipulate as a condition of the acceptance of the act of congress by this state such conditions as in his discretion may be necessary to safeguard the interests of the state of Wisconsin.

"(2) Whenever funds shall be made available to the state of Wisconsin through an act of congress and acceptance thereof as provided in sub. (1), the governor shall designate the state board, commission or department to administer any of such funds, and the board, commission or department so designated by the governor is hereby authorized and directed to administer such fund for the purpose designated by the act of congress making an appropriation of such funds, or by the department of the United States government making such funds available to the state of Wisconsin.

"(4) Any board, commission or department of the state government designated to administer any such fund, shall, in the administration of such fund, comply with the requirements of the act of congress making such appropriation and with the rules and regulations which may be prescribed by the United States government or by the department of the federal government making such funds available."

Sec. 16.54 was formerly sec. 14.205 and was renumbered to be 16.54 by ch. 228, sec. 2, Laws 1959, effective July 1, 1959. We find no prior opinions of this office or court decisions construing this statute. Attention is called to 40 OAG 6 and 48 OAG 84 relating to acceptance of federal funds for educational purposes under 101.345, but those opinions have no relevancy to the precise question raised here.

There are at least two difficulties in using 16.54 as a source of authority for an executive order creating a new commission to accept and administer the benefits of the federal act.

The first is with the word "designate" in that part of 16.54 (2) which provides that "the governor shall *designate* the state board, commission or department to administer any of such funds."

The word "designate" is not synonymous with the word "create".

"Designate" means to mark or point out, specify or select or identify.

On the other hand "create" means to bring into existence or make out of nothing and for the first time.

These are the meanings of the terms as employed in their natural sense according to the dictionary. In the interpretation of the statutes all words and phrases are to be construed according to common and approved usage although technical words and phrases and others that have a peculiar meaning in the law are to be construed according to such meaning. Sec. 990.01 (1).

The distinction between "designate" and "create" was observed in the case of *Ex parte Heymen,* (1904) 45 Tex. Cr. R. 532, 78 S.W. 349, 352. In that case there was a constitutional provision directing the legislature to enact a law whereby any county, justice precinct, town, city, or such subdivision of the county as might be designated by the commissioners' court may determine from time to time whether the sale of intoxicants should be prohibited. It was held that the word "designate" does not have the same meaning as the word "create", and the legislature therefore was not authorized to empower the commissioners' court to combine two or more political subdivisions of a county into a local option district, thus creating a new subdivision.

Moreover, there is a second difficulty of even greater significance.

That arises out of the fact that even though the word "designate" in 16.54 (2) were construed to mean "create" we would be faced with the constitutional objection that as so construed the statue might be invalid as an attempted delegation of legislative power to the governor.

Generally speaking, the power to create an office is vested in the legislative department of the government. 67 C.J.S. "Officers" §9, p. 119.

In 42 Am. Jur. "Public Officers" §31, p. 902, it is stated that in England the right of creating new offices was primarily vested in the Crown, but that in the United States, except for such offices as are created by constitutional provisions, the creation of public offices is primarily a legislative function, and in so far as the legislative power in this respect is not restricted by constitutional provisions, it is supreme. In §32 at p. 903 of this text it is pointed out that the legislature cannot authorize the governor to create a public office.

One of the most important tests as to whether a particular law amounts to an invalid delegation of legislative power is found in the completeness of the statute as it appears when it leaves the hands of the legislature. 11 Am. Jur. "Constitutional Law" §215, p. 924.

If "designate" in 16.54 (2) means "create" then the statute would be wanting in some of the elements of completeness such as compensation, length of term and the like. In *State v. Young,* (1951) 154 Neb. 588, 48 N. W. 2d 677, it was held to be within the power of the legislature to create an office, define its powers, limit its duration, and provide for the compensation of the occupant.

In *Reilly v. Ozzard,* (1960) 33 N.J. 529, 166 A. 2d 360, 372, it was said:

"* * * Except as to offices created by the Constitution, public offices and employments are ultimately the creatures of legislation. The Legislature alone may determine the duties and the interrelation of the public posts it estab-

lishes or authorizes to be established. Within the constitutional framework, the Legislature is the architect of the structure of government."

In *Pollack v. Montovee,* (1951) 55 N. Mex. 390, 234 P. 2d 236, 238, in discussing the elements of a "public officer" it was pointed out that the specific position must be created by law. Again in *State ex rel. Mathews v. Murray,* (1953) 70 Nev. 116, 258 P. 2d 982, it was held that an office is brought into existence either under terms of the constitution, by legislative enactment, or by some municipal body pursuant to authority delegated to it. To constitute a public office it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law, to be exercised by the incumbent in virtue of his election or appointment to the office thus created and defined, and not as a mere employe, subject to the discretion and control of some one else.

In Wisconsin under Art. IV, sec. 1, Const., the legislative power is vested in a senate and assembly, and one branch of government cannot effectively delegate powers which peculiarly and intrinsically belong to that branch. *In re Constitutionality of Sec. 251.18, Wisconsin Statutes,* (1931) 204 Wis. 501, 236 N. W. 717.

There is, of course, a vast difference between creating an office and making an appointment to an office. It was said in *State v. Chittenden,* (1906) 127 Wis. 468, 107 N.W. 500, that the true distinction between delegation of power to make law and delegation of power to administer law is this: The former contemplates exercise of discretion as to what the law shall be, the other excercise of discretion in its administration.

A case which demonstrates the foregoing principle rather well is that of *State ex rel. Thompson v. Giessel,* (1953) 265 Wis. 185, 60 N.W. 2d 873. There the legislature created a Wisconsin turnpike commission of 5 members to be appointed by the governor and the legislature declared that the construction of modern toll roads was in promotion of

the public welfare, and that the general purpose of the toll road law was to facilitate vehicular traffic, and the legislature fixed the termini of the proposed road. It was held that the provisions, that if the majority of the commissioners should determine that construction of the toll road was feasible and that the members of the commission should incorporate and proceed with the construction of the toll road without further action by the legislature, did not unconstitutionally delegate legislative power to the commission.

This case should not be overlooked in making an over all study of the problems presented by P. L. 88-204.

We are also mindful of the rule of statutory construction that an act must be given a construction that will avoid constitutional objections to its validity even though such is not the most obvious or natural construction. *State ex rel. W.D.A. v. Dammann,* (1938) 228 Wis 147, 190, 280 N. W. 698. The conclusion here reached is consonant with this guide.

In view of the foregoing it is our opinion that 16.54 may not be used as a source of authority for an executive order creating a commission to administer federal funds made available for public and private institutions of higher learning in the state pursuant to Public Law 88-204.

This opinion is limited strictly to the narrow question here raised and should not be read as expressing any views on other legal questions which may be involved in the acceptance and administration of the moneys in question.

WHR

School District—Leases—School Buses—School district is without power under 40.53 (5) or otherwise to lease its school buses to private individuals for transportation of pupils.

April 15, 1964.

ANGUS B. ROTHWELL
Superintendent of Public Instruction

You have furnished a sample of an agreement wherein a school district turns over its fleet of school buses to a private party to be used by him to transport for the district the pupils attending its school and ask whether a school board has legal authority to lease property belonging to the district to a private party, corporation or company, on its own order or by authorization of the electors. We understand your inquiry to be whether a school district may legally enter into such arrangement.

The submitted agreement is in the form of a lease between a school district and a private individual whereby the several buses the district owns are let to him for the school year, to be used by him to transport the pupils of the district during the year to and from its schools, five days a week, to arrive and leave at specified times, and on extracurricular and field trips. It specifically provides that the buses shall not be used except for approved school transportation. The school district agrees to provide drivers for the buses, to furnish and pay for the bus licenses, to furnish all necessary tires, to pay for all repairs and lubrication, and to pay $60 per year per pupil transported and 30¢ per mile for extracurricular and field trips. The other party agrees to pay the salaries of all drivers, and for all gasoline and oil, and to pay the school district 10¢ per mile. There is a provision that he will save the school district harmless from any liability or claim for damage arising out of the operation of the buses. It also provides the buses are to be returned at the end of the lease in their present good condition less reasonable wear and tear from use.

There is very little in any of the court decisions that furnishes assistance upon your question. Such cases as there are in other states vary and to a large extent depend upon the language of the particular statutes involved. However, it is a generally accepted proposition of law that school districts derive their existence and all their power from the legislature and have no inherent powers. They have only such powers as are expressly conferred upon them by statute or are necessarily implied from those expressly so given. There is no provision in our statutes which expressly authorizes a school district or its board to lease any of its property to private persons for private use.

It was held early in this state in *School District v. Arnold,* (1866) 21 Wis. *660 (667) that, in the absence of a statute providing therefore, neither the electors nor the board of a school district have any power to permit the use of school district property for other than school purposes. It was there said:

"* * * The statute has not given the board, nor the electors of the district, any authority to permit a schoolhouse to be used for meetings of the Sons of Temperance or any thing of the kind.* * *"

Later in *Tyre v. Krug,* (1914) 159 Wis. 39, 149 N.W. 718, it was held that the school board of the city of the first class has no authority to permit the use of school buildings for the purposes of conducting therein a private school book and supply business for the personal profit of school principals. The court there said:

"* * * We think that school boards have not been granted authority to permit school buildings to be devoted to uses other than to school purposes, aside from those uses expressly enumerated in the statutes. * * *"

There are no later decisions of our court on the subject and these decisions stand unreversed as stating fundamental law applicable to school districts. The legislature accordingly over the years enacted, and maintains in what is now sec. 40.30, various statutory provisions expressly stating when

the use of school property may be permitted for other than school operation. This is acceptance by the legislature over many years that the limitations enunciated in said decisions are still applicable in this state.

These several provisions in 40.30, however, are not intended to and do not contemplate the use of school district property by private interests upon any continuous or regular day-to-day basis, either by lease or through some other arrangement. Such provisions are no more than authorizations for permitting the occasional or irregular use of assemblies, gymnasiums, auditoriums or other school facilities for meetings or gatherings of a somewhat public flavor or character, at times when not needed for and in a way that will not interfere with or deprive the primary use thereof for school operation. This agreement does not fall within such provisions.

This agreement is in terms a lease. Despite the express limitation of the use of the buses to approved transportation, which restricts their use to the transporting of pupils for the district because that is the only transportation it has the power to authorize, complete exclusive possession and dominion over the buses is given to the lessee during the period of the agreement. The lessee, not the school district, would operate them over the highways and house them. The school district would have no right to possess, use or control the buses or their operation so long as the terms of the lease are observed. The lessee agrees to pay a rental of 10¢ per mile to the district for their use. He also agrees to "return" the buses to the district at the end of the term in good condition less reasonable wear and tear from use and also to save the district harmless from any liability arising out of his operation thereof. The agreement is therefore definitely a lease and cannot be regarded otherwise.

A school district is merely an agency of the state and has existence solely for the purpose of performing those activities necessary for the maintenance and operation of an efficient system of public schools within the particular locality of its jurisdiction. It has only such powers as are expressly

given to it or implied as necessary for the performance of the functions and duties which have been assigned to it. The use of funds of a district to acquire or maintain property in order to lease or rent to others for private use certainly does not come within any of the functions of a school district. In effect, a school district would be financing or subsidizing the private party in his private business or operations. Clearly that is no function of a school district.

I find no statute which contains any authorization for a school district or its board to own or acquire buses, or for that matter any property, for the purpose of renting or leasing to others. It follows therefore that neither a school district nor its board has any power to permit the use of school properties for private purposes under a lease, unless it could be deemed that under the particular circumstances it would come within the general power of "possession, care, control and management of the property of the district," accorded to school boards by 40.29 (1). Only if it were clearly necessary to and incidental to the performance of a proper function of a district, could it be within such general power.

It is not necessary for the carrying out of the function of furnishing transportation for its pupils that a school district own or acquire buses to lease or rent to a private party for the latter to use for his benefit in carrying out a contract with the district to transport its pupils. Provisions in 40.53 and elsewhere in the statutes make it a function of a school district to furnish transportation to its pupils and others in specified circumstances. But in subsec. (5) of sec. 40.53, there are prescribed the several different methods which a school district may use in discharging its transportation functions. The methods which a school board may follow, as there stated, are:

"(a) By contract with a common carrier, with a taxi company or with other parties;

"(b) By contract with the parent or guardian of the pupils to be transported. * * *

"(c) By contract with another public school district;

"(d) By joint contract between 2 or more school districts and a third party who is either an individual or a common carrier;

"(e) By the purchase and operation of a district-owned vehicle."

Paragraph (a) thereof sets out one method which a school district may follow in providing the transportation for its pupils. It authorizes a contract by a school board with a common carrier, taxi company or somebody else, whereby such other contracting party as an independent contractor, in consideration of charges or amounts therein agreed to be paid by the school district, agrees to supply the necessary transportation for the pupils through operation of its own buses or other transportation equipment by its own employes. It is the engagement of some other party to its own employes. It is the engagement of some other party to render a complete transportation service, including supplying of all necessary equipment, personnel and supplies, independent of and without any participation therein by the school district other than the payment by it of the agreed charges.

The method in paragraph (e) on the other hand encompasses the school district itself furnishing the transportation through operation of its own buses by its employes.

Clearly, the agreement you submit is not the type of contract which falls within either of the methods in paragraphs (a) and (e) of 40.53. It is an attempt to make a contract which embodies characteristics of both of said methods but with the result that it is neither one nor the other. The statute by specifically setting out the separate and distinct methods which a school board may follow, does not authorize the use of any other method. It thus does not empower a school board to follow or use a method which has only part of that embodied in one of the specified methods and a part of those of another. Any attempted use of any such combination arrangement is a different

method and a departure from any of those set forth. It therefore is not authorized thereby.

It is therefore my opinion that this agrreement is beyond the power of a school district or its board. The ownership or acquisition of buses for the purpose of leasing or renting them to others is not a function of a school district. There is neither specific authority for such a contract nor does it fall within any power necessarily implied in order for a district to carry out and perform its public school functions.

HHP

Legislators—Salaries—Art. IV, sec. 26, Wis. Const. does not prohibit legislator elected to serve unexpired term from receiving salary increase provided by current legislation. He may receive per diem expenses notwithstanding his predecessor having received maximum.

April 15, 1964.

HONORABLE KENNETH E. PRIEBE
Assembly Chief Clerk

You ask whether new members of the assembly, elected on April 7, 1964, to fill unexpired terms, are entitled to receive, as salaries, $450 per month as provided by ch. 225, Laws 1963, or $300 per month, being the salary previously established for the legislative term commencing in January, 1963 and ending in January, 1965.

In my opinion, such new members are entitled to $450 per month.

Art. IV, sec. 26, might at first glance appear to provide otherwise as to the new members. That section provides:

"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. This section shall not apply to increased benefits for teachers under a teachers' retirement system when such increased benefits are provided by a legislative act passed on a call of yeas and nays by a three-fourths vote of all the members elected to both houses of the legislature."

However, in *State ex rel. Bashford v. Frear,* (1909) 138 Wis. 536, 120 N. W. 216, the supreme court held that the phrase "his term of office" as used in Art. IV, sec. 26 was a reference to the incumbent; that is, it did not prohibit a person elected or appointed for the balance of a term of state office from receiving an increased salary provided for that office prior to the commencement of "his" term (i. e., the residue of the unexpired term) although, had there been no vacancy, the original incumbent for the whole term would not have been eligible to receive the increase. The *Bashford* case appears to be so clear as not to require further discussion.

You also ask whether the new members may receive the per diem expense of $15 provided by sec. 2, ch. 225, Laws 1963. That section provides in material part:

"(f) Any member of the legislature who has signified, by affidavit filed with the department of administration, the necessity of establishing a temporary residence at the state capitol for the period of any regular or special legislative session shall be entitled to an allowance of * * * *$15 for each day of actual attendance at a session of the legislature,* for expenses incurred for food and lodging during each regular session *not to exceed 110 days* and during each special session *not to exceed 20 days.* Such allowances shall be paid within one week after each calendar month; and shall be paid, upon the filing with such director, the * * * *chief clerk's* affidavit stating the * * * *number of actual days in attendance for all members of his house.* * * *"

The section on its face applies to the members personally. In other words, the test is not whether the predecessors of

the newly-elected members had used up all or part of *their* 110 days for regular sessions and 20 days for special sessions prior to their decease. The test is whether the members claiming the per diem had themselves done so.

You are therefore advised that in my opinion, a new member elected to serve for the residue of a term may receive, during his service as a legislator, per diem for not to exceed 110 days of regular session, and not to exceed 20 days for any special session, upon compliance with the affidavit requirements for section 2 above set forth.

RDM

County Judge—Hospital Care—Ch. 142 does not empower county judge to authorize payment for care at Wisconsin General Hospital unless application is made prior to admission, except where emergency makes it impossible.

April 23, 1964.

DANIEL J. MIRON
District Attorney
Marinette County

You ask whether a county judge may authorize payment by the public for care of a patient at Wisconsin general hospital, when no application was made pursuant to secs. 142.02, *et seq.*, until after the patient had received the care and been discharged from the hospital.

It has long been the rule, as stated in *Patrick v. Baldwin*, (1901) 109 Wis. 342, 348, 85 N.W. 274, that:

"To what extent, under what circumstances at what place, and by what agencies poor persons shall be relieved at the expense of the public, are all purely legislative questions. * * *"

The rule that public liability exists only under the conditions fixed by statute was applied to a claim by a doctor

and hospital for public payment for medical treatment in *Carthaus v. Ozaukee County,* (1941) 236 Wis. 438, 441, 295 N.W. 678. The court introduced the discussion with the following statement:

"FAIRCHILD, J. The facts involved in this case relate to care of an injured person by a doctor and a hospital and the question presented is: Who is legally obligated to pay therefor? The obligation to pay primarily rests upon the individual who had the benefit of the treatment and the hospital services. It is a debt which should be paid by the individual. * * *"

See, also, 42 OAG 172.

Secs. 142.02 through 142.04 described the prerequisites for admission to the Wisconsin general hospital at public expense. The procedure begins with the filing of an application, and culminates with certification of the order of the county judge on the application.

Sec. 142.07 (2) expressly provides that a patient admitted to the hospital without certificate shall not receive care at public expense except under certain conditions:

"(2) APPLICATION OF CHARGES. (a) * * *A patient may be admitted to the Wisconsin general hospital without certificate, but the cost of his care shall not be a joint charge against the state and county wherein he has a legal settlement or residence or was found, except when such patient is admitted in an emergency pending action of the county judge. If the county judge grants the application, the charge against the state and such county shall date from his admission. * * *"

To the same effect is sec. 142.07 (2) (b).

The payment by the public for hospital care where the county judge has not previously authorized it is thus limited to cases of "emergency pending action of the county judge."

Your statement of facts indicates there was "more or less" an emergency; but we do not believe that action of a

county judge can be considered "pending" where no application was filed until after the patient's discharge from the hospital.

Black's Law Dictionary, 4th ed., defines "pending" as:

"Begun, but not yet completed; * * * Thus, an action or suit is 'pending' from its inception until the rendition of final judgement. * * *"

If the legislature had intended to empower a county judge to authorize payment by the government, retroactively, in cases in which no application had previously been made to him, it could have chosen language to make that intention clear.

This is not a case in which an application is filed simultaneously with an emergency admission, or as soon thereafter as possible. Such a case would differ substantially in fact from the one on which this opinion is based and would not necessarily be governed by this opinion.

BL

Relief—Dependent Persons—Under sec. 49.02 town, city or village in which a dependent person is present must furnish relief where a county system under 49.03 has not been established and may be held liable for failure to do so.

April 24, 1964.

ALEXANDER HOPP
Corporation Counsel
Sheboygan County

You request an opinion about the obligation of political subdivisions of the state, and their officials, to furnish relief to dependent persons.

Your first question is:

"1. In a county which operates on a unit system for relief purposes who is primarily liable for the granting of relief?"

The town, city or village in which the dependent person is present is liable for furnishing relief in the first instance, with right of recoupment under secs. 49.04 and 49.11 in appropriate cases.

As pointed out in *Holland v. Cedar Grove,* (1939) 230 Wis. 177, 189, 283 N.W. 357, the question of liability for relief is dependent upon statute; and municipalities are subject to whatever policy the legislature adopts. The court there said:

"* * * The matter of poor relief being of purely statutory origin, the legislature has very large powers with respect thereto. It may impose duties and liabilities upon its creatures, the various municipal corporations of the state, in accordance with its discretion provided no provision of the constitution is violated. Except with respect to their property rights municipal corporations have a limited protection against acts of the state legislature under the constitutional guaranties. In a well considered case, the Connecticut supreme court of errors said:

" 'Municipalities, as political subdivisions of the state, created for public purposes and having their powers, rights, and duties conferred and imposed by the state through the legislature, are subject to its will and liable to have any such rights or duties modified or abolished by it, and not to be regarded as thereby being deprived of any vested rights.' *Sanger v. Bridgeport,* (1938) 124 Conn. 183, 198 Atl. 746, 116 A.L.R. 1031, 1035. See authorities cited in note beginning at page 1037.

"This is the general rule and it is the rule in this state. * * *"

Sec. 49. 02 (1) provides:

"Relief administration. (1) Every municipality shall furnish relief only to all eligible dependent persons therein

and shall establish or designate an official or agency to administer the same."

The terms "relief", "municipality", "eligible", and "dependent" are defined in sec. 49.01. The term "only" in the provision quoted above was held in *Outagamie County v. Brooklyn,* (1962) 18 Wis. 2d 303, 311-312, 118 N.W. 2d 201, to relate the term "dependent" back to the definition in sec. 49.01 so as to make the question of need one of fact rather than one governed wholly by discretion of local authorities.

The statutes relating to public assistance have been revised from time to time, particularly with respect to administration of so-called "categorical aids" such as old-age assistence and aid to dependent children; but the statutory plan for liability of the appropriate town, city, village or county to grant relief in the first instance has varied little since *Mappes v. The Board of Supervisors of Iowa County,* (1879) 47 Wis. 31, 32, in which the court said:

"The statute clearly imposes the obligation upon every town of relieving and supporting all poor and indigent persons having a lawful settlement therein, whenever they shall stand in need of such support. Sec. 1, ch. 34, Tay. Stats. The law is founded upon the humane idea that a poor person has a right to live, and that when one, through age, disease or misfortune, is unable to procure the means of bodily subsistence, he shall not die from want or exposure, but the property of the town in which he resides shall be chargeable with the expense of his maintenance. The intent and policy of the law upon this subject are too plain to require comment. * * *"

To similar effect, the court commented in *Ashland County v. Bayfield County,* (1944) 246 Wis. 315, 318, 16 N.W. 2d 809:

"* * * Counties or municipalities do not have a right to furnish relief under the statute. They are under a duty to do so. * * *"

According to 49.02 (1) each town, city and village is obligated to furnish relief to dependent persons "therein" unless the county has assumed the obligation under 49.03.

Your second question is:

"2. Does a public official have any personal liability for the wrongful or negligent failure to grant relief to an 'eligible dependent person?' "

An official responsible for administering relief may be held personally liable for a violation of his statutory duty; but there is so much room for variance in facts and for difference of opinion of fact-finders that it is difficult to predict the exact circumstances under which liability might be imposed by the appropriate tribunal.

The legislature has not provided a specific statutory method of enforcing the obligation of municipalities to grant relief as it has done in 49.50 (8), and (9) with respect to aid to the blind, old-age assistance, and other categorical aids.

The supreme court long ago commented, however, that agents of municipalities who fail to perform the duties imposed by statute are "doubtless amenable in some way for such misconduct", although it ruled that private parties who volunteer assistance cannot recover from the government.

See *Patrick v. Town of Baldwin,* (1901) 109 Wis. 342, 353-354, 85 N.W. 274, 53 L.R.A. 613, where it is said:

"* * * The statute creates a liability to relieve destitute persons * * *. It empowers appropriate agents of municipalities to make their liability effective by necessary contracts to that end, and imposes upon such agents the duty to exercise such power. If they refuse to do so, they are doubtless amenable in some way for such misconduct * * *."

It is said in 41 Am. Jur. 708, with respect to personal liability of public officials charged with poor relief, that:

"* * * the rule more generally obtaining seems to be that if poor officers neglect their duty to provide for a pauper,

he may, under proper circumstances, maintain an action against them for the injury sustained by reason of such neglect * * *."

See 70 C.J.S. 27 with respect to criminal liability of such officials.

There is a large area for fact-finding as to what is a clear neglect of mandatory duty or abuse of discretion, and what is a mere error in judgment, so that it is impossible to give more than a generalized answer to your generalized question. As the supreme court pointed out in *Outagamie County v. Brooklyn,* (1962) 18 Wis. 2d 303, 311-312, 118 N. W. 2d 201, the area for fact-finding and for exercise of discretion by local authorities is to be considered in determining whether they have violated statutory duties in any given case:

"* * * the exercise of discretion by the Outagamie county relief officials was controlling on the question of whether Mrs. Stephan was in need of the hospital and medical care provided by the county in the absence of any showing of bad faith or abuse of discretion. The evidence presented at the hearing clearly supported the department's determination that the relief authorities did not act in bad faith or abuse their discretion. * * *

"The relief authorities were not, however, given discretion in deciding whether the Stephans were 'dependent persons' within the meaning of sec. 49.02 (2), Stats. 1957, which required that any relief furnished by a county to persons not having legal settlement therein be given '*only* to all eligible dependent persons.' (Italics supplied.) To the extent that the rule quoted above from the *Holland Case, supra,* gave discretion to the relief authorities to determine both the dependency of a person and extent of his need, we deem the word 'only' in sec. 49.02 (2), Stats. 1957, sufficient to remove the determination of dependency from that rule. A 'dependent' is defined by sec. 49.01 (4), Stats. 1957, as a person 'without the present available money or income or property or credit, or other means by which the same can be

presently obtained, sufficient to provide necessary commodities and services . . .' that may be furnished as relief. The question of the Stephans' status as dependent persons at the time relief was furnished to Mrs. Stephan presented a a question of fact for determination both by the Outagamie county relief authorities and thereafter by the department. * * *"

BL

Words and Phrases—Engineer—Engineering—Sec. 101.31 discussed in relation to violations or possible violations by a corporation which uses the word "engineering" or "engineer" in its corporate name without complying with 101.31 (7) (b).

April 24, 1964.

REGISTRATION BOARD OF ARCHITECTS AND PROFESSIONAL ENGINEERS AND JOINT COMMITTEE FOR REVIEW OF LEGISLATIVE RULES
State Capitol

Your recent requests for my opinion are concerned with the same problem and, therefore, this single response will be an answer to both of your letters. The problem involves the use of the word "engineer" or "engineering" in the name of a corporation which does not meet the requirements of sec. 101.31 (7) (b). More specifically, your question is:

"Does the use of the word 'engineer' or 'engineering' in a corporate or business name, standing by itself, constitute a violation of the statute?"

The statute referred to is sec. 101.31.

Sec. 101.31 is on the subject of architects and professional engineers. It governs the practice of these professions within the state and is based upon the police power of the

state to protect the public welfare and to safeguard the life, health and property of its citizens. Sec. 101.31 (2) (c) defines the term "professional engineer" as:

"* * * a person who by reason of his knowledge of mathematics, the physical sciences and the principles of engineering, acquired by professional education and practical experience, is qualified to engage in engineering practice as hereinafter defined."

The practice of professional engineering is defined in (2) (d) as including:

"* * * Any *professional service,* requiring the application of engineering principles and data, wherein the public welfare or the safeguarding of life, health or property is concerned and involved, such as consultation, investigation, evaluation, planning, design, or responsible supervision of construction, alteration, or operation, in connection with any public or private utilities, structures, projects, bridges, plants and buildings, machines, equipment, processes and works. * * *"

Contrary to the situation in many states, a corporation may engage in the *practice* of professional engineering in Wisconsin if it meets the requirements of 101.31 (7) (a). If the corporation has at least one registered professional engineer in responsible direction of its professional engineering work, the other engineers working under him as regular employes of the corporation are exempt from the registration requirements under the provisions of 101.31 (9) (d).

The corporation can also *offer to practice* professional engineering and so advertise and use a name which conveys the impression that it is engaged in the practice of professional engineering if, and only if, it also meets the additional requirements set forth in 101.31 (7) (b). There are, then, more requirements for a corporation which not only engages in the practice of professional engineering but also offers to so practice than there are for a corporation which only practices professional engineering as a part of its internal operations. This is consistent with the overall

intent of the law to protect the public, since it is one thing for a corporation to engage in professional engineering work, through its employes, exclusively for itself, and another to offer professional engineering services to the public.

The corporation, then, which meets the requirements of (7) (a) and (b) can use the word "engineer" or "engineering" or the term "professional engineer" or "professional engineering" in its name or title.

In addition to the corporations which comply with 101.31 (7) (a) and (b), there are corporations which actually engage in the practice of professional engineering and cannot or do not meet the requirements of 101.31 (7) (b) and those which do not practice the profession of professional engineering, but use the word "engineering" or "engineer" in their corporate names.

The question of whether a particular corporation is engaged in the practice of professional engineering is a question of fact and must be determined on the basis of each individual situation.

If a corporation uses the word "engineer" or "engineering" in its corporate name and is not qualified to offer to practice professional engineering, there are a number of possible violations of 101.31. They include:

A. Violation of the provision in 101.31 (14) against use of the term "professional engineer" in its business name or title. This possible violation would apply to corporations which do and those which do not engage in the practice of professional engineering.

B. Violation of the various provisions against "offer to practice". This, too, could apply to both corporations which do and those which do not actually engage in the practice of professional engineering.

C. Violation of 101.31 (7) (b) in respect to "the use in connection with its name - - - [of] any title or description tending to convey the impression that it is engaged in the

practice of professional engineering." This provision applies only to those corporations which engage in the practice of professional engineering. Sec. 101.31 (1) (c), however, contains the same prohibition and it applies to all non-registered or exempt persons.

Let us, then, individually consider the violations which do or may occur when a corporation uses the word "engineer" or "engineering" in its corporate name without meeting the requirements of 101.31 (7) (b).

A. *Is there a violation of the express prohibition against use of the term "professional engineer" in a business name or title when the word "engineer" or "engineering" is used?*

When a corporation does not meet the requirements of 101.31 (7) (b), and is not otherwise exempt, it is clear that it cannot use the term "Professional Engineer" in its corporate name because of the express prohibition found in 101.31 (14). It is likewise obvious that other forms of this same term cannot be used, such as "Professional Engineers", "Professional Engineer*ing*", "Pro Engrs", etc. This point was settled in respect to architects in 15 OAG 449 (1926). In such opinion it was concluded that the statutory prohibition against the use of the word "architect" by non-qualified persons also prohibited the use of such titles as "architectural engineer", "architectural designer" and "bachelor of architecture".

Your question, however, is in relation to the use of the word "engineer" or "engineering", unaccompanied by the word "professional". Sec. 101.31 (14) is a penal statute and must, therefore, be strictly construed. For this reason, unless the word "engineer" is synonymous with "professional engineer", no violation occurs.

We do not believe that the word "engineer" is synonymous with the term "professional engineer".

"The words 'engineer' and 'engineering' are commonly applied to many persons and occupations whose work and duties may or may not require any special training in any

of the sciences such as mathematics, physics, chemistry. The word engineer is applied to persons whose work is nothing more than maintenance or operation of a machine, such as a locomotive, stationary engine, production machinery in factories. On the other hand, the word 'engineer' or 'engineering' is applied to a person or occupation which requires highly technical training in the sciences such as physics, mathematics, chemistry, electricity, etc." Michigan OAG, Opinion #1635, dated Feb. 26, 1953.

Likewise, the Ohio supreme court in *Ohio Society of Professional Engineers v. Hulslander,* (1949) 86 O. A. 497, 89 N. E. 2d 119, said that " * * * the term 'engineering' which is a generic term covering many phases of human activity * * * does not come within the classification of 'professional engineering' as defined by statute."

Further examples of the fact that the word "engineer" is not synonymous with the term "professional engineer" can be found by looking in any dictionary; it is illustrated by our own statutes in that the word "engineer" is also found in ch. 192, Stats., and it there means one who runs or operates a locomotive (see sec. 192.25) and it is also demonstrated by the definitions contained in 101.31. The statute defines "professional engineer" and "the practice of professional engineering". By so doing, it attempts to separate those professional persons and practice which require special training, knowledge and experience. Registration is required only of those who fall within the classification of professional.

It is, therefore, concluded that the word "engineer' or "engineering" is not synonymous with the term "professional engineer" or "professional engineering" so as to constitute a violation of the express prohibition against the use of the term "professional engineer" in the business name or title of a non-qualified person.

B. *Does the use of the words "engineer" or "engineering" in a business name or title constitute an "offer to practice professional engineering"?*

A corporation which does not meet the requirements of 101.31 (7) (b) is prohibited from offering to practice professional engineering even though it may qualify to engage in the practice of professional engineering under the provisions of 101.31 (7) (a). Any "person", which term includes not only living persons but also all partnerships, associations and bodies politic and corporate (990.01 (26)), is also prohibited from making an offer to practice under the provisions of 101.31 (1) (c), unless properly registered or exempt.

Within 101.31 (2) (d) is a definition of an offer to practice professional engineering. This states:

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

A similar statutory definition is found in the laws of the states whose court decisions on this question will be hereinafter cited and discussed.

The state of Tennessee decided a similar question in 1928. The case of *State Board of Examiners etc. v. Standard Engineering Company,* (1928) 157 Tenn. 157, 7 S. W. 2d 47, involved an action against a defendant who was in the plumbing business. He operated under the name of "Standard Engineering Company" and used stationary on which was printed "Engineers and Contractors for Plumbing, Heating, and Ventilating Systems, Power Plant Equipment". The court held that a violation occurred since the owners of the company did "by sign, advertisement, letterhead, card" represent themselves to be engineers and must be construed to practice or offer to practice engineering. This case is somewhat distinguishable, however, since although the definition of "offer to practice" is similar, if not identical to ours, the Tennessee statutes regulate "engi-

neering", not "professional engineering". Their definition of the practice of engineering, however, is about the same as our definition of the practice of professional engineering. Therefore, the situation is comparable to the company here calling itself the "Standard Professional Engineering Company", but there being no express prohibition against the use of the term "professional engineer" and the decision being dependent upon whether or not one is making an "offer to practice".

A recent District of Columbia decision is also of interest on this point. An action was brought against a company which operated as "T. V. Engineers, Inc." The defendant was found guilty of a misdemeanor for representing itself to be a professional engineer without being so registered. In this case, *T. V. Engineers, Inc. v. District of Columbia,* (1961) 166 A. 2d 920, the court held that it was immaterial whether the defendant did actually practice professional engineering, since the question before the trial court was whether the defendant "implied, intentionally or not is of no matter, that it offered professional television engineering service". The trial court found that the corporate name did so imply and this finding was affirmed. This case is also distinguishable because of the fact that there is an express prohibition against use by unregistered persons of the word "engineer" in a name or title.

The Ohio case of *Ohio Society of Professional Engineers v. Hulslander,* (1949) 86 O. A. 497, 89 N. E. 2d 119, was an action to punish Hulslander for contempt of court for failure to obey an injunction enjoining him from practicing or offering to practice engineering and using the word "engineer" or any other word of like import in connection with its name or business. The defendant was doing business as the "Aimes Engineering Company, Inc." The Ohio supreme court concluded that the defendant was exempt from coverage of the law because he was engaged in the "design or fabrication of manufactured products". This type of business was specifically exempt from coverage. No specific exemption is found in our law.

Another recent case is *State v. Durham,* (1963) 191 A. 2d 646. This involved a defendant in Delaware who used the title "Engineering and Design" without being registered as a professional engineer. The court found that the defendant by use of this title did unlawfully convey the impression that he was a registered professional engineer. In Delaware, however, the word engineer is defined as a professional engineer.

A number of attorneys general have also been faced with a question similar to that posed to us. We have reviewed opinions from Michigan, Iowa, Connecticut, Texas, Florida, Colorado, New York, Washington, and Ohio. Each of these opinions, just as the cases cited above, depend upon the laws of the particular state. The laws of these states bear striking similarities to our law, but there also are some important differences. Therefore, rather than going into a discussion of these opinions, we will reach our conclusions on the basis of our specific statute, and aided by the rulings in other states.

We conclude that under our law the mere use of the word "engineer" or "engineering" in the name or title of a business does not in and of itself and as a matter of law constitute an "offer to practice" professional engineering. We say this because exception can be easily suggested. Other words in the name or title may modify or contradict the implication created by the use of the word "engineering". For example, a sign in front of a tavern located across the street from a railroad depot, which sign reads, "Casey Jones Engineering Club" would not be such as to imply that professional engineering services were being performed or offered therein.

When, however, a company uses a name such as the "X Engineering Company" this title, by itself, is enough to raise a question as to whether there is an "offer to practice". When such a corporate name is *coupled with the actual practice* of professional engineering, we believe that there is a violation of 101.31 (7) or 101.31 (1) (c) in that there is an improper "offer to practice" as defined in 101.31 (1)

(d), unless such corporation has complied with the requirements of 101.31 (7) (b).

If the "X Engineering Company" does not actually practice professional engineering, it may still be violating the provision against an "offer to practice". The question of whether the company "implies" or "represents" or "holds itself out" as able to practice professional engineering is then a question of fact and must be decided on the basis of the individual circumstances including, but not exclusively based on, the use of the word "engineering" in its corporate name. If such a company performs or offers a service which coupled with the word "engineering" in its name misleads the public into thinking it is offered a professsional engineering service, there is a violation.

The practice of professional engineering, just as the practice of all the other professions, involves the performance of a professional *service* for the client or potential client. As defined in 101.31 (2) (d), "the practice of professional engineering within the meaning and *intent* of this section includes any professional *service* * * *". Therefore, if a company does not practice professional engineering and does not offer a service which its purchasing or potential purchasing public can be misled into thinking is a professional engineering service, then it would appear that the corporatoin by the mere use of the word "engineering" in its corporate name has not violated the provisions against making an "offer to practice professional engineering".

This emphasis on "service" is made because some corporations which use and have for many years used the word "engineering" in their corporate names do not practice professional engineering and do not offer any professional *service* to their public and potential public. What they offer is a manufactured product, and in some instances a mere component of another manufactured product. In such a situation, it is doubtful that the mere use of the word "engineering" in their corporate name would imply that they are professional engineers or constitute a holding out that

they are able to practice professional engineering, when professional engineering is a service and they *exclusively* offer their public not a service but a manufactured product. This conclusion is consistent with the legislative intent of 101.31, as quoted above.

Of course, a corporation could engage in the practice of professional engineering and, in addition, sell a manufactured product. In such an instance, there would be a violation when the word "engineering" or "engineer" appears in its corporate name, if the corporation did not comply with the requirements of 101.31 (7) (b).

C. *Does the use of the words "Engineer" or "Engineering" in a corprate name tend to convey the impression that it is engaged in the practice of professional engineering contrary to the provisions of sec. 101.31 (7) (b) or 101.31 (1) (c).*

Sec. 101.31 (7) (b) prohibits any corporation which engages in the practice of professional engineering and does not meet the requirement set forth therein from using "in connection with its name or otherwise assume, use or advertise any title or description tending to convey the impression that it is engaged in the practice of the profession of * * * professional engineering, nor shall it advertise to furnish * * * professional engineering services". Although 101.31 (7) (b) refers to corporations which do practice professional engineering, the same type of prohibition is contained in 101.31 (1) (c) and this latter provision would cover corporations which do not practice professional engineering.

The considerations discussed under section B of this opinion also apply here. Therefore, we will not repeat the discussion, but will merely state our conclusions for this section of the opinion. They are:

1. If a corporation engages in the practice of professional engineering, but does not comply with the provisions of 101.31 (7) (b), the use of the word "engineering" or "engineer" in its corporate title does tend "to convey the impres-

sion that it is engaged in the practice of the profession of * * * professional engineering" contrary to, and in violation of, the provisions of 101.31 (7).

2. If the corporation uses the word "engineer" or "engineering" in its name and does not practice professional engineering, there may be a violation of 101.31 (1) (c), but this is a question of fact.

3. If the corporate name is something like "X Engineering Company", and it does not practice professional engineering, but it does offer a service which tends to convey the impression to the public that it is a professional engineering service, there is a violation of 101.31 (1) (c).

4. If, however, a corporation uses such a name, does not practice professional engineering and does not offer "services", but rather exclusively a manufactured product, it is doubtful that the use of the word "engineering" in its corporate name tends to convey the impression and thereby mislead its purchasing or potential purchasing public into thinking that it is procuring or is offered a professional engineering service.

BRB

Insurance—Legislation—Bill No. 69, S., as amended, which generally would prohibit blood transfusion insurance, would not create a valid act.

April 27, 1964

THE HONORABLE, THE ASSEMBLY

By Resolution No. 18, A., you have requested an opinion whether Bill No. 69, S., would, if enacted, create a valid law. In my opinion it would not.

Bill No. 69, S., as amended by Amendment No. 1, S., would create a new section of the statutes to read:

"204.315 BLOOD INSURANCE. It being in the public interest to assure an adequate supply of human blood for medical purposes, no policy of insurance or contract for prepaid hospital service or sickness care shall be delivered or issued for delivery to any person in this state providing indemnity against the cost of human blood for transfusion purposes which requires payment of any premium other than a contribution of human blood, except for persons who are unable because of age or for other medical reasons to contribute their own blood. As used herein 'cost of human blood' shall not include expenses of preparing and testing human blood for transfusion purposes. Nothing in this section shall prohibit insuring against legal liability for the cost of human blood for persons other than the insured and his dependents."

The stated purpose of the bill—to assure an adequate blood supply—certainly is a legitimate concern of the state and a proper subject for the exercise of the police power in order to promote the public health and welfare. On the other hand, there is no inherent evil in providing insurance protection against the cost of blood for transfusions and charging a monetary premium for such protection. That being so, any interference with the freedom to contract for such insurance must be reasonably calculated to achieve the legitimate objective of assuring an adequate blood supply and cannot be unduly discriminatory or oppressive.

In *State ex rel. Time Ins. Co. v. Smith,* (1924) 184 Wis. 455, at 470, 200 N.W. 65, the decision held:

"* * * The right to make a contract of insurance existed at the common law and parties might make under the common law such contracts of insurance as they wished. The right of free contract is one of the inherent rights guaranteed to the citizen by our constitution as well as by the national constitution. * * *

"This right, like all other rights, is subject to limitation or regulation in the interest of the general welfare, and the power of the state to regulate the issuance of policies of insurance is conceded * * *."

The power to regulate, however, is itself limited. As was said in *State v. Redmon,* (1907) 134 Wis. 89, at 107, 114 N.W. 137:

"As it is a judicial function to define the proper subjects for the exercise of police power (*Lake View v. Rose Hill C. Co.* 70 Ill. 191), it must be to decide, as to any enactment, whether it really relates to a legitimate subject, or under the guise of doing so violates rights of persons or property. * * *"

The opinion in *Lawton v. Steele,* (1894) 152 U.S. 133, at 137, 14 S. Ct. 499, 38 L. ed. 385, speaking of the exercise of the police power, stated:

"* * * To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. * * *"

In the *Redmon* case, supra, at 134 Wis. 112, it was said:

"The inquiries to be solved in testing an enactment purporting to be for the promotion of the public health as to whether it is fairly within the field of police power are well stated at sec. 143, Freund, Police Power, thus:

The Honorable, The Assembly

" 'Does a danger exist? Is it of sufficient magnitude? Does it concern the public? Does the proposed measure tend to remove it? Is the restraint or requirement in proportion to the danger? Is it possible to secure the object sought without impairing essential rights and principles?'

"The judgment of the legislature, of course, as to all of them is to be taken as correct, unless it appear to be clearly wrong, and also it is to be taken as true that its ostensible is its actual purpose, unless the contrary clearly appears."

In light of these principles must the provisions of Bill No. 69, S., be examined.

The bill is intended generally to prohibit transfusion insurance where the consideration is a premium of money. The underlying theory is that persons who are protected by such insurance are less likely to donate their blood and that with the spread of such insurance donations of blood for transfusion purposes will decrease until the shortage of blood supplies becomes serious. The theory may or may not be sound, but it is not unreasonable to accept that theory on the basis of the information I have received. The questions as to the validity of the proposed statute arise from the particular means employed to accomplish the objective.

If the bill is intended to prohibit blood transfusion insurance only when the premium is paid in money — and this is what the wording appears to attempt —, it should be pointed out what the actual result will be.

The business of insurance is extensively regulated under our statutes, and there is no statutory authority for an insurance program based on blood, rather than money, premiums. In fact, sec. 201.24 (1) expressly prohibits a domestic insurance company from dealing directly or indirectly in goods or commodities, except damaged goods insured by such company. In short, a blood bank or any insurance organization is prohibited from selling blood transfusion insurance for a blood premium. Thus the bill would prohibit all blood transfusion insurance for persons who are able to contribute their own blood.

Persons unable to donate their own blood "because of age or for other medical reasons" would be permitted to obtain transfusion insurance for a money premium.

On the other hand, a large portion of the residents of the state would be prohibited from obtaining transfusion insurance, regardless of their willingnesss to pay a money premium or to donate blood to a blood bank.

At first blush, it might seem that the discrimination based upon the unacceptability of a person's blood for transfusion purposes is proper and germane to the objective of the bill, since the unacceptable donor would not be deterred from

donating his blood by reason of having transfusion insurance. However, there are several other factors involved in meeting the needs for blood, which, combined with the blanket exemption accorded to unacceptable donors, make the bill highly discriminatory and ambiguous.

The annual blood needs for transfusion purposes are about 4 pints per 100 persons. Persons under 18 or over 60 years of age generally are considered unacceptable as donors. Those age groups comprise about 51% of the population of Wisconsin, according to the Blue Book, 1962. A small part of the remaining 49% are permanently unacceptable as blood donors for medical reasons other than age. Those persons temporarily unacceptable will be mentioned subsequently. It is obvious that from the generally acceptable donors one pint of blood from each person per decade would supply more blood than is needed for transfusion purposes. In order to assure this rate of blood donation, the bill seeks to prohibit entirely transfusion insurance for over 40% of the population of the state, while permitting the rest of the population to obtain such protection.

The bill would have no effect on non-residents who received transfusions in Wisconsin, but would effectively prevent 40% of Wisconsin residents from protecting themselves against the costs of transfusions received anywhere.

Almost any individual is an unacceptable donor at times because of some temporary medical disability such as a common cold. During a period of temporary unacceptability a man could, under the bill, obtain insurance covering the cost of blood for transfusions for himself and his dependents, even though he had three or four dependents who were acceptable donors. On the other hand, a man who is an acceptable donor could not obtain such coverage for dependents who are unacceptable donors. This results from the fact that the bill prohibits the delivery, or issuance for delivery, of a policy of the proscribed type to a person who is an acceptable donor.

This form of prohibition results in another anomaly, in the field of group insurance. If a group insurance contract

is issued by an insurance carrier to a corporation, to provide health insurance, including transfusion coverage, for the corporation's employes, the proposed law would not apply to that policy, since the corporation is not an acceptable donor. Whether the covered employes were acceptable donors would be irrelevant.

The last sentence of the bill permits insuring against liability for the cost of human blood for persons "other than the insured and his dependents." The clear inference is that a person may not obtain insurance against liability for the cost of blood for his dependents. However, under 204.34 (2) no insurance policy issued in Wisconsin and covering liability arising by reason of the use of a motor vehicle shall exclude from the benefits or coverage persons related by blood or marriage to the insured. Repeal of statutes by implication is not favored, and it is my conclusion that the language of the bill last above quoted cannot be reconciled with 204.34 (2). Hence, the quoted language would be of no effect as to motor vehicle liability insurance.

The various discriminatory effects of the bill, as previously discussed, in my opinion cannot be said to be reasonably germane or necessary to the ultimate objective of assuring an adequate supply of blood for transfusion purposes and are unduly oppressive upon the many individuals who would be denied any opportunity of protecting themselves and their families against the cost of blood for transfusions. For this reason alone, I believe the bill would not, if enacted, create a valid law.

Although the foregoing answers your request, I deem it advisable to point out some other problems which would be created by passage of this bill.

The prohibition of the bill is restricted to policies "providing indemnity against the cost of human blood for transfusion purposes" and cost of human blood does not include "expenses of preparing and testing human blood for transfusion purposes".

In the case of blood supplied to a hospital by a charitable blood bank, the question arises whether there is any charge

for the "cost of human blood". The blood bank's charge to the hospital — at least in many cases — would appear to be no more than preparing, testing, storing and delivering the blood to the hospital. The hospital charge to the patient for a transfusion, of course, includes what the hospital has to pay the blood bank, plus a charge for the hospital services associated with the transfusion. There may be nothing in the total charge to cover the cost of human blood. In such a situation, the bill would have no application and, consequently, no effect upon the adequacy of the supply of blood for transfusions. The policy issued for a money premium could provide full indemnity for the transfusion costs.

If, on the other hand, a hospital charge of $25 for a transfusion were considered to be comprised of a $15 charge for hospital services and $10 for the cost of human blood, and the patient were an acceptable donor who was prohibited by the bill from obtaining full tranfusion coverage, the oppressive nature of the bill is apparent. Should the patient need only two or three transfusions, his health insurance carrier could indemnify him for all but $20 or $30 and there might be no charge for that if his family or friends donated two or three pints of blood to the local blood bank. If the patient were suffering from aplastic anemia and required 100 or more transfusions, he would be faced with a bill of $1,000 or more, no insurance protection for that liability, and the difficult or impossible task of producing 100 or more pints of blood from family and friends. Thus the effect of the bill is to deny the insurance to some who may become the most needful of such protection, while allowing approximately one-half of the population to obtain the insurance without regard to their financial status, number of dependents or any other factor except age.

The exemption accorded to "persons who are unable because of age or for other medical reasons to contribute their own blood" is extremely ambiguous. No standards are established for determining when a person is an acceptable donor. The minimum and maximum age limits mentioned above are not universally accepted, and there is no provision in the bill for establishing any standards as to what

may disqualify a person, temporarily or permanently, as a blood donor. For each violation of the law the violator would be subject to a forfeiture under 200.14. In view of that penalty provision, the absence of such standards alone might invalidate the proposed statute, for penal statutes must contain ascertainable standards of guilt.

Many of the discriminatory and ambiguous features of the bill might be removed by a simple prohibition of insurance indemnifying against the cost of blood for a limited number of transfusions within a specified period of time and applicable to all persons. This would allow the individual to protect himself against the great cost of massive transfusions for himself or his dependents and at the same time encourage donations of blood so that the charitably operated blood banks could continue to supply the hospitals with their blood requirements at a reasonable cost.

In my opinion, however, the bill in its present form would not create a valid act because its discriminatory features are unduly oppressive upon individuals and the means employed to achieve the ultimate objective are not reasonably necessary for the accomplishment of the purpose.

EWW

Trust Fund—Contractor—Under 289.02 (4) a trust fund to the amount of all claims due and to become due and owing for improvements is created in the hands of the contractor when the owner pays him for improvements.

April 29, 1964.

WILLIAM J. MCCAULEY
Milwaukee County District Attorney

Your request for my opinion raises question about the application of sec. 289.02 (4), Stats., to the following situation:

"John Jones, an independent contractor in Milwaukee, solicited the business of Tom Smith, a tavern owner and proprietor, to refinish the front of Mr. Smith's tavern. The total cost of the alterations was to be $1500. Mr. Smith paid $500 as a down payment on the contract. Mr. Jones, after accepting the $500, immediately used that amount to pay for bills he had incurred with materialmen for material supplied on other previous jobs and partially for his own living expenses."

The work has not commenced and no labor or materials have as yet been furnished on Mr. Smith's job.

Your question is "whether the money paid by the owner of the property to the contractor must be held in trust by the contractor until such time as all claims are due and have become due and owing" or whether, as contended by the contractor, the down payment is "his to do with as he pleases" and that there is no violation "until materials or labor have been supplied for the job and he does not have the money with which to pay them".

The contention of the contractor is without merit and he has violated the provisions of 289.02 (4) by using the $500 down payment for his own purposes.

Sec. 289.02 (4) provides as follows:

"(4) THEFT BY CONTRACTORS. The proceeds of any mortgage on land, paid to any principal contractor or any subcontractor for improvements upon the mortgaged premises and *all moneys* paid to him by any owner for improvements, *constitute a trust fund* in the hands of any such contractor or subcontractor *to the amount of all claims due and to become due or owing* from such contractor or subcontractor for labor and materials used for such improvements *until all such claims have been paid;* and the *use* of any of such moneys by any contractor or subcontractor *for any other purpose* until all claims, except those which are the subject of a bona fide dispute, have been paid in full, or pro rata in cases of a deficiency, *is theft* of moneys so misappropriated."

This statute expressly provides for the creation of a trust fund in the hands of the contractor. This trust fund consists of all moneys paid by the owner "to the amount of all claims due or to become due and owing for such improvements" and the trust fund is not terminated until "all claims have been paid". Use of the funds by the contractor for "any other purpose" before the claims have been paid is theft of the money misappropriated.

In your hypothetical situation, no claims for labor or materials were due at the time of the down payment by the contractor and his personal use of the money. This fact is entirely immaterial if the trust fund was created by the payment of the owner and if it is inevitable that claims for materials and labor on the Smith job will 'become due and owing".

The Wisconsin cases interpreting 289.02 (4) make it clear that the statutory trust fund is created when the owner of the property pays money to the contractor. It is *not* created when claims for labor or material become due and owing. *Bastian v. Le Roy,* (1962) 20 Wis. 2d 470, 483, 122 N. W. 2d 387; *Visser v. Koenders,* (1959) 6 Wis. 2d 535, 95 N. W. 2d 363.

The elements of a "trust" are a *trustee,* who holds the trust property and is subject to equitable duties to deal with it for the benefit of another, a *beneficiary* to whom the trustee owes equitable duties to deal with the trust property for his benefit and the *trust property,* which is held by the trustee for the beneficiary. *Sutherland v. Pierner,* (1946) 249 Wis. 462, 467, 24 N. W. 2d 883. Restatement of Trusts, Vol. I, § 2, p. 13.

It is apparently inferred by the contractor that since no labor or materials have been furnished, there is no present specific beneficiary of the trust. This fact, however, in no way invalidates the trust or prevents its creation. According to Restatement of Trusts, Vol. I, § 2, p. 13-14:

"Although all three elements are present in a complete trust, one or more of them may be temporarily absent with-

out destroying the trust or even without preventing the creation of the trust.

"* * *

"A trust can be created, or having been created can continue, although for the time being there is no beneficiary. * * * Thus, a trust can be created for the benefit of a child not born or conceived at the time of the creation of the trust, or for the benefit of a definite class of persons although the identity of the individuals comprising its membership is not ascertainable at the time of the creation of the trust."

We have then, in your example, a trust created by the payment from the owner to the contractor. The exact identity of the beneficiaries is not known at the time of the creation, but they are those who must provide the labor and materials necessary to fulfill the contract under which the payment was made.

Implicit in the contractor's contention that there is no violation until claims are due is an assumption that no one is hurt by his use of the money when there are no presently existing claims for labor or materials. This is an erroneous assumption.

Our statute, and those in the other states which provide that subcontractors, laborers and materialmen may have direct liens against the property of the owner, are aimed at the protection not only of laborers and materialmen, but also at the protection of the owner of the property. *Pauly v. Keebler,* (1921) 175 Wis. 428, 434-5, 185 N. W. 554. *State v. Tabasso Homes,* (1942) 28 A. 2d 248, 253. By the personal use of the down payment in this situation the contractor is "hurting" the owner of the property as well as diminishing the chances of collection of their claims by the laborers and materialmen whose services and material are absolutely essential to the completion of the contract.

If the contractor's contention was accepted that there is no violation until not only claims are due but "he does not have the money with which to pay them", 289.02 (4) could

well be unconstitutional as a violation of the constitutional provision against imprisonment for debt arising out of contract. The violation of 289.02 (4) does not consist of one not paying his debts, but rather is based upon a misappropriation of funds which have been entrusted to a contractor. *Pauly v. Keebler,* (1921) 175 Wis. 428, 185 N. W. 554.

Under the fact situation described by you, it is inevitable that claims for labor and materials will arise and later "become due and owing", unless, of course, the contractor does not intend to do the work contracted for and did, in fact, obtain the money from the owner under false pretenses.

It is also inevitable that this first payment is included in the trust, since unlike a situation in which a last payment is used for personal purposes by a contractor, it cannot be claimed that the amount received is outside of the trust because it exceeds the "amount of all claims due or to become due".

Until such time as all claims for labor and materials are paid, the contractor's interest in the money paid to him by the owner to the extent of the amount of all claims due and to become due is merely as a "trustee". He does not himself own the money. The nature of the contractor's interest in the money due under a contract when labor and material claims have not been paid has been decided in several New York cases. In *Aquilano v. United States,* (1961) 219 N. Y. S. 2d, 254, 10 N. Y. 2d 271, 176 N. E. 2d 826, the contractor owed subcontractors. He also owed taxes to the United States government. The owner of the property had in his hands some moneys still owing to the contractor under the contract. The United States government first filed its tax lien and thereafter the subcontractors filed their liens. The owner paid the funds owed by him to the contractor into court. The case went all the way to the United States supreme court (363 U. S. 509) and upon being remanded to the state court it was decided:

"Our conclusion, then, is that as a matter of New York law, a contractor does not have a sufficient beneficial interest in the moneys, due or to become due from the owner

under the contract, to give him a property right in them, except insofar as there is a balance remaining after all subcontractors and other statutory beneficiaries have been paid."

This conclusion resulted in an award of the money to the subcontractors rather than to the United States government, even though the tax lien was filed prior to the filing of the mechanics lien. See also: *Kaufman v. Lap Construction Co.*, (1961) 222 N. Y. S. 2d 624.

In conclusion, then, under 289.02 (4) a trust arises when the owner pays any money to the contractor. It is immaterial that at the time of the creation of the trust no labor or materials have as yet been furnished when it is essential that labor and materials must be furnished in order to perform the contract. The trust created by the payment is to the amount of all claims due and to become due and does not terminate until all claims for labor and material are paid. Until this is done, the money paid to the contractor is held by him as a trustee and not as owner of the money. Since he holds the money as a trustee he cannot spend it for his own purposes. When he does so, he violates the provisions of 289.02 (4).

BRB

Assessor's Plat—An assessor's plat made under 70.27 may include both platted and unplatted lands, but should not be used for the primary purpose of correcting prior plats.

April 30, 1964.

WILLIAM D. O'BRIEN
District Attorney, Chippewa County

You request my opinion on the following question: "Can an assessor's plat be made under Section 70.27 of the

Wisconsin Statutes of an area of land which includes both platted and unplatted lands?"

You state that the question is squarely presented in an area of the city of Eau Claire which lies in Chippewa county. The area includes four small subdivisions as well as unplatted land. You state that the criteria stated in 70.27 (1) are met so as to make an assessor's plat otherwise possible and desirable.

The intent is not to effect a change in subdivision layout, but only to reconcile the subdivision with ground survey and to describe the unplatted lands so that all of the lands in the assessor's plat can then be sufficiently described for assessment purposes without referring to metes and bounds descriptions.

As stated in your request, vacation and alteration of the plats under 236.40 is unavailable, because the city does not own any lot in the subdivision. You further point out that many boundary disputes are to be anticipated and a large number of owners involved.

It is my opinion that an assessor's plat may include both platted and unplatted lands. Sec. 70.27 (7) so indicates. This section provides what the certification must contain.

Sec. 70.27 (7) (b) reads:

"(b) A clear and concise description of the land so surveyed and mapped, by government lot, quarter quarter-section, township, range and county, or if located in a city or village or platted area, then according to the plat; otherwise by metes and bounds beginning with some corner marked and established in the United States land survey."

If platted areas were not to be included in the assessor's plat, the statute would not provide that the description could include a platted area.

Sec. 236.03 (2) exempts assessors' plats from the requirements of ch. 236, with the exception of 236.15 (1) (a) to (g) and 236.20 (1) and (2) (a) to (e). None of these sections

would prohibit an assessor's plat from including portions of platted areas.

While it is not clear from your request, it can be inferred that you intend to use the assesor's plat as a means of correcting the four small subdivisions that will be included in it.

An assesor's plat is ordered by the local governing body to facilitate the assessment of property. In considering the purpose of 70.27, this office in 35 OAG 437, at page 439, held:

"* * * Accordingly, it is our opinion that sec. 70.27 must be limited to its proper function of providing a means for simplifying the work of the assessors in describing the parcels of land which have already been conveyed to various owners in severalty. * * *"

In considering whether a replat could be used as a means of altering a recorded plat, it was held in 49 OAG 113 at page 114:

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

"I can find nothing in the chapter that would indicate a certified survey map could be used to accomplish replatting according to your definition. The maxim *expressio unius*

est exclussio alterius applies to the recording of a certified survey map just as it does to a replat."

Consequently, an assessor's plat should not be employed as a direct means of correcting recorded subdivision plats.

From the facts given in your letter it is impossible to determine whether the errors in the four recorded plats are such as to make it impractical for the assessor to rely on them for the purpose of assessment and taxation. If in fact the errors in the plats are such as to force the assessor to resort to metes and bounds description, then it is my opinion 70.27 may be used to correct them.

While it is true that 70.27 (5) allows the assessor's plat to reconcile discrepancies that become apparent, so that the certified plat will be in conformity with the records of the register of deeds, this does not, in my opinion, authorize the use of assessors' plats as a direct means of correcting earlier plats, but only as authority to prevent the perpetuation of errors.

It is my opinion that if it is impractical to exclude the four subdivision plats from the assessor's plat, or if they are such that the assessor cannot rely on them in the performance of his duty, then in these instances, they may be included and corrected by the assessor's plat. If, however, the subdivision plats are being included merely as a convenient way of having them corrected, they should not be included, but should be corrected under the procedures of Ch. 236.

AJF

Words and Phrases—Property Taxation—Term "residence" in 70.11 (2) is defined as any structure of a residential nature and does not include the land.

April 30, 1964.

ROBERT P. RUSSELL

Corporation Counsel, Milwaukee County

You inform me that a dispute has arisen between Milwaukee county and various units of local government, with respect to property exempt from taxation.

The provisions of sec. 70.11 (2), Stats., exempts certain municipal property. Prior to 1961, this section (Wis. Stats. 1957) read:

"MUNICIPAL PROPERTY. Property owned by any county, city, village, town, school district, metropolitan sewerage district, municipal water district created under s. 198.22 or town sanitary district; lands belonging to cities of any other state used for public parks; land tax-deeded to any county or city before the first Monday in July."

By ch. 58, Laws 1961, the following provision was added, "but any residence located upon property owned by the county for park purposes, which is rented out by the county for a non-park purpose, shall not be exempt from taxes". You state that the disagreement concerns the interpretation of the amendment.

You further state that the park commission has been engaged for many years in advance planning and purchasing. Frequently, residential property is acquired far in advance of the time when it can be used for park purposes. Meanwhile, the property may be rented in order to obtain some income. The assessors in some of the local municipalities in the county have taken the position that the entire property is subject to tax, while the county takes the position that the word "residence" in the amendment to 70.11 (2) by ch. 58, Laws 1961, includes only the houses or structures, which are occupied and not the land upon which they are located.

As stated in your opinion request, if there is no ambiguity in the statute, the words must be given their ordinary true meaning. However, the word "residence" is not clear, and therefore, we must look to the intent of the legislature to resolve the ambiguity.

It is my opinion that the legislative history is helpful to determine the intent of the legislature. The original bill introduced was Bill No. 246, A., and read as follows: "* * * but land owned by any county for park purposes, which is rented out by the county for private use, shall not be exempt from taxation. * * *" Amendment 1, A., changed the bill to its present form and the bill, as amended, became ch. 58, Laws 1961.

The amendment indicates that it is not intended that land be taxed, but only structures that are used for residential purposes.

It is my opinion that if the legislature intended that land be taxed, it would have included the term "land" as it did in the original bill. There is no reason to broaden the definition of the term "residence" to include land, in view of the history.

AJF

Airport—Municipality—A municipality cannot unilaterally interrupt and abandon an airport project initiated under sec. 114.33.

May 1, 1964.

T. K. JORDAN, *Director*
State Aeronautics Commission

You have requested an opinion concerning the Park Falls municipal airport.

You state that the city of Park Falls initiated an airport project under sec. 114.33, Wis. Stats. The city filed a peti-

tion with the aeronautics commission of the state of Wisconsin. The commission held a hearing on the petition and made a finding favoring the airport project. The governor approved the finding and the commission notified the city of Park Falls to that effect by filing a copy of its finding, which included, among other things, the location of the approved site, the character and extent of the improvements deemed necessary, and an approximate estimate of the costs and the amount to be paid by the city.

The city thereupon entered into an agency agreement with the commission pursuant to 114.32 (1). The agency agreement authorized the commission to act as the agent of the city for the purpose of completing the airport project and to enter into the necessary agreements with the federal authorities in order to receive federal aid for the airport. The city deposited $7,500 with the commission to cover preliminary costs.

Subsequently, the city of Park Falls, in the spring election, placed on the ballot the following referendum question: "Shall the City of Park Falls construct an airport to be paid for by federal, state, and local funds".

The referendum question was defeated. The city clerk thereupon notified the commission that the city of Park Falls was forced to withdraw from its part of the contract with the federal and state aeronautics commission, and asked that the unused portion of the $7,500, paid to the commission, be returned.

You ask whether the city of Park Falls can unilaterally interrupt and abandon the project, as the result of the referendum vote.

It is my opinion that the city of Park Falls may not interrupt and abandon the project. When the city initiated the airport project, it was necessary that they make a finding of public necessity. The aeronautics commission and the governor confirmed this finding and thereupon a contract was entered into. Once a project is initiated, the commission has made its findings, and the governor has approved the find-

ings, it is my opinion that the commission could take appropriate action to compel the municipality to perform its part of the project. This office, in 11 OAG 841, renedered an opinion to the effect that if the local unit of government failed to live up to its contractual obligation, it could be compelled to do so by mandamus. The question presented in that opinion was similar to the question you ask. The statute involved was the predecessor of 84.11 and dealt with intrastate bridges. This statute is very similar to 114.33.

That opinion was relied on in *State ex rel. Owen v. Stevenson,* (1917) 164 Wis. 569, 161 N.W. 1, wherein the court issued a writ of mandamus requiring the county to carry out its statutory duty.

The referendum cannot, in any way, change the duties of the city under the statute. Once the city petitions for an airport project and there is a finding of necessity, and a contract has been entered into, the functions of the city from that point on are merely ministerial. They must be performed according to the requirements of the statute.

AJF

Words and Phrases—Tax—Personal Property— The "true cash value" under 70.34 of gasoline carried in this state for sale should be determined by actual market price on May 1.

June 3, 1964.

COMMISSIONER OF TAXATION

Your department has asked my opinion of the proper interpretation of the term "true cash value" as used in sec. 70.34, Stats., which directs that personal property shall be asssessed for taxation at its "true cash value". Your problem arises from an application of the standards of this statute (sec. 70.34) to stocks of gasoline held in the possession of

the retail gas station operator on the tax day which is May 1 for each tax year. (Sec. 70.10.)

The claim is advanced that the retailers may be divided into 2 classes who shall be treated differently. The first class includes those retailers who have purchased the gasoline from some other bulk operator or wholesaler who has thereby become liable for both the federal and the state gasoline taxes, and who has added those taxes to the price of the gasoline charged to the retailer.

The second class includes those retail stations operated by integrated companies who produce their own petroleum, refine their own gasoline, transport it to bulk distribution points and thereafter transport it to stations which they own or to which they deliver it on consignment for sale.

The argument is made, and it is apparently supported by the opinion reported in 27 OAG 362, that only in the first case stated shall the federal and state taxes upon the sale of gasoline be considered a part of the "true cash value" of the gasoline, on the theory that the taxes have been co-mingled with the other items of value, but that in the second case the federal and state taxes must be deducted from the quoted retail sales price on that date in determining the "true cash value."

The inequitable, and in fact unconscionable, nature of such a result is obvious and in my opinion it is not the law. The fundamental principle laid down by our constitution for the taxation of both real and personal property on an ad valorem basis is uniformity of taxation, and an argument which leads to the conclusion that identical volumes of identical commodities can be taxed under two different rules, depending upon its prior commercial history, defeats itself.

Whatever may have been the theoretical justification for the 1938 opinion at the time it was announced, since that time in at least 6 leading cases our supreme court has reiterated the principle that for such commodities as a ready market exists, "true cash value" means the sales price established on like sales as of the time the tax is assessed.

The cases are: *Sate ex rel. Nat. Dairy Prod. Corp. v. Piasecki,* (1957) 2 Wis. 2d 421, 86 N. W. 2d 402; State ex rel. *Dane County Title Co. v. Board of Review of City of Madison,* (1957) 2 Wis. 2d 51, 85 N. W. 2d 864; *State ex rel. Evansville Mercantile Association v. City of Evansville,* (1957) 1 Wis. 2d 40, 82 N. W. 2d 899; *State ex rel. Enterprise Realty Company v. Swiderski,* (1955) 269 Wis. 642, 645, 70 N. W. 2d 34; *State ex rel. Baker Manufacturing Company v. City of Evansville,* (1952) 261 Wis. 599, 608, 53 N. W. 2d 795; *State ex rel. New Lisbon State Bank v. City of New Lisbon,* (1952) 260 Wis. 607, 51 N. W. 2d 509; *State ex rel. I. B. M. Corp. v. Board of Review,* (1939) 231 Wis. 303, 285 N. W. 784; *State ex rel. Northwestern Mutual Life Insurance Company v. Weiher,* (1922) 177 Wis. 445, 448, 188 N. W. 598.

Many of the cases involving the application of 70.34 arose over the valuation of property for which there was no ready cash market which could be referred to for the determination of the "true cash value". Nevertheless, in these cases the court emphasized in every case that the duties of the assessor were to seek to determine from such factors as the court deemed appropriate the value at which a willing buyer and a willing seller would deal.

In the second *Evansville* case, *State ex rel. Evansville Mercantile Association v. Evansville,* supra, the court quoted with approval from *State ex rel. Baker Manufacturing Company v. Evansville,* supra, at p. 43 the following:

" 'Sec. 70.32 (1), Stats., provides that "Real property shall be valued by the assessor . . . at the full value which could ordinarily be obtained therefore at private sale. . . ." By sec. 70.34 articles of personal property shall ". . . be valued by the assessor . . . at their true cash value. . . ." These sections have often been construed. In each class of property they presuppose a value at which a willing buyer and a willing seller would deal. For property whose market is restricted or nonexistent and for unique property which is not for sale the appraisal is necessarily based on many factors other than actual sales of this or comparable property. Nevertheless,

the task of the appraiser it to determine, as accurately as he can, the amount which the property would bring in the period for which the assessment is made, both buyer and seller being willing and able to deal.' *State ex rel. Baker Mfg. Co. v. Evansville* (1952), 261 Wis. 599, 608, 53 N. W. (2d) 795."

In the *Evansville Mercantile Association* case, the court stated further at p. 45:

"* * * The intrinsic value may have been greater, but it is the sale value which controls assessments. *State ex rel. Northwestern M. L. Ins. Co. v. Weiher, supra; State ex rel. New Lisbon State Bank v. New Lisbon* (1952), 260 Wis. 607, 51 N. W. (2d) 509. The owners were willing but not obliged to sell. We conclude that the fair market value was established by this sale and that other evidence tending to show what market value might be, which might be resorted to in the absence of such a sale, may not be used here to overthrow the evidence of the market itself. Therefore the assessment must be set aside and recalculated upon the basis of the price which appellants paid for the property."

The principle that the objective of the assessor must be to determine the value at which a willing buyer and a willing seller would deal is adhered to in all of the cases quoted. In my opinion, it is just as important to emphasize the factor of the amount which the seller pays for the property transferred as the amount which it may have cost the vendor. In the case of gasoline sold at retail there is no difficulty in determining this price. It is the price posted on the pumps of the retailer in question on the day of the sale.

While the argument is advanced that the retailer does not really pay the tax, but simply acts as a collector from the consumer on behalf of the federal or state government, this argument ignores the fact that there is no lien on the gasoline in the hands of the consumer for the tax nor is he independently liable to the government therefor. The tax which becomes due at the ultimate sale of the gasoline is just as much a part of the market value of the gasoline on the day of sale as all of the other taxes which have been paid at

various steps in the production of the gasoline from the time the prospector first went searching for an oil field through the drilling, recovery, transportation, refining, distribution and retail sales costs, all of which are added into the sales price which is borne by the ultimate consumer. As one of our presidents has stated, "taxes are paid in the sweat of every man who labors", and to argue otherwise is only a general fraud perpetrated by certain economists and certain accountants who are seeking to aid their clients to avoid taxes. In the absence of any specific direction in the taxing statutes to eliminate any specific tax from the market price of a commodity, it would appear that the market price which the consumer must pay for the product is controlling in determining its "true cash value".

A subsidiary question would involve the determination of the "true cash value" of stocks of gasoline held in the hands of wholesalers who are independent bulk operators, or at the tank farms of integrated oil companies. In the case of the independent bulk operator, it would appear that the "true cash value" of the gasoline in his tanks is the value for which he bills the retailers for gasoline delivered on the tax day. In the case of the integrated operator, it would appear that the "true cash value" is the retail sales price of the gasoline quoted on its pumps on the tax day, diminished by such portion of the price as is fairly attributed to the cost of operation of the retail gasoline sales station.

RGT

Compatibility—Board of Education—Except as otherwise provided in 41.15 (11) (a) member of city board of education should not serve on local board of vocational and adult education.

June 8, 1964.

C. L. GREIBER, *Director*
Vocational and Adult Education

You have requested an opinion on the legality of a member of a city board of education serving as a member of the local board of vocational and adult education.

Sec. 41.15 (11) provides that the members of a local board of vocational and adult education established by a city school board shall be appointed by such board.

In 8 OAG 214 it was concluded that where the board of education is charged with supervision of schools in a city, and the board is appointed by the mayor and confirmed by the common council, or is elected by the common council, the position of member of the board of vocational education is incompatible with the position of city alderman. This opinion was dated March 26, 1919, and in an unpublished opinion of June 3, 1919, from Attorney General John J. Blaine to the secretary of the Wisconsin State Board of Vocational Education reference was made to the March 26 opinion and the view was expressed that the position of member of the regular board of education was incompatible with the position of member of the board of vocational education or industrial education as it was then called.

However, the legislature has specifically provided for membership of a city educational board member on the vocational board under certain circumstances. Sec. 41.15 (11) (a) relating to members of the vocational board provides that some of the members thereof shall consist of:

"(a) The city superintendent of schools, the superintendent of the unified or common school district, or the principal of the high school if there is no city superintendent or the president or director of the local school board in case there is neither of the above-mentioned officers, and if there is more than one such superintendent, principal, president or director in the district, the ex officio member shall be selected by the appointing board; and * * *"

Thus under the circumstances stated in this paragraph, the president or a director of the local school board may be a member of the vocational board.

In view of this exception provided by the legislature itself it cannot be said that membership on the one board is wholly incompatible with membership on the other, but under familiar rules of construction the exception ought not to be extended by implication.

The general rule is that the holding of one office does not of itself disqualify the incumbent from holding another office at the same time if there is no inconsistency in the functions of such offices; but a public officer is prohibited from holding two incompatible offices at the same time. 67 C.J.S. 133. See also 42 Am. Jur. "Public Officers" §§58, 59, and 60, p. 926-7. One of the considerations underlying the disapproval of multiple office holding is so that offices and places of public trust will not accumulate in a single person.

Another objection which might be made to dual board membership is that members of the city board of education would be in a position to name themselves as members of the board of vocational education and that this would deprive the vocational school system of the services of an independent governing board and thus defeat whatever purpose the legislature had in mind when it provided for the creation of separate governing board for the vocational school or schools.

Another argument that may be made against dual membership is that each board is to some extent at least in competition with the other for the taxpayer's dollar. Only so much money is going to be spent for education of all types and a member of two boards is going to have to wrestle with his own conscience on the question of how hard he will press for the needs of the one board as oppresed to the needs of the other. This brings us to the oft-quoted admonition from the Sermon on the Mount in VI Matthew 24 against serving two masters: "No man can serve two masters" which emphasizes not so much the fact that this is wrong, as that it will not work. It is also interesting to

note that the same admonition occurs in XVI Luke 13, - "No servant can serve two masters: for either he will hate the one, and love the other; or else he will hold the one, and despise the other". This follows immediately after the parable of the unjust steward, a flagrant violation of fiduciary fidelity and conflicting interest.

Lastly, we are informed that the practice over the years has been to avoid dual membership, which is entitled to considerable weight in analyzing the problem although it is not necessarily controlling.

Accordingly, you are advised that except as otherwise provided in 41.15 (11) (a) it is incompatible for a member of a city board of education to serve on the local board of vocational and adult education established by said city board of education.

WHR

Words and Phrases—Insurance—Meaning of word "period" in sickness and accident insurance policies discussed.

June 11, 1964.

CHARLES MANSON, *Commissioner*
Department of Insurance

You request an opinion as to whether, under section 204.31 (3) (a), Stats., certain variations from the statutory standard provisions on proof of loss in an accident and sickness insurance policy may be permitted. The cited paragraph of the statutes provides, in essence, that any such policy shall contain certain statutory provisions except that the insurer may substitute different wording "approved by the commissioner" if such wording is "not less favorable in any respect to the insured or the beneficiary".

statutory standard provision on proof of loss as follows:

The pertinent part of 204.31 (3) (a) 7. sets forth the

"Written proof of loss must be furnished to the insurer at its said office in case of claim for loss for which this policy provides any periodic payment contingent upon continuing loss within 90 days after the termination of the period for which the insurer is liable and in case of claim for any other loss within 90 days after the date of such loss. * * *"

The answer to your question depends upon the meaning of the phrase "period for which the insurer is liable" in the first sentence above quoted.

The two variations about which you inquire are as follows:

A.

Written proof of disability must be furnished to the company within 90 days *after the end of the first month or lesser period for which the company may be liable. Subsequent written proofs of the continuance of disability must be furnished to the company at such intervals as the company may reasonably require.*

B.

Written proof of the total disability incurred must be furnished to the company within 90 days *after the termination of the first monthly period for which the company is liable. Subsequent written proof of the continuance of such total disability must be furnished to the company at such intervals as the company may reasonably require.*

If the phrase "period for which the insurer is liable" in the first sentence of 204.31 (3) (a) 7. means the total period for which benefits are payable, regardless of whether benefits are payable monthly, weekly or for some other interval, then the statutory standard form would mean that in the event of a covered disability extending for 12 months the insured would have 90 days after the end of the 12 months in which to submit written proof of loss. Measured by such a standard, variation A or B, set forth above, would be less favorable to the insured and beyond your power to approve.

It is my opinion, however, that the "period" referred to in the first sentence of 204.31 (3) (a) 7. is the individual period for which a benefit is payable, whether it be a week or month or some other interval. In that first sentence the word "period" is used in connection with a claim for loss for which the "policy provides any periodic payment contingent upon continuing loss". Proof of any other loss must be made within 90 days of the loss. In view of the latter restriction upon the insured, it is scarcely reasonable to allow a much longer time for submitting proof of loss where the policy provides periodic payments which may continue for many months. Nor is such a construction called for by the wording of the statute.

The "period" referred to by the statute is the period for which a benefit is payable, whether a week or a month or some other interval. This is in accord with the use of the word in subparagraph 8, which refers to periodic payment and provides for a "period for payment which must not be less frequently than monthly". This construction also is the only reasonable one as applied to long-term disability coverage. In the case of a policy providing monthly disability benefits for maximum of 60 months—or even for life—there is no apparent reason for prohibiting the insurer from requiring that proof of loss be furnished within a reasonable time. In fact, the second sentence of subparagraph 7. expressly provides that failure to furnish proof of loss within the time required shall not invalidate a claim if it is not reasonably possible to meet the time limit, "provided such proof is furnished as soon as reasonably possible".

When the word "period" in 204.31 (3) (a) 7. is construed in accordance with the foregoing, it is clear that variation A and B above are more, rather than less, favorable to the insured or beneficiary than the statutory standard form. Neither A nor B provides a shorter period than the statutory standard in which to furnish proof of loss. Also, the statutory standard would require a new proof of loss for each period (monthly, weekly or other interval) of disability, whereas variations A and B each would require but one proof of loss plus such subsequent proofs of continuing disability

as the company reasonably might require. At the most, this might result in requiring a new proof of loss for each benefit period—as the statutory standard requires—, and even then the burden would be on the company to demand the subsequent proofs. It is more likely that a company would, under either variation, require less frequent subsequent proofs of loss.

In my opinion either of the variations set forth above may be approved by you under 204.31 (3) (a).

EWW

Juror Fees—Counties—Under 255.25 a county can pay a juror only the per diem and mileage allowed. The court, however, may make arrangement for payment of meals under certain circumstances.

June 17, 1964.

FRANKLIN J. SCHMIEDER
District Attorney, Calumet County

Your recent letter raises quesion at to whether:

"If a court shall order that the jurors be taken out for meals during the course of a trial, either civil or criminal, and both before and after the case has reached them for delibertion, is the county allowed to pay these costs of meals * * *."

Sec. 255.25 provides:

"**Juror's fees and mileage.** Every grand and petit juror summoned upon any venire shall receive not less than $4 nor more than $16, as fixed by the county board, for each day's actual attendance upon any circuit or county court, and 10 cents for each mile actually traveled each day in going and returning by the most usual route; but shall be paid for no day when the court is not in session unless specially ordered by the presiding judge."

This per diem and mileage is all that a juror can be paid and normally out of this sum he must pay for his own meals while in attendance upon the court. As stated in 31 Am. Jur., Jury, §65, p. 63:

"Since jury service is a civic duty, there is no right to compensation for such service in the absence of statute. Statutes generally provide, however, for such compensation. The common provision is for a certain per diem and a certain mileage which frequently is made payable out of the county treasury as a charge against the county. * * *"

50 C. J. S., Juries, §207, p. 943 states:

"Compensation for service as a juror is not a common-law right, but is purely statutory, and in the absence of statute compensation cannot be recovered; * * *"

It was apparently on the basis of this type of reasoning that the attorney general in 1932 came to the conclusion that a juror was entitled only to statutorily specified mileage and per diem and that the county could not pay for his meals (21 OAG 932). This is still the law, but there is an exception to the rule that the county cannot pay for meals of a juror.

Our court in the case of *Fernekes v. The Supervisors of Milwaukee County,* (1877) 43 Wis. 303, 23 N. W. 558, was faced with a situation involving the payment for meals and lodging of jurors and deputy sheriffs while the jury was ordered to be kept together and placed in the charge of the deputies until they had agreed upon their verdicts in two murder cases.

The plaintiffs, as hotelkeepers, presented bills to the supervisors for the meals and lodgings of the jurors and the deputies. The supervisors paid the bill for the jurors, but not for the deputy sheriffs. Suit was brought and the supreme court affirmed a judgment ordering the payment for the meals and lodging of the deputies. In so doing, it said at p. 305:

" * * * It would be proper for the trial court, in these murder cases, to give some order or direction for furnishing

meals and lodging to the jury and officer in attendance upon them, in some suitable place, so that the jury might always be under the charge of an officer."

The court, therefore, did not have the question of county payment of the jurors' meals and lodging directly before it, but it certainly expressly approved of the county's action in paying such expenses even though the jurors were entitled also to per diem and mileage.

The supreme court of Michigan was faced with the question of county payment to a hotelkeeper for meals of jurors when the court ordered that the jury be placed in the custody of an officer. It found that the county could pay for the meals despite the fact that the jurors received a per diem and in so doing explained its reasoning. In *Stowell v. County of Jackson,* (1885) 57 Mich. 31, 23 N. W. 557, that court explained:

" * * * They are allowed a *per diem* fee, which is, no doubt, all they can ask for their services and expenses, so long as they are left at liberty to choose their own mode of living. The general custom in this country is to allow jurors to separate during the trial and before they are charged. But it is sometimes necessary to provide for their safe custody while waiting for agreement, and during that period it is now generally understood that they should not be deprived of food and necessaries. * * * It must always depend upon the power and discretion of the court whether they shall be secluded or not.

"If the court has power to require such action, there must be a liability on the part of the public to pay such expense as it involves. * * *

" * * * But in criminal cases the power of the court to keep them in custody, and to bind the county to pay for their maintenance, is established by several cases, and is believed to have been done without dispute heretofore in this State. * * *"

As authority for this latter statement the Michigan court cites the *Fernekes* case, as well as cases from Ohio, Maryland, and Arkansas.

Since the *Stowell* case, other courts, including those in Idaho and California, have also so held. In *Schmelzel v. Board of Commissioners,* (1909) 16 Idaho 32, 100 P. 106, and *Hart Bros. Co. v. Los Angeles County,* (1938) 31 C. A. 2d 766, 82 P. 2d 221, the rulings rely in large part upon the inherent power of the courts and necessary incidentals to the administration of justice.

In the *Hart Bros. Co.* case the court said at p. 770:

"* * * For the purpose of a jury trial the jury is a part of the court, and the court has inherent power to provide for its functioning under conditions which will favor its doing so efficiently, even to the extent of providing meals and lodging and transportation, if necessary, in cases of prolonged deliberation. * * * It is true, the jurors in criminal cases receive fees which may be considered as compensation for their services, and while they are permitted to remain separate and maintain themselves in such fashion as they see fit, they are expected to use these fees to provide for themselves; but when they are kept together in charge of the officer of the court they are no longer free to follow their own desires and provide for themselves and the court which prevents them from so doing has inherent power to provide for them, to the extent involved in this case, even without express statutory authority, * * *."

The Idaho case, cited above, declared that a court has inherent power to incur and order payment of all expenses as are necessary for the administration of justice. Although it seemed to feel that payment of board and lodging for jurors who were secluded by order of the court was proper, it decided that expenses for shaving and cutting the hair of jurors was not necessary to the administration of justice.

Accordingly, it is my opinion that:

1. A county can pay a juror only the per diem and mileage provided for in 255.25, for actual attendance upon any circuit or county court and cannot pay a juror an extra sum for meals.

2. A county can, however, pay to a vendor the expense of a juror's meals and other necessaries when a court has

determined that it is necessary for the administration of justice that the jurors be secluded and in the charge of an officer of the court and so orders both the seclusion and the payment of reasonable expenses involved therein. If the administration of justice so requires and the court so orders it is immaterial whether the case involved is criminal or civil or whether the jury has reached the point of deliberating its verdict. Ordinarily, however, seclusion of a jury is required and ordered only in certain criminal cases and while the jury is deliberating its verdict.

BRB

State Board of Health—Permits—Cosmetology—Under 159.02 (8) board of health may issue permits to students of cosmetology at Oregon school for girls if the board is convinced that despite their current status they are possessed of a good moral character and temperate habits.

July 6, 1964.

CARL N. NEUPERT
State Health Officer

You ask my opinion on this question: May the state board of health, pursuant to sec. 159.02 (8), Stats., issue student permits to the pupils of a school of cosmetology which the state department of public welfare proposes to operate at the Wisconsin school for girls, Oregon, Wisconsin?

You inform me that the students who will attend such proposed cosmetology school would be delinquent girls in the custody of the state department of public welfare (hereinafter called "the department").

A "student permit" is a matter of considerable importance to each student in a school of cosmetology in this state. In fact, it is vital to her schooling in cosmetology that she obtain it once she has commenced attendance at such school. In 29 OAG 424, 426 (1940), the then attorney general, referring to such permit, said:

"* * * It is considered that the purpose of the permit is to allow the holder to engage in student practice as required by sec. 159.02 (5) without being subject to prosecution for practicing cosmetic art without a license. That it is *not* a prerequisite to enrollment in a school and attendance at classes is shown by par. (e) of subsec. (8) above quoted, which requires that the student be *attending* a school in order to qualify for a permit. If one could not attend without a permit, no one could qualify and the law would be a nullity." (Emphasis supplied by Attorney General.)

In order to receive a student permit for use in a Wisconsin school of cosmetology a person must meet certain require-

ments set forth in sec. 159.02 (8). The requirement which might provide a troublesome hurdle for any one of the students here in question to clear is that the person receiving a student permit must be "of good moral character and temperate habits". Sec. 159.02 (8) (b). Unless the board is convinced that a student in the cosmetology school in question is possessed of good moral character and temperate habits, it is clear that the board would have no right or power to issue such student a student permit pursuant to sec. 159.02 (8). Stating the matter affirmatively, it is my opinion that the board may issue a student permit to such a student, provided it is convinced that such student is possessed of "good moral character and temperate habits".

You state that any individual now applying for a student permit under sec. 159.02 (8) is required to have the following completed form submitted to the board with her application:

CERTIFICATE OF CHARACTER

"I, the undersigned, do hereby certify that I am personally acquainted with _____(name of applicant)_____ and have known the applicant for at least one year and further state upon knowledge and belief that the applicant is a person of good moral character and temperate habits.

"Signed this____day of_____, 19__.

_____
Signature

_____
Street and City Address

_____
Occupation"

Such a certificate may well suffice as proof of good moral character and temperate habits in the case of a person applying for a student permit who has no status as a delinquent child housed in a state-operated facility. It seems to me,

however, that in the case of the students in question the board is entitled to far more than a mere certificate of good moral character and temperate habits to help it in determining whether or not the "good moral character and temperate habits" requirement for student permit has been met. If the board should so desire, that certificate, in the case of each or any such student, ought to be supplemented by a reasonably detailed personal history of the applicant prepared by the department. It might well include, *inter alia,* a statement of the nature of the conduct producing the applicant's status as a delinquent child in the legal custody of the department. It might well include, too, a statement by the department as to precisely why it views the applicant in question as having good moral character, despite her status as a delinquent child in the department's custody. (It is assumed, of course, that the department would be in agreement with a certificate of good moral character submitted by the applicant; and it would seem that such certificate, in order to have any weight whatsoever with the board, ought to be executed by an officer or employe of the department with sufficient knowledge of the applicant to make some informed judgment as to her moral character and temperate habits at the time of the application.)

Each applicant's situation would be judged on its own merits. In passing on the question of whether or not the applicant has good moral chracter and temperate habits, the board should bear in mind that 48.38 (1) reads in part:

"No adjudication upon the status of any child in the jurisdiction of the juvenile court shall operate to impose any of the civil disablities ordinarily imposed by conviction, *nor shall any such child be deemed a criminal by reason of such adjudication, nor shall such adjudication be deemed a conviction.* * * *"

This statutory provision, however, does not mean that a child adjudged delinquent shall be deemed, despite such adjudication, a person of good moral character. If anything, the adjudication would indicate that the subject child *at the time of the adjudication* was not of good moral character in

most instances. In 14 C.J.S. at p. 400, it is said of the words "Good moral character":

"The words are general in their application but they include all the elements essential to make up such a character; among them are common honesty and veracity, especially in all professional intercourse, although it has been held that the highest degree of moral excellence is not required; and the term has been defined as meaning a character that measures up as good among the people of the community in which the person lives, or that is up to the standard of the average citizen; that status which attaches to a man of good behavior and upright conduct."

In the case of *In Re O. - -*, (1889) 73 Wis 602, 618, the court said:

"* * * The words 'good moral character' are general in their application, but of course they include all the elements essential to make up such a character. Among these are common honesty and veracity, especilly in all professional intercourse. * * *"

With these definitions of "good moral character" in mind, it is clear that a child adjudged a delinquent in Wisconsin may often be said to lack such character at the time of the adjudication. If adjudged a delinquent, it is because it has been alleged and established that, in the language of sec. 48.12:

"(1) He has violated any state law or any county, town, or municipal ordinance; or

"(2) He is *habitually truant from school or home;* or

"(3) He is uncontrolled by his parent, guardian or legal custodian *by reason of being wayward or habitually disobedient;* or

"(4) *He habitually so deports himself as to injure or endanger the morals or health of himself or others.*"

Manifestly, the conduct leading to such an adjudication may often be such as to evidence bad moral character on the

part of the subject-child. It is conceivable, however, that such child's moral character may, while the child is in the custody of the department, undergo a marked improvement, and if the board, on the basis of evidence of the kind above described, were satisfied that the moral character of the delinquent child had so improved that it might fairly be called "good moral character", it could, in my opinion, issue the student permit in question to such child, assuming the child met the other requirements of 159.02 (8).

It is possible that the board, in rare instances, might conclude that a child adjudicated delinquent was at the time of such adjudication, and despite it, possessed of good moral character. Should the board so decide, it would not, of course, have before it the question of whether or not the child, following the adjudication, had acquired good moral character while in the legal custody of the department.

It should here be said that a child, adjudicated a delinquent in this state, may in fact have good moral character and temperate habits, although reputed to be of poor moral character and intemperate habits, with such reputation perhaps gaining in strength and acceptance in the community by reason of the adjuudication of delinquency. In short, the reputation may be one thing, the fact another, with the latter in conflict with the former. It is the fact of good moral character and temperate habits in one seeking a student permit under 159.02(8), which is of prime concern to the board under the circumstances here in question. That fact can coexist with an adjudication of the child as delinquent. The adjudication may have nothing to do with the child's moral character or habits, i. e., those areas of concern may not have been in any way involved in such adjudication. The good moral character and temperate habits of such subject-child may conceivably be unquestioned by those best fitted, through dealing with her, to judge her character and habits.

JHM

Words and Phrases—Human Rights—Applications—Resort applications requiring information as to race, creed, color, national origin, etc., would be in violation of 942.04.

July 14, 1964.

G. AUBREY YOUNG, *Director*
Governor's Commission on Human Rights

You ask whether in pursuance of your duty under sec. 15.85, Stats., to disseminate information and to educate the people of the state to a greater appreciation and practice of human rights, you can point out that the distribution of certain literature by some resorts is in violation of 942.04, the denial of rights statute. You inquire specifically about reservation forms which request information concerning the nationality, color and religion of the applicant, and state that if the requested information is not given, references from other resorts where the applicant has vacationed are required.

Sec. 942.04 (1) (b) provides criminal penalties for one who:

"(b) Directly or indirectly publishes, circulates, displays or mails any written communication which he knows is to the effect that any of the facilities of any public place of accommodation or amusement will be denied to any person by reason of his race, color, creed, national origin or ancestry or that the patronage of a person is unwelcome, objectionable, or unacceptable for any of those reasons; or"

Subsec. (2) defines a public place of accommodation or amusement to include "inns, restaurants, taverns, barber shops and public conveyances."

The first question to be answered is whether a resort, as distinguished from an ordinary hotel or inn, is a "public place of accommodation or amusement" within the meaning of the statute. The legislative history of the statute was discussed in an opinion dated July 11, 1963, to the district attorney for Dane county, and a copy of that opinion is

enclosed. As there stated, I have concluded that 942.04 should be construed to apply to the same types of places covered by the predecessor statute—sec. 340.75, Stats. 1953.

In its 1953 form, the denial of rights statute applied to "inns, restaurants, saloons, barber shops, eating houses, public conveyances on land or water, or any other place of public accommodaation or amusement". That language embraces a resort as well as an ordinary hotel. In either case the owner or operator offers living accomodations and board to the public upon payment of a fixed charge, and the operator must obtain a permit, pursuant to 160.02, and may be relieved from certain liability to his guests by complying with the requirements of 160.31. The fact that a typical resort or resort hotel may cater primarily to vacationers, while the usual urban hotel caters primarily to more transient guests and particularly to businessmen, is not a sufficient distinction to warrant excluding resorts from the statutory term "public place of accommodation or amusement."

This brings us to the next question—whether issuing the type of literature which you describe would violate 942.04 (1) (b), set forth above.

What the statute proscribes is the publication, circulation, display or mailing of a written communication which the circulator knows is to the effect that any facility of a public place of accommodation or amusement will be denied to a person because of his race, color, creed or national origin or that the patronage of a person is unwelcome for any of those reasons.

A reservation application form which asks for the race, creed, color or national origin of the applicant and states that, if such information is not furnished, references from other resorts where the applicant has vacationed are required, indicates that the management of the resort discriminates on the basis of race, creed, color or national origin in choosing patrons or in assigning accommodations. Thus the form infers that some of the facilities of the resort will be denied to some persons because of their race, creed, color or national origin.

Accordingly, you are advised that it is proper for you to inform owners and operators of resorts and others that publication, circulation, display or mailing of such a reservation form, with knowledge of the contents and effect thereof, is in violation of 942.04.

EWW

Safety Belts—Words and Phrases—Discussion of regulations governing seat belts and the possible statutory violations.

July 16, 1964.

JAMES KARNS, *Commissioner*
Motor Vehicle Department

You state that a prosecution of an automobile dealer for sale of an automobile without safety belts in violation of sec. 347.48, Stats., was recently dismissed on recommendation of an assistant district attorney for the reason that he was unable to prove operation of the vehicle in question, which he conceived to be necessary under 347.02 (2), and also on the ground that 347.48 is in conflict with 347.04. You inquire whether the position of the assistant district attorney is correct.

The statutes involved are:

"347.48 **Safety Belts** (1) Safety belts required. It is unlawful for any person to buy, sell, lease, trade or transfer from or to Wisconsin residents at retail an automobile, which is manufactured or assembled commencing with the 1962 models, unless such vehicle is equipped with safety belts installed for use in the left front and right front seats thereof, and no such vehicle shall be operated in this state unless such belts remain installed.

"(2) TYPE AND MANNER OF INSTALLING. All such safety belts must be of a type and must be installed in a

manner approved by the motor vehicle department. The department shall establish specifications and requirements for approved types of safety belts and attachments thereto. The department will accept, as approved, all seat belt installations and the belt and anchor meeting the society of automotive engineers' specifications."

"347.02 (2) No provision of this chapter requiring or prohibiting certain types of equipment on a vehicle is applicable when such vehicle is not operated upon or occupying a highway."

"347.04 Owner responsible for improperly equipped vehicle. Any owner of a vehicle not equipped as required by this chapter who knowingly causes or permits such vehicle to be operated on a highway in violation of this chapter is guilty of the violation the same as if he had operated the vehicle himself. No demerit points shall be assessed or counted pursuant to s. 343.32 against the operator's or chauffeur's license of the owner of the vehicle on account of or by reason of his guilt or conviction of any such violation unless he was personally operating the vehicle at the time of the violation."

It will be observed that 347.48 (1) makes it unlawful to "buy, sell, lease, trade or transfer" 1962 and later model automobiles not equipped with safety belts, and it is also unlawful to *operate* such a vehicle unless the belts "remain installed". The statute, so far as it relates to the selling of the vehicle, cannot be affected by 347.02 (2). The obvious purpose of the latter statute is to make it possible for vehicles which do not have the proper lighting equipment, brakes, horns, mufflers and the like, to be lawfully possessed while undergoing repairs in repair shops or otherwise stored off of the highways. But 347.48 was clearly intended to apply *at the time of the sale, lease, trade, or other transfer* involving Wisconsin residents, and so far as the seller, lessor or transferor is concerned, no operation of the vehicle on the highways at any time need be established to constitute the violation. Sec. 347.02 (2) is a general statute while 347.48 (1) is specific and more recent. In case of conflict or

inconsistency, the specific statute controls. *Pruitt v. State,* (1962) 16 Wis 2d 169, 173, 114 N. W. 2d 148; *Wauwatosa v. Grunewald,* (1962) 18 Wis 2d 83, 87, 118 N. W. 2d 128; *Grant County Service Bureau v. Treweek,* (1963) 19 Wis. 2d 548, 552, 120 N. W. 2d 634.

It is apparent that the legislature intended to make the buyer guilty if at the time of purchase the automobile is not properly equipped, or if the belts do not "remain installed" when the vehicle is being operated in this state. The words "remain installed" imply that they were once installed in accordance with the previous clause of 347.48 (1).

Only the last part of 347.48 (1) requires proof of operation and, as pointed out, that part implies that safety belts once properly installed had been removed.

Sec. 347.04 does not in any way conflict with 347.48. It is merely a provision fixing liability for the operation of an improperly equipped vehicle upon the owner thereof if he knowingly causes or permits its operation on a highway in violation of Ch. 347. It is a provision imposing vicarious liability similar to 939.05 (2) (b) and (c) of the criminal code. It implies that the operation of the vehicle violates Ch. 347, but in the case of 347.48 the transaction of buying, selling, leasing, trading or otherwise transferring a vehicle at retail is an offense, regardless of whether the vehicle is "operated" while in that condition.

You call attention to the fact that it was erroneously reported in the press that the reason for dismissal of the case was that the defendant was a corporation and that in the criminal law a corporation is not a "person" subject to criminal liability. This, of course, is untrue. Corporations are subject to criminal liability for offenses punishable by fine or by fine or imprisonment or by both. A corporation cannot be imprisoned, and therefore is not subject to criminal liability where the only penalty provided is imprisonment, but it can be fined and provision is made in the criminal procedure statutes for the prosecution of corporations. Secs. 954.017, 955.18 (1), 959.10, 959.11 and 960.36. See also 62.24 (5). Cases applying criminal liability to corporations

are *Vulcan Last Co. v. State,* (1928) 194 Wis. 636, 217 N. W. 412; and *State v. Dried Milk Products Cooperative,* (1962) 16 Wis. 2d 357, 114 N. W. 2d 432.

WAP

Communications—Patients—Sec. 51.35 (1) providing for the unexamined forwarding of communications from patients in public mental hospitals to certain designated public officials and "licensed attorneys" means attorneys licensed to practice in Wisconsin.

July 27, 1964.

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

Your recent letter asks for my opinion on a situation involving a patient at the central state hospital. The patient has addressed a communication to an individual in Minnesota and claims that that individual is an attorney. On the basis of this claim he asserts that the communication must be transmitted without examination by hospital authorities.

Sec. 51.35 (1) provides:

"(1) COMMUNICATIONS. All communications addressed by a patient to the governor, attorney-general, judges of courts of record, district attorneys, the department or licensed attorneys, shall be forwarded at once to the addressee without examination. Communications from such officials and attorneys shall be delivered to the patient."

This subsection was added to our statutes by the 1947 legislature. It has not been judicially interpreted in the ensuing 17 years, and was based on an Illinois statute, which also has not been the subject of litigation. Wisconsin is one of the few states in the union which has a statutory provision allowing for unexamined communications from patients in

public mental hospitals to attorneys. See "The Mentally Disabled and the Law", (1961) American Bar Foundation, pp. 158-160.

The question raised by the patient is whether the phrase "licensed attorneys" as contained in 51.35 (1) means attorneys licensed in the state of Wisconsin, or whether it means attorneys licensed anywhere.

The language of the statute clearly implies that the right of privileged communication is given in respect to communications with Wisconsin officials and Wisconsin attorneys. The statute speaks of the "governor", the "attorney-general" and "the department". Obviously this means the governor, attorney general and state department of public welfare of Wisconsin. Likewise, the statute means Wisconsin "judges of courts of record", Wisconsin "district attorneys" and Wisconsin "licensed attorneys".

This construction is consistent with the aim of legislation concerning a patient's right to communicate. As stated in the American Bar Foundation's study, "The Mentally Disabled and the Law" (1961), pp. 142, 143:

"The basis of many laws granting communication rights to patients is that such communication exposes cases of wrongful hospitalization. Improperly detained individuals are permitted an opportunity to protest their confinement by the free posting of letters. * * * As a result, the guarantee of correspondence is often limited to correspondence with named public officials or the central hospital agency for the state. * * *"

"Since the power of the hospital to deny the patient visitation or correspondence rights may be misused to the point of depriving him of his right to a writ of habeas corpus, this type of provision is extremely important to the patient. In two New York cases, the state hospital's failure to forward letters to attorneys was held to constitute an unreasonable restraint on the patient's right to a writ of habeas corpus."

* * *

"New York, as a result of these cases, now provides by statute that mental patients have a right to unrestricted correspondence with attorneys from the county in which the patient resides. * * *"

Accordingly, it is my opinion that under the provisions of 51.35 (1) communications addressed to attorneys licensed in Wisconsin must be forwarded without examination by hospital authorities. Communications with other than Wisconsin attorneys and the enumerated Wisconsin public officials may be examined and processed in accordance with hospital procedures. There are no state or federal constitutional objections thereto.

BRB

Sheriffs—Mileage—Discussion of sec. 59.15 relative to sheriff's fees and expenses and action of county board relative thereto.

July 28, 1964.

JAMES R. POPE
District Attorney, Iowa County

Your recent letter asks my opinion on several questions concerning sheriff's fees and allowances.

The first question you ask is whether under sec. 59.15 (1) (a) and (3), Stats. 1961, mileage to be paid to a sheriff is considered to be compensation which cannot be raised or lowered during his term or reimbursement for expenses, which rate may be altered during his term.

The statute involved is sec. 59.15:

"**Compensation, fees, salaries and traveling expenses of officials and employes.** (1) ELECTIVE OFFICIALS. (a) The board shall, prior to the earliest time for filing nomination papers for any elective office to be voted on in the

county (other than supervisors and circuit judges), which officer is paid in whole or part from the county treasury, establish the total annual compensation for services to be paid him (exclusive of reimbursements for expenses out-of-pocket provided for in sub. (3)). The annual compensation may be established by resolution or ordinance, on a basis of straight salary, fees, or part salary and part fees, and if the compensation established is a salary, or part salary and part fees, it shall be in lieu of all fees, including per diem and other forms of compensation for services rendered, except those specifically reserved to the officer in such resolution or ordinance. The compensation established shall not be increased nor diminished during the officer's term and shall remain for ensuing terms unless changed by the board.

" * * *

"(3) REIMBURSEMENT FOR EXPENSE. The board may provide for reimbursement to any elective officer, deputy officer, appointive officer or employe of any expense out-of-pocket incurred in the discharge of his duty in addition to his salary or compensation, including without limitation because of enumeration, traveling expenses within or without the county or state, tuition costs incurred in attending courses of instruction clearly related to his employment, and the board may establish standard allowances for mileage, room and meals, the purposes for which such allowances may be made, and determine the reasonableness and necessity for such reimbursements, and also establish in advance a fair rate of compensation to be paid to the sheriff for the board and care of prisoners in the county jail at county expense."

It is my opinion that under the above quoted statutory sections mileage authorized to a sheriff is reimbursement for expenses out-of-pocket, which rate may be changed during his term of office.

For a long time mileage was considered to be part of the salary or compensation of the sheriff. See 20 OAG 1141 and 30 OAG 484.

The first provisions of 59.15 were adopted in 1867 which prohibited the county board from increasing or decreasing the salary or compensation of a county officer during his term. The section further provided that such salary should be in lieu of all fees and compensation for services. In the early years of the statute, the various attorneys general gave opinions that the words "annual salary" included reimbursement for out-of-pocket expenses, including travel expenses. The legislature responded to these various decisions by amending 59.15 to include various exceptions.

The exceptions included compensation to the sheriff for maintaining prisoners in the county jail, reimbursement to the district attorney for travel in the course of his duties, reimbursement to the sheriff of counties containing three thousand or more population for expenses incurred in the course of his duties, and others. See sec. 59.15, Stats. 1943. This was substantially the posture of the statute at the time of its repeal and recreation by ch. 559, Laws 1945.

The present sec. 59.15, (1) (a), provides in part:

"The board shall, prior to the earliest time for filing nomination papers * * * establish the total annual compensation for services to be paid him (exclusive of reimbursements for expenses out-of-pocket provided for in sub. (3)). * * * The compensation established shall not be increased nor diminished during the officer's term * * *."

Sec. 59.15 (3), provides in part:

"The board may provide for reimbursement to any elective officer, * * * of any expense out-of-pocket incurred in the discharge of his duty in addition to his salary or compensation, including * * * traveling expenses * * * and the board may establish standard allowances for mileage * * *."

The present statute excludes from compensation, which may not be increased or diminished during his term, reimbursement for out-of-pocket expenses. Webster's Third New International Dictionary (1961) defines out-of-pocket as "consisting of or requiring an actual cash outlay". Traveling expenses of the sheriff in performance of his duties require a cash outlay on his part. Sec. 59.15 (3) authorizes the

legislature to establish standard allowances for reimbursement of such mileage to the sheriff.

Upon passage of the present statute it was no longer necessary to include the exceptions of traveling expenses for district attorneys and for the sheriff of Milwaukee county, because the new statute excluded reimbursement for expenses out-of-pocket from the compensation of elective county officials.

Under the present statute then, mileage of a sheriff is excluded from compensation or salary and the mileage rate may be changed by the county board during the sheriff's term of office. The two opinions issued by previous attorneys general, since the passage of amended 59.15 in 1945, can be distinguished from the present situation on their facts.

Your second question asks whether or not the sheriff can properly file a claim against the county for mileage incurred by a deputy sheriff while performing the sheriff's duties. This question, of course, presupposes that the sheriff and deputy sheriff are paid at a different mileage rate. This question is not pertinent because the mileage reimbursement set by the Iowa county board is uniform for all county officers and employes.

Your third question asks whether the applicable fee for mileage in serving a civil paper depends upon the mileage rate of the sheriff, under-sheriff, or deputy sheriff serving such paper, or whether the applicable mileage fee is that which is set forth in the statutes for service by the sheriff.

Sec. 59.15 (1) provides that:

" * * * The annual compensation may be established by resolution or ordinance, on a basis of straight salary, fees, or part salary and part fees, and if the compensation established is a salary, or part salary and part fees, it shall be in lieu of all fees, including per diem and other forms of compensation for services rendered, except those specifically reserved to the officer in such resolution or ordinance. * * * "

The sheriff's compensation then may be set by resolution or ordinance as (1) a straight salary, with no fees retained;

(2) no salary but retention of fees; or (3) a fixed salary plus retention of fees. However, whenever fees are to be retained by the sheriff, only such fees may be retained as are "specifically reserved to the officer in such resolution or ordinance".

Where the sheriff is on a straight salary basis, neither the under-sheriff nor deputy sheriff has a right to retain as his own fees from service of civil papers, when such service is a part of the duties of the office of sheriff. See: 15 OAG 350 and 20 OAG 296.

The sheriff must charge for the performance of a duty given to him by statute, whatever fee the statute provides. He can charge no more or no less. See: 48 OAG 257.

The sheriff must charge the mileage fee for service of a civil paper set in 59.28 (2) and must, under the provisions of 59.15 (1) (b), " * * * collect all fees authorized by law appertaining to his office and shall remit all fees not specifically reserved to him * * * to the treasurer * * *". It is my conclusion that the mileage fee to be charged for service of a civil paper is the fee set forth in 59.28 (2), and such fee if not reserved to the sheriff by resolution or ordinance must by virtue of sec. 59.15 (1) (b) be paid over to the county treasurer.

WMS

Transit Right of Way Authority—The function of the authority under ch. 156, Laws 1963, is to acquire and hold abandoned rights of way for possible use in the future and not to engage in the financing or constructing of a mass transportation system.

August 14, 1964.

JOHN NIELSON, *chairman*
TRANSIT RIGHT OF WAY AUTHORITY

You have requested my opinion on several questions respecting the powers of the newly created "Transit Right of Way Authority".

The purpose of the "authority" is to acquire and hold title to lands which formerly comprised a right of way for a transportation system. The intent of the law is that these rights of way which have fallen into disuse should be preserved for possible use in the future by some mass transportation system.

The first question you have asked is:

"Can the Transit Right of Way Authority enter into an agreement such as is proposed?"

The agreement you refer to is to be with a corporation that is to be formed before the contract is entered into. The corporation is to be known as the Milwaukee/Chicago Monorail Transit Corporation, Inc. This corporation is to act as agent for the "authority" in the securing of funds for the construction of a monorail mass transportation system between Milwaukee and Chicago. When the funds have been acquired the contractual obligation of the Milwaukee/Chicago Monorail Transit Corporation, Inc., ceases. Arrangements must then be made by the "authority" for the actual construction and eventual operation of the system. The funds to be raised under this contract are construction funds and are not to be used for the acquisition of right of way which under the contract must be secured by the "authority" as a condition precedent to the securing of funds by the Milwaukee/Chicago Monorail Transit Corporation, Inc.

The transit right of way authority was created by ch. 156, Laws 1963. The powers of the "authority" are detailed in subsecs. (4) and (5) of sec. 66.941, which read:

It is my opinion that the transit right of way authority does not have the power to enter into the proposed contract.

"(4) ORIGINAL EXERCISE OF POWERS. The authority is vested with the following powers:

"(a) To acquire, by purchase or otherwise, existing rights of way which have been used for mass transit purposes, in

such instances where the operations of mass transit have either been terminated or abandoned after January 1, 1960, pusuant to order of a regulatory agency. The authority shall hold such right of way for mass transit use or for uses directly related thereto as determined by the members of the authority board or as provided for by an enactment of the legislature.

"(b) The authority shall be operated through a board which shall meet from time to time as determined necessary by its chairman.

"(c) The authority may cause to be made such plans for the use of any right of way which it acquires as it deems most appropriate and effective.

"(d) The authority may acquire such right of way in any municipality or area within any county of the state if such right of way will have an ultimate use as a part of a continuous right of way for mass transit purposes.

"(e) The authority may sue and be sued in its corporate name, and it may hold title to real estate or appurtenances with respect thereto. The authority may adopt a corporate seal and change the seal at pleasure. The principal office of said authority shall be located at the state capital.

"(f) The authority may acquire property by condemnation pursuant to ch. 32, and to sell, lease, transfer or convey any property or rights when such property is not entirely useful to the purposes for which the authority functions. The authority may exchange property held by it for other property when it determines that such property will be useful for its objectives. When exercising the powers of condemnation the authority shall have the same power as that provided under s. 66.94 (13).

"(g) The authority may grant easements or license agreements to all public utilities upon terms that are reasonable and just for the use of its property by such public utilities. If the authority and a public utility cannot agree upon the terms and conditions of such grants, either party may petition the public service commission for a final determination of such terms and conditions.

"(5) POWER TO BORROW MONEY. The authority may borrow money for the purpose of acquiring any transit right of way and it may issue notes or bonds or other obligations of indebtedness in carrying out such powers. It may issue revenue bonds under s. 66.066."

These powers have been strictly limited by subsec. (2) of sec. 66.941 which provides in part:

" * * * which shall exercise only those powers conferred by this section."

The "authority" has neither express nor implied power to borrow funds to aid in construction or to actually construct a transportation system. Under the statute that created it the function of the "authority" is to secure lands for right of way purposes.

Your second question is:

"What, if any, part can the Authority take in assisting in the financing of a potential transit system on the abandoned right of way?"

The "authority" may not assist in the financing of a transit system other than in the securing of right of way and the development of plans for the use of such acquired lands.

Your third and fourth questions are:

"Could the Authority purchase the right of way with money advanced by a private corporation at no cost to the Authority, and subsequently enter into a purchase or lease agreement with a transit operating company?"

"Can the city and/or county governments acquire the right of way and subsequently enter into purchase or lease agreements directly with a transit operating company?"

These questions do not relate to an existing state of facts but concern possible courses of action by the "authority" in the future.

The duties of the attorney general are defined in s. 14.53 (4), which reads:

"(4) GIVE OPINION TO OFFICERS. Give his opinion in writing, when required, without fee, upon all questions of law submitted to him by the legislature or either branch thereof, or by the head of any department of the state government."

In discussing 14.53 (4), the attorney general in 39 OAG 41, 42, stated:

"The practical construction heretofore given to the phrase 'upon all questions of law' by the attorney general in determining the propriety of requests for opinion is that the advice sought by the department head or state officer must relate to his official duties and must be necessary in the sense that such department head or officer is unable to decide which of alternative or various courses of action he should pursue by reason of an ambiguity in the law which defines his duty. Further, such question should relate to an existing state of facts, as the attorney general will not ordinarily answer hypothetical questions. Nor can he be expected to lay down definite rules with reference to a general statute which will satisfactorily cover a wide variety of factual situations arising in the future. That, of course, is merely stating in another way that he will not answer hypothetical questions."

Therefore, at this time I will not attempt to answer these last two questions.

It should be noted, there is a serious question as to the consitutionality of 66.941 in light of Art. VIII, sec. 10, Wis. Const., which prohibits the state from contracting any debt for or engaging in a work of internal improvement. This opinion is therefore limited to the legal questions asked and discussed, and it is not intended to be an over all endorsement of the act.

CAB

Corporations—Fees—The fee paid by a foreign corporation on its capital employed in Wisconsin cannot be credited to another foreign corporation into which it merges.

September 10, 1964.

ROBERT C. ZIMMERMAN
Secretary of State

You have written to me as follows:

"A foreign corporation which holds a Certificate of Authority under Chapter 180 has been requested to pay additional fees, based on an increase in the amount of invested capital employed in the state, computed as provided in Section 180.813. This additional fee is provided for in Section 180.87 (1), subsection (k).

"The corporation has refused to pay this additional fee claiming that it should receive credit for fees previously paid by a foreign corporation which was merged into said corporation during 1962. The claim is based on Section 180.67 and we attach a copy of the letter from the attorneys for the subject corporation in which they set forth their position.

"We, therefore, request your opinion as to whether this corporation should pay the additional fees or be given credit for the fees paid in previous years by the corporation which was merged into the present corporation, as survivor."

It is my opinion that the foreign corporation in question must pay such additional fees, and cannot escape liability therefor by reason of the provisions of secs. 180.67 (4) or 180.68 (2), Stats.

Counsel for such corporation cite portions of those statutes, hereinafter quoted, as supporting the claim of the corporation that the additional fees should not be paid because it should receive credit for fees previously paid by the foreign corporation which it absorbed by merger in 1962.

The corporation in question is a foreign one, and so, too, was the corporation which it absorbed. It follows that its

above mentioned claim of nonliability for the additional fees in question can be grounded neither on 180.67 (4) nor on 180.68 (2). Sec. 180.67 (4) deals only with the merger or consolidation of two or more domestic corporations, while 180.68 (2), relating only to merger or consolidation of one or more foreign corporations and (i. e., with) one or more domestic corporations, clearly has no bearing on a merger of two foreign corporations such as that here involved, and creates no rights for the surviving corporation.

Sec. 180.67 commences as follows:

"When such merger or consolidation has been effected:"

It then reads in part:

"(4) Such surviving or new corporation shall thereupon and thereafter possess all the rights, privileges, immunities, and franchises, as well of a public as of a private nature, of each of the merging or consolidating corporations; and all property, real, personal and mixed, and all debts due on whatever account, including subscriptions to shares, and all other choses in action, and all and every other interest, of or belonging to or due to each of the corporations so merged or consolidated, shall be taken and deemed to be transferred to and vested in such single corporation without further act or deed; * * *"

One must look to preceding statutes to determine what "such merger or consolidation" means. The preceding statutes providing the answer are 180.62 and 180.63, which leave no doubt whatsoever that 180.67 refers only to the effect of the merger or consolidation of two or more *domestic* corporations. Sec. 180.62 is entitled "Procedure for merger" and subsec. (1) thereof reads:

"Any 2 or more *domestic* corporations may merge into one of such corporations pursuant to a plan of merger approved in the manner provided in this chapter."

Sec. 180.63 is entitled "Procedure for consolidation" and subsec. (1) thereof reads:

"Any 2 or more *domestic* corporations may consolidate into a new corporation pursuant to a plan of consolidation

approved in the manner provided in this chapter."

Nothing in the subsequent language of either of such statutes extends their application to the merger or consolidation of any but domestic corporations, and their limited application obviously confines the application of 180.67 to effects flowing from the merger or consolidation of domestic corporations only.

Sec. 180.68 reads in part as follows:

"(1) One or more foreign corporations and one or more domestic corporations may be merged or consolidated in the following manner, provided such merger or consolidation is permitted by the laws of the state under which each such foreign corporation is organized:

"(a) Each domestic corporation shall comply with the provisions of this chapter with respect to the merger or consolidation, as the case may be, of domestic corporations and each foreign corporation shall comply with the applicable provisions of the laws of the state under which it is organized.

"(b) If the surviving or new corporation, as the case may be, is to be governed by the laws of any state other than this state, it shall comply with the provisions of the statutes of this state with respect to foreign corporations if it is to transact business in this state * * *.

"* * *

"(2) The effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations, if the surviving or new corporation is to be governed by the laws of this state. If the surviving or new corporation is to be governed by the laws of any state other than this state, the effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations except in so far as the laws of such other state provide otherwise."

It is clear from that portion of 180.68 (1) above quoted that this statute deals not with a merger of foreign corpora-

tions, but of domestic and foreign corporations, and subsec. (2) thereof relates only to the effects of the latter kind of merger.

In 1950 the then attorney general, confronted with the same question dealt with herein, ruled that the fee paid by a foreign corporation on its capital employed in Wisconsin cannot be credited to another foreign corporation into which it merges. 39 OAG 449. In so opining, he said:

"In *Wisconsin E. P. Co. v. Department of Taxation,* 251 Wis. 346, the supreme court decided that in the absence of 'a specific and unambiguous provision' in the statutes a tax deduction privilege of a merged domestic utility corporation did not pass to the surviving corporation. While the present Wisconsin statutes controlling the procedure for and effect of mergers generally are different from the statute considered in that case, there is no provision anywhere in the statutes specifically and unambiguously authorizing a foreign corporation which is the surviving corporation in a merger carried out under the law of another state, to take credit for the fees previously paid by the merged corporation."

This reasoning is as valid today as it was in 1950, and leads me to conclude that the corporation in question must pay the additional fees demanded, since no provision of the kind which would exempt it from such payment exists in our statutes.

It is noted that counsel for the corporation here in question apparently believe that 39 OAG 449, and the reasoning thereof, are not determinative of the question answered herein. In a letter to you relative to this matter, they state:

"* * * I am aware that your Attorney General, in Opinion No. 449, dated 1950 [39 O.A.G. 449], has stated that there will be no credit for previous fees paid upon a merger. However, this opinion is dated prior to your new Business Corporation Law."

In no way does the fact that 39 OAG 449 antedated the creation of present Ch. 180, Stats. (Laws 1951, ch. 731, sec.

7), preclude resort to such opinion and its rationale in giving you this opinion. The foreign corporation involved in the question dealt with in my predecessor's opinion sought exemption from the additional fee demanded under provisions of sec. 181.06 (8), Stats. 1949, in substance the same as the present sec. 180.67. See Wis. Anno. 1960, p. 866, citing Revision Committee Note, 1951, as to sec. 180.67, Stats. The then attorney general, with reference to such claimed exemption from the additional fee in question, pointed out (as I have done herein with reference to 180.67) that subsecs. (1) to (8) of 181.06, Stats. 1949, "were never intended to apply to a merger by two or more foreign corporations". 39 OAG 449, 451. The corporation involved in that opinion did not claim exemption from such additional fees under 181.06 (9), Stats. 1949, the predecessor statute of 180.68 (and in substance the same as its successor); but had it done so, the then attorney general would doubtless have ruled that 181.06 (9), Stats. 1949, afforded no refuge to the foreign corporation involved from the additional fees in question, because such statute (like its successor) has nothing to do with the merger of foreign corporations only, or results arising therefrom.

JHM

Primary—Election—Candidates—Discussion of sec. 5.17 relative to write-in candidates at primary election and determination of party nominee.

September 14, 1964.

ROBERT C. ZIMMERMAN
Secretary of State

You ask the following question regarding sec. 5.17, Stats., concerning the September primary election:

"When all votes cast for an office on any party ballot are for write-in candidates will percentages as outlined in s. 5.17

apply; or does the write-in candidate receiving the most votes become the candidate of such party for such office regardless of percentage requirements?"

Sec. 5.17 (1) clearly requires that a write-in candidate receiving the most votes must personally receive at least 10% of the average of the votes cast by his party for governor at the two preceding general elections in order to be placed on the November ballot as the nominee of his party.

Sec. 5.17 (2) provides that if all candidates for nomination to any one office on the party ballot at the primary receive in the aggregate less than 5% of the specified vote average, the candidate receiving the most votes does not become the party nominee, but is to be placed on the November ballot as an independent candidate, to be denominated as "Independent" prefixed to the proper party designation. The last sentence of 5.17 (2) provides:

"* * * The provisions of this *subsection* shall not apply when all votes cast for an office on any party ballot are for write-in candidates."

Nothing in 5.17 (2) provides that 5.17 (1) shall not apply if all votes so cast are for write-in candidates. Consequently the 10% minimum requirement specified in 5.17 (1) is unaffected. The quoted sentence pertains to 5.17 (2) only. Hence, if all votes cast for an office on any party primary ballot are for write-in candidates, and no such candidate receives at least the 10% vote average specified in 5.17 (1), the candidate with the most votes will not be entitled thereby to a place on the November ballot, either as a party nominee or as an independent candidate.

RDM

Insurance Companies—Investments—Sec. 201.25 (1) (n) does not authorize investing ten per cent of the admitted assets of an insurance company contrary to the restrictions imposed by 201.24 (4) (b).

September 17, 1964.

CHARLES MANSON
Commissioner of Insurance

In the course of an examination of a domestic insurance company you have found that the company has made loans to or invested its assets in loans, securities or investments which involve officers, directors or members of its investment which involve officers, directors or members of its investment committee. Because of this you request an opinion whether the provisions in sec. 201.25 (1) (n), Stats., authorize an insurance company to invest up to 10% of its assets in loans, securities and investments which are within the prohibitions in 201.24 (4) (b).

It is my opinion that the provisions in 201.25 (1) (n) were not intended to override or negate the restrictions imposed by the provisions in 201.24 (4) (b), and do not have such effect. The two statutory provisions cover separate and distinct aspects of the investment of insurance company funds. Their history is basically separate and the objectives and purposes thereof are entirely different. If possible, they must be so construed and applied that each achieves and accomplishes its purpose.

Sec. 201.24 (4) now reads, so far as here material:

"(a) All investments and deposits of the funds of any such company shall be made in its corporate name.

"(b) No director or other officer of any such company, and no member of a committee having any authority in the investment or disposition of its funds, shall receive, in addition to his fixed salary or compensation, any money or valuable thing, either directly or indirectly, or through any substantial interest in any other corporation or business

unit, for negotiating, procuring, loaning or aiding in any purchase or sale of property, loan, deposit or investment, made by such company or any affiliate or subsidiary thereof; nor shall he be pecuniarily interested, either as principal, co-principal, agent or beneficiary, either directly or indirectly or through any substantial interest in any other corporation or business unit, in any such purchase or sale of property, loan, deposit or investment. * * *"

Provisions of this import first came into the statutes by ch. 178, Laws 1937, which created a new subsec. (4) of 201.24. It remained unchanged until revised by ch. 362, Laws 1961, to the present form. As initially enacted such provisions read:

"(4) All investments and deposits of the funds of any such company shall be made in its corporate name; and no director or other officer thereof, and no member of a committee having any authority in the investment or disposition of its funds, shall accept, or be the beneficiary, either directly or remotely, of any fee, brokerage, commission, gift or other consideration except their regular fixed compensation, for or on account of any loan, deposit, purchase, sale, payment or exchange made by or in behalf of such company, or be pecuniarily interested in any such purchase, sale or loan, either as borrower, principal, co-principal, agent or beneficiary, except that, if a policy holder, he shall be entitled to all the benefits accruing under the terms of his contract."

For many years there have been in 201.25, provisions specifically limiting the investment of insurance company funds to those properties set out in its various subdivisions. At present this is set forth by the following introductory paragraph in subsec. (1):

"(1) Except as otherwise provided by law, a domestic insurance corporation, except domestic life insurance corporations, may invest its assets as follows:"

which is followed by a number of paragraphs that set out species or categories of properties and characteristics and amount limitations applicable. Among them is parargaph

(n), which as amended by said ch. 362, Laws 1961, and ch. 266, Laws 1963, now reads:

"(n) In loans, securities or investments except stock in its own corporation in addition to those permitted in this section, whether or not such loans, securities or investments qualify or are permitted as legal investments under its charter, or under other provisions of this or other sections of the statutes. The portion of loans, securities and investments which is in excess of the limitations established by sub. (4) and s. 201.24 (2) shall not be deemed a permitted investment under this paragraph. The portion of the loan secured by a mortgage upon real property, permitted by par. (c), which does not exceed two-thirds of the then fair market value of said property, shall be deemed to be a permitted investment under par. (c) and the remainder of said loan may be deemed to be made under this paragraph. Any investment originally made under this pargraph which would subsequently, if it were then being made, qualify as a permitted investment another paragraph of this subsection shall thenceforth be deemed to be a permitted investment under such other paragraph. The aggregate of such company's loans, securities and investments under this paragraph shall not exceed 10 per cent of such company's admitted assets."

Such provision had its origin in the enactment by ch. 325, Laws 1947, of a new paragraph (m) to 201.25 (1) which read:

"(m) In loans, securities or investments in addition to those permitted in this section, whether or not such loans securities or investments qualify or are permitted as legal investments under its charter, or under other provisions of this section or under other sections of the statutes; provided that the aggregate of such company's loans, securities and investments under this paragraph shall not exceed 5 per cent of such company's admitted assets."

Except for an increase from 5% to 10% by ch. 312, Laws 1953, and renumbering to be paragraph (n) by ch. 433, Laws 1955, it has remained the same until revised to its present

form by said ch. 362, Laws 1961, and the subsequent addition by ch. 266, Laws 1963, of "except stock in its own corporation".

Nothing in either the history of the present provisions of 201.24 (4) (b) and 201.25 (1) (n), or in the provisions themselves, indicates any intention that they are to operate other than wholly independent of each other. They were enacted at different times to cover and control separate subjects that are unrelated. They are grounded upon different considerations. Their purposes and scope are entirely separate.

The provisioans in 201.24 (4) (b) deal with and prescribe relative to ethics and standards of conduct required in the handling of insurance company funds by its officials. The purpose thereof is the absolute preclusion of any personal benefit being obtained by a company official as the result of being in a position to do so by controlling the investment of its funds. Such provisions are grounded upon the well recognized proposition that the officers and directors of a corporation occupy a position of trust and like others standing in a fiduciary capacity may not use their position to further their private interests. This is particularly true of the prohibition against any officer, director or investment committee member possessing any pecuniary interest in any purchase or sale of property, loan, deposit or investment by the company. These provisions are for the purpose of assuring there may be no opportunity for such an insurance company official to obtain a private gain through any such transactions. That purpose is achieved through prohibiting any such transactions where an official has a pecuniary interest in it. Certainly the legislature never intended to provide that company officials should be allowed to use company funds for their own private gain to the extent of 10% or any other portion of its assets. It is to the opposite end that it has clearly declared that all such transactions are unlawful. Sec. 201.24 (4) (b) is unmistakably a conflict of interest prohibition that has no relation to or concern with the kind or species of the property which is involved. It must therefore be given an operative effect that carries out its obvious objective.

On the other hand the provisions of 201.25 (1) (n) are of an entirely different nature and purpose. They relate only to the soundness and adequacy of insurance company investments from the standpoint of the kind or species of property involved therein. They are an integral part of 201.25, the purpose and scope of which is the preservation of insurance company assets. It does this through regulating the quality of the investment thereof by limitation of the kinds or species of properties that may be used, with stated standards and restrictions as to amount and qualities. Such provisions are in no way concerned with the considerations upon which the provisions in 201.24 (4) (b) are rested.

The provisions of 201.25 (1) (n) are no more than a legislative recognition of the stringency of the statutory limitations as to the kinds and species of investments and that some lifting of such restrictions is advisable. Thus, a company is thereby accorded relief therefrom by allowing it latitude as to the kind or species of investments to the extent of 10% of admitted assets. This is the sole and obvious purpose of the provision.

The original enactment in 1947 of the forerunner of 201.25 (1) (n) was at a time when the provisions in 201.24 (4) were of 10 years' standing. Certainly, considering the nature and objectives of 201.24 (4), if the legislature had intended by such 1947 enactment to eliminate the restrictions thereof to the extent of 5% of a company's assets it would have made that plain by specifically so providing. Similarly, if in the amendment by ch. 562, Laws 1961, which was a comprehensive revision of insurance regulatory statutes prepared and supported by your department, there was any such intent, it would have been expressed. I do not find any rational basis for saying that the public policy underlying 201.24 (4) (b) does not apply equally to 10% of admitted assets.

The qualifying words "Except as otherwise provided by law" in the introductory provision of 201.25 (1) are most significant. There would be a conflict therewith in any attempt to give the words "or under other sections of the statutes" in 201.25 (1) (n) an operative effect of eliminating

the applicability of 201.24 (4) (b) to investments under 201.25 (1) (n). In addition, there is the unqualified provision in 201.25 (3) that no domestic insurance company "shall make any investment not authrized by law".

In view of the mechanics and different objectives of the provisions, the words in the introductory part of 201.25 (1), and the over-all general language in sec. 201.25 (3) must be given operative effect that reconciles them with that in paragraph (n) and vice versa. The well recognized rule is that conflicts in statutes are to be avoided and if possible provisions are to be so construed as to make them harmonious and to avoid an absurd result. Therefore, the language in the introductory part of subsec. (1) must be intended to preserve, as respects matters falling within its several provisions, the applicability of other statutes not providing limitations on the kind or species of insurance company investments. The noted language of paragraph (n) therefore is intended to relieve, to the extent of 10% of admitted assets, only from any limitations in any other statute relative to the kind or species of permitted investment. All provisions are therefore effective and are without conflict.

Furthermore, as you state in your request, your department has not interpreted 201.25 (1) (n) as overriding or negating the restrictions imposed by 201.24 (4) (b). This is the construction and application which your department has given to the provisions of 201.25 (1) (n) in the administration thereof ever since enactment in 1947. This administrative construction must be given controlling effect inasmuch as ch. 562, Laws 1961, was a revision of the statutory provisions which was proposed and participated in by your department. If there had been any intention to make a change in the operative effect which the department had been giving to the provisions of 201.24 (4) and 201.25 (1) (n) there would have been something to that effect.

The provision in 201.25 (1) (n) that investments in excess of the limitations in subsec. (4) and in 201.24 (2) are not deemed included in the 10% latitude provided is no indication of any intent to limit or cut down the prohibitions

in 201.24 (4). Rather, it is consistent with an intent that the first sentence of 201.25 (1) (n) is to permit investment of 10% of admitted assets without regard to other statutory provisions imposing limitations upon the kind or size of investments, but provided such investments are not otherwise prohibited by law. Absent the special mention of the restriction in 201.24 (2), which limits certain real estate investments, that limitation would not apply and a company would be permitted to invest 10% of its assets in such real estate. This, along with the fact that 201.24 (4) and 201.25 (1) (n) were both revised by ch. 562, Laws 1961, shows there was no intention of relaxing in any way the prohibitions in 201.24 (4) as they had been construed and applied over the years prior to the enactment of said ch. 562. There is further support therefor in the fact that the revision or amendment of 201.24 (4) by said ch. 562 strengthened and added to the prohibitions therof by broadening and making its provisions more comprehensive.

You are therefore advised that the provisions in 201.25 (1) (n) do not authorize the making of investments thereunder which would be contrary to the prohibitions and restrictions imposed by 201.24 (4) (b).

HHP

Dentists-Dental Hygienists—Fees—Dentists and dental hygienists must pay additional fee if licenses are renewed after specified date. Failure to receive notice from board regarding renewal does not afford ground for relief from penalty.

September 22, 1964.

A. H. CLARK, *Secretary-Treasurer*
Board of Dental Examiners

You have requested an official opinion from this office on the responsibility of the board of dental examiners with

respect to the failure of dentists and dental hygienists to receive notice of annual license renewals.

Sec. 152.05 (4), as amended by ch. 342, Laws 1963, provides among other things:

"Dentists shall annually register with and pay a fee to be fixed each year by the board, which fee shall not exceed $15. This fee is due and payable to the secretary of the board on or before September 30 of each year. Late registrants shall pay an additional fee of $3. * * *"

Sec. 152.08 (3), as amended by ch. 342, Laws 1963, contains a similar provision with respect to dental hygienists except that the fee shall not exceed $10, and it is payable on or before September 1 of each year. The penalty for late registration is the same.

We are informed that it is the practice of the board to mail out registration notices to hygienists not later than August 1, and to dentists not later than September 1. Second notices are sent out after the respective due dates have passed. Following the second notice the board usually receives a number of protests to the effect that the first notice was never received.

The only notices relating to the licenses in question that are required by statute are those provided for license suspension or revocation for nonpayment of annual registration fees.

Sec. 152.07 (1) provides:

"The board may without further notice or process suspend or revoke the license of a dentist who fails within 60 days after the mailing of notice in writing, sent by registered mail to his last known address, to register and pay the fee due for that year. His license may be reinstated, in the discretion of the board, by the payment of $25 within one year from such revocation. If application for reinstatement is not made within one year from the date of such revocation he may be required to demonstrate that he is still qualified to practice by taking an examination in such dental subjects

as may be required by the board. The fee for such examination and reinstatement of license shall be $25."

Sec. 152.08 (7) as amended by ch. 342, Laws 1963, provides:

"The board may without further notice or process revoke the certificate of a dental hygienist who fails within 60 days after the mailing of notice in writing, sent by registered mail to his last known address, to register and pay the fee due for that year. His license may be reinstated, in the discretion of the board, by the payment of $25 within one year after revocation. If application for reinstatement is not made, within one year from the date of such revocation he may be required to demonstrate that he is still qualified by taking an examination in such subjects relating to dental hygiene as may be required by the board. The fee for such examination and reinstatement of crtificate shall be $25."

Failure to receive a notice that is not required by statute affords no grounds for relief. By accepting and acting under the license, the licensee consents to all conditions imposed upon him, including statutory provisions with respect to license renewal. See 33 Am. Jur. "Licenses" §65.

The statutory provisions with respect to license renewal clearly place the burden of timely payment upon the licensee. If the legislature had intended to place the burden of notice on the board it no doubt would have said so by appropriate language in 152.05 (4) and 152.08 (3), as was done in 152.07 (1) and 152.08 (7) relating to suspension or revocation for failure to pay annual registration fees. The fact that the legislature specifically provided for notice in the one situation and not in the other results in the implied exclusion of such notice in the sections where it was not so provided, under the familiar role of statutory construction,—*expressio unius est exclusio alterius*, i.e., the expression of one thing is the exclusion of another.

Accordingly, you are advised that the board must collect the late registration fee of $3 in the case of late registrations of dentists and hygienists, irrespective of the receipt of no-

tice from the board prior to the date of September 1 in the case of a hygienist and September 30 in the case of a dentist.

WHR

Minors—Fermented Malt Beverage—Holder of Class "B" fermented malt beverage license cannot sell or furnish such beverage to unemancipated minors not accompanied by parent, guardian, or chaperon for consumption outside of licensed building.

September 25, 1964.

THOMAS L. MASSEY
District Attorney, Fond du Lac County

Your recent letter outlines a fact situation involving a drive-in restaurant. The proprietor of the restaurant has been issued a Class "B" license to sell fermented malt beverages on the premises located at a specified street address. On his application for the license he described his building or premises as "drive-in restaurant—frame building—one story" located at the street address. The drive-in restaurant consists of the building in which patrons are sold and served both food and beverages. Adjacent to the building is a paved parking area. This parking area, which is partially enclosed by a fence, is used as a parking lot for the cars of restaurant patrons, who are served in the restaurant, but it is also used for the parking of cars of patrons who are sold and served food and beverages in their cars.

Your question is:

" * * * in view of 66.054 (24) (a) of the statutes, may the proprietor of this drive-in restaurant serve fermented malt beverages to persons in their vehicles on the parking area for consumption on said parking area if the persons are unemancipated minors between 18 and 21 years of age, and unaccompanied by parent, guardian or chaperon."

Sec. 66.054 (24) provides in part:

"RESTRICTIONS ON SALE TO AND POSSESSION BY UNEMANCIPATED MINORS. (a) Except as otherwise herein provided, whoever sells or furnishes fermented malt beverages to any unemancipated minor not accompanied by his parent or guardian or a chaperone, for consumption outside of a building or permanent structure covered by a retail Class "B" fermented malt beverage license may be fined not more than $500 or imprisoned not more than 30 days or both. * * *"

"* * *

"(c) It is the legislative intent to require that consumption or posssession of fermented malt beverages by unemancipated minors outside of Class "B" licensed premises be under the supervision of their parents, guardians or chaperones."

Rephrased in the light of this section of the statutes, the question is whether the sale of fermented malt beverages to the described minors under the specified circumstances is a sale for consumption "outside the building or permanent structure" covered by the license. In this particular fact situation there is no need to determine whether a paved and semi-enclosed parking lot can be a "permanent structure" within the meaning of the statute. Although such a determination may be necessary under a different fact situation, here it would be a rather fruitless line of inquiry because the fermented malt beverages in the present circumstance are sold for consumption *in cars*, which are obviously neither a "building or permanent structure covered by a * * * license". Sale of beer to unemancipated minors, who are unaccompanied by the persons mentioned in the statute, for consumption in a car is a sale for consumption outside of the licensed building or permanent structure. It is immaterial that the car is temporarily parked on the defendant's lot.

This conclusion is substantiated by the statement of legislative intent set forth in sec. 66.054 (24) (c), which is quoted above. The proprietor may exercise supervision over

his parking lot, but he certainly cannot supervise conduct within privately owned cars.

In fact, the consumption of fermented beverages in such places as parked cars by the described minors is the very problem which 66.054 (24) attempted to solve. This section of the statute was passed by the 1963 legislature as ch. 246, Laws 1963. It was enacted after a study by the legislative council study committee on youthful drinking and driving. As a result of this study, legislation was introduced and passed which set up a different age base for persons who purchased fermented malt beverages for consumption "off" the licensed premises, than for those who purchased and consumed beer "on" the licensed premises. In recommending that legislation, the committee stated its reason to be:

" * * * in order to eliminate much of the procurement for minors and drinking in unsupervised places, such as parked cars and parks. * * * " Wisconsin Legislative Council 1963 Report, Vol. III, p. 167.

Although the bill originally introduced by the committee is not exactly the same as that which ultimately became 66.054 (24), the intent behind both bills was the same.

Accordingly it is my opinion that the proprietor of a drive-in restaurant, who has a Class "B" fermented malt beverage license, cannot sell or furnish fermented malt beverages to unemancipated minors over the age of 18 who are unaccompanied by parent, guardian, or chaperon, for consumption in cars parked in his parking lot. Such sales are "for consumption outside of a building or permanent structure" covered by a retail Class "B" license and therefore are in violation of the provisions of sec. 66.054 (24) (a).

BRB

Wage and Hour Law—Highway Construction—Applicability of sec. 103.50 to certain categories of highway construction labor discussed in light of *Green v. Jones* decision.

September 29, 1964.

V. L. FIEDLER, *Secretary*
State Highway Commission

You have requested my opinion concerning a number of problems that are anticipated in the administration of the minimum wage and hour law (sec. 103.50) due to the recent decision of the Wisconsin supreme court in the case of *Green vs. Jones,* (1964) 23 Wis. 2d 551.

A brief history of sec. 103.50, Stats., and certain legal interpretations is necessary to fully understand the problems.

The law was created by ch. 432, Laws 1931, for the purpose of providing the payment of reasonable wage rates to persons engaged in work on state highway construction projects.

Sec. 103.50 (1) reads:

"(1) HOURS OF LABOR. No laborer or mechanic in the employ of the contractor, or of any subcontractor, agent, or other person doing or contracting to do all or a part of the work under contract based on bids as provided in section 84.06 (2) to which the state is a party for the construction or improvement of any highway, shall be permitted to work a longer number of hours per day or per calendar week than the prevailing hours of labor determined pursuant to this section; nor shall he be paid a lesser rate of wages than the prevailing rate of wages thus determined, for the area in which the work is to be done; except that any such laborer or mechanic may be permitted or required to work more than such prevailing number of hours per day and per calendar week if he shall be paid for all hours in excess of the prevailing hours at a rate of at least 1½ times his hourly rate of pay."

It is not necessary to set forth the remainder of the statute for the purpose of this opinion. It is sufficient to state that it provides that the industrial commission makes a determination of the prevailing rates of various catagories of labor. The highway commission is given the enforcement responsibility.

The problems that you are concerned with arise out of those cases where there is doubt as to whether the laborer is engaged in highway construction, or is merely acting in the capacity of one delivering material to the construction site.

In 1949 the attorney general issued an opinion in which the applicability of 103.50 to truck drivers performing certain hauling operations with respect to highway improvements is discussed. That part of the opinion (38 OAG 481) we are here concerned with reads:

"The essential question in determining the scope of its applicability is: What operations are part of 'work under a contract' for highway improvement? It is the character of the particular operation and its relation to the highway improvement which the statute makes determinative, and not the relationship to the state or the principal contractor of the person performing the operation. If a particular operation constitutes 'work under a contract,' then the principal contractor or any 'subcontractor, agent or other person' doing or contracting to perform that operation is subject to sec. 103.50 (1). It then follows that the wages and hours of any laborer or mechanic in his employ for that purpose are subject to sec. 103.50 (1). In my opinion 'work under a contract' for a particular highway improvement means the work performed in executing such highway improvement.

"The specific situations presented in your request for opinion are repeated below with my conclusion as to each.

"(a) Do truck driver rates certified by the industrial commission apply to drivers for stock piling material at a given spot?

"A categorical answer cannot be given. Materials used in highway improvements are often purchased from commer-

cial establishments which have a fixed place of business from which they regularly supply such materials on a delivered basis and sales are often made with the stipalation that the seller make delivery at the site of the highway improvement. Where the transaction is of this type and where the seller merely transports the materials to a stock pile at the site of the highway improvement, the delivery operation is not, in my opinion, a part of the work of executing the improvement. Accordingly the wages and hours of the truck driver employes of the seller are not subject to sec 103.50 (1).

"On the other hand, certain materials such as sand, gravel and crushed rock are often obtained from a pit which is opened specifically in order to supply the particular highway improvement or from one which is used only sporadically when a project happens to be close at hand. The principal contractor often arranges with the land owner for the purchase of the material and hauls it in his own trucks or contracts with another to do so. In either event, the hauling operation would in my opinion be a part of the work of executing the improvement and wages and hours of the truck driver employes of the person doing or contracting to do the hauling would be subject to sec. 103.50 (1). This would be true whether the truck which transported the material out of the pit dumped it on a stock pile or distributed it over the highway.

"(b) Do truck driver rates certified by the industrial commission apply to drivers for delivery and distribution over the surface of the highway where it can be used without rehandling?

"In my opinion, this operation is part of the work of executing the improvement. It is immaterial whether the person performing it is also the seller of the materials. It is not essential that he have a contract directly with the principal contractor. The wages and hours of his truck driver employes would be subject to sec. 103.50 (1).

"(c) Do truck driver rates certified by the industrial commission apply to drivers for hauling from a roadside plant on the job to a black top mixer and spreader?

"In my opinion, this operation is part of the work of executing the improvement. It is not essential that the person performing it be the principal contractor or that he have a contract directly with the principal contractor. The wages and hours of his truck driver employes would be subject to sec. 103.50 (1).

"(d) Do truck driver rates certified by the industrial commission apply to drivers for hauling ready-mixed concrete to a bridge or to a highway and dumping the mixture into forms?

"In my opinion, this operation is part of the work of executing the improvement. As I understand the facts, the ready-mixed concrete is normally supplied from the fixed place of business of a commercial establishment which is in the business of supplying it and is transported in trucks belonging to the person who operates the establishment. The whole operation goes beyond mere delivery of materials, however, since the concrete must be and is dumped directly out of the seller's truck into forms. In my opinion the hauling operation is for that reason a part of the work of executing the improvement. The wages and hours of the truck driver employes are subject to sec. 103.50 (1).

"In none of the foregoing situations is the fact that the person performing the operation is a contract motor carrier or private motor carrier as defined in sec. 194.01 the determining factor. The applicability of sec. 103.50 (1) is determined by the character of the operation performed."

In 1962 the opinion was reconsidered by the attorney general and considerably modified. See 51 OAG 20. The following quotations indicate the reasoning applied:

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

"However, since the issuance of 38 OAG 481, it has become generally recognized that the pouring of concrete into forms, even if it is considered to be part of the work of executing

the improvement, does not constitute a sufficiently substantial part of work and must be considered *de minimis*. See opinion letters No. DB-14, October 11, 1961 and No. DB-1, April 3, 1961 issued by the solicitor of labor under the Davis-Bacon Act.

"* * *

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

"* * *

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

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

"Accodingly, it is my belief that in those cases where the material supplier is not responsible for any portion of the

contractor's obligation to the state, his employees are outside of the scope of the statute. The test of coverage under the statute hinges first, on the nature of the employment relationship, and second, on the character of the operation performed.

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

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

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

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

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

Recently the Wisconsin supreme court considered the problem of truck drivers delivering gravel to a highway construction site. See *Green v. Jones,* (1964) 23 Wis. 2d 551, 561. Our court stated:

"2. *Are the truck driver's activities in the instant case within the coverage of sec. 103.05, Stats.?*

"The basic test for determining coverage under sec. 103.50, Stats., was set forth in 38 Op. Atty. Gen. 481, at page 483, which we have seen may be treated as authoritative internal legislative history for this statute:

" 'The essential question in determining the scope of its applicability is: What operations are part of "work under a contract" for highway improvement? It is the *character of the particular operation and its relation to the highway improvement which the statute makes determinative, and not the relationship to the state or the principal contractor of the person performing the operation.* If a particular operation constitutes "work under a contract," then the principal contractor or any "subcontractor, agent or other person" doing or contracting to perform that operation is subject to sec. 103.50 (1). It then follows that the wages and hours of any laborer or mechanic in his employ for that purpose are subject to sec. 103.50 (1). *In my opinion "work under contract" for a particular highway improvement means the work performed in executing such highway improvement.*' (Emphasis added.)

"In response to specific questions the opinion elaborated the coverage tests. If certain materials were stockpiled at the site, then coverage depended upon whether the materials were hauled from a commercial pit operating continuously, in which event there would be no coverage, or whether the materials were hauled from a pit opened solely for the purpose of supplying materials, in which event there would be coverage.[13] However, if the materials hauled were immediately utilized on the improvement, the drivers were covered regardless of the source of the material.

"(b) Do truck driver rates certified by the industrial commission apply to drivers for delivery and distribution over the surface of the highway where it can be used without rehandling?

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[13] "38 Op. Atty. Gen. 481, 483."

" 'In my opinion, this operation is part of the work of executing the improvement. It is immaterial whether the person performing it is also the seller of the materials. It is not essential that he have a contract directly with the principal contractor. The wages and hours of his truck driver employes would be subject to sec. 103.50 (1).'[14]

"It is clear that the legislature has adopted the functional 'work on the site' test of coverage incorporated in the Davis-Bacon Act, federal legislation authorizing the secretary of labor to predetermine minimum wage rates for 'mechanics and laborers' on federal construction projects. [15]

"The Davis-Bacon Act was enacted in 1931, at nearly the same time that sec. 103.50, Stats., became law.

"In the instant case, although the drivers hauled materials from both commercial and *'ad hoc'* pits, such materials were immediately distributed over the surface of the roadway. The drivers' tasks were functionally related to the process

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[14]"Ibid., p. 484."

[15]"40 U. S. Code, sec. 276a '[That] the advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction, . . . of public buildings or public works of the United States . . . which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State . . . in which the work is to be performed, . . . and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, . . . the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, . . .' "

of construction. The crushed base for the first layer of the highway above the ground was dumped or spread by the drivers and immediately leveled by graders under the supervision of the general contractor. The crushed base and granulated subbase for shoulder material was dumped on the highway and immediately pushed onto the shoulder and leveled by the general contractor's graders. The aggregate, utilized as filler in the concrete, was dumped adjacent to a ready-mix concrete set up. The aggregate was immediately mixed with cement, and the concrete was then immediately laid upon the highway strip.[16]

"Clearly, the materials were applied to the process of highway improvement, almost immediately after the drivers arrived at the site. The delivery of materials was an integrated aspect of the 'flow' process of construction. The materials were 'distributed over the surface of the roadway' with no 'rehandling' out of the flow of construction. The drivers were 'executing such highway improvement' and hence performing 'work under the contract.' [17] "

An examination of the briefs of both parties in this case reveals that the modified opinion of the attorney general (51 OAG 20) was not cited to the court which is perhaps not too material except that the reasoning of the second

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[16] "In *Brogan v. National Surety Co.* (1918) 246 U. S. 257, 38 Sup. Ct. 250, 62 L. Ed. 703, the United States supreme court, in construing a federal statute which applied to persons who 'furnished labor or materials used in the construction or repair,' held that the extent of a supplier's involvement in the construction work depended on the function he performed in connection with the work. Following this guide line, the Secretary of Labor has determined that truck drivers carrying aggregate to be used in mixing concrete at the construction site are performing work on the site within the meaning of the Davis-Bacon Act. See Tyson, Prevailing Wage Determinations in the Construction Industry: Some Legal Aspects, 1952 Wisconsin Law Review, 440, 456."

[17] "38 Op. Atty. Gen. 481, 483."

opinion ("work under the contract" conception), which I believe has considerable merit, has not been taken into account. Also, the briefs of the parties do not make any reference to the administrative interpretation of the Davis-Bacon act by the department of labor concerning the particular problems involved in *Green v. Jones, Supra.*

The court assumed that the 1952 Wisconsin Law Review correctly stated the present interpretation of the Davis-Bacon act (see footnote p. 563, *Green v. Jones*). This is not correct.

The following are rulings of the solicitor of labor:

"(h) *Employees of Established Material Supplier Deliver Sand Directly into Concrete Mixers*: The truck driver employees of a sand and gravel firm hauled the sand and crushed rock at intervals so that each load was dumped directly into the concrete mixing machines at the site and not into stockpiles. The Solicitor held that the Davis-Bacon Act does not apply to the truck driver employees of the sand and gravel firm simply because each load was dumped directly into the concrete mixing machines at the site and not into stockpiles. The coverage, in this instance would be dependent upon resolution of the question of whether or not the sand and gravel firm was an independent materialman or a subcontractor.

"(i) *Employees of Established Material Supplier Dump Rocks at Spaced Intervals to Facilitate Spreading*: A sand and gravel firm contracted with the paving subcontractor for supplying crushed rock to be used as such in constructing macadamized parking areas and driveways around the project, which was dumped by truck drivers of the sand and gravel firm at points specified by the paving contractor, spaced over such areas, from which points it was spread by the employees of the paving contractor in the course of construction. The Solicitor held that, on the fact pattern as established here, no Davis-Bacon Act coverage was established.

"(j) *Employees of Established Material Supplier Using 'Tailgate' Delivery into Roadbed*: A valid, independent ma-

terialman, owner-operator of a stone quarry enters into a contract with a prime Federal contractor to provide crushed stone from his quarry on a highway project. The contract price includes delivery of the stone to the construction site and unloading the trucks by the 'tailgate' method at locations specified by personnel of the prime contractor. Tailgate unloading is performed by truck drivers employed by the quarry by raising the tailgate of the truck and driving slowly along the roadbed until the truck is emptied. Neither the truck driver nor any other employee of the quarry spreads, rolls, or levels the stone after it is unloaded. These operations are performed by employees of the prime contractor. On this fact pattern, the Solicitor held that the quarry company's truck drivers would not be subject to the contract labor standards provisions even though in their delivery of the material they utilized the tailgate spreading method as described. He held 'it would appear that the mere raising of the truck's tailgate and slowly driving along the construction roadbed until his truck is empty, with no additional construction-type work (such as spreading, rolling, or leveling of stone after it had been unloaded) being performed by the quarry's truck drivers, would not affect the general rule that the delivery at or on the construction site is incidental to the sale by the materialman and not subject to the contract labor standards requirements.' "

(From synopsized administrative opinions of the Solicitor of Labor, Labor Compliance Manual, U. S. Department of Commerce, Bureau of Public Roads 1963, pp. 179-180.)

As matters now stand, our court has reached a position almost completely opposite to the federal interpretation of the Davis-Bacon act on the particular problems here involved. It is not material how this came about or what the result would be had the court been fully apprised of the law in *Green v. Jones, supra.* Until the statute has been changed, or the supreme court decision modified, *Green v. Jones, supra,* is the law of the state.

You ask the following specific questions pertaining to the typical truck driver operations:

"(1) Drivers employed by a bona fide commercial material supplier for delivery of material from his fixed place of business to a highway construction project under each of the following specific conditions:

"(a) Sand, gravel or crushed stone to a stockpile at a contractor's concrete batching, ready-mix or black top plant where it is later rehandled by employees of the contractor."

The controlling factor which determines whether 103.50 applies to this situation is the element of time. The court expressed the view that if the aggregates "were applied to the process of highway improvement, *almost immediately* after the drivers arrived at this site" then "the delivery of materials was an integrated aspect of the 'flow' process of construction" and 103.50 would apply (emphasis supplied).

As I understand it, aggregates are stockpiled to assure a constant production so that construction will not be held up waiting for the next truckload to arrive. The load from an individual truck is dumped on the stockpile where all, part, or none may be used "almost immediately". Since the court has adopted a liberal view in the matter, the best advice I can give you is that the rates would apply in cases where the deliveries constitute a constant replenishment of a stockpile and are not made for the establishment of the pile prior to the commencement of construction.

"(b) Sand, gravel or crushed stone to the roadbed where it is tailgate spread while unloading, or dumped into the hopper of a spreader or shouldering machine. Further spreading, shaping, and compacting is performed by employees of the contractor."

This operation is definitely subject to 103.50.

"(c) Ready-mix concrete to its place in forms for paving, curbs, gutters, sidewalks, slope or ditch paving, bridges, culverts, etc., where it is consolidated and finished by employees of the contractor."

This operation is definitely subject to 103.50.

"(d) Ready-mix concrete to a structure construction site where it is dumped into buggies, wheelbarrows or buckets for transporting to its place in the forms."

This operation is subject to 103.50 since the material is used "almost immediately" in the construction project. (In this respect the court decision has gone beyond the opinion in 38 OAG 431.)

"(e) Black-top mixtures to a paver where the material is discharged as the truck is being pushed along the road by the paver."

This operation is definitely subject to 103.50.

"(f) Cement or asphalt to a jobsite batching, ready-mix or black top plant where it is emptied into silos or tanks."

As I understand it, these operations are the same in fact as the operation of the situation discussed in (a) above. A load of cement or bitumin arrives at the job site. In the case of cement, it may be pumped or otherwise transported into either the bin which flows directly into the measuring receptacle and then into the batching trucks or into a storage silo or tank which is connected directly with the bin. The storage is a reserve to insure continuous construction and does not have any element of permanency about it. If this is true, 103.50 would apply. A black top plant does not differ in any material way and the same rule must apply.

"(g) Cement or asphalt spread on the roadbed for mixing to provide a soil cement or a cement or asphalt-stabilized base."

This operation is definitely subject to 103.50.

"(h) Reinforcing steel delivered to stockpiles in the vicinity of a structure or concrete paving project."

In my opinion, if these materials are stockpiled and not used "almost immediately" their delivery is not subject to 103.50.

"(i) Structural steel, prestressed concrete beams or culvert pipe unloaded in the vicinity of a structure or adjacent to its place in the road."

In my opinion, the delivery of this material is not subject to 103.50 unless the beams or steel are placed directly "or

almost immediately" into its structural position at the time of delivery, which I understand is sometimes the case.

"(j) Structural steel, prestressed concrete beams or culvert pipe unloaded directly into their place in a structure or culvert trench."

This operation is definitely subject to 103.50.

"(k) Numerous other miscellaneous items such as seed, sod, concrete curing compound, calcium chloride, signs, manhole, catch basin or inlet covers, fencing materials, marker posts, guard rail, etc., which are usually stockpiled or otherwise stored at or along the job and not incorporated directly into the work from the supplier's vehicle."

In my opinion, the delivery of these items is subject to 103.50 under the same conditions as other materials—if they are used "immediately" or "almost immediately". They are necessary in the construction of the finished highway.

"(2) Drivers employed by a contractor or subcontractor to haul material from a bona fide commercial supplier to a highway construction project in accordance with each of the specific conditions enumerated in paragraphs (1) (a) through (i) above."

If the contractor or subcontractor assumes to do this work as part of the construction, his employes must be paid according to 103.50.

This has been the administrative interpretation since the law was enacted. This question was not before the court. The historic interpretation should be continued.

"(3) Drivers employed by a contractor or subcontractor to haul material from a pit or quarry opened specifically to supply a highway project in the vicinity to:

"(a) A stockpile for a concrete batching or ready-mix plant or black top plant.

"(b) The roadbed where it is spread as it is unloaded and is later shaped and compacted by others."

The answer for both (a) and (b) above is the same. If the contractors assume to do this work as part of the construction, their employes must be paid according to 103.50.

"(4) Drivers employed by a contractor or subcontractor to haul concrete batches, ready-mix concrete or black top from a roadside plant to:

"(a) Concrete pavers or spreaders.

"(b) Forms for concrete pavement, curbs, gutters, sidewalks, structures, etc.

"(c) Buckets, buggies or wheelbarrows.

"(d) Black-top pavers."

The answer for (a), (b), (c), and (d), above is the same. If the contractors assume to do this work as part of the construction, their employes must be paid according to 103.50.
"(5) If the truck drivers cited in the above examples are employed by trucking firms engaged by the supplier or contractor is their status altered in any way?"

If the trucking firms are engaged by the supplier, the answers to the questions would be the same as though the drivers were directly employed by him. If the trucking firms are engaged by the contractor, 103.50 would apply since the contractor has assumed the work under his contract.

"(6) Under the 'flow' concept of the process of construction as expressed in the opinion, what would be the status of railroad employees who transported cement, asphalt, concrete or black top aggregates to a rail siding where it was unloaded directly into bins, silos, tanks or stockpiles for weighing or mixing at a proportioning, ready-mix, or blacktop plant set up adjacent to the siding?"

To be completely consistent, it would seem that the same legal rules should apply whether or not delivery is made either by train or truck. However, the law was enacted to cover the field of seasonal labor and obviously not to govern the field of railroad employe's remuneration. The industrial

commission has never included railroad workers as a catagory of labor under 103.50, nor was the problem of whether or not to include them before the court in *Green v. Jones, supra.* I do not believe 103.50 to be applicable.

"(7) We also wish to be advised if the principles of applicability set forth in your reply are to be considered retroactive."

It is not possible to answer this question definitely. It can only be determined through litigation.

I appreciate that the factual situations here considered are subject to variations which makes your duty as the enforcement agency most difficult, if not, in some instances, virtually impossible. In many instances, such as the delivery of beams and light miscellaneous materials, the employer would never know when the material is used in the "flow of construction" or what part of the material is so used. He has no way of making a proper determination as to the wages of his employes at the time he contracts to furnish the material. I believe the law, in regard to the application of 103.50 and related statutes, to be a proper subject for legisative study and clarification.

REB

Words and Phrases—Credit Unions—Discussion of the interpretation of sec. 186.09 concerning collateral security for loans made by credit unions.

September 29, 1964.

WILLIAM E. NUESSE

Commissioner of Banks

You asked my opinion as to interpretation of sec. 186.09, Stats., concerning collateral security for loans made by credit unions.
unions.

Sec. 186.09 provides in part:

"* * * All loans to an individual member exceeding $500 and all such loans which in the aggregate exceed 5 per cent of the total assets of the credit union, except where such loan is $100 or less, shall be secured by such collateral as the credit committee shall approve; however, this does not preclude the credit committee from requiring collateral on smaller loans. * * *"

You ask the following questions:

1. A member requests a loan of $2,000 from his credit union. Do the provisions of sec. 186.09 require such a loan to be secured by collateral which has an appraised or determined value at least equal to the amount of the loan, or does the credit committee have authority to grant such loan with collateral worth only $1,200?

2. A member of a credit union requests a loan of $2,000 and states in his application that he will have a cosigner or guarantor representing the security for the loan. Must the credit union have any evidence of the net worth of such cosigner or guarantor to provide evidence of security as referred to in the above provisions of 186.09? If such statement is needed should the statement reflect net worth in non-exempt assets to evidence collectibility of the loan from said cosigner or guarantor?

Sec. 186.09 as set forth includes the following requirements and is subject to the following considerations:

(1) All credit union loans in amounts greater than $500 or 5 per cent of the total assets of the credit union must be secured by some collateral in addition to the personal obligation of the borrower. "Collateral security" has been defined as follows:

" ' "Collateral security" necessarily implies the transfer to the creditor of an interest in some property or lien on property, *or obligation which furnishes a security in addition to the responsibility of the debtor.*' (Italics supplied.)" *James Employees Credit Union v. Hawley,* (1958) 2 Wis. 2d 490, 498, 87 N.W. 2d 299.

(2) The credit committee of the credit union has the discretion to determine the proper collateral for each loan. Sec. 186.09 provides in part that a loan:

"* * * shall be secured by *such* collateral as the credit committee shall approve; however, this does not preclude the credit committee from requiring collateral on smaller loans. * * *"

(3) The term "collateral" as used in 186.09, is used in its generic or general sense. Therefore, collateral security for a loan need not be equal in value to the amount of the loan. In *James Employees Credit Union v. Hawley,* (1958) 2 Wis. 2d 490, 497, 87 N.W. 2d 299, the court stated:

"We are of the opinion that the term 'collateral' as it appears in the provision of sec. 186.09, Stats. 1953, that 'All loans [by a credit union] to an individual member exceeding $500 . . . shall be secured by such collateral as the credit committee shall approve,' is to be considered in a generic rather than a limited sense. Collateral security, in bank parlance, means *some* security additional to the personal obligation of the borrower. [Citing cases.]" (Emphasis added.)

(4) The term "collateral" also includes cosigners, guarantors and accommodation parties to a loan obligation. In *James Employees Credit Union v. Hawley,* (1958) 2 Wis. 2d 490, 87 N.W. 2d 299, the court held that the cosigner of a promissory note given for a credit union loan was "primarily" responsible thereon and that such primary liability was deemed "collateral". The court said at p. 498:

"From a consideration of the above authorities it is plain that while a pledge of property may serve as collateral for a loan, the obligation of a person who is not the borrower to become liable with the borrower for the repayment of the loan, is also 'collateral.' "

In this regard, Ch. 186, Stats., provides no standards of financial responsibility which cosigners, guarantors or accommodation parties must meet before they can be accepted by the credit committee. However, the credit committee has

the discretion to determine proper collateral and since the term "collateral" includes cosigners, guarantors and accomodation parties, it appears that sound business practice would require the credit committee to inquire as to a cosigner's financial responsibility just as it would inquire as to the value of property pledged as security for a loan.

JPA

Licenses—Private Detectives—The Willmark Service System, as principal, and its representatives are required to be licensed as private detectives under sec. 175.07.

October 9, 1964.

ROBERT C. ZIMMERMAN
Secretary of State

You have asked my opinion whether an agency such as the Willmark Service System must be licensed as a private detective agency before it can do business in this state. Sec. 175.07 (1) provides that no person shall perform any service in this state as a private detective, private police, or private guard without being licensed and bonded as required by this section. Sec. 175.07 (2) reads:

"The term 'private detective' shall include among others those persons known as inside shop operatives, that is, persons who do not undertake direct employment whether in shops or otherwise with the owner of a place of employment, but who are engaged by some independent agency to operate or work in such place of employment, and to render reports of activities in such place of employment, to such independent agency, or to the owners of the place of employment under the direction of such independent agency."

You have furnished a description of the business methods of the Willmark Service System. Willmark supplies to its clients information as to the courtesy, efficiency, selling ability, and adherence to rules on the part of the client's employes who deal with the consuming public. Willmark's clients consist of retail stores, restaurants, hotels, airlines, and advertising agencies. The basic service furnished by Willmark is that of teaching, testing, and correcting the client's employes in the proper ways of dealing with the client's customers. Willmark furnishes educational materials to the client for distribution to employes and all employes are notified in advance that Willmark shoppers will at some time enter the client's place of business for the

purpose of performing Willmark's work. In the case of a client which is a retail store, a Willmark representative will enter the store and buy merchandise at random. Such representative notes whether the sales clerk is courteous and efficient, whether he exercises good salesmanship, and whether the store's rules are followed, etc. A report is then sent to the store management for use by the store as a basis of awards to employes and for correction of errors made by such employes. The Willmark representative also reports any failure by the sales clerk to record the sale properly. This occurs in only about one out of a thousand cases, and is clearly incidental to Willmark's main function of teaching, testing, and correcting sales employes. The identity of Willmark's representative is not disclosed to the sales clerks being tested. Willmark representatives also report the operation of store elevators and comment upon the condition of the store's physical plant.

Willmark representatives also make price comparisons and report on display arrangements. None of the work done by Willmark is done for its clients for the purpose of civil action or criminal prosecution. Willmark representatives do not pose as store employes.

The usual concept of a detective is that he is a person whose business it is to detect criminals or discover matters of secrecy and pernicious importance for the protection of the public. A public detective is one engaged by the public for the protection of society. A private detective is one engaged by individuals for private protection, a person unofficially engaged in obtaining secret information for the use and benefit of those who choose to employ him and pay his compensation. The fact that a private detective is engaged by individuals for private protection is the only distinction readily apparent between the two classes of detectives, for the class of work which each performs is the same in the respective spheres of operation. See 26A C.J.S., Detectives §1, p. 877. Clearly Willmark is not a detective agency in this conventional sense.

However, the question is whether Willmark activities come within the language of the above quoted statute. This

office has construed this statute on a number of occasions. In 28 OAG 485 an independent agency sent representatives into the store to make purchases and check on the efficiency, honesty, politeness, and ability of sales clerks. Cash register tapes were checked and clerks were questioned about any indication of dishonesty in an attempt to obtain an admission of guilt. This office expressed the opinion that persons engaging in such activities came directly within the definition of private detective in sec. 175.07.

In 36 OAG 322 the agency involved sent its representatives into hotels, restaurants, and theatres to check on the honesty, efficiency, and neatness of employes and the condition of the premises. These representatives posed as patrons and kept their identity secret from the employes of the place being investigated. The opinion was expressed that such persons must be licensed as private detectives.

In 37 OAG 469 the opinion was expressed that an agency and its employes must be licensed as private detectives where they engage in the business of checking theatres for the purpose of observing the operations and honesty of the cashier and ticket taker and determining the number of patrons. It was also pointed out that the three principal characteristics of a private detective are:

1. He is an unofficial person, not an employe of a governmental agency.

2. He is engaged in obtaining information in secret, in that it is without the knowledge of the person being observed.

3. His information is obtained for and transmitted to a third person.

In 37 OAG 542 we further clarified this opinion, stating that no private detective license is necessary where theater employes are informed that the check is being made and it is done openly and in their presence, since this removes the element of secrecy.

In 40 OAG 497 the opinion was expressed that no private detective license is necessary where the person involved

merely goes to the theater and buys a ticket in the first and last hours of the day and then forwards the ticket to the motion picture distributor. Reasons given were that such persons make no observations on their own account, and do not interpret such observations, nor do they exercise judgment in determining the extent and scope of the observations to be made. Neither do they prepare anything which might be considered the preparation of a report of their observations.

Based upon the reasoning of these previous opinions, it is clear that the function of a Willmark representative is similar to that of a private detective in the following respects: he is an unofficial person, not an employe of a governmental agency; he is engaged in obtaining information without the knowledge of the person being observed. To this extent his activities are secret, even though employes have been informed that at some time unknown to such employes such checks will be made. The information is obtained for and transmitted to a third person, the employer. The acts of the Willmark representative are unlike those of a private detective in the conventional sense in that the Willmark representatives serves chiefly to educate and train the employe and not to discover evidence of crime.

However, sec. 175.07 specifies that a license as a private detective is required of persons who do not undertake direct employment whether in shops or otherwise with the owner of the place of employment, but who are engaged by some independent agency to operate or work in such place of employment, and to render reports of activities in such place of employment to such independent agency, or to the owners of the place of employment under the direction of such independent agency. The activities of the Willmark representatives fall squarely within this language. The fact that they are chiefly concerned with educating the employe and not with the discovery of crime is not controlling. The legislature has seen fit to require persons who perform such services to be licensed as private detectives. Suggestions that this is unnecessary, impracticable, and expensive should be directed to the legislature for their consideration.

It is my conclusion that both the Willmark Service System, as principal, and its representatives are required to be licensed as private detectives under sec. 175.07, Stats.

AH

School District—Private Schools—A school district board has power and authority to permit private school students to attend district school on a part-time basis.

October 27, 1964.

ANGUS B. ROTHWELL
Superintendent of Public Instruction

You request an opinion as to whether or not a school district may enter into an arrangement under which the parochial school located therein will operate its 8th grade on only a half-time basis and its pupils therein will attend the public school of the district on a part-time basis. The details of the proposal are recited by you as follows:

"There are some 130 students attending 8th grade in the parochial school. To relieve the crowded conditions, it is desired that one half of the parochial 8th graders attend classes in the public schools during the morning and that the remaining parochial 8th grades attend public school classes in the afternoon.

"Four and eight tenths (4.8) more teachers will be required in the public school junior high or 8th grade because of the additional students. The public school would have to buy more textbooks for book rent purposes because of the increase in students. The present facilities of the public school will be adequate under the proposed circumstances.

"Subjects offered to these students would include home economics, industrial arts, music, band, art, chorus and science. In many cases the public school and parochial school students would be attending the same classes. Some classes

may contain strictly parochial students because of the attendance pattern rather than any planning on the part of the public school administration.

"The parochial students attending the public school in the morning would begin at 8:15 A.M., and would attend 3 fifty minute class periods with dismissal coming from the public school at 10:54 A.M. The afternoon group of parochial students would begin instruction in the public school at 12:55 P.M., and after attending 3 fifty minute class periods would be dismissed at 3:33 P.M. All programs for parochial students attending public school would be the same as for public school students except that the latter group would attend one additional class period.

"The parochial students would not be enrolled in the public schools but would be registered or enrolled in the parochial schools. There would be no grades sent in courses completed by parochial students in the public schools but a letter would be sent to the parents of such students stating whether such courses has been satisfactorily completed.

"The parochial students would not be transported by public school transportation and they would not eat in the public school hot lunch program. Parochial students would not be counted as public school students for aid purposes.

"It is contemplated that there would be no conferences or required working together of the public school administrators and teachers with their parochial school counterparts. The parochial school students are to be present in their halfday attendance in public school classes as individuals when and where the public school requires."

In order to give you the opinion requested, I must answer this question: does a school district board in this state have the power and authority to permit children, enrolled at and attending a private school, to attend the district school on a part-time basis, i.e., for certain classes only?

If the school district board involved in this matter is to permit the private school students in question to attend public school on the part-time basis and under the circum-

stances above described, it must have statutory authority to do so. A school district is a quasi-public corporation, with only the powers given to it by statute "and such implied powers as are necessary to execute the powers expressly given to it." *State ex rel. Van Straten v. Milquet* (1923) 180 Wis. 109, 113. The school district board is also a creature of statute, with only the powers expressly conferred on it by statute and such implied powers as are necessary to execute the powers expressly given to it.

While the statutes confer no express power on school district boards to authorize the part-time attendance at public schools here in question, it is my opinion that other express powers conferred on such boards give them an implied power to authorize such attendance.

Among the powers of a school district board in Wisconsin is that of exercising "general supervision over the school." Sec. 40.29 (12), Stats. Sec. 40.29 is entitled "District board; duties," while sec. 40.39 is entitled "District board; powers," but the duty to provide "general supervision" over the district school or schools is also clearly a *power* to exercise such supervision. See *Aull v. City of Lexington,* (1853) 18 Mo. 401, 402. It is an express power to do so, and the power here in question—the power to permit private school students to attend public schools on a part-time basis—is an incident of such express power, an implied power necessary to the full and effective exercise of the express power of "general supervision" given school district boards. Stated otherwise, it is necessary to the plenary exercise of such power of "general supervision" possessed by a district school board that there exist in such board the power—if it so desires—to permit part-time attendance by the pupils of private schools.

It should here be said that a power of "general supervision" over a given area of governmental activity, especially one of great importance to the public weal, is obviously no paltry power but one of impressive scope, implying the existence of any other power necessary to its complete and effectual exercise without need for such implied powers to

be spelled out in the statutes. In *Aull v. City of Lexington,* (1853) 18 Mo. 401, 402, the court had under consideration the duty (and power) of a municipal board of health "to excercise a general supervision over the health of the city;" and such board by ordinance was "vested with all power necessary" to carry out its power of general supervision. (Under case law, school district boards in Wisconsin are also vested with all the necessary implied powers to carry out their power of general supervision over their schools.) Referring to the power of "general supervision" there involved, the court in the *Aull case said*:

"* * * The power is intended to be an active, efficient power, to be exercised for the public good, and in its scope it reaches to whatever may be necessary to the preservation of the public health. * * *"

Of the power of "general supervision" over district schools here involved, it may be said that it was intended to be an active, efficient power to be exercised for the public good, and that in its scope it reaches to whatever may be necessary to give the children of our state access to a good education in the public schools.

This implied power of school district boards to grant the privilege of part-time attendance at district schools to pupils of private schools is necessary to the execution of still another power expressly granted school district boards also found in sec. 40.29—the power existing in school district boards by virtue of the "control and management of the * * * affairs of the district" conferred on them. Sec. 40.29 (1). Such express power, like the express power of exercising "general supervision over the school", is a power of wide scope plainly implying the existence of any other power necessary to its execution.

The legislature in conferring on school district boards the broad, express powers above mentioned, with all those necessarily implied thereby, assuredly intended those powers, express and implied, to be exercised wisely and well in the best interests of all the children of Wisconsin, to provide them with the best education possible. It is manifestly un-

necessary in these days of recurring crises for our nation, at home and abroad, to belabor the fact that our republic needs —and will continue to need—well educated men and women of many skills and professions to assure its very existence. Ours is a pluralistic society, drawing much of its vast strength from that fact. If a Wisconsin child, whose attendance at a private school is one of the evidences of the pluralistic character of our society, may by part-time attendance at a public school receive there certain valuable schooling, some of it unavailable in his private school, then he has been benefitted by such schooling, and our state and nation have benefitted as well. The founding fathers of Wisconsin, who held education for all the children of this state in the highest regard, could only take comfort and pride in such a result. "Education, and that of a nature which reaches the boys and girls in every quarter of the state,—common school education and training for the profession of common school teacher, was one of the most cherished thoughts of the constitutional convention." *State ex rel. Owen v. Donald,* (1915) 160 Wis. 21, 95.

There is a great history of progress and achievement wonderfully beneficial to countless Wisconsin children, which lies between our present public school system and the miserably crowded classrooms Rufus King inspected in Milwaukee in 1847. "In 1846 the city [Milwaukee] had five public schools, one in each of its wards. All were housed in rented buildings or church basements. When Rufus King inspected one of them in 1847 he found 126 children huddled together in a room twenty-four by eighteen feet, where they were being taught without being in any way classified as to age or grade." pp. 186, 187, "The Founding of Public Education in Wisconsin", Floyd P. Jorgenson.

If district school boards open their schools for part-time attendance by children in private schools in their respective districts, doing so under the above-described authority and in such a manner that the efficient operation of the district schools is not adversely affected, then such school board action following progressive Wisconsin traditions in the field of education will assist in writing another bright chap-

ter in the already distinguished history of the schooling of our children in this state. The source of its refulgence will be no secret—the benefits conferred through a well-ordered combination of public and private schooling on children, and indirectly on our state and nation. Such chapter—its writing already commenced in certain public schools of this state where such part-time attendance has been permitted—provides further proof, though no more is needed, of the power of our great public school system to do that which it was intended to do —educate Wisconsin children—all of them if need be—and educate them well. It is a system aptly described in the words of a Pennsylvania court with reference to the school system of that commonwealth—a system "created and devised for the elevation of our citizenship as a whole." *Com ex. rel. Wehrle v. Plummer and Baish,* (1912) 21 Pa. District Reports 182, 185.

In giving you this opinion I am fully aware that the implied power of school district boards to grant the privilege of part-time attendance at district schools to pupils of private schools is one that will be challenged in many quarters on constitutional grounds. The exercise of such power will doubtless be assailed on the ground that it would violate the provisions of Art. 1. sec. 18, Wis. Const. It may be charged, too, that the exercise of such power violates Art. X, sec. 3, Wis. Const. Such challenges will likely be made the subject of litigation.

For several reasons, it would be presumptuous at this juncture to state flatly that in my opinion the exercise of such power would be constitutional or unconstitutional. First there is a dearth of helpful authority on the question of the constitutionality of shared-time plans such as that considered herein. So far as I am able to determine through careful research, no appellate or trial court of any jurisdiction in the United States has as yet passed on the validity of such a "shared-time" plan under state constitutional provisions similar to those of Art. I sec. 18, Wis. Const., or under Art. 1, Amendments to the United States Constitution. Second, such case law as is relevant on the question of the constitutionality of "shared-time" plans gives support

to the proposition that the carrying out of the plan considered herein would violate no provision of our state constitution; but it may be argued that there exists as a counterbalance to such case law a body of persuasive Wisconsin precedents found in decisions of our supreme court and opinions of the attorney general, for condemning a "shared-time" plan as violative of the Wisconsin constitution. While none of such decisions or opinions dealt with "shared-time," they nevertheless should not be ignored in considering the above-described question.

The case law above mentioned consists of but two cases: *Com. ex rel. Wehrle o. Plummer and Baish,* (1912) 21 Pa. District Reports 182, 185, 186, and *State ex rel. Reynolds v. Nusbaum,* (1961) 17 Wis. 2d 148, 159. In the former case it was held that pupils of private sectarian schools who were personally and properly qualified and resided in a school district which maintained as an integral part of its public school system a manual traning school under the school code of Pennsylvania could not be deprived of admission to such manual training school because their elementary training or academic education had been, or was being, received in a school other than a public school. The Pennsylvania court, ruling on the validity of the section of the school code providing that certain educational institutions should be open not only to regular pupils of the public schools but to other persons residing in the school district, held that such section was not violative of the provision of the Pennsylvania constitution providing that "no money received for the support of the public schools of the commonwealth shall be appropriated to or used for the support of any sectarian school;" and it further held that such section was not violative of a provision of such constitution prohibiting the general assembly from authorizing "any county, city, borough, township or incorporated district * * * to obtain or appropriate money for, or loan its credit to, corporations, institutions or individuals."

In *State ex rel, Reynolds v. Nusbaum,* supra our supreme court held a so-called "school bus law" to be violative of Art. 1, sec. 18, Wis. Const. In so doing the court stated at p. 159:

"We have also given consideration to whether the benefits, conferred by ch. 648 upon parochial schools, differ in kind from the situation where parochial school pupils are permitted to attend certain specialized courses in the public schools. For example, it has been brought to our attention that pupils of certain parochial schools attend manual-training and domestic-science classes in the public schools. These parochial schools benefit in that they are saved the expense of providing the specialized equipment required for such courses, and of securing teachers trained to teach the same. *However, let us assume but not decide that permitting children, who satisfy the age and residence requirements, to secure part of their education in the public schools, even though at the same time they may be in attendance at parochial schools, does not violate sec. 18 Art. I, Wisconsin constitution.* On this hypothesis it might be argued that permitting parochial school children to take advantage of transportation by public school bus, is a use of public school facilities equivalent to attendance at manual-training and domestic-science classes in the public schools. *However, the essential difference, from a constitutional standpoint, is that riding school buses is not an educational objective of the state in itself, but merely an instrumentality to bring the pupils to the public schools where they will secure a public education.* * * *" (Emphasis supplied.)

The foregoing language is not, of course, a holding by such court that "shared-time plans" such as that here considered are constitutional. It is inescapable, however, that it is language which gives unequivocal recognition to what the court termed "the essential difference from a *constitutional* standpoint" between a situation wherein parochial school children are permitted to take advantage of transportation by public school bus to and from their parochial schools, and one wherein parochial school children are permitted attendance at manual-training and domestic-science classes in the public schools. It is not for me to say that the recognition of such essential difference by the supreme court is an adumbration of a decision by it that "shared time" plans such as that considered herein violate no con-

stitutional provision, state or federal; but many reasonable men might think it such an adumbration.

For the reasons above shown I must advise you that I cannot say that the exercise of the implied power of school district boards to grant the privilege of part-time attendance at district schools to pupils of private schools is either constitutional or unconstitutional. Were it not for the other factors above mentioned, however, I would be strongly disposed to state that it would be a constitutional exercise of power, on the basis of the *Pennsylvania* case referred to above and *State ex rel. Reynolds v. Nusbaum.*

Let me observe in closing that the problem of dealing with the "constitutionality of shared time" question herein is much the same as was the problem of dealing with the contitutional question involved in 50 OAG 132. Such opinion was one requested by the senate on the constitutionality of a proposed "school bus" law relative to transportation of grade and high school pupils to private schools at public expense. For reasons in part similar to those dictating my conclusion on the constitutional question here involved, such opinion concluded with the following statement from the then attorney general: "Therefore, I must advise you that I cannot say that this proposed law is either constitutional or unconstitutional. This is a question which must be resolved ultimately by the Wisconsin supreme court." 50 OAG at p. 139.

JHM

Board of Health—Plumbers—Licenses—Discussion of the effect of ch. 179, Laws 1963, concerning the granting of plumber's licenses under certain conditions.

November 2, 1964.

DR. CARL N. NEUPERT
State Health Officer

You ask my opinion as to whether the state board of health, pursuant to sec. 145.07 (1), Stats., as recreated by

ch. 179, Laws 1963, may grant an appropriate plumber's license without examination to any person who, prior to July 25, 1963, was not required to be licensed under ch. 145, Stats., and who was actively engaged in this state on or before January 1, 1964 in the practical installation of: (1) septic tanks, or (2) sewers from the curb to the building or water service piping from the main to the building, or (3) water softeners, or (4) water heaters or dishwashers, upon presenting to the state board of health (hereinafter referred to as "the board"), on forms prescribed by the board, evidence of the foregoing satisfactory to the board.

It is my opinion that the board, acting pursuant to the above-mentioned statute, may grant an appropriate plumber's license to the person above described.

Sec. 2, ch. 179, Laws 1963, repealing and recreating sec. 145.07 (1), Stats., reads:

"Any person heretofore not required to be licensed under this chapter, who was actively engaged on or before January 1, 1964, in the *practical installation of plumbing in this state,* may be licensed without examinaotion as a master or journeyman plumber, whichever is appropriate to the particular applicant, upon presenting to the board, on forms prescribed by the board, evidence of the foregoing satisfactory to the board. Such application shall be presented not later than January 31, 1965, and shall be accompanied by the appropriate license fee."

This statute was published July 24, 1963 going into effect the following day.

With respect to the interpretation of this statute, you state that there has been "considerable difference of opinion" as to the meaning of the phrase "practical installation of plumbing" used therein. You state:

"Questions have been raised as to whether persons engaged in a limited area of the plumbing field such as the installation of: (1) septic tanks or, (2) sewers from the curb to the building or water service piping from the main to the building or, (3) water softeners or, (4) water heaters and

dishwashers, all performed in rural areas where persons performing plumbing previous to this amendment [repeal and recreation of sec. 145.07 (1), Stats.] were not required to be licensed as plumbers, shall now be granted an appropriate plumbing license even though they have not engaged in the broad field of plumbing."

The phrase "practical installation of plumbing" has been present in our plumbing statutes since 1913 in the definitions of "master plumber" and "journeyman plumber" therein. See sec. 21, ch. 731, Laws 1913. Sec. 145.01 (2) defines a master plumber as "any person skilled in the planning, superintending and *the practical installation of plumbing* and familiar with the laws, rules and regulations governing the same." Sec. 145.01 (3) defines a journeyman plumber as "any person other than a master plumber, who is engaged *in the practical installation of plumbing.*" As you know, "plumbing" as employed in ch. 145 is defined by sec. 145.01 (1) to mean and include:

"(a) All piping, fixtures, appliances and appurtenances in connectiin with the water supply and drainage systems within a building and to a point from three to five feet outside of the building.

"(b) The construction and connection of any drain or waste pipe carrying domestic sewage from a point within three to five feet outside of the foundation walls of any building with the sewer service lateral at the curb or other disposal terminal, including private domestic sewage treatment and disposal systems and the alteration of any such system, drain or waste pipe, except minor repairs to faucets, valves, pipes, appliances and removing of stoppage.

"(c) The water service piping from a point within 3 to 5 feet outside of the foundation walls of any building to the mains in the street, alley or other terminal and the connecting of domestic hot water storage tanks, water softeners, and water heaters with the water supply system.

"(d) The water pressure system other than municipal systems as provided in chapter 144.

"(e) A plumbing and drainage system so designed and vent piping so installed as to keep the air within the system in free circulation and movement, and to prevent with a margin of safety unequal air pressures of such force as might blow, syphon or affect trap seals, or retard the discharge from plumbing fixtures, or permit sewer air to escape into the building."

If the phrase "practical installation of plumbing" as used in the re-created sec. 145.07 (1), must be viewed as necessarily involving and embracing *all* the aspects of plumbing described in sec. 145.01 (1) (a) through (e) then the person referred to in your above-stated question cannot under such statute receive a license without examination, since his work prior to July 25, 1963 involved but one of the four aspects of plumbing mentioned in such question. It is my opinion however, for reasons hereinafter stated, that the phrase "practical installation of plumbing" in the context of sec. 145.07 (1) must be construed as covering not only "across the board" installation of plumbing, involving all the aspects of plumbing described in sec. 145.01 (1), but must also be construed as covering practical installation of only one type or kind of plumbing, e.g., the installation of septic tanks for private domestic sewage treatment and disposal.

Sec. 145.07 (1) constitutes a so-called "grandfather clause". It has been said that, "Ordinarily, as applied to the regulation of a profession, a grandfather clause exempts from the examination pre-requisite to obtaining a license, those who were already bonafide engaged in the practice of a profession being regulated *for the first time.*" (Emphasis supplied by court.) *Eslin v. Collins,* (1959) Fla., 108 So. 2d 889, 890. "The purpose of an exception or grandfather clause is to exempt from the statutory regulations imposed for the first time on a trade or profession those members thereof who are then engaged in the newly regulated field on the theory that they who have acceptably followed such profession or trade for a number of years, or who are engaged therein on a certain date, may be presumed to have the qualifications which subsequent entrants to the field

must demonstrate by examination." *State v. Streeter*, (1948) 33 N.W. 2d 56, 59.

While plumbing as an occupation has been subject to regulation in Wisconsin for decades, until 1963 the licensing of plumbers was required only "in any city or village having a system of waterworks and sewerage or in any metropolitan sewerage district or in any area platted under ch. 236 adjacent to such city or village." Sec. 145.06 (1), Stats. 1961. In 1963, sec. 1 of the above-mentioned ch. 179, Laws 1963, amended sec. 145.06 (1) to read in part:

"No person shall engage in or work at plumbing *in the state* unless licensed to do so by the board [the state board of health]. * * *"

The effect of this amendment of sec. 145.06 (1) was to regulate the business or occupation of plumbing by licensing for the first time in large areas of the state, chiefly rural in character, where no plumber's license requirement had previously obtained. Sec. 145.07 (1) as recreated is clearly a "grandfather clause" designed to provide an exemption from such new licensing requirement for the person therein described. The courts, when called upon to do so, have tended to give grandfather clauses in the licensing field a liberal construction, exempting more rather than less persons from new licensing requirements. See *State v. Streeter* (1948) 33 N.W. 2d 56, 59, citing *State v. Zeno*, 79 Minn. 80, 81 N.W. 748; *Matter of Tucker v. N.Y. State Bd. of Pharmacy*, 127 Misc. 538 217 N.Y.S. 217; and *Commonwealth Air Transport, Inc. v. Stuart*, 303 Ky. 69, 196 S.W. 2d 866. This judicial tendency and practice provides one of two reasons for my opinion that the phrase "practical installation of plumbing" as used in the grandfather clause in question is subject to a liberal construction, i.e., must be construed as covering not only all aspects of plumbing but a single aspect of plumbing as well, so as to bring a person who has been engaged in only one aspect of plumbing rather than "across the board" plumbing activity within the exemption from examination provided by sec. 145.07 (1).

There is a second reason for my opinion that sec. 145.07 (1) authorizes issuance of an appropriate license without examination to the person described in your question, i.e., to one who prior to July 25, 1963 was not required to be licensed under ch. 145, and was actively engaged on or before January 1, 1964 in the practical installation of one of the four types or kinds of plumbing you describe. As already noted herein sec. 145.06 (1) prior to its 1963 amendment provided that: "No person shall engage in or work at plumbing * * *" in designated portions of the state "unless licensed to do so by the board". The 1963 amendment extended this prohibition to the entire state. Violations of this prohibition were punishable before such amendment under sec. 145.12 (1) as misdemeanors, and are so punishable now. It is my understanding that the board in seeking prosecution under sec. 145.12 (1), for a violation of sec. 145.06 (1) has always taken the position that sec. 145.01 (1) has been violated in any instance where a person required to have a plumber's license but having none does no more than "engage in or work at" one type or kind of plumbing, e.g., installation of a private domestic sewage treatment and disposal system. In other words, the board has *not* said that a person in order to violate sec. 145.06 (1) must engage in or work at all kinds or types of plumbing described in sec. 145.01 (1). This in my judgment is a sound position, obviously based on the board viewing "plumbing", as used in sec. 145.06 (1) as meaning a single type or kind of plumbing as well as all types. Such a long-standing administrative construction of "plumbing", so used in some degree supports the same construction for the words "practical installation of plumbing", which might easily have been used in sec. 145.06 (1) in lieu of the word "plumbing", and would doubtless have been given the same construction given "plumbing" by the board, had they been so used.

JHM

Liquor Licenses—Words and Phrases—Sec. 176.05 (21) (d) as amended by ch. 383, Laws 1963, construed relative to liquor license quotas.

November 10, 1964.

GEORGE W. CORNING, *Commissioner*
Department of Taxation

You have raised a number of questions involving the interpretation of sec. 176.05 (21), Stats,. as amended by ch. 383, Laws 1963.

Sec. 176.05 (21) is the law which establishes quotas for the number of class B intoxicating liquor licenses which a municipality may issue. Generally speaking, the quota established by the statute is one license for each 500 "population" or fraction thereof or the number of licenses lawfully issued and in force on August 27, 1939 when the quota law became effective or, to cover cases where the population has decreased, the number of licenses lawfully issued and in force on the last preceding federal census date. Generally speaking, "population" is defined to mean the "last federal decennial census" figure or the figure arrived at in connection with the incorporation of new cities and villages, less in either case inmates of charitable, mental and penal institutions in the municipality. Next, the statute provides for the effect of annexations and detachments of territory, and until the enactment of ch. 383, Laws 1963, par. (d) provided:

"(d) Detachment of territory decreases the quota by the number of licensed premises in the detached portion, until subsequent decennial federal census warrants a greater quota as prescribed by par. (b) 1; but the quota of the municipality after detachment shall be at least one."

By ch. 383, par. (d) was repealed and recreated to read:

"(d) Detachment of territory subsequent to any census enumeration and occurring after January 1, 1960, shall not decrease the quota of the remainder of the town, village or city to less than one license per 500 people or less than one license."

It is at once apparent that whereas the statute formerly provided what effect upon the quota a detachment of territory might *have*, it now provides what effect it shall *not* have. Also, instead of referring to "population" which is defined as noted above, it now refers to "people" which is not defined, and it does not refer to fractions of 500.

Your first question is: Does the term "people" in sec. 176.05 (21) (d) as created by ch. 383, Laws 1963, have the same meaning as the term "population" as defined in sec. 176.05 (21) (a)?

It is my conclusion that the answer to this question is "No". "Population" as defined with reference to the last federal census can have no application to a situation where a territory has been detached from a municipality and presumably organized as a new municipality or attached to an existing one. There is no way to determine the "population" of the remaining territory, because it was never enumerated as such in the decennial census. Therefore the legislature studiously avoided the word "population" and instead used "people" in the sense of inhabitants of the area.

Your second question is: Should the number of people remaining after a detachment of territory be determined by proof such as is referred to in *State ex re. Fairchild v. McCarthy*, (1950) 257 Wis. 62, 42 N.W. 2d 484?

The answer to this question is "Yes".

Your third question is: May the department of taxation demand, after a detachment of territory from a municipality, a certification of the population remaining in such municipality?

I am not aware of, and you do not cite, any statute authorizing the department to require such a certification and the answer to your question therefore is "No". However, the department may ascertain, from the records of the governing body, by what authority it deems itself authorized to issue the number of licenses which it does issue, to determine whether the proofs upon which it acted comply with the standards of accuracy required by *State ex rel. Fairchild v. McCarthy* (1950) 257 Wis. 62, 42 N. W. 2d 484.

Your fourth question is: Does the phrase in new 176.05 (21) (d) "shall not decrease the quota of the remainder of the town, village or city *to less than one license per 500 people*" mean that a license cannot be included in the quota for the remainder of a municipality after a detachment, for a number of people in excess of a number of multiples of 500? For example, for the 499 people in excess of 1,500 if 1,999 are the remaining people or for the one person in excess of 1,500 if 1,501 are the remaining people?

Since par. (d) as amended refers only to "one license per 500 people" and does not say "or fraction thereof" it must mean the full number of 500.

Moreover, the entire expression in the statute is "to less than one license per 500 people *or less than one license.*" If fractions of 500 were intended to be included, it would have been unnecessary to add "or less than one license", since any number of people less than 500 would then have been entitled to a quota of one license without those words. I must therefore conclude that the legislative intent is clear not to include fractional parts of 500.

Your fifth question is: Does the term "any census enumeration" contained in new sec. 176.05 (21) (d) mean only a "decennial federal census" as that term is used in 176.05 (21) (a)?

It is my conclusion that the term "any census enumeration" is on its face broader than the term "the last decennial federal census" in the definition of "population". However, since the last federal decennial census is the only census relevant to determination of quotas, I am at a loss to know what other census could be referred to by the quoted phrase.

Your sixth question is: If a municipality having a quota based on the number of licenses issued and in force on August 27, 1939 (per 176.05 (21) (b) 2) loses part of its population by detachment after January 1, 1960, must the quota for the remainder be determined on the basis of one license per 500 people or at least one license, in view of new

sec. 176.05 (21) (d), or may it be determind by subtracting the number in effect in the detached area from the total in effect at time of detachment?

The answer to this question is left somewhat in doubt by the repeal of former par. (d) quoted at the beginning of this opinion. If the present statute meant that the quota is "one license per 500 people or * * * one license", and no accurate count was made of the "people" remaining in the town after detachment, it would be impossible to determine the quota except to conclude that it was one license. But the statute does not say that. It says that "detachment * * * shall *not* decrease the quota of the remainder * * * to less than" that number. It implies that detachment affects the quota, but since former par. (d) is repealed, there is no statutory rule for determining what reduction in the quota is caused by the detachment, other than the minimum established by the new statute.

To assume that the rule is that the quota is reduced by the number of taverns in the detached area, except that the reduction may not go below one license for each 500 people left in the municipality after detachment, appears to be the only sensible construction, although it involves an illogical assumption that former par. (d) remains in effect, subject to the limitation set by new par. (d). After much thought devoted to this subject, I have not been able to arrive at any other solution consistent with the legislative intent.

It seems clear that the legislature should not have repealed former par. (d), but rather should have added new par. (d) to it, as a limitation upon its effect. Or at least it should have incorporated the substance of former par. (d) into new par. (d), subject to the limitations fixed by new par. (d). I strongly suggest that legislation along that line be proposed to the 1965 legislature.

I may best express my meaning by an example:

Suppose Town A had a population of 1,200 according to the 1960 decennial census and had an excess quota of 5 based on August 27, 1939. Certain territory containing 3 licensed

establishments is annexed to an adjoining city and thus detached from Town A. This would reduce the quota of Town A to 2 licenses according to former par. (d). If a count of the remaining "people" shows that the remaining population is under 1,000, the quota will then be 2, although it would be only one if new par. (d) were considered as fixing the new quota, not merely fixing a minimum. I do not believe the latter was the legislative intent, since it would force one of the remaining tavenrs out of businesss, a result studiously avoided by the legislature in other instances.

But if a count of the remaining people were to show that Town A had grown so much since the 1960 census that there were 1,500 people living in the portion remaining after the detachment, then the new quota would be 3 instead of 2. On the other hand, if the count showed only 1,300 people, the new quota would be 2 because the fractional part of 500 cannot be included in calculating the minimum quota.

In any event, after the next decennial federal census the quota will be either the number of licenses lawfully issued and in force on the census date or one for each 500 population or fraction thereof, whichever is greater.

WAP

Parental Rights—Legal Settlement—Dependent Children —Under sec. 49.10 (2) (c) children whose custody has been transferred to the state welfare department have no legal settlement after termination of parental rights.

December 17, 1964.

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

You ask an opinion about the legal settlement of children whose custody has been transferred to your department by legal proceedings, when parental rights are terminated in

subsequent proceedings, for the purpose of determining whether charges are to be made against counties under sec. 48.55 for care of the children in foster homes. Sec. 48.55 provides that the "county of legal settlement" shall be liable.

The status of legal settlement is governed by sec. 49.10, which was revised by ch. 102, Laws 1959. Bill 14, A., from which the law was enacted contained the following comment, Legislative Council Note, 1959:

"Note: This bill is a complete revision of §49.10 of the statutes relating to the determination of legal settlement of individuals. The legal settlement of the individual, in turn, determines the liabilty of units of government, as between each other, for the charges incurred in furnishing relief to the individual.

"This statute does not determine the eligibility of a person to obtain relief. * * *"

Since legal settlement is a status of legislative creation for the sole purpose of determining chargeability of government branches for public assistance, and since it does not add to nor detract from the rights of an individual to obtain assistance, the legislature is free to assign or withhold the status as it chooses. See *Holland v. Cedar Grove,* (1939) 230 Wis. 177, 282 N.W. 111.

Sec. 49.10 (2) is the only provision, other than sec. 49.10 (6), which specifically governs legal settlement of minors. In general the child's settlement is derivative from the father or mother, unless the child is emancipated. Sec. 49.10 (2) (a) contains the general rules respecting derivation of a child's settlement from a parent, concluding with the words:

"* * * but if custody is awarded to other than a parent such children have no settlement."

Because of the context, the quoted provision may be regarded as applicable only to children of divorced parents. The quoted words clearly govern the situation of children of divorced parents where neither parent has custody, and so I assume you are concerned with the settlement of children whose parents have not been divorced.

Sec. 49.10 (2) (c) provides:

"(c) If parental rights are terminated, notwithstanding any disposition of custody in the same or companion proceedings, the child has no settlement."

Bill 14, A., from which ch. 102, Laws 1959, was enacted, contained the following note to the above provision:

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

You indicate that your department followed the rule prior to 1959 that when transfer of custody and termination of parental rights were effected *simultaneously,* either in one proceeding or companion proceedings, the legal settlement derived by the child from the parent was retained so as to render that county chargeable. The wording of sec. 49.10 (2) (c) indicates that it was directed toward altering such previous practice. I do not believe, however, that it follows that a different result was contemplated in cases where parental rights are terminated *subsequent* to transfer of custody.

The legislature may have included the quoted provision of sec. 49.10 (2) (c) not so much to change the law as to establish that the earlier interpretation did not conform to the statutory plan. The use of the term "companion proceedings" is not necessarily limited to proceedings disposed of simultaneously. The term has no fixed legal meaning, and was probably intended by the legislature to refer to proceedings involving the same subject matter irrespective of whether decisions were simultaneous.

You also refer to sec. 49.10 (4) (f) which is incomplete unless read in connection with the opening paragraph of subsec. (4). Together the pertinent provisions read:

"(4) Every person * * * who voluntarily resides * * * one whole year * * * gains a legal settlement * * *. Residence by a person * * * under the following circumstances shall not

be considered as voluntary * * * and no settlement status shall be changed:

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

As pointed out in *Marathon County v. Milwaukee County*, (1956) 273 Wis. 541, 544-545, 79 N.W. 2d 233:

"* * * the acquisition of a legal settlement depends on residence. While that term is not defined in the statute, it is held to be the equivalent of domicile as generally used. *Carlton v. State Department of Public Welfare*, 271 Wis. 465, 468, 74 N.W. (2d) 340."

An unemancipated child cannot acquire a *residence* in his own behalf since the exercise of intent sufficient to establish residence lies with his parent, guardian, or custodian.

Sec. 49.10 (4) deals with legal settlement of persons having capacity to establish residence, and the reference to a "foster home" in subsec. (4) (f) governs in determining the legal settlement of the person responsible for a child's support. If aid is given a child, that prevents acquisition of a new settlement by the parent liable for his support. See, for example, *Milwaukee County v. Waukesha County* (1940) 236 Wis. 233, 237, 294 N.W. 835. See also the discussion in 50 OAG 86, 90-91.

Under sec. 48.03 (10) transfer of custody without termination of parental rights does not cancel the parents' duty to support.

Whether the obligation of a parent to support a child continues after judicial termination of parental rights under secs. 48.40 to 48.43 has not been the subject of a supreme court determination, and may be dependent on the decree of the court effecting the termination in each specific proceeding. The 1955 report of the Wisconsin Legislative Council on Child Welfare, Vol. VI, Part 11, pp. 29-30, says:

"(1) *Judicial Termination of Parental Rights*

"Termination of parental rights is a judicial proceeding in juvenile court to sever the parent-child relationship

[§48.07 (7)]. It may be a voluntary proceeding; i.e., one based on the request and consent of the parent, or it may be an involuntary proceeding based on the parent's misconduct or inability. * * *

"It is clear that once there is a judicial termination of parental rights, the parent loses the right to the guardianship and custody of his child and to consent to the adoption of his child [§322.04 (2)]. But whether all parental rights and duties are ended is not clear. For example, does the child lose the right to inherit from his parent once the parent's rights are terminated? Probably not, since the Wisconsin supreme court has held that even in the case of an adoption there must be 'explicit and unmistakable language' to the effect that the right of inheritance is ended.

"Does the parent's duty to support his child end with the termination of parental rights? In some juvenile courts in Wisconsin, for example, the parent must agree to support his child after his rights have been terminated until the child is adopted. In addition, it has been the practice of counties, in the case where the parent did not support the child after the termination of parental rights, to charge back to the county of legal settlement of that parent the cost of the child's care on the ground that the parent's legal settlement still determines the child's. [See §49.10.]"

If the obligation to support survives, the settlement of the parent liable for support could be affected by the provisions of sec. 49.10 (4); otherwise probably not. In cases where provision is made in the proceedings for termination of parental rights, that the parent shall be liable for continued support, the provisions of sec. 49.10 (4) may still affect the parent's status as to legal settlement.

Your question, however, is concerned only with whether the *child* has a settlement so as to make a county liable for his care. That question must be answered in the negative because of the specific provisions of sec. 49.10 (2) (c). If read without the explanatory clause, that section provides:

"If parental rights are terminated * * * the child has no settlement."

The clause "notwithstanding any disposition of custody in the same or companion proceedings" is explanatory, similar to the one the supreme court held in *Phelps Dodge Corp. v. Labor Board,* (1941) 313 U.S. 177, 189, 61 S. Ct. 845, 85 L. Ed. 1271, and should not be construed to "shrivel a versatile principle to an illustrative application."

It is my opinion that the legislature intended by sec. 49.10 (2) (c) to classify unemancipated children as having no legal settlement in cases where rights of parents have been terminated by judicial proceedings.

BL

Real Estate Brokers Board—Licenses—Board has authority to promulgate rule requiring individuals or partnerships doing business under a trade name to list the name of licensed broker in advertisements, signs and business cards.

December 21, 1964.

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

You have requested that I reconsider an opinion issued to you on March 17, 1958. The opinion is reported at 47 OAG 72 and states in part that the board had probably exceeded its authority in the promulgation of R.E.B. 2.03 (5) (b), which provides:

"*Change of broker's status.* Individuals already licensed as brokers under this board, either individually, as corporation officers, or as members of a co-partnerssship or co-partnerships, making application to this board to be licensed as brokers under another title or firm name or another form of organization, must make application in anticipation of a change in their form of organization or name under which they conduct business and the application shall be granted under the new name upon payment of the usual fee, without

examination, provided said title or trade name does not conflict with any other title or trade name already registered with the board."

The opinion further stated that the board could not arbitrarily limit the use of a given proper name or trade name to one licensee and could not prevent an applicant from using a trade name similar to that used by another licensee unless the intended use constituted misrepresentation, deceit or other improper motive thereby affecting the competency or trustworthiness of the applicant.

The right of a person to use his given family name is a natural right. 52 Am. Jur. 547. The use of a trade name is subject to reasonable regulation by statute. Wisconsin has such a statute. However, the law of trade names is closely related to the law of unfair competition and both areas of the law are complex. The Wisconsin statutes do not contemplate that the Wisconsin real estate brokers' board should resolve disputes in this area. The fact that one user of a trade name has registered such name first does not of itself establish that he shall be entitled to exclusive use of said trade name. Many other factors are to be considered when a controversy over use is brought in a proper forum.

The board has not seen fit to materially amend R.E.B. 2.03 (5) (b), but has apparently not attempted to enforce it since the opinion referred to was written. In addition, even though Ch. 136 has been substantially amended at the board's request, and after study by the legislative council, no legislation has been enacted which either directly or indirectly grants the board the power to limit the use of trade names in the manner contemplated by R.E.B. 2.03 (5) (b). As stated in 47 OAG 72, where an individual broker's license is involved, the license is personal and runs to the individual rather than to the name under which the licensee may otherwise lawfully do business.

In 46 OAG 1, 2, it is stated:

"You inquire first whether a person licensed as a real estate broker who wishes to do business under more than

one trade name need obtain a separate license under each trade name.

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

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

At present you are faced with a complaint by an individual licensee doing business under a trade name he has registered with the secretary of state under the provisions of Ch. 132. He claims exclusive right to the use of the name and wants the board to deny the use of the same or similar trade names to other licensees even though he may have a remedy under sec. 132.01 (8) to protect his trade name . He contends other licensees are presently using a similar trade name. No compliant has been filed to revoke or suspend any broker's license.

In 34 OAG 198, it was stated that in view of the legislative history of Ch. 132, the secretary of state must accept all applications for registration of trade names, irrespective of whether they are identical or similar to others previously filed and leave the parties to the remedy provided in sec. 132.01 (8).

While the problems are not identical of the specific legislation in Ch. 132, and the absence of any related legislation in Ch. 136, you are advised that the board should follow the recommendations of the attorney general as outlined in 47 OAG 72.

If an action were brought under sec. 132.03 (8) and the court determined that one of the parties was entitled to exclusive use of a given trade name and the other party licensed as a real estate broker continued to use the trade

name, the matter would reflect on the competency and trustworthiness of the latter and would be a matter for board investigation and action depending upon the circumstances.

Sec. 136.08 (2) (d) provides that a license may be suspended or revoked if the holder has:

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

Sec. 136.08 (2) (b), (c), (i) and (k) are also concerned with broker representations.

The board presently does not have any rules which clearly define the responsibilities of a broker in the field of advertising although some of the rules in R.E.B. 7.01 and 10.01 (12) border on the area.

It is my opinion that the board could adopt reasonable rules in this area, including a rule requiring that advertisements contain the name of the licensed broker. If such a rule were adopted, individuals or partnerships doing business under a trade name could be required to list the name of the responsible licensed broker in advertisements, signs and business cards, and the chance for any misrepresentation would be reduced. Corporations would of course use their corporate name.

Neither your letter nor the materials appended thereto, including the letter of the attorney questioning the soundness of the opinion referred to, cite any cases from this state or elsewhere, or any changes in legislation which would require modification of the opinion at 47 OAG 72. The attorney's complaint is not that the public is misled or deceived in any manner, but that his client licensee has built up good will, and that his business is being adversely affected by other broker's use of the same or similar trade name.

While the real estate brokers' licensing law does benefit all of those persons engaged in the business, the primary purpose of the law is the protection of the public from

unscrupulous and incompetent brokers, and not the issuance of licenses or franchises to engage in the real estate business. *State ex rel. Green v. Clark,* (1940) 235 Wis. 628, 631, 294 N.W. 25; *Payne v. Volkman,* (1924) 183 Wis. 412, 419, 198 N.W. 438.

The board does not have authority to adjudicate financial disputes as between its various licencees, although it may consider certain relationships between licensees in determining whether or not a given licensee is sufficiently trustworthy and competent to continue to be licensed as a broker.

RJV

Zoning—Towns—Approval, or failure to disapprove, amendment of a county zoning ordinance by a majority of towns, adopting the original ordinance and having lands affected, is required for adoption.

December 23, 1964.

WALTER K. JOHNSON, *Deputy Director*
Department of Resource Development

You requested my opinion regarding the application of sec. 59.97, Stats., particularly subsec. (3) (g). Your inquiry relates to the proposed amendment of a county zoning ordinance in a county where such zoning ordinance has been adopted by 9 of 14 towns within that county. In this regard you inquire:

"1. In applying Section 59.97 (3) (g) how many towns must ratify the zoning amendment in order for it to become effective—one-half of those that had ratified the original ordinance, or one-half of the entire county?

"2. Would the amendment, if adopted by more than half of the 14 townships, be applicable in the entire county even

though all of the towns had not ratified the original zoning ordinance?"

Sec. 59.97 (3) (g) reads as follows:

"(3) AMENDMENTS: CHANGES. * * *

"(g) Any such amendatory ordinance when so adopted shall within 7 days thereafter be submitted in duplicate by the county clerk by registered mail to the town clerk of each town in which lands affected by such ordinance are located. If after 40 days from the date of such adoption a majority of such towns have not filed certified copies of resolutions disapproving such amendment with the county clerk, or if, within a shorter time a majority of the towns in which the ordinance is in effect have filed certified copies of resolutions approving the amendment with the county clerk, the amendment with the county clerk, the amendment shall thereupon be in full force and effect in all of the towns affected by the ordinance. Any such ordinance relating to the location of boundaries of districts shall within 7 days after adoption by the county board be transmitted by the county clerk by registered mail only to the town clerk of the town in which the lands affected by such change are located and shall become effective 40 days after the adoption of the ordinance by the county board unless such town board shall prior to such date file a certified copy of a resolution disapproving of such ordinance with the county clerk provided that if such town board shall approve of such ordinance, said ordinance shall become effective upon the filing of the resolution of the town board approving same with the county clerk. The county clerk shall record in his office the date on which such ordinance becomes effective and he shall notify the town clerk of all towns affected by such ordinance of such effective date and also make such report to the county board, which report shall be printed in the proceedings of the county board."

The foregoing section was enacted by ch. 490, Laws 1951, which created sec. 59.97. Subsec. (3) (g) was redrafted several times prior to passage and such drafts are helpful in understanding the intent of language of the section in its present form.

The first draft read:

"Any such amendatory ordinance when so adopted shall within 7 days thereafter be submitted in duplicate by the county clerk by registered mail to the town board of each town in which lands affected by such ordinance are located. If such ordinance pertains to regulations applicable to all towns in which the zoning ordinance is effective, unless a majority of the town boards of said towns adopt a resolution disapproving of such ordinance and file a certified copy of such resolution attached to one of said duplicate copies of said ordinance with the county clerk within 40 days from the date of adoption by said county board of said ordinance, the ordinance shall be in effect in the respective towns affected by it."

This draft would have applied only to cases where the amendment affected lands in all of the towns in which the original ordinance was effective. It left unanswered the method of enactment of amendments regulating lands in a lesser number of towns than were covered by the original ordinance. The second sentence was therefore redrafted to read:

"Where such ordinance if after 40 days from the date of such adoption a majority of such towns have not filed certified copies of resolutions disapproving such amendment with the county clerk, or if within a short time a majority of the towns in which the ordinance is in effect have filed certified copies of resolutions approving the amendment with the county clerk, the amendment shall thereupon be in full force and effect in all of the towns affected by the ordinance."

The final revision of sec. 59.97 (3) (g) struck from the beginning of the second sentence the unnecessary words "Where such ordinance". The clause, "or if, within a shorter time a majority of the towns in which the ordinance is in effect have filed certified copies of resolutions approving the amendment with the county clerk," was added to permit the adoption of the amendment within a shorter period than the 40 days which would otherwise have been required.

Sec. 59.97 (3) (g) in its final form requires that the county clerk notify only the town clerks of those towns which contain lands affected by the amendment. This may be all or a lesser number of the towns which had adopted the original ordinance. The amendment becomes effective in those towns containing lands affected by the ordinance, and to which notice was given, at the expiration of 40 days if a majority of such towns have not disapproved such amendment. The 40-day period may be shortened under the provision that if a majority of the towns containing land affected by the amendment approve of such amendment it will become effective in all such towns.

It is conceded that the clause "or if, within a shorter time a majority of the towns in which the ordinance is in effect have filed certified copies of resolutions approving the amendment with the county clerk," would appear to refer to the original ordinance and therefore permit a majority of the towns covered by such original ordinance to adopt the amendment even though such towns did not contain lands affected thereby. This interpretation would not, however, be consistent with the general intent of the section. Further, there is no provision in sec. 59.97 (3) (g) for giving notice to towns other than those containing lands affected by the amendment.

The answer to your first question, then, is that a zoning amendment must be ratified by a majority of the towns containing lands affected by the amendment and in which the original zoning ordinance is in effect.

As to your second question, it must be noted that sec. 59.97 (2) (d) in setting forth the procedure for the information of zoning ordinances states in part:

"(d) A county ordinance adopted as provided by this section shall not be effective in any town until it has been approved by the town board. * * *"

This language follows the zoning policy which has prevailed from the outset of county zoning in Wisconsin, that the initial determination as to whether a zoning ordinance shall be applicable in a given town lies with that town. Ch.

388, Laws 1923, which created sec. 59.97, Stats. 1923, contained the following:

"* * * Such ordinance or amendments thereto may be adopted as to such town or towns which shall have given their approval thereto."

Nothing in sec. 59.97 (3) (g) implies that this long standing policy is to be defeated through the adoption of an amendment to an ordinance, thus permitting the enforcement of such zoning ordinance in towns which have never approved thereof. The amended ordinance is, as to those towns which have not adopted the original ordinance, original zoning subject to their individual approval pursuant to sec. 59.97 (2).

With reference to your suggestion that an alternative would be the repeal of the old ordinance and enactment of a comprehensive amendment as a new ordinance, I should like to call your attention to the opinion set forth in 48 OAG 65. That opinion holds that "Revision of an existing county zoning ordinance can be accomplished only by amendment pursuant to sec. 59.97 (3) * * *." This opinion follows that in 42 OAG 91 to the effect that: "An ordinance to repeal an existing county zoning ordinance, pursuant to sec. 59.97, Stats., is not valid unless it complies with the requirements therein provided for the amendment of such an ordinance."

I should also like to point out that the foregoing discussion relates only to those amendments of zoning ordinances which do not relate to the location of boundaries of zoned districts. Any amendment changing the bundary of such district will only be effective in a given town when approved by that town. 48 OAG 65, 67.

DGM

Fees—Clerk of Court—Register of Deeds—Sheriffs— Clerk of court may extend credit when papers are filed, register of deeds' fees payable in advance except as pro-

vided, and sheriff may extend credit or demand payment. Such officers may set up checking accounts but county may not advance money for such use.

December 30, 1964.

WILLIAM D. O'BRIEN
District Attorney, Chippewa County

You have requested an official opinion on the question of whether the clerk of court may extend credit to attorneys and others for the payment of clerk's fees, and the same question is raised with respect to payment of fees of the register of deeds and the sheriff.

Sec. 59.43 provides:

"The clerk of the circuit court and the clerk of any other court of record may refuse to accept any paper for filing or recording until the clerk's fee provided in s. 59.42 or other applicable statute is paid."

The clear import of the language is that the clerk may extend credit but is not obligated to do so, and of course when he does so it is at his own risk.

Sec. 59.43 was created by ch. 206, Laws 1957, but the same or a similar provision has been in the statutes before.

A case which is very much in point is that of *Lang v. Menasha Paper Co.*, (1903) 119 Wis. 1, 96 N. W. 393. That case had to do with the validity of the filing of a mechanic's lien which was sent to the clerk of the circuit court with directions to file the same and send his bill to the plaintiff's attorney. The clerk by letter acknowledged that the lien had been "duly received for filing" and that the fee was 35 cents. The clerk made no demand for payment, although the bill was paid in about 30 days. The statute provided for both filing and docketing, but the clerk did not docket it until he was paid.

The court held the filing to be effective, saying at p. 6:

"* * * In legal contemplation, the claim was filed when it was presented to the clerk to be filed, and retained by him as such clerk. Id. True, the statute authorized the clerk to 'require his fees' for filing such claim 'to be paid in advance.' Sec. 748, Stats. 1898. But he made no such requirement; and, in the absence of such requirement, his duty was to put his file mark upon the claim and docket the same. * * *"

It is to be noted that sec. 748, Stats. 1898, provided substantially the same thhing as our present sec. 59.43, and the court construed the statute to be directory rather than mandatory.

Sec. 59.57 sets up the statutory fees for the register of deeds. The opening language reads:

"Except as otherwise provided by law every register of deeds shall receive the following fees, to wit:"

Sec. 59.57 (12) provides:

"All the foregoing fees to be payable in advance by the party procuring such services, except that the fees for such services performed for a state department, board or commission shall be invoiced monthly to such department, board or commission."

This contemplates advance payment of the fees of the register of deeds except as to the state. By the same token it strengthens the conclusion that advance payments are not mandatory in those instances where the legislature has not so provided, if the officer elects to extend credit at his own risk.

Sec. 59.28 relating to the fees of the sheriff opens with the following language:

"Every sheriff shall be entitled to receive the following fees in advance for his services providing the county board approves advance payment:"

This language is significant and makes it clear that in the case of the sheriff credit is the rule rather than the exception in the absence of specific action by the county board.

There are particularly strong reasons for extension of credit by the sheriff since he cannot know in advance whether or not he is going to be successful in effecting service of papers. There is a difference in fees where service is attempted but not effected and he cannot be sure of his mileage until he knows what it is going to be.

There appears accordingly to be no basis for concluding that either the clerk of court or sheriff must collect his fees when papers are offered for filing, recording, or service.

In this connection your attention is directed to an opinion from this office to Harold J. Wollenzien, corporation counsel for Waukesha county, under date of December 20, 1963, 52 OAG 439, wherein it was concluded that 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 and that such units may maintain separate checking accounts. It was pointed out in this opinion that county officers, other than the county treasurer, have the necessarily implied power to maintain separate checking accounts in which to deposit money pending delivery to the county treasury but that there is an element of risk involved in the exercise of this power as a failure of the depository would impose liability on the head of the department maintaining it. 41 OAG 160.

The extension of credit by clerks of courts and sheriffs becomes almost a necessity under various circumstances. It might be pointed out here that almost universally these officers have extended credit to the attorney general. This has been done for many, many years, and the work of this office would be greatly hampered if such were not the case. In those rare instances where credit has been denied to the attorney general because of some personal differences between a county officer and the attorney general, it has been necessary for individual attorneys on the staff to advance the cash out of their own pockets, take a receipt, and submit it for reimbursement on an expense account voucher at the end of the month. Along with heavy travel expenses

which the individual must finance until reimbursed, it may be necessary for him to resort to the bank, credit union, or a small loan company and pay interest on moneys which he has advanced for the use of the state, and for which interest payments he cannot be reimbursed.

This is hardly an ordely way of conducting the state's business, but there is no statutory way by which the state can advance expense money or salary.

However, there is one point which deserves further discussion before this opinion is concluded.

Reference is made in your request to the fact that the county proposes to assist the clerk of the court by financing his revolving fund up to the extent of a $1,000 balance. We find no statutory authority for such procedure. If after extending credit the clerk finds that his collections are slow, he must carry the burden. His only way to avoid this problem is to refuse credit, since he is personally responsible when it comes to accounting for every paper that has been filed and for which a fee must be charged. The county board cannot supply him with a revolving line of credit even though it is axiomatic that capital is required in the operation of any kind of business transactions in which credit is extended. A public officer takes his office *cum onere,* and this is just one of the burdens that goes with the job, at least until such time as the legislature provides differently.

WHR

Hunting and Fishing Laws—Indians—Discussion of Public Law 280 regarding applicability of conservation laws to Indians in Wisconsin and amendments necessary for statutory compliance.

December 30, 1964.

L. P. VOIGT, *Director*
State Conservation Commission

You ask whether the state conservation laws now apply without restriction to all persons, including tribal Indians residing on non-patented lands within the boundaries of any Indian reservation in the state. Your request is prompted by the 1953 enactment of Public Law 280 (18 U.S.C.A. §1162), the material parts of which are:

"(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory, shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

"* * *

"Wisconsin.....All Indian country within the State.

"(b) Nothing in this section shall * * * deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

The answer depends on whether there is in existence any "Federal treaty, agreement or statute" affording the right of any Indian (especially tribal Indians residing on non-patented lands) to be free of the applicability of the state conservation laws.

As to persons other than Indians, the power of the state to regulate in general the taking of fish and game is unquestioned. *Geer v. Connecticut,* (1896) 161 U.S. 519, 16 S Ct. 600. Hence, we need be concerned solely with the question as it relates to Indians.

Prior to enactment of Public Law 280, the law of Wisconsin relating to Indian hunting and fishing rights was quite clear. In *State v. Morrin,* (1908) 136 Wis. 552, 117 N.W. 1006, the court held that Indians not residing within the boundaries of an Indian reservation were subject to the

conservation laws. As to Indians residing on lands within a reservation but not fully patented, however, such laws did not apply. *State v. Johnson,* (1933) 212 Wis. 301, 249 N.W. 284.

In the *Johnson* case, there was involved a question whether the Wisconsin courts had jurisdiction to enforce the conservation laws against an Indian member of the Bad River band of the Chippewa tribe who had hunted out of season on lands within the Bad River Indian reservation, but which had been fully patented to the heirs of a deceased Indian allottee, and had later been conveyed by the heirs to a white man, who in turn had conveyed to another white man, the owner at the time of the offense. The reservation had been created as a result of the 1854 treaty between the Chippewa Indians of Lake Superior and the Mississippi, and the United States, by which the reservation was set apart by the United States in return for a cession by the Indians of lands in Minnesota. Noting that the treaty made no reference to hunting and fishing rights with respect to the lands set apart (as distinguished from the ceded lands), the court in *Johnson* stated, p. 311:

"Art. 11 of that treaty provides as follows:

" 'All annuity payments to the Chippewas of Lake Superior, shall hereafter be made at L'Anse, La Pointe, Grand Portage, and on the St. Louis river; and the Indians shall not be required to remove from the homes hereby set apart for them. And such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President.' Senate document No. 452, pp. 484-487.

"All of the treaty provisions which reserve hunting and fishing rights to the Chippewa Indians obviously relate to the lands ceded rather than to the lands reserved and retained. The lands upon which the defendant hunted deer during the closed season therefor were not within any area ceded by the treaties mentioned, but were lands within the boundaries of the Bad River (La Pointe) Reservation retained by them in the treaty of 1854 to which they retired

as their permanent abode. While the treaty entered into did not specifically reserve to the Indians such hunting and fishing rights as they had theretofore enjoyed, we think it reasonably appears that there was no necessity for specifically mentioning such hunting and fishing rights with respect to lands reserved by them. At the time the treaty of 1854 was entered into there was not a 'shadow of impediment upon the hunting rights of the Indians' on the lands retained by them . 'The treaty was not a grant of rights to the Indians but a grant of rights from them—a reservation of those not granted.' *United States v. Winans,* 198 U.S. 371, 25 Sup. Ct. 662, 664. We entertain no doubt that the rights of the Indians to hunt and fish upon their own lands continued. If the lands here involved were not fully patented we should have no difficulty in concluding that as to such lands the fish and game laws of this state are without force and effect."

We have set out the rather extensive quote from the *Johnson* case because of its importance in the resolution of the question now posed as to whether the court's decision might still prevail, notwithstanding Public Law 280. Stated another way, does the unstated reservation by the Indians of hunting and fishing rights as a result of the 1854 treaty constitute an "agreement" within the meaning of Public Law 280?

We find no federal statute conferring such rights, and the *Johnson* case makes clear that the rights there involved were not conferred by or because of the 1854 treaty. Significantly, Public Law 280 appears to differentiate between "treaty" and "agreement". The reason may be explained upon the ground that "until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties." *Lone Wolf v. Hitchcock,* (1903) 187 U.S. 553, 565, 23 S. Ct. 216. Since then Indian affairs have been regulated by acts of congress and by *contracts* with the Indian tribes similar in nature to treaties. *Lane v. Morrison,* (1918) 246 U.S. 214, 38 S. Ct. 252; 42 C.J.S., *Indians,* §24, pp. 682, 683. An "agreement" within the meaning of Public Law 280 is therefore referable solely to a contract entered

into between the United States and an Indian tribe or tribes subsequent to the 1871 enactment of 25 USCA §71, forbidding the making of further Indian treaties.

"Agreement" and "treaty" are consequently not synonymous, in my opinion, with respect to Public Law 280; and since no applicable federal statute appears to have dealt with the matter of conferring or preseving the hunting and fishing rights of the Indians included in the 1854 treaty, we must revert to the proposition that any continued existence of such rights must under Public Law 280 be afforded by the treaty of 1854. If, as appears, these rights were not in fact afforded either by that treaty or by either of the prior treaties of 1837 and 1842 discussed in the *Johnson* case (these 3 treaties being the only ones pertinent), the conclusion must follow that Public Law 280 has effectually extinguished such rights. Cf. *Klamath and Modoc Tribes v. Maison,* (1956) 139 Fed Supp. 634, holding that Public Law 280 did not extinguish fishing rights there involved because expressly secured by specific treaty provision.

In that respect, the situation leading up to the enactment of the Termination Act of 1954 with regard to the Menominee tribe is of significance. As observed in *State v. Sanapaw,* (1963) 21 Wis. 2d 377, 124 N. W. 2d 41, joint hearings were held by the 83rd congress, second session, on 3 bills providing for termination of federal supervision over the Menominees. S. 2813 and H.R. 7135 expressly provided for the preservation of any special hunting and fishing rights that might have been conferred upon the Menominees by treaty, statute, *custom or judicial decision.* Neither H.R. 2828, which became the Termination Act, nor the act itself contained either of the italicized provisions. The "custom or judicial decision" aspects likewise do not appear in Public Law 280. Therefore, in my opinion, congress clearly did not intend that Public Law 280 should be construed to preserve such rights that may have arisen solely by custom (aboriginal user) or by court decision, although it is true that Public Law 280 was enacted prior to the 1954 Termination Act. However, Public Law 280 was enacted during the

83rd congress, which adopted House Concurrent Resolution 108, the preamble of which was considered in *State v. Sanapaw*, pp. 387-388, to be pertinent as to interpretation of the Termination Act:

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

" 'Whereas the Indians within the territorial limits of the United States should assume their full responsiblities as American citizens:' "

By a parity of reasoning, the preamble is just as applicable to ascertainment of the congressional motive and intent regarding Public Law 280, thus supporting the conclusion that any hunting and fishing rights possessed by the Indian tribes included within the 1854 treaty were extinguished by Public Law 280.

It is true that in the treaties of 1837 and 1842, referred to in the *Johnson* case, such rights were reserved as to lands thereby ceded. However, in *State v. Morrin*, supra, the court citing *Ward v. Race Horse*, (1896) 163 U.S. 504, 16 S. Ct. 1076, observed:

"In *Ward v. Race Horse, supra*, it is held that an act of Congress which admits a state into the Union, and declares without reservation that such state shall have all the powers of the other states of the Union, is an abrogation of a previous treaty stipulation with Indians within the territory of such state respecting their right to fish and hunt. The court holds that to exempt such Indians from state laws regulating hunting and fishing within the borders of a state after its admission into the Union would deprive the state of its sovereign power to regulate the rights of hunting and fishing, and would deny to such state admission into

the Union on an equal footing with the original states, upon the ground that a treaty with the national government giving the right to hunt and fish within territory which subsequently is embraced within the limits of a state is a privilege in conflict with the act of admitting the state into the Union on an equality with the other states and is repealed thereby. The instant case presents such a situation, and it follows that the stipulations in the treaty with the Chippewa Indians respecting their right to hunt and fish within the borders of this state were abrogated by the act of Congress admitting the state into the Union and making no reservation as to such rights."

See also, 51 OAG 103 at p. 109.

State v. Morrin (not cited in *State v. Johnson*) appears to be authority for the proposition that the 1837 and 1842 treaties were repealed by the subsequent act of congress admitting Wisconsin to statehood without any reservation, as pointed out in *State v. Morrin,* of prior treaty rights. Unless *State v. Morrin* is to be overruled or distinguished (neither of which has occurred), it must follow that the rights possessed by the Indians at the time of the 1854 treaty were not themselves afforded by treaty—nor did the treaty of 1854 refer either expressly or impliedly to those of 1837 and 1842 (cf. *State v. Sanapaw,* supra, observing reference in the 1854 Menominee treaty to the treaty of 1848) which otherwise might possibly have revived such rights. Further, the hunting and fishing rights mentioned in the 1837 and 1842 treaties were terminated by presidential executive order of February 6, 1850. *Mole Lake Band v. United States,* (1956) 134 Ct. Cl., 478, 481, 139 F. Supp. 938.

It must be noted that in *Ward v. Race Horse,* supra, the court seems clearly to have distinguished between rights of Indians to hunt game *on a reservation set apart for exclusive Indian use and occupancy* prior to admission to statehood of a territory including such reservation, and the treaty right to hunt over non-reservation lands. It is the latter right which was held in *Ward v. Race Horse* to have

been extinguished on the admission of the territory as a state. It must be noted also that with respect to the 1837 and 1842 treaties above mentioned, no reservation in Wisconsin territory had then, or prior thereto, been set apart for exclusive Indian occupancy. *Ward v. Race Horse* also held that the rights there involved were limited as to duration by specified conditions, i.e., the presence of game on the lands, and the subsistence of peace between the whites and Indians on the borders of the lands (described as hunting districts). So in the 1837 and 1842 treaties the rights were to continue, respectively, "during the pleasure of the President of the United States" and "until required to remove by the President of the United States." *State v. Johnson,* supra, p. 310. Hence those rights were not guaranteed in perpetuity, as *Ward v. Race Horse* seems clearly to require, in order for their preservation beyond territorial status of the involved lands, and were in fact ended by the 1850 executive order above mentioned.

United States v. Winans, (1905) 198 U.S. 371, 25 S. Ct. 662, cited in *State v. Johnson,* did not overrule *Ward v. Race Horse,* even by implication, and is clearly distinguishable. That case involved an 1859 treaty made prior to admission of Oregon as a state by which certain fishing rights were secured to the Indians without any limit as to duration, contrary to the situation in *Ward v. Race Horse* and to the 1837 and 1842 treaties referred to in *Johnson.* Further, the court there held that because of non-limitation as to duration such rights were intended to continue even after the lands affected had been sold and patented—just what *State v. Johnson* refused to hold. Consequently the court in *Johnson* must have been aware of the material difference in the treaties concerned in both cases. Hence, I cannot say that our court in *Johnson* would have followed *United States v. Winans* rather than *Ward v. Race Horse* had the necessity of choice arisen. The implication is, I believe, otherwise.

Before passing to the final portion of this opinion, a reference to *Organized Village of Kake v. Egan,* (1962) 369 U.S. 60, 82 S. Ct. 562, 7 L. ed 2d 573 is pertinent. The

court there observed at page 72 that the freedom within an Indian reservation from the operation of state conservation laws arose from the notion that such a reservation was assumed originally to be in effect "a distinct nation within whose boundaries state law cannot penetrate," pointing out also at page 72, that:

"By 1880 the Court no longer viewed reservations as distinct nations. On the contrary, it was said that a reservation was in many cases a part of the surrounding state or territory, and subject to its jurisdiction except as forbidden by federal law."

The case is likewise of significance in its observation at page 74 with respect to Public Law 280:

"In 1953 Congress granted to several states full civil and criminal jurisdiction over Indian reservations, consenting to the assumption of such jurisdiction by any additonal states making adequate provision for this in the future. 67 Stat. 588, 18 U.S.C. sec. 1162, 28 U.S.C. sec. 1360 Alaska was added to the list of such states in 1958, 72 Stat. 545. This statute disclaims the intention to permit states to interfere with *federally granted* fishing privileges or use of property." (Emphasis added.)

Accordingly Indian hunting and fishing rights founded solely upon aboriginal user or judicial decision, not being federally granted, are extinguished in this state. Because no such rights in Wisconsin appear to exist on account of federal treaty, agreement or statute, I must conclude that the state conservation laws may be made applicable to Indians on non-patented reservation lands within the state.

Whether such laws may presently be enforced on non-patented reservation lands without state legislative action is, however, a matter of doubt. The last sentence of sec. 29.09 (1), provides:

"* * * Indians hunting, fishing or trapping off Indian reservation lands are subject to all provisions of this chapter."

It might be argued that this statute was the result of legislative recognition that the state conservation laws could not then apply to Indians on non-patented reservation lands, and that it was a declaration that such laws should apply to Indians otherwise. From this premise the conclusion might follow that because of Public Law 280 the state conservation laws were automatically extended to apply to Indians on non-patented reservation lands. In 34 OAG 236 however the opinion of this office was that the legislature intended such laws to apply to Indians only when off Indian reservation lands, and not to apply even where such Indians were on lands of a reservation within which they did not reside. The statute has not since been modified in that respect. I must therefore consider that the opinion might now be treated by the courts as a correct exposition of the legislative intent. *State ex rel. West Allis v. Dieringer,* (1956) 27 Wis. 208, 81 N.W. 2d 533. Hence, I conclude that affirmative state legislation would be highly advisable in order to extend the conservation laws as permitted by Public Law 280, either by repeal of the last sentence of sec. 29.09 (1) or by specific extension thereof to reservation lands. I should mention, however, that retention of the last sentence of sec. 29.09 (1) without change may render the continued immunity on reservation lands of doubtful constitutionality. 52 OAG 282 at p. 286.

You are therefore advised that in my opinion: (1) Public Law 280 has extinguished the federal immunity of Wisconsin Indians from operation of the conservation laws while hunting, fishing or trapping on reservation lands in the state; but (2) specific state legislation should extend the applicability of such laws to Indians in those circumstances.

AH:RM

STATUTES AND CONSTITUTIONAL PROVISIONS, SESSIONS LAWS, LEGISLATIVE BILLS AND RESOLUTIONS REFERRED TO AND CONSTRUED

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