OPINIONS

OF THE

ATTORNEY GENERAL

OF THE

STATE OF WISCONSIN

VOLUME 54

January 1, 1965 through December 31, 1965

BRONSON C. LA FOLLETTE
Attorney General

MADISON, WISCONSIN

1965

675—154

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 Jan. 5, 1965
BRONSON C. La FOLLETTE, Madison ..... from Jan. 5, 1965, to

ATTORNEY GENERAL'S OFFICE

BRONSON C. La FOLLETTE	Attorney General
JOHN H. BOWERS	Deputy Attorney General
WARREN H. RESH	Assistant Attorney General
JAMES R. WEDLAKE	Assistant Attorney General
HAROLD H. PERSONS	Assistant Attorney General
WILLIAM A. PLATZ	Assistant Attorney General
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ROY G. TULANE	Assistant Attorney General
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GEORGE F. SIEKER	Assistant Attorney General
E. WESTON WOOD	Assistant Attorney General
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JAMES H. McDERMOTT	Assistant Attorney General
LEROY L. DALTON	Assistant Attorney General
ALBERT O. HARRIMAN	Assistant Attorney General
ROY G. MITA	Assistant Attorney General
WILLIAM H. WILKER	Assistant Attorney General
GEORGE SCHWAHN	Assistant Attorney General
GORDON SAMUELSEN	Assistant Attorney General
JAMES P. ALTMAN	Assistant Attorney General
ROBERT D. MARTINSON	Assistant Attorney General
WARREN D. SCHMIDT	Assistant Attorney General
DAVID G. McMILLAN	Assistant Attorney General
BETTY R. BROWN	Assistant Attorney General
CHARLES A. BLECK	Assistant Attorney General
WILLIAM F. EICH[2]	Assistant Attorney General-Trainee
JAMES D. JEFFRIES[3]	Assistant Attorney General-Trainee
ROBERT B. McCONNELL[3]	Assistant Attorney General-Trainee
E. GORDON YOUNG[3]	Assistant Attorney General-Trainee
MILO W. OTTOW	Chief Investigator
EDWARD E. RYCZEK	Investigator
LAVERNE G. STORDOCK	Special Agent
CLARK E. LOVRIEN	Special Agent
WALTER A. YOUNK	Special Agent
DONALD R. SIMON	Special Agent
HERBERT L. KRUSCHE	Special Agent

1. Leave commencing September 1, 1965
2. Appointed August 4, 1965
3. Appointed September 7, 1965

RECENT DEVELOPMENTS INVOLVING THE ANTI-SECRECY LAW

INTRODUCTION

During my first year in office I have received many requests for interpretation of the Wisconsin anti-secrecy law. These requests have come from state agencies and from private persons as well. In view of the great importance of this matter, I have decided to review the opinion issued by former Attorney General John W. Reynolds in 49 OAG v and summarize some of the developments since the issuance of that opinion.

The anti-secrecy law is found in sec. 14.90, Wis. Stats. Subsec. (2) thereof provides:

"To implement and insure the public policy herein expressed, all meetings of all state and local governing and administrative bodies, boards, commissions, committees and agencies, including municipal and quasi-municipal corporations, unless otherwise expressly provided by law, shall be publicly held and open to all citizens at all times, except as hereinafter provided. No formal action of any kind, *except as provided in sub. (3),* shall be introduced, deliberated upon or adopted at any closed session or closed meeting of any such body, *or at any reconvened open session during the same calendar day following a closed session. No adjournment of a public meeting into a closed session shall be made without public announcement of the general nature of the business to be considered at such closed session, and no other business shall be taken up at such closed session.*"

The italicized language was added recently by ch. 209, Laws 1965.

Subsec. (3) reads as follows:

"(3) Nothing herein contained shall prevent executive or closed sessions for purposes of:

"(a) Deliberating after judicial or quasi-judicial trial or hearing;

"(b) Considering employment, dismissal, promotion, demotion, compensation, licensing or discipline of any public employe or person licensed by a state board or commission or the investigation of charges against such person, unless an open meeting is requested by the employe or person charged, investigated or otherwise under discussion;

"(c) Probation, parole, crime detection and prevention;

"(d) Deliberating or negotiating on the purchasing of public property, the investing of public funds, or conducting other public business which for competitive or bargaining reasons require closed sessions;

"(e) Financial, medical, social or personal histories and disciplinary data which may unduly damage reputations;

"(f) Conferences between any local government or committee thereof, or administrative body, and its attorney concerning the legal rights and duties of such agency with regard to matters within its jurisdiction."

Despite the great importance of this statute and the frequent conflict between public bodies and private interests over the application of such law, very few cases ever reach the courts for adjudication. This is because enforcement through the courts is ordinarily an inadequate remedy since the disputed meeting will have been concluded before the court could provide appropriate relief. This fact makes it manifestly clear that the law places upon the public agencies concerned a high responsibility and duty to comply with the mandate of the anti-secrecy provisions of the law to conduct all of their meetings in public, except where the subject matter falls squarely and clearly within one of the exceptions provided by the statute.

I, as attorney general, intend to execute the public policy declarations of this law in every instance brought to my attention. As the chief legal officer of the state and as legal advisor to the departments and divisions of state government, I hereby reaffirm that all meetings of all public

agencies must be conducted in public unless the subject matter clearly falls within one of the exceptions of the statute, and I call upon all state and local governing and administrative boards, commissions, committees, and agencies, including municipal and quasi-municipal corporations, to implement the requirements of the statute. Any doubt whether a matter falls within one of the exceptions should be resolved in favor of open public meetings. However, when a public agency finds it necessary to conduct business in private, the agency must first make a public announcement of the general nature of the business to be considered at the closed session and also make a statement that the matters to be discussed fall within one or more of the statutory exceptions prior to going into executive session. Matters which do not fall within one of the stated exceptions may not be discussed or acted upon at such closed session. And, no formal action of any kind may be introduced, deliberated upon or adopted at any reconvened open session during the same calendar day following a closed session. Sec. 14.90 (2).

THE REQUIREMENT OF NOTICE

The Wisconsin anti-secrecy law is a declaration of public policy by the legislature that the effectiveness of our form of government is dependent upon an informed electorate and that the public is entitled to the most complete information regarding the affairs of government. It is to execute that policy that the statute declares that all meetings of governing and administrative bodies, boards, commissions, committees and agencies shall, with certain stated exceptions, be publicly held and open to all citizens at all times. The question naturally arises whether a meeting, concerning which the public has received no notice and no information whatsoever, is publicly held and open to members of the public within the meaning of the statute.

It is my opinion that a meeting is not publicly held if the public receives no notice of the meeting. A meeting secretly called, though "open to the public", violates the spirit of the anti-secrecy law and is, in my opinion, a violation of the intent and purpose of the law.

The statute does not specifically require that notice of a meeting be given. The statute does, however, impose a duty on the public agencies to make meetings public. This duty is not complied with by merely keeping the doors of the meeting room open. The spirit of the law requires the agency concerned to take some additional positive steps to inform the public of the fact that the meeting is being held in order to give members of the public a fair opportunity to attend.

No attempt is here made to detail the form of notice which should be given. That must be determined on a case-by-case basis according to the needs and limitations of the situation. Certainly, notice to representatives of the news media would appear to be minimal. It would also be desirable to notify persons having an obvious interest in the subject matter.

MAKING A RECORD OF CLOSED MEETINGS

When the law allows and the situation requires that a public body meet in secret, steps should be taken to protect the public's right to know. The issues involved and the business conducted by public bodies in secret are of great public importance. Accordingly, in order to comply with the spirit of the anti-secrecy law, and to provide the public with as much information as is possible under the circumstances, arrangements should be made for a court reporter to fully transcribe all of the proceedings of the secret portion of the meeting whenever that is feasible and consistent with the intent of the law. These minutes should be made available for public inspection at such time when disclosure would no longer be contrary to the interest sought to be protected by the secret meeting. There are circumstances where disclosure may never be feasible or lawful however, and having a transcript prepared may be fruitless. Subsecs. (b), (c), (d), and (f) involve matters which may require permanent secrecy. Each case is different and it is appropriate therefore to decide each case on its own merits—on a case-by-case basis.

I have already advised at least one state agency that the above procedure should be followed in the conduct of its secret meeting. It now appears that a bill will be introduced in the legislature to require that a record of secret meetings be made.

ADVISORY COMMITTEES

It is my opinion that the anti-secrecy law is applicable to meetings of advisory boards and committees when governmental affairs and governmental business are discussed or considered. Advisory committees and groups dealing with governmental affairs and the transactions of governmental business must comply with the requirements of the statute.

The anti-secrecy law applies to meetings of the university of Wisconsin faculty. It is my opinion that the law also applies to meetings of duly constituted committees or subcommittees of the faculty, unless such meetings are concerned with matters which clearly fall within one of the exceptions provided by the statute.

MEDIATION IN LABOR DISPUTES

In 52 OAG 363, the attorney general had under consideration the validity of a rule of the Wisconsin Employment Relations Board which provided that the mediators' functions under sec. 111.70 are confidential and that mediation meetings are non-public. The question was whether this rule violated the anti-secrecy law. The opinion points out that the success of mediation depends upon confidential relations and circumstances in which both parties may offer exploratory suggestions without being held to account either by their principals, their opponents, or the public generally. In private employment, the mediation function is carried on in private. Sec. 14.90 (1) provides that the most complete information is to be available to the public as is compatible with the conduct of governmental affairs and the transaction of governmental business, and, the opinion observes, it was not likely that the legislature intended that mediation in public employment be different from that carried on in private industry. It was therefore concluded that

the mediation meetings under sec. 111.70 could be non-public and the mediators' functions be confidential.

WAGE NEGOTIATIONS

I have been asked whether negotiations between a school board and a teachers' salary committee must be conducted in public. Subsec. (3) (b) of the anti-secrecy law provides that closed meetings may be held for the purpose of considering employment, dismissal, promotion, demotion, compensation, licensing or discipline of a public employe. I advised that this subsection is applicable only to a discussion relating to an individual employe, and that a discussion of teacher salary proposals, generally, at a school board meeting, does not come within this exception and must be open to the public. However, subsec. (3) (d) of this law permits closed meetings for conducting public business which for competitive or bargaining reasons requires a closed meeting. As to the applicability of this subsection, I advised as follows:

"Whether the teacher salary proposals submitted by the teachers' committee and the counter proposals made by the school board are preliminary in nature and for bargaining reasons need to be discussed in a closed session is basically a question of fact to be decided by the school board. If the board finds that the bargaining process can best be carried on in private, the meeting may be closed. If the board finds no necessity for bargaining in private, the meeting should be open to the public. In any event, when the bargaining period is past, no final action should be taken on the teachers' salary schedule until they are made public and discussed in an open public meeting."

COUNTY SCHOOL COMMITTEES

I have also been asked whether a meeting of a county school committee and six school boards to discuss school district reorganization must be open to the public. The committee felt the meeting should be closed because it was to be exploratory in nature with the hope of developing mutual understanding among the school boards. It was said that

at that time they had nothing firm to share with the public and more damage than good could result from an open meeting. It was further stated that they have the prerogative of calling a closed meeting because no official action was to be taken and no specific matter had been advertised for discussion.

The first sentence of sec. 14.90 (2) provides for meetings to be held publicly and the second sentence provides that no formal action shall be taken at a closed meeting except as provided in subsec. (3). It has been assumed by some that this second sentence means that a meeting may be closed if no formal action is to be taken. This is not correct. The statute clearly provides that all meetings are to be open unless the subject matter falls within one of the stated exceptions. A meeting at which no formal action is to be taken is not included within these stated exceptions. And, exploratory discussions are not included in the exceptions. The fact that no specific matter has been announced for discussion is no basis for a closed meeting. Likewise, the feeling that there is nothing firm to share with the public and that more damage than good could result if the meeting is open, does not justify a closed meeting. One of the responsibilities of public officials is, with certain limited exceptions, to discuss and to conduct public business in public so that members of the public may know what is being done. A discussion as to whether a joint school district should be established may be of great interest and concern to many persons living in the area affected. Such a meeting clearly must be open to the public.

BOARD OF ZONING APPEALS

In *Cities Service Oil Company v. Board of Appeals,* (1963) 21 Wis. 2d 516, 124 N.W. 2d 809, the question arose as to whether the board of zoning appeals of the city of Milwaukee had committed prejudicial error by holding executive sessions in connection with the revocation of a building permit. Construing secs. 62.23 (7) (e) (which requires that meetings of the board be public) and 14.90 (2), the court held that where a municipal board is acting in a quasi-

judicial capacity, all hearings must be public. Closed executive sessions, however, may thereafter be held for the purpose of deliberating to determine what decision should be made. The court further held that the taking of the vote, whereby the board determined the appeal, could properly take place at an executive session and was not required to be taken at a meeting open to the public. Voting, the court said, is an integral part of deliberating and merely formalizes the result reached in the deliberating process. The court held, however, that the board acted improperly in receiving the views of representatives of the municipality at the closed executive session.

CONSULTATION WITH ATTORNEY

In *North Central Airlines, Inc. v. Wisconsin State Aeronautics Commission,* Case No. 113351, Circuit Court, Dane County (1963), North Central Airlines sought a writ of mandamus to compel the state aeronautics commission to open a conference it had scheduled for the purpose of conferring with counsel and expert economic consultants in connection with litigation which was then pending before the U. S. Civil Aeronautics Board and to which the state of Wisconsin was a party. The court held that the conference in question fell within the exception of sec. 14.90 (3) (f) of the anti-secrecy law and that the commission was entitled to consult with counsel incident to the position which it may, in the future, take concerning the litigation which was then pending. The court further held that it was proper to call in and consult with expert economic consultants for that purpose. Such consultation, the court said, may be properly done in a closed session if it is incident to consultation with the attorney relative to the position to be taken in the case.

MATTERS WHICH MAY UNDULY DAMAGE REPUTATIONS

In *State ex rel. Youmans v. Owens,* (1965) 28 Wis. 2d 672, 137 N.W. 2d 470, the court referred to sec. 14.90 as the "Public Right to Know" law and pointed out that sub-

sec. (3) (e) of that statute permits closed sessions for discussion of financial, medical, social or personal histories and disciplinary data which may unduly damage reputations. The court held that this legislative policy of not disclosing data which may unduly damage reputations carries over to the field of inspection of public records and documents under sec. 18.01.

INSPECTION OF PUBLIC RECORDS

While the question of public inspection of public records does not directly involve the provisions of sec. 14.90, relating to open public meetings, it does involve the public's right to know, and it is appropriate therefore that this matter be discussed. In *State ex rel. Youmans, supra,* the publisher of the **Waukesha Freeman,** brought a mandamus action against the mayor of the city of Waukesha to permit the newspaper publisher to examine certain papers relating to the investigation of alleged misconduct on the part of members of the Waukesha police department which were in the custody of the mayor. The supreme court held in effect, that any resident, taxpayer of the state of Wisconsin has a sufficient interest to entitle him to inspect public records, regardless of motive. The court further held that sec. 18.01, defining public records, includes not only such books, papers and records as are required by law to be filed, deposited or kept by a public officer, but that the term "public records" includes as well all written memorials made by a public officer within his authority where such writings constitute a convenient, appropriate, or a customary method of discharging the duties of his office. In determining the extent of the right of a member of the public to inspect public records, the court held that there are certain limitations on the right to inspect stating at pages 681-683:

"* * * the right to inspect public documents and records at common law is not absolute. There may be situations where the harm done to the public interest may outweigh the right of a member of the public to have access to particular public records or documents. Thus, the one must be balanced against the other in determining whether to per-

mit inspection. An illustration of a type of situation in which the harm to the public interest, if inspection were permitted, was held to outweigh the individual's right to inspect is provided by *City & County of San Francisco v. Superior Court.* There the records sought to be inspected contained information which had been gathered from employers under the pledge that it would be kept confidential. To have permitted inspection would not only have constituted a breach of this pledge, but would have seriously handicapped governmental agencies in gathering information in the future under a similar pledge because of distrust that the pledge would not be observed.

"We deem it unwise to attempt to catalog the situations in which harm to the public interest would justify refusal to permit inspection. It is a subject which had best be left to case by case decision.

"The duty of first determining that the harmful effect upon the public interest of permitting inspection outweighs the benefit to be gained by granting inspection rests upon the public officer having custody of the record or document sought to be inspected. If he determines that permitting inspection would result in harm to the public interest which outweighs any benefit that would result from granting inspection, it is incumbent upon him to refuse the demand for inspection and state specifically the reasons for this refusal. If the person seeking inspection thereafter institutes court action to compel inspection and the officer depends upon the grounds stated in his refusal, the proper procedure is for the trial judge to examine *in camera* the record or document sought to be inspected. Upon making such *in camera* examination, the trial judge should then make his determination of whether or not the harm likely to result to the public interest by permitting the inspection outweighs the benefit to be gained by granting inspection.

"In reaching a determination so based upon a balancing of the interests involved, the trial judge must ever bear in mind that public policy favors the right of inspection of public records and documents, and, it is only in the exceptional case that inspection should be denied. * * *"

The foregoing is the most recent and authoritive statement on the question of the right of the public to inspect public records.

SUMMARY

In deciding the question whether or not a meeting of a public body must be open to the public the presumption is that the meeting must be public. A closed meeting is permissible only if it falls within one of the stated exceptions provided by sec. 14.90. This statute presupposes the right of the public freely to attend all meetings of all state and local governing and administrative bodies, boards, commissions, committees and agencies, unless otherwise expressly provided by law. A course of action which tends to dilute the right of the public to know is violative of the anti-secrecy law.

The anti-secrecy law is not self-enforcing and no penalty is provided for its violation. Accordingly, observance of the requirements of the statute and the protection of the public's right to the fullest and most complete information regarding the affairs of government, as is compatible with the conduct of governmental affairs, requires the utmost good faith on the part of all governmental bodies and agencies in the conduct of public business.

As attorney general, I am prepared to provide whatever assistance I can to insure that the provisions of the anti-secrecy law of this state are fully complied with.

OPINIONS

OF THE

ATTORNEY GENERAL

VOLUME 54

Licenses—Boats—Proposed legislation providing a different fee for boats depending upon their size violates Art. IX, sec. 1, Wis. Const.

March 15, 1965.

L. P. VOIGT, *Vice Chairman*
Natural Resources Committee of State Agencies

You have submitted a copy of proposed legislation under consideration by the National Resources Committee of State Agencies. This legislation relates to amendments and changes in sec. 30.52 (3), Wis. Stats.

The effect of the legislation is to change the present fees for the issuance of a certificate of number relating to boat registration.

You call my attention to Art. IX, Sec. 1, Wis. Const., which prohibits the imposing of a tax, impost or duty upon the use of rivers and lakes which form a common boundary to the state and any other state or territory and the Mississippi and St. Lawrence Rivers. You question the constitutionality of the proposed legislation in view of Art. IX, sec. 1, Wis. Const.

It is my opinion that the proposed legislation as drafted is unconstitutional, as it applies to the waters defined within Art. IX, sec. 1 of the constitution.

A license fee may be imposed for the purpose of regulation without that fee being a tax, impost or duty. However, the fee may not be imposed for revenue purposes. In the present law, the license is obviously for regulation and can be classified as a license under the police power. It is not a tax on the use of the waters, even though no person may operate on the waters without a valid certificate of number issued pursuant to statute, or is exempt under the statute. The fee levied has a relationship to the cost of administering a boat numbering system.

The legislation proposed provides for a different fee for boats depending upon their size. I find no relationship between the administration costs of handling an application because of size differentiation of a boat. If there is a reason that the administration costs differ for handling applications depending upon the size of the boat, then the proposed legislation, in my opinion, would be valid. However, there must be some relationship between the expense of processing the application and the fee. If the fee becomes a revenue measure, then it would obviously be unconstitutional under Art. IX, sec. 1 of the constitution.

You have also called my attention to the Wisconsin case of *Madison v. Tolzmann,* 7 Wis. 2d 570. I have carefully considered the case.

I am of the opinion that present sec. 30.52 is constitutional and that this case does not hold that licensing provision as a prerequisite to the use of waters is unconstitutional. It is my opinion, however, that the licensing provision must be strictly for regulation, and the license must not grant any special privileges. It is my opinion, as long as anyone owns a boat they can make application and receive a number for the purpose of identification, and the fee charged has a relationship to the cost of handling the application, it is not an imposition of a tax, impost or duty for the use of the waters.

AJF

Annexation—Constitutionality—Bill 24, A., of the 1965 legislature which would alter the powers of certain municipalities would be unconstitutional.

March 17, 1965.

HONORABLE WARREN P. KNOWLES
Governor

You have asked whether Bill No. 24, A., now modified by substitute amendment 1, A., is violative of the constitutional restrictions on special legislation or is otherwise invalid.

Art. IV, sec. 31, Wis. Const. provides as follows:

"**Special and private laws prohibited.** *Section 31.* * * * The legislature is prohibited from enacting any special or private laws in the folowing cases:

"* * *

"7th. For granting corporate powers or privileges, except to cities.

"9th. For incorporating any city, town or village, or to amend the charter thereof."

Art. IV, sec. 32, reads as follows:

"**General laws on enumerated subjects.** *Section 32.* * * * The legislature shall provide general laws for the transaction of any business that may be prohibited by section thirty-one of this article, and all such laws shall be uniform in their operation throughout the state. * * * "

In addition to this section, I think the bill should be considered in terms of Art. IV, sec. 23, Wis. Const. which provides as follows:

"**Uniform town and country government.** *Section 23.* * * * The legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable; * * *"

The substance of the proposed legislation reads as follows:

"Contracts Relating to Annexation in Racine County.

"(1) 'Municipality' as used in this law means the city of Racine, the villages of Sturtevant and Elmwood Park and the town of Mount Pleasant, and any combination or combinations thereof.

"(2) Any municipality may, but shall *not* be required to, contract with any other municipality that no contiguous territory shall be annexed except upon compliance with the requirements specified in such contract.

"(3) Municipalities may specify in such contracts any requirements deemed advisable by them except that:

"(a) Every such contract shall provide that it may be canceled at any time upon a two-thirds vote of the governing body of each and every* municipality which is a party thereto, and

"(b) Shall provide that, in addition to the requirements specified in such contracts, the requirements for annexation specified by any other law shall be complied with, unless the requirements specified in such contracts and the requirements for annexation specified by any other law are in conflict in which case the requirements that are the more restrictive of annexations shall apply.

"(4) It is the purpose of this law to authorize municipalities to contract for requirements for annexation which are in addition to those specified by any other law, the requirements specified by any other law being minimum requirements only, and this law and any other law shall be so construed."

The stated purpose of this law is to permit the city of Racine, the villages of Sturtevant and Elmwood Park and the town of Mount Pleasant, all in Racine county, to enter into contracts which would have the effect of altering the laws relating to annexation as they apply to any two or more of these communities.

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* Original version read, "any".

Sections 66.021 through 66.029 constitute the main body of annexation law as it applies to all municipalities in this state. They provide for the several means of annexing territory to an incorporated city or village and spell out the rights, powers and duties of the electors, owners of property, members of governing bodies, courts, the state director of regional planning, local officials and others. They also provide for the review of annexations.

Among other provisions these statutes specify that certain acts require the signatures of 20% of the electors, the votes of a majority of electors, the signatures of the owners of half of the real estate, or the votes of two thirds of the members of certain governing bodies. They require that some acts be done within a specified number of days of other acts and in considerable detail determine the rights and powers of both citizens and local units of government, including cities, villages and towns and also determine the validity of certain affected plats of land.

The purpose and effect of Bill 24, A., would be to permit four named communities in Wisconsin, but no others, to exercise different governmental powers in this field than all other similar units of government by entering into contracts with each other. One probable effect would be that a governing body of such a community could enter into a contract which would limit the powers of its successors.

The original Bill 24, A., carried no time limitation on contracts between or among the four municipalities nor any provisions for termination thereof except as the contracts themselves might specify. It specifically provided that such municipalities may:

"(3) Set conditions in such contracts binding such contracting parties as to methods of entering into and of revoking such contracts, including without limitation because of enumeration, provisions as to necessary parties signatory thereto and percentage of or fractional portion of membership of governing bodies which must affirmatively vote thereon."

The substitute amendment, as amended, now requires inter alia that:

"(a) Every such contract shall provide that it may be canceled at any time upon a two-thirds vote of the governing body of *each and every* municipality which is a party thereto. * * *" (Emphasis supplied.)

The net effect of this is to tie the contracting municipalities together on matters relating to annexation and covered in a contract and to that extent, to limit their ability to independently exercise their powers of government.

The existing annexation law, for example, requires a two-third's vote of the governing body of the annexing unit to pass an ordinance to incorporate new territory. If Bill 24,A., as amended, were to become a law and the four named municipalities were to so contract, they would thereafter require a three-quarters vote or even a stricter requirement. Once such a requirement became binding by means of a contract, succeeding governing bodies could not modify the provision during the life of the contract except by a two-thirds vote of each and all of the governing bodies of the municipalities involved.

We do not think it necessary under the circumstances to here relate the various cases interpreting the constitutional requirement for unity and uniformity in town and county government. Suffice it to say that on several occasions the right of the legislature to make classifications based upon sound distinctions has been upheld, even though only one unit of government may fit within a certain classification. See for example, *Milwaukee County v. City of Milwaukee,* (1937) 223 Wis. 674, 271 N. W. 394. But the court has made it clear that Art. IV, sec. 23, Wis. Const., means that but one system of town or county government is permissible and that such system must be as uniform as practicable. In *State ex rel. Milwaukee County v. Boos,* (1959) 8 Wis. 2d 215, 99 N. W. 2d 139, the court stated at page 222:

"Changes in county government may be made where it is not practicable to carry on such government in a particular class of counties in the same manner as is carried on

in other counties, *provided there is a reasonable basis for diversity and the powers, duties, and functions of the county board remain the same.* * * *" (Emphasis supplied).

For a more extensive discussion of this point, see 52 OAG 45.

The question as it relates to Art. IV, sec. 23, therefore is whether Bill 24, A., if enacted, would meet the uniformity and "one system" tests. We think it fails to meet these tests in two respects.

1. There is no classification as such and no finding direct or implied that there is a reasonable basis for putting the town of Mount Pleasant, when acting in conjunction with any or all of the villages of Sturtevant and Elmwood Park and the city of Racine in a separate category; which as a practical matter must be treated in a different manner from all other towns. Instead, the situation indicates that:

"* * * The classification is purely arbitrary, and very strongly suggests that the law was passed for the purpose of meeting a particular situation * * *" *Hjelming v. La Crosse County,* (1956) 188 Wis. 581, 206 N. W. 885.

2. It permits the expansion and extension of the powers and functions of the town board by means of a contract with adjacent municipalities.

Again, without going into a degree of detail unnecessary here, Art. IV, sec. 31, which in this case should be read in conjunction with sec. 32, has been held to prohibit special legislation amending municipal charters; its purpose has been ruled to be "to promote uniformities, so far as possible, in the laws governing the incorporated towns and villages in this state." See *Smith v. Sherry,* (1880) 50 Wis. 210, 6 N. W. 561, *State ex rel. City of Shawano v. Engel,* (1920) 171 Wis. 299, 177 N. W. 33, and comment at 1961 Wis. Law Review 123, 125. Both the *Smith* and *Shawano* cases involved annexation by special laws and held those special laws invalid pursuant to the provisions of the 9th paragraph of this section as well as of sec. 32. Because of the substantial similarities of the facts involved and the reasoning used

by the court, it is my opinion that this doctrine would apply equally to the provisions in Bill 24, A., as they relate to the city of Racine and the villages of Sturtevant and Elmwood Park, and further that the provisions of the 7th paragraph thereof would logically exclude the granting of powers involved in Bill 24, A., to the town of Mount Pleasant.

For examples of the holding that special legislation affecting contract rights is in violation of Art. IV, sec. 32, see *Neacy v. Drew,* (1922) 176 Wis. 348, 187 N.W. 218, and *Cawker v. Central B. P. Co.,* (1909) 140 Wis. 25, 121 N. W. 888. For examples of such legislation being held to violate the uniformity clause thereof see: *The State ex rel. Sanderson v. Mann,* (1890) 76 Wis. 469, 45 N. W. 526, *White Construction Co. v. West Allis,* (1926) 189 Wis. 8, 206 N. W. 908, and *Federal Paving Corp. v. Prudisch,* (1940) 235 Wis. 527, 293 N. W. 156. In the latter two cases special statutes were held invalid in violation of secs. 31 and 32 on the grounds that they applied to a limited number of communities which fell within a closed class.

In the *Federal Paving* case (pp. 530-531) the court sustained the doctrine that a valid classification of cities must meet all of the following five tests:

"* * * (1) They must be based upon substantial distinctions which make one class really different from another; (2) they must be germane to the purpose of the law; (3) *they must not be based upon existing circumstances;* (4) the law must apply equally to every member of the class; (5) the characteristics of each class should be so far different from those of other classes as to reasonably suggest the propriety of the substantially different legislation. * * *"

No effort is made in the bill under consideration to meet these tests. On the contrary, it clearly violates them and accordingly is invalid.

BCL: GFS

Constitutional Amendment—Legislature—Publication of erroneously worded joint resolution nullifies said resolution and proposed constitutional amendment must be started anew.

March 18, 1965.

THE HONORABLE, THE ASSEMBLY

You have requested my opinion pursuant to Assembly Resolution No. 7 (1965) which is as follows:

"Resolved by the assembly, That the attorney general is requested to provide an opinion as expeditiously as possible as to the status of enrolled joint resolution 31 of 1963, in view of the fact that the constitutional amendment proposed by that measure was published in a different form than as adopted by the 1963 legislature; and specifically as to whether the 1965 legislature can adopt, on second consideration, the proposed constitutional amendment in either its published or adopted form."

Joint Resolution No. 31 of 1963, as actually adopted by the legislature, reads in material part:

"(Article I) Section 23. Nothing in this constitution shall prohibit the legislature from providing for the safety and welfare of children by providing for the transportation of children to and from any parochial or private school or institution of learning."

The legislative history of Joint Resolution No. 31 shows that it was introduced in the assembly on March 5, 1963, as joint resolution No. 39, A. On April 16, 1963, substitute amendment No. 1, A., to joint resolution No. 39, A., was adopted. On the same day, amendment No 1, A., to substitute amendment No. 1, A., was offered, which would have inserted the word "approved" between the words "any" and "parochial". This amendment was rejected on that day by a vote of 52 ayes, 21 noes. Substitute amendment No. 1, A., was, on the same day, ordered engrossed and read a third time. On April 24, 1963, it was adopted in its consequently

unamended form by a vote of 73 ayes, 21 noes, and ordered immediately messaged. It was concurred in, without amendment, by the senate on May 23, by a vote of 25 ayes, 4 noes, paired 2. Through error, however, joint resolution No. 39, A., enrolled as joint resolution No. 31, was enrolled as though amendment No. 1, A., to substitute amendment No. 1, A., had been adopted; and in consequence, joint resolution No. 31 was published in the 1963 session laws and in the official state paper in material part as follows:

"(Article I) Section 23. Nothing in this constitution shall prohibit the legislature from providing for the safety and welfare of children by providing for the transportation of children to and from any approved parochial or private school or institution of learning."

The matter is ruled, in my opinion, by *State ex rel. Bentley v. Hall,* (1922) 178 Wis. 109, 189 N. W. 265. There, the 1919 legislature had considered a joint resolution to amend the constitution by (1) providing for municipal home-rule, and (2) by authorizing an increase in municipal debt limitation for acquisition of public-service properties. By later amendment, the second proposal was eliminated, and the joint resolution as finally adopted contained the municipal home-rule proposal only. However, through error, the original joint resolution containing both proposals was enrolled and deposited with the secretary of state as though it were the one actually adopted, and it was published for 3 months in its erroneous form prior to the 1920 general election. The 1921 legislature sought to override the defect by concurring in the joint resolution as actually adopted by the preceding legislature. In holding such action ineffective by virtue of Art. XII, sec. 1 of the constitution, the court stated:

"It is apparent, therefore, that that which was published in 1920 at the close of the 1919 session was not the resolution actually adopted by the two houses of the legislature, and as it was published was not what the legislature actually did. * * *

"The notice given by the publication of the resolution as mistakenly enrolled and certified cannot therefore be con-

sidered as a substantial compliance with the constitutional directions for amendments to such a fundamental document."

The question reduced to its essentials is whether or not the term "approved school" means essentially the same thing as "school". It seems manifest that an authorization to allow the use of public funds with respect to transportation of children attending *any* parochial or private school or institution of learning is substantially different from a limitation of such use to an *approved* school or institution. In the one case, all children attending any such school could be made eligible for public-paid transportation; in the other case, only those attending approved schools would qualify. In the latter instance, some sort of standard for classifying such schools as "approved" would have to be formulated, and some agency designated to administer such standard.

The legislative history of the amendment to the substitute amendment of the resolution, which would have included "approved" in the language of the proposed amendment, evidences that the term "approved school" is substantially different from the term "school". Since the 1963 legislature deliberately rejected the inclusion of the word "approved", it is clear that the inclusion of the word "approved" in the pubication is a substantial variance from what the 1963 legislature adopted.

In attempting to appraise the materiality or substantiality of inclusion of the term " approved" in the publication, it can well be urged that the decision maker must destinquish the function of the electorate in the selection of the legislators—upon the first publication involved here—who will do the detail work concerning the content of the constitutional amendment itself, and the function of the electorate in ratifying the constitutional amendment itself. The purpose of the first publication is to afford the electorate an opportunity to be advised of proposed amendments and to ascertain the attitude of candidates for election to the legislature *(Tausing v. Lawrence,* (1937) 197A, 235, 238, 328 Pa. 408). With such distinction in mind it could be said that the electorate had sufficient opportunity to ascertain the attitudes

of candidates for the 1965 legislature on the question, and that the composition of the 1965 legislature would not be different from what it is, had the published version of joint resolution No. 31 been entirely accurate.

Such considerations are speculative, however, and do not override established law. In *State ex rel. Thompson v. Zimmerman,* (1953) 264 Wis. 644, 660, 60 N. W. 2d 416, 61 N. W. 2d 300, the court said:

" * * * Some suggestion is made by plaintiff that the question on the ballot is sufficiently accurate because, though not compelled to do so, it would be expedient for the legislature, in districting, to follow the lines stated on the ballot. It does not lie in our mouths to say that that which the people think of sufficient importance to put in their constitution is in fact so unimportant that misinformation concerning it printed on the very ballot to be cast on the subject, may be disregarded. If the subject is important enough to be mentioned on the ballot it is so important that it must be mentioned in accord with the fact. The question as actually submitted did not present the real question but by error or mistake presented an entirely different one and, therefore, as stated by Mr. Justice Doerfler in *State ex rel. Ekern v. Zimmerman, supra,* no claim can be made that the proposed amendment is validly enacted."

In *State ex rel. Owen v. Donald,* (1915) 160 Wis. 21, 151 N. W. 331, the court held, among other matters, that in connection with a joint resolution proposing a constitutional amendment, the succeeding legislature to which the resolution is referred must record its vote thereon as to the *precise question* agreed to.

The *Bentley* and *Owen* cases make clear that the present legislature cannot validly concur in joint resolution No. 31 as actually adopted by the 1963 legislature, because it had not been published in correct content. Nor, in my view, may the legislature validly concur in the resolution as published, because it was not in fact what had been adopted by the previous legislature.

I must advise, therefore, that the decision in *State ex rel. Bentley v. Hall* renders invalid any attempt by the 1965

legislature to concur in, ratify, or adopt curative measures with respect to joint resolution No. 31 of 1963, whether as actually adopted by the 1963 legislature, or as actually enrolled and published. Accordingly, you are further advised that in order to accomplish the amendment provided for by joint resolution 31 of the 1963 legislature it is necessary to begin anew.

BCL:RDM

Constitutional Amendment—Legislature—Constitutional Officers—Senate joint resolution 5, 1965 legislature, would comply with Art. XII, sec. 1, Wis. Const. regarding procedure in amending state constitution.

March 19, 1965.

THE HONORABLE, THE SENATE

By senate resolution 13,S., an opinion is requested on the question of whether senate joint resolution 5 is in compliance with Art. XII, sec. 1, Wis. Const., relating to the amendment of the state constitution.

Senate joint resolution 5 proposes in effect that Art. V, sec. 1, of the constitution be amended to change the term of the governor and of the lieutenant governor from two to four years and that Art. V, sec. 3, be amended to provide that beginning with the general election in 1970 these officers shall be chosen jointly by the casting by each voter of a single vote applicable to both offices.

The resolution also provides a recommendation that if the necessary legislative approval is given by the 1965 and 1967 legislatures the proposed amendments be submitted to the people substantially as follows:

"1. Shall section 1 of Article V of the state constitution be amended to increase the terms of office of the governor and lieutenant governor to 4 years?

"2. Shall section 3 of Article V of the state constitution be amended to provide that the governor and lieutenant governor shall be elected on a joint ticket by the casting of a single vote applicable to both offices?"

Art. XII, sec. 1, sets forth the procedure to be followed in amending the constitution. Among other things it provides "that if more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against such amendments separately."

It would appear that senate joint resolution 5 complies with this directive.

Reference is made in the request for this opinion to 48 OAG 188 (1959), 50 OAG 65 (1961) and *State ex rel. Thomson v. Zimmerman,* (1953), 264 Wis. 644, 60 N.W. 2d 416, as having bearing on the question submitted.

In 48 OAG 188 the attorney general considered a proposed constitutional amendment which would have given all constitutional officers a four-year term, and it was concluded that this could not be done in one amendment except as to the offices of governor and lieutenant governor concerning which the attorney general said at pages 191-2:

"At the outset there would appear to be no serious question as to the propriety of covering the offices of governor and lieutenant governor in one amendment. While the lieutenant governor has some separate and independent duties as president of the senate under Art. V, sec. 8, of the constitution, the provisions of that section as well as sec. 7 of Art. V, are directed primarily to his exercise of the powers and duties of the governor in case of the governor's impeachment, removal from office, death, inability from mental or physical disease, resignation, or absence from the state. In other words, the constitutional provisions relating to the governor and lieutenant governor are concerned basically with the discharge of the duties of the state's chief executive office. In a sense the lieutenant governor is the *alter ego* of the governor, and it would seem to be both incongruous and inconsistent to conclude that an opportunity should be afforded the electors to vote separately on

whether each office should be limited to a two-year term as at present or extended to four years.

"Hence, it appears to be entirely proper to leave in one resolution the provision of Joint Resolution 22,S., relating to the extension of the terms of both the governor and lieutenant governor to 4 years. This would appear to be but 'one amendment' for all practical purposes."

The other proposed amendment relates to the election of the governor and lieutenant governor on the same ticket. This is in a separate section of Art. V and must be voted on separately.

As was pointed out in 48 OAG 188 the purpose of constitutional provisions such as Art. XII, sec. 1, relating to the amending process, is to prevent voters from being required to vote for something which they disapprove in order to register approval of other propositions tied up therewith. 11 Am. Jur. "Constitutional Law" No. 31, p. 635, 94 A.L.R. 1510 Annotation.

Senate joint resolution 5 gives recognition to the fact that what is being proposed constitutes two subjects which are distinct and independent of each other Either one could be adopted without in any way controlling, modifying or qualifying the other. The voter is not required to take a "package deal" requiring him to vote for something of which he disapproves in order to register his approval of a part of the "package".

Moreover, no conceivable harm to the machinery of government could arise from the fact that one of the questions proposed for submission to the voters might pass, and the other might fail. It might well be that the majority of the voters would favor one amendment and not the other. This could be disastrous if the two propositions were so inextricably interwoven that effect could not be properly given to one without the other. Here, however, neither proposition standing alone is in any way dependent upon the other, and a voter could intelligently vote for one and against the other.

The position taken in 48 OAG 188 is in no way modified by 50 OAG 65 and the *Zimmerman* case, *supra,* was given consideration in the writing of 48 OAG 188.

Accordingly, senate joint resolution 5 is approved as to form and as being in full compliance with Art. XII sec. 1, Wis. Const.

BCL:WHR

Words and Phrases—Employee—Interpretation of sec. 135.02 (9) regarding employment of bookkeeper and accountant.

March 25, 1965.

ARTHUR E. WEGNER, *Secretary*
Wisconsin Board of Accountancy

You have inquired whether the word "employed" as used in sec. 135.02 (9), Wis. Stats., includes services rendered by one who is retained on an independent contractor basis thereby exempting from the Accounting Practice Act persons retained for bookkeeping services if no representation is made that the work was prepared by a public accountant.

In approaching this question it is necessary to take a look at the over-all provisions and purposes of Ch. 135 relating to the board of accountancy and the practice of accounting.

The validity of this chapter was sustained in *Wangerin v. Wisconsin State Board of Accountancy*, (1936) 223 Wis. 179, 270 N.W. 57, where the court concluded that the subject of public accountancy is a proper field for the exercise of the police power in the interest of the public welfare. This decision is in accord with the weight of authority elsewhere. See 70 A.L.R. 2d 433 for Annotation on Regulatoin of Accountants.

Ch. 135 is primarily directed to the licensing and regulation of certified public accountants. It also contains what might be denominated as a "grandfather clause" for the benefit of persons practicing as public accountants prior to December 1, 1935, and who applied for certificates as public

accountants without licenses prior to that date. In general the members of this group may do about anything that a licensed certified public accountant can do except that they may not hold themselves out as certified public acountants.

Certified public accounts on the other hand must meet certain educational requirements and pass what is generally considered to be a very difficult and thorough examination. After July 1, 1968, they must have a bachelor's or higher degree from a reputable institution approved and recognized by the board as having standards of education and training substantially equivalent to those of the school of commerce of the University of Wisconsin for a resident major in accounting. Sec. 135.04 (4). They are generally considered to be professionals. They have a national professional organization, the American Institute of Certified Public Accountants and publish a highly regarded professional magazine "The Journal of Accountancy." Also they have adopted a code of ethics which in some particulars parallels that of the legal profession; and they have entered into an agreement with The American Bar Association defining the boundaries of their practice as it may relate to the practice of law. This agreement was approved by the National Conference of Lawyers and Certified Public Accountants on February 8, 1951, and by the board of governors and the house of delegates of The American Bar Association on February 24 and 27 respectively, 1951, and by The Council of The American Institute of Accountants on May 8, 1951. See Volume III Martindale - Hubbell Law Directory, Page 181A-182A.

As in nearly all licensing laws the accounting practice act contains certain exceptions and exemptions. Reference has already been made to the closed class of "public accountants" who will eventually disappear and whose status need not be further discussed here in any great detail.

Another exception is that provided in sec. 135.02 (8), which reads:

"(8) Nothing contained in this chapter shall apply to a practicing attorney, who, in connection with his professional work renders any accounting service."

The exception with which we are here concerned is that contained in sec. 135.02 (9), which reads:

"(9) Nothing contained in this chapter shall apply to any persons who may be employed by more than one person, partnership or corporation, for the purpose of keeping books, making trial balances or statements, and preparing audits or reports, provided such audits or reports are not used or issued by the employers as having been prepared by a public accountant."

It does not appear that the word "employed" as used in the above statute is to be accorded the status of a word of art having any particular technical or restricted application. Whether an individual is engaged to do bookkeeping as an independent contractor or as an employee would seem to have no bearing on the over-all purpose of the statute.

The matter which is important is whether such person or the concern for which the bookkeeping services are performed attempts to use the audit or report as having been prepared by a public accountant or a certified public accountant. It is quite clear that only a licensed certified public accountant may be designated as such and only a public accountant holding a certificate of authority as such may be designated as a public accountant. Sec. 135.11.

The obvious purpose of sec. 135.02 (9) is to exempt bookkeeping and audits from the accountancy licensing law where such services are performed for the benefit of the concern seeking such services and not for purposes of publication as being the work of a licensed certified public accountant or registered public accountant.

Ordinarily a person who is subject to control by the hirer as to means, method and details of performance is an "employee" within the meaning of compensation acts. See cases cited under "Employee" 14 Words and Phrases, page 524 and ff.

On the other hand an employee is an "independent contractor" if the will of the employer is represented only by the result and not with respect to the means by which that

result is accomplished. See cases cited under "Independent Contractor" 21 Words and Phrases, page 14 and ff.

It should be noted that the statute refers "to any persons who may be employed by more than one person." If anything, this lanugage is more applicable to the independent contractor who is rendering bookkeeping services for a number of concerns than to an "employee" who usually works for only one person or firm. Many small businesses find it unprofitable to employ a full time bookeeper and rely on the help of persons who serve a number of business firms. This, of course, does not rule out the situation where a bookkeeper may be working for one employer in the morning and for another one in the afternoon and is actually carried on the payrolls of both with appropriate payroll deductions being made for social security and withholding of income taxes, etc.

In almost any sizable city the classified section of the telephone directory carries a heading "Bookkeeping Service" with a considerable number of listings. Many of these operate under trade names and presumably employ a number of persons. Some of them travel from job to job in utility trucks carrying their mechanical equipment with them.

Some of these concerns are also listed under the heading "Accountants," and their names may appear under the heading "Accountants - Public." Presumably these individuals are registered under the "grandfather clause" of Ch. 135. Likewise there is a heading "Accountants - Certified Public." These people must likewise be licensed under Ch. 135.

There are literally hundreds of cases on what constitutes an "employee" and what constitutes and "independent contractor".

It has been held that the word "employee" has a flexible meaning depending upon the context and object to be accomplished by the document in which it appears. *Muise v. Century Indemnity Company*, (1946) 319 Mass. 172, 65 N.E. 2d 98. Likewise it is said that the term "independent contractor" is a very elastic one, and whether one employed to

render service does so as a servant or as an independent contractor must be determined from the facts of the particular case. *Alphonso v. Amer. Iron and Machine Works Co., et al.*, (1941) D. C. La. 39 F. Supp. 934.

Accordingly it is concluded that the word "employed" as used in sec. 135.02 (9), is broad enough to cover services rendered by an independent contractor as well as those rendered by one operating under the strict relationship of master and servant. No useful purpose could be served by a contrary conclusion, having in mind the purpose of the statute to say nothing of the well nigh impossible task of enforcement which the board would have on its hands in attempting to distinguish between the two.

WHR

Health Assistance—Veterans—Interpretation of Ch. 163 does not preclude a veteran eligible for admission to a federal or state veterans' hospital from health assistance payments.

March 31, 1965.

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

You ask whether, under Ch. 163, Stats., created by ch. 224, Laws 1963, veterans are eligible for health assistance payments under sec. 163.05, when they are also eligible for medical treatment in federal or state veterans' facilities. Your inquiry is based primarily on subsec. (2) (d) of sec. 163.05, which reads:

"(2) Benefits shall not include any payments with respect to:

* * *

"(d) That part of any services otherwise authorized under this section which are payable through insurance,

third party liability, or any federal, state, county, municipal or private benefit systems to which the beneficiary may otherwise be entitled."

The foregoing provision cannot be construed in isolation, because it is only one provision of Ch. 163, Stats., which is entitled "Health Assistant Payments". As the supreme court pointed out in *Associated Hospital Service v. Milwaukee,* (1961) 13 Wis. 2d 447, 463, 109 N.W. 2d 271, 88 A.L.R. 2d 1395:

"* * * In interpreting statutes they must be construed, if possible, so as to avoid inconsistency and conflict and to give effect to every part. *State v. Berres* (1955), 270 Wis. 103, 107, 70 N.W. (2d) 197. Furthermore, it should not be presumed that any part of a statute is superfluous. 50 Am. Jur., Statutes, p 365, sec. 359."

Another relevant provision of Ch. 163, is sec. 163.12, which reads:

"**Free Choice.** Nothing contained in this chapter shall alter the right of each eligible person to the free choice of physician, dentist, pharmacist, hospital or skilled nursing home. The legal responsiblity of physician or dentist to patients and all other contract and tort relationships with patients shall remain as though dealings were direct between such physician or dentist and patient. No physician or dentist shall be required to practice exclusively in any plan established under this chapter."

The "benefits" authorized by sec. 163.05 are that the plan "shall pay all or part of the charges to beneficiaries" for medical, hospital, and related services.

Nowhere in the statute is there any differentiation between elderly veterans and other elderly people, so far as their eligibility is concerned, so that the qualifications in sec. 163.05 (2) (d) are presumably to be interpreted no differently for a veteran who might be eligible for care without charge in a veterans' facility than for non-veterans who might obtain care without charge in the Wisconsin General Hospital or a county hospital.

If the legislature guaranteed to elderly citizens a free choice of physician and hospital under sec. 163.12, it seems unlikely that it intended to place elderly persons who have performed military service for the country in a less preferred class.

The legislative intent seems to me to be borne out by the wording of sec. 163.05 (2) (d). That exception to the eligibility requirement refers only to cases where services are "payable" through another benefit system.

Although the term "payable" might be held to be satisfied by a situation in which a person can receive care in a a designated institution not of his choice, that is not the usual sense in which the term "payable" is used. The supreme court commented in *Oneida County v. Tibbits,* (1905) 125 Wis. 9, 15, 102 N.W. 897, for example:

"Another consideration significant of the legislative intent is, that secs. 2560 and 4060 are the only ones which relate to *payment* of jurors and witnesses, either in terms or in the primary, accurate, and most usual meaning of that word. 'To pay' means primarily to transfer or deliver money or other agreed medium from the debtor to the creditor; and while the word 'payment' is often used merely to signify satisfaction or discharge of an obligation by any means, as by setting off some other or the like, as in *Martinette v. Oconto Co.* 47 Wis. 216, 2 N. W. 314, that is a secondary and somewhat loose use of the term. * * *"

See, also, *Krahn v. Goodrich,* (1917), 164 Wis. 600, 610-611, 160 N.W. 1072, where it was said:

"* * * 'Pay' is a word of quite comprehensive meaning; but we agree with counsel for appellant that, as used in the deed, it was evidently intended to have its ordinary meaning which is to discharge an indebtedness by the use of money. The thought was payment which would relieve the property from incumbrance, not a mere change in form, or of creditors, leaving the property burdened as before, or a discharge of indebtedness by using the property therefor. That the ordinary meaning of the word 'pay' is as indicated, is supported by *Becker v. Chester,* 115 Wis. 90, 122, 91 N.W. 87, 650, and cases cited to our attention. *Marinette v. Oconto*

Co. 47 Wis. 216, 2 N.W. 314; *Oneida Co. v. Tibbits,* 125 Wis. 9, 15, 102 N.W. 897. That, as used in this case, it contemplated the movement of money to the creditors and actual extinquishment of indebtedness, seems very plain. * * *"

The natural meaning of the term "payable", according to the foregoing authorities, makes it clear that the exception applies only where some benefit system offers monetary payment for the services selected by the beneficiary. The term does not include a veteran's right to free medical care. This intent also seems to be borne out by the reference to "insurance, third party liability, or * * * benefit systems." Under the following rule of *Chicago & N. W. Ry. Co. v. Railroad Commission of Wisconsin,* (1916) 162 Wis. 91, 93, 155 N.W. 941, it seems probable that the legislature intended to refer to "benefit systems" of a kind which make payments in the same manner as insurance:

"* * * These rules require us, when we find in a statute words relating to a particular person or specific subject followed by general words, to restrain these general words to persons or subjects of the same genus or family to which the particular person or subject belongs. * * *"

Another indication of legislative intent appears in the use of the term "entitled". Where the question whether one is "entitled" to another form of public assistance, as in the case of non-service-connected disability, or care in the Wisconsin General Hospitals, the legislature surely did not intend to require an elderly person to establish that he has followed all other approaches to charitable assistance, and been unsuccessful, before he can obtain health assistance payments.

There is, of course, nothing to compel an elderly person to elect health assistance payments in lieu of other forms of assistance, so that many veterans may elect to utilize federal or state facilities because they prefer to do so, rather than resort to benefits under Ch. 163. I do not, however, believe that a veteran is precluded from assistance under Ch. 163 merely because he may be eligible for admission to a veterans' hospital.

BCL/BL

Irrigation—Navigable Waters—An owner of cranberry lands may not divert water from a navigable lake under sec. 94.26 without a permit from the public service commission under sec. 30.18.

April 12, 1965.

FRANCESCA A. DI LORENZO
Acting Secretary
Public Service Commission

You request an opinion as to whether an owner of lands suitable for cranberry culture may divert water from a navigable lake under the cranberry laws (secs. 94.26 to 94.32, Wis. Stats.) without satisfying the requirements of sec. 30.18, Wis. Stats.

The water is to be diverted by pump from the lake into a storage reservoir, to be used at a later time to flood a cranberry bog and then to be returned by gravity to the lake after such use. The navigable lake concerned has an outlet stream.

The statutory sections involved are:

"94.26 **Cranberry culture; maintenance of dams, etc.** Any person owning lands adapted to the culture of cranberries may build and maintian on any land owned by him such dams upon any watercourse or ditch as shall be necessary for the purpose of flowing such lands, and construct and keep open upon, across and through any lands such drains and ditches as shall be necessary for the purpose of bringing and flooding or draining and carrying off the water from such cranberry growing lands, or for the purpose of irrigation, fertilization and drainage of any other lands owned by such person; provided, that no such dams or ditches shall injure any other dams or ditches theretofore lawfully constructed and maintained for a like purpose by any other person."

"30.18 **Diversion of water from lakes and streams.** (1) WHEN DIVERSION LAWFUL. (a) It is lawful to tempor-

arily divert the surplus water of any stream for the purpose of bringing back or maintaining the normal level of any navigable lake or for maintaining the normal flow of water in any navigable stream, regardless of whether such navigable lake or stream is located within the watershed of the stream from which the surplus water is diverted.

"(b) Water other than surplus water may be diverted with the consent of riparian owners damaged thereby for the purpose of agriculture or irrigation but no water shall be so diverted to the injury of public rights in the stream or to the injury of any riparian located on the stream, unless such riparians consent thereto.

"(2) SURPLUS WATER DEFINED. 'Surplus water' as used in this section means any water of a stream which is not being beneficially used. The public service commission may determine how much of the flowing water at any point in a stream is surplus water.

"(3) APPLICATION FOR PERMIT. (a) Before any water may be diverted for the purposes set forth in sub. (1), the applicant shall file an application with the public service commission * * *."

Section 30.18 clearly requires that any diversion of water for agricultural purposes must be by permit from the public service commission. That any diversion made under the provisions of sec. 94.26 is also included, is evident from the legislative history of the act which created sec. 31.14, the predecessor to the present sec. 30.18. The court quoted this history in *Nekoosa-Edwards P. Co. v. Public Serv. Comm.*, (1959) 8 Wis. 2d 582, 589, 99 N.W. 2d 821:

" * * * As originally drafted the bill was designed to permit diversion from one stream to maintain the normal level or flow in another stream or lake. The provision applying to the use of nonsurplus water for agriculture and irrigation was added later. See bill jacket on ch. 287, Laws of 1935, Wisconsin legislative reference library. Mr. Adolph Kanneberg, a former commissioner of the Public Service Commission and an expert on water power, was a consultant and assisted in drafting this statute. In his article on 'Wis-

consin Law of Waters,' 1946 Wisconsin Law Review, 345, * * * he stated the provision in the act that water other than surplus water may be diverted with the consent of the riparians affected thereby was inserted in the interest of cranberry growers. * * * "

The Wisconsin Legislative Council Report, 1959, Vol. 4, "Water Resources", supports the conclusion that any diversion under sec. 94.26 also requires a permit under sec. 30.18. At page 3 the report reads: "Diversion of stream or lake water for agriculture or irrigation is prohibited except in accordance with permits issued by the public service commission."

Sec. 30.18 (1) (b) provides that "no water shall be so diverted to the injury of public rights in the stream." The public service commission is required to make a determination as to whether public rights are injured as the result of a diversion of nonsurplus water. "The pumping of water from a lake which results in reducing the flow in its outlet streams does constitute a diversion from the outlet stream." 39 OAG 564, 568.

That any rights given to cranberry growers by the cranberry laws must bow to the rights of the public in such waters is evident from *Cranberry Creek D. Dist. v. Elm Lake C. Co.,* (1920) 170 Wis. 362, 174 N. W. 554, in which the court said at page 367:

" * * * it is clear that whatever rights were granted to the owners of lands adapted to cranberry culture they were not paramount to rights involving the public health or welfare, but subordinate thereto. * * * "

See also 45 OAG 36 where it was held that a person constructing a dam for cranberry culture under the authority of sec. 94.26, must secure the permission of the public service commission if the dam crosses a navigable water.

For the above reasons, it is my opinion that an owner of cranberry lands may not divert water from navigable lakes in the above manner without fulfilling the requirements of sec. 30.18.

WMS

Nonresident Tuition—Under sec. 37.11 (8) (a) a resident minor student does not lose status when parents remove from the state subsequent to student's 21st birthday.

April 13, 1965.

EUGENE R. MCPHEE, *Director*
Wisconsin State Universities

You have requested an opinion on the tuition status of a minor student who will, as a resident student, have completed four semesters and one summer session at one of the state universities in June of 1965. She attained the age of 21 years on March 13, 1965. Her parents who presently reside in Wisconsin will move to Washington, D. C., in June of 1965, while the daughter will continue with her education in the school where she is presently enrolled.

Sec. 37.11 (8) (a) relates to tuition at the state colleges (now state universities). The portion which is material here provides:

" * * * Any adult student who has been a bona fide resident of the state for one year next preceding the beginning of any semester for which such student registers at the state colleges, or any minor student whose parents have been bona fide residents of the state for one year next preceding the beginning of any semester for which such student registers at the state colleges, * * * shall while he continues a resident of the state be entitled to exemption from nonresident tuition, * * *."

In IV OAG 929 it was pointed out that a minor whose parents are living together, and who has not been emancipated, derives his residence from that of his parents and follows that of his parents when they remove from the state.

It is to be noted here that the residence of the student in question will not follow that of her parents to Washington, D. C., in June of 1965, for the reason that she will then be 21 years of age.

Thus, she does not lose the bona fide residence which she now has in the state of Wisconsin. It makes no difference under the wording of the statute that such bona fide residence was established while she was a minor and was derived from that of her parents. In other words, a bona fide residence for one year acquired as a minor is not lost when the parents leave the state subsequent to the time that the student becomes an adult. As long as the residence is a bona fide one it makes no difference that it was acquired partly as a minor and partly as an adult. There is no change so far as residence is concerned upon reaching the age of 21.

WHR

Justices of the Peace—Courts—Amending Art. VII, sec. 2, Wis. Const., and repealing Art. VII, sec. 15, would abolish justice of the peace courts but not municipal justice of the peace courts as provided for in secs. 62.24, 61.305, 60.595.

April 15, 1965.

HENRY A. HILLEMANN
Executive Secretary
Judicial Council

You have requested an opinion on the question of whether Senate Joint Resolution 26 of the 1965 legislature will result in the abolition of the office of municipal justice of the peace if approved by the voters.

Senate Joint Resolution 26 which is now before the legislature for second consideration will abolish the office of justice of the peace. It amends the first two sentences of Art. VII, sec. 2, Wis., Const., as follows:

"(Article VII) Section 2. The judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, circuit courts, *and* courts of probate, ~~and in justices of the peace.~~ The legislature may also vest

such jurisdiction as shall be deemed necessary in municipal courts, and ~~shall have power to establish~~ *may authorize the establishment of* inferior courts in the several counties, *cities, villages or towns,* with limited civil and criminal jurisdiction."

It also strikes out Art. VII, sec. 15, relating to justices of the peace, in its entirety.

It is your conclusion that the proposed amendment will not have the effect of abolishing the office of municipal justice of the peace.

Sec. 62.24 makes provision for city election of municipal justices of the peace in addition to justices of peace otherwise provided by law. Sec. 61.305 makes similar provision in the case of villages, and sec. 60.595 does the same thing for towns.

It is true that the municipal justice of the peace by statute has many of the powers of a justice of the peace as you have indicated by your reference to 51 OAG 17 and 51 OAG 111. In the first of these opinions it was stated that taxable costs by statute are the same in municipal justice of the peace courts as in justice of the peace courts generally; and in the second opinion it is pointed out that with certain exceptions the territorial jurisdiction of the two courts is the same.

In other words many of the sections of the statutes relating to justices of the peace are incorporated by reference into the statutory provisions relating to municipal justices of the peace.

It may well be that in the task of revising the statutes to conform to Art. VII, secs. 2 and 15, if amended as provided in the joint resolution, it will be necessary to do considerable "house-cleaning" to get rid of the obsolete statutory provisions relating to the justice of the peace.

This does not mean, however, that where these provisions have been incorporated by reference into other sections of the statutes that these reference statutes will be repealed by implication. In 2 Sutherland "Statutory Construction"

§5208 the statement is made that the repeal of the statute referred to will have no effect on the reference statute unless that statute is repealed by implication with the referred statute. In other words, a statute of specific reference incorporates the provisions referred to from the statute as of the time of adoption without regard to later amendment or repeal of the statute incorporated by reference.

Many cases could be cited in support of the foregoing but reference will be made here to only one case, *In re. Heath,* (1892) 144 U.S. 92, 36 L. Ed. 358, 12 Sup. Ct. 615, where the court said at page 93:

"Prior acts may be incorporated in a subsequent one in terms or by relation, and when this is done, the repeal of the former leaves the latter in force, unless also repealed expressly or by necessary implication."

Assuming the adoption of the proposed amendment, the statutory provisions relating to the justice of the peace generally will become mere surplusage until removed from the statutes by a revisor's bill, or otherwise, but in any event there is no cause for alarm in view of the assurance given us by the rule of construction explained above.

Lastly, it is significant to note that the Wisconsin supreme court has taken the position that a court which has the power and jurisdiction of a justice of the peace is not thereby to be equated with a justice of the peace court in any constitutional sense. In the case of *Mathie v. McIntosh,* (1876) 40 Wis. 120, the court had under consideration the charter of the city of Wausau which provided for a police justice with a two-year term of office and who had the power and jurisdiction of a justice of the peace with exclusive jurisdiction of all cases arising under the city charter and ordinances with the same power in cases of contempt as a court of record. The court held that the police court thus created must be deemed a municipal court within the meaning of the constitution.

Thus *Mathie v. McIntosh* stands for the proposition that a court such as a municipal justice of the peace court is

more than a justice of the peace court within the meaning of the constitution. It therefore follows that the elimination of the justice of the peace court from the constitution does not result in the automatic abolition of municipal justice of the peace courts even though they have many of the powers of the ordinary justice of the peace court.

WHR

Wisconsin Real Estate Brokers' Board—Discrimination —The WREBB under existing law does not have power to discipline broker for racial discrimination in sale of real estate owned by broker.

May 4, 1965.

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

You have inquired whether, under existing statutory authority, the Wisconsin Real Estate Brokers' Board may revoke or suspend the license of a corporate broker engaged in the business of building and selling houses on its own land on a finding that the broker has discriminated against a prospective purchaser of one of his homes on the basis of race.

Your inquiry raises three questions:

First, do the statutes authorize revocation of a broker's license for an act of discrimination on account of race?

Second, do the statutes authorize the board to adopt a rule to that effect?

Third, is such a discriminatory act "state action" because the broker holds a license from the state, and therefore violative of the 14th Amendment to the United States Constitution?

The statutes authorize the board to revoke a broker's license for any reason which would have justified denial of a license in the first instance, and for the express reasons set forth in sec. 136.08 (2). Sec. 136.02, in effect, authorizes the board to deny a license to any person who is not trustworthy and not competent to transact real estate business in such manner as to safeguard the interests of the public. The grounds for revocation set forth in sec. 136.08 (2) are as follows:

"(a) Made a material misstatement in the application for such license or in any information furnished to the board;

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

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

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

"(e) Acted for more than one party in a transaction without the knowledge of all parties for whom he acts;

"(f) Accepted a commission or valuable consideration as a salesman for the performance of any act specified in this chapter from any person except his employer;

"(g) Represented or attempted to represent a broker other than the employer, without the express knowledge and consent of the employer;

"(h) Failed, within a reasonable time, to account for or remit any moneys coming into his possession which belong to another person;

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

"(j) Paid or offered to pay a commission or valuable consideration to any person for acts or services in violation of this chapter;

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

"(l) Violated any provision of this chapter."

The legislature has not expressly provided for revocation of a broker's license for engaging in discriminatory practices. Accordingly, the issue is whether the conduct complained of comes within subsec. (i) or (k), which are the only provisions of the foregoing statute applicable to the question. In my opinion such conduct does not come within the meaning of either of said subsections.

The phrase "improper dealing" contained in sec. 136.08 (2) (k) is not applicable in view of the holding of *Lewis Realty v. Wisconsin R. E. Brokers' Board,* (1959) 6 Wis. 2d 99, 106, 94 N. W. 2d 238. In the *Lewis* case the court restricted the meaning of improper dealing to the taking of unfair financial advantage of the other party, stating at page 108:

"* * * In order to save the constitutionality of the statute we consider it necessary that the words 'improper dealing' as used in sec. 136.08 (2) (k) be restricted to conduct which involves moral culpability and which tends to take an unfair financial advantage of the person with whom the actor is dealing. In other words, it must be closely akin to dishonest or fraudulent dealing"

The phrase "demonstrated untrustworthiness or incompetency" contained in sec. 136.08 (2) (i) does not apply to the complained of conduct. In *State ex rel. Durham Corp. v. Brokers' Board,* (1927) 192 Wis. 396, 211 N. W. 292, the court defined trustworthiness as used in what is now sec. 136.05 (1) (e) at page 401:

"Courts should hesitate in compelling the issuance of a broker's license, which is in effect much more than a mere

permission to sell real estate. It carries with it the commendation of the licensee as a trustworthy and competent broker, upon whom the public has a right to rely. If the board grants licenses to untrustworthy applicants, the public will be in greater danger of fraudulent practices than it was before the board was created.

"* * * 'Trustworthy' signifies worthy of trust, and in financial or business transactions it means worthy of trust in reference thereto. * * *"

The word has also been defined to be synonymous with reliable, or worthy of confidence. *Quinn v. Daly,* (1921) 300 Ill. 273, 133 N. E. 290.

See also: *State ex rel. Progreso D. Co. v. Brokers' Board,* (1930) 202 Wis. 155, 160, 231 N. W. 628.

The word "incompetency" has a common and approved usage, it being a relative term without technical meaning. It has been employed to mean, among other things, disqualification, inability, lack of ability, lack of fitness, want of moral as well as intellectual qualities, and unreliability. *Young v. Milwaukee Gas Light Co.,* (1907) 133 Wis. 9, 13, 113 N. W. 59; *Nehrling v. State ex rel. Thal,* (1902) 112 Wis. 637, 647, 88 N.W. 610; *Horosko v. School Dist. of Mount Pleasant Tp.,* (1939) 335 Pa. 369, 6 A. 2d 866.

While, therefore, the statutes do not authorize revocation or suspension of a broker's license for the conduct complained of, the question whether a rule of the board prohibits such conduct remains, since violation of a duly enacted rule of the board may constitute "incompetency" on the part of a broker within the meaning of sec. 136.08 (2) (i). *Lewis Realty v. Wisconsin R. E. Brokers' Board,* (1959) 6 Wis. 2d 99, 106, *Sailer v. Wisconsin R. E. Brokers' Board,* (1958) 5 Wis. 2d 344, 92 N.W. 2d 841.

None of the board's rules is applicable to this case. The Wisconsin board has not attempted to promulgate any rules regarding discrimination against a person by reason of race, religion, color, or national origin, by a broker. In the absence of enabling legislation such a rule would be of

doubtful validty. See, *McKibbin v. Michigan Corporation & Securities Commission,* (1963) 369 Mich. 69, 119 N.W. 2d 557; *State v. Grayson,* (1958) 5 Wis. 2d 203, 92 N.W. 2d 272. Such enabling legislation is presently pending in the legislature.

If Bill No. 413, A., 1965, is enacted it will prohibit discrimination in employment and housing on the basis of age, race, creed, color, national origin or ancestry and section 6 of the bill amends sec. 136.08 (2) of the statutes to provide that the license of a broker or salesman could be revoked for any violation of the proposed anti-discrimination law.

Finally, it might be urged that by permitting licensees to engage in discriminatory conduct (which if carried on by the state itself, would be a violation of the equal protection clause of the 14th Amendment (See *Shelly et al. v. Kraemer et al.,* (1948) 334 U. S. 1, 92 L. Ed. 1161)), state action has, in effect, deprived the prospective purchaser of his constitutional rights under the 14th Amendment. Although the concept of what constitutes state action so as to come within the purview of the 14th Amendment has been continually broadened (See 16A C.J.S. 464) ever since *Shelly v. Kraemer, supra,* no court has yet held that it covers action by state licensees. Furthermore, this precise question was considered and specifically rejected in *McKibbin v. Michigan Corporation & Securities Commission,* (1963) 369 Mich. 69, 119 N.W. 2d 557, where the court held that the Michigan real estate licensing board was without power to make a rule prohibiting discrimination of the kind here involved under a statute similar to sec. 136.08 (2).

In concluding this opinion, it must be pointed out that there are situations in which the board may discipline one of its licensees for engaging in discriminatory practices. The fact situation of your request involves a broker-owner of the land being sold. Where a broker is acting as an *agent* for a seller or purchaser and the broker unilaterally engages in discriminatory practices to the disadvantage of his principal, grounds for discipline may be present.

A real estate broker, with whom an owner has listed property for sale, is duty bound to communicate *all offers*

of purchase to his principal, unless the principal has issued specific instructions relieving the broker of such duty; and the broker must do this even though in his judgment the offer is so disadvantageous to the owner that the latter would be unwise to accept it. *Nolan v. Wisconsin Real Estate Brokers' Board,* (1958) 3 Wis. 2d 510, 541, 89 N.W. 2d 317.

A broker with whom an owner has listed property for sale is a fiduciary and has a duty to exert his best efforts to find a purchaser for the property listed with him and he also has obligations to a prospective purchaser with whom he is dealing and who has made an offer on the property.

There may be many situations where unilateral discrimination on his part might give rise to grounds for discipline.

Where a broker is acting as an agent for a seller or purchaser and the broker unilaterally engages in discriminatory practices to the disadvantage of his principal, grounds for discipline may be present.

In reaching this conclusion we have taken into consideration the provisions of the 1964 Civil Rights Act and find that it is not applicable.

I, therefore, reluctantly conclude that absent enabling legislation, the board does not have power to discipline a broker for engaging in discrimination on the basis of race in the sale of real estate owned by the broker.

BCL:JHB:RJV:

Assessments—Highway Commission—A municipality may not make special assessments on state owned property under sec. 66.64 until highway commission declares land unnecessary for right-of-way.

May 7, 1965.

T. H. BAKKEN, *Secretary*
Commissioners of the Public Lands

You have requested an opinion concerning municipal assessments under sec. 66.64 on land owned by the state of Wisconsin.

Sec. 66.64 is set forth for your convenient reference:

"**Special assessments for local improvement.** The property of the state, except that held for highway right of way purposes, and the property of every county, city, village, town, school district, sewerage district or commission, sanitary or water district or commission, or any public board or commission within this state, and of every corporation, company or individual operating any railroad or street railway, telegraph, telephone, electric light or power system, or doing any of the business mentioned in ch. 76, and of every other corporation or company whatever, shall be in all respects subject to all special assessment for local improvements. Certificates and improvement bonds therefor may be issued and the lien thereof enforced against such property, except property of the state, in the same manner and to the same extent as the property of individuals. Such assessments shall not extend to the right, easement or franchise to operate or maintain railroads, street railways, telegraph, telephone or electric light or power systems in streets, alleys, parks or highways. The amount represented by any certificate or improvement bond issued as aforesaid shall be a debt due personally from such corporation, company or individual, payable in the case of a certificate when the taxes for the year of its issue are payable, and in the case of a bond according to the terms thereof. In the case of a special assessment upon property of the state, the clerk of the municipality levying the assessment shall notify the commissioners of the public lands of the amount of the assessment and a description of the property. If the commissioners find that the assessment is just and legal they shall order the same paid. They shall transmit a certified copy of their order to the department of administration, and upon its audit and warrant drawn upon the state treasurer the amount of the assessment shall be paid out of the appropriation under s. 20.550 (4), and when paid shall be charged to the general, con-

servation of state highway funds as equitably as possible in the judgment of the commissioners when considering the agencies or departments occupying or having jurisdiction over the state property involved."

The particular situation that prompts your request is this: A municipality has attempted to make such an assessment on lands held by the state under the jurisdiction of the state highway commission. The highway commission has objected to the assessment on the ground that the lands in question are being held for highway right of way purposes. These lands were acquired by the highway commission in connection with a public highway project. They lie outside of the apparent limits of the actual roadway as presently traveled, but are abutting the traveled highway. You state the lands in question were not included on the original relocation order, but were included on a revised relocation order prior to their being acquired.

In my opinion, a municipality may not make such assessments until the highway commission determines that the lands in question are no longer necessary for highway right of way purposes. A local municipality does not have the authority to determine what state-owned lands are necessary or not necessary for highway right of way purposes. This legislative function has been delegated to the highway commission. (Sec. 84.09.) A municipality does not have the authority to question the highway commission's determination in legislative matters. *Town of Ashwaubenon v. State Highway Commission,* (1962) 17 Wis. 2d 120, 115 N.W. 2d 498. The determination of what lands are needed for highway right of way purposes will stand in the absence of bad faith, fraud, or gross abuse of discretion. *Brausen v. Daley,* (1960) 11 Wis. 2d 160, 105 N.W. 2d 294.

Also, I call your attention to a portion of sec. 80.01 (3) which provides, "No lands abutting on any highway, and acquired or held for highway purposes, shall be deemed discontinued for such purpose so long as they abut on any highway. * * *"

Such assessments could be made only after the highway commission makes a determination, pursuant to sec. 84.09

(5), that such lands are no longer necessary for highway right of way purposes. The public records of the state highway commission disclose that the state holds, throughout the state, right of way not within the apparent roadway limits, for such future highway purposes as contemplated widening projects, modernization, change of traffic patterns and roadways, as well as for current uses, such as wayside parks, drainage adjuncts, vision corners, maintenance areas, and other highway purposes. (In fact, the records of the highway commission disclose that some of the land outside of the current apparent roadway on the very project prompting your inquiry, has already been turned over to a local municipality for local road purposes.) These current and future uses often are not apparent to persons untrained in modern and advanced highway use, planning and design.

Many determinations have to be made prior to a finding and declaration by the highway commission that lands abutting on an existing roadway are no longer required for highway right of way purposes. These would include possible current or future uses, matters of access control to the existing roadway, economic factors, the length of time anticipated before additional monies were available for additional construction, local and state requirements, and other determinations.

Because of all these factors, the decision of what lands are required for highway right of way purposes must rest with the highway commission.

WHW

Tuition—Tuition is not payable by county under sec. 40.657 to a district in which the county institution is located.

May 28, 1965.

RALPH W. FINK
District Attorney
Richland County

Joint School District No. 2 is a common school district operating both elementary and high school grades, within which the Richland County Old Folks Home is located. Recently the district made claim against the county for payment under sec. 40.657 of tuition for children of employes residing at the home who attended its schools. The county for several years has been making annual payments pursuant to sec. 59.07 (13) (a) to the district in lieu of taxes.

You ask: Is tuition payable under sec. 40.657 when a county institution in question is completely within a school district? When payments in lieu of taxes have been made under sec. 59.07 (13) (a), may a claim still be presented for tuition under sec. 40.657? Is it proper for the county to make a payment in lieu of taxes under sec. 59.07 (13) (a), and also tuition under sec. 40.657?

Sec. 40.657 provides:

"**County to pay tuition.** The elementary and high school tuition of every person of school age who is a child of a parent employed and residing at a county institution shall be paid by the county. The county board may charge such tuition to the account of the county asylum or the county home."

Sec. 59.07, setting out the powers county boards may exercise, provides in subsec. (13) (a):

"* * * Appropriate each year to any municipality and school district in which a county farm, hospital, charitable or penal institution or state hospital, charitable or penal institution or state-owned lands used for agricultural purposes or county or municipally-owned airport is located, an amount of money equal to the amount which would have been paid in municipal and school tax upon the lands without buildings, if such land were privately owned. * * *"

These provisions in sec. 59.07 (13) (a) are derived, so far as they authorize annual payment to school districts, from the creation by ch. 70, Laws 1913, of a new subsec. (18) of sec. 670 Stats. It included within the special powers of

county boards appropriation to any school district in which the county farm was located of an amount equal to the school taxes payable had the land been privately owned. It was renumbered sec. 59.07 (13) by ch. 695, Laws 1919. By ch. 233, Laws 1931, land of state charitable and penal institutions and state-owned agricultural lands were added. In the revision by ch. 651, Laws 1955, such provisions and those in subsec. (20) of the section that similarly authorized county payment of a municipal tax equivalent to a city, village or town in which there was located a county farm, asylum, hospital, home for the aged or charitable institution or a state hospital or charitable or penal institution, were combined and revised to be sec. 59.07 (13) (a). As so revised, the subsection has remained unchanged.

Historically, the system of public schools of the state has been based upon the attendance of children at the schools operated by the school districts in which they reside free and without charge therefor, with the burden of operating the schools of a district borne by taxes on the property located therein. At the time of the enactment in 1913 of the forerunner of sec. 59.07 (13) (a), there was a large number of common school districts, most of which were located in rural areas and, being small in size, operated only elementary schools. Diminution of the tax base of such small rural districts by county exempt ownership of land for use as a county farm could have serious fiscal impact upon the remainder of the district. It was in recognition that a serious impact might exist due to the removal of county farm land from a school district tax base that the provisions were enacted in 1913. The impact thereof would be caused by the use of the land for purposes of the entire county and thus provision was thereby made whereby the burden thereof could be shifted and borne by the entire county through payment to the school district to compensate it for loss of potential revenue. As stated in 20 OAG 986, such provisions are discretionary with the board and appropriation made thereunder is raised by general county taxation.

Clearly children residing at a county farm, or on county-owned land now covered by sec. 59.07 (13) (a), are residents

of any school district in which such premises are located. As such residents, they were in 1913 and now are entitled to attend any school operated by the district free and without charge the same as any other children residing elsewhere in the district. This authorization to make a county subsidy payment, as originally enacted and as now in sec. 59.07 (13 (a), is in no way related to whether there may or may not be children residing upon the county-owned property who attend the schools of the district of which the property is a part. The purpose of such provisions is to provide a means by which a county board may relieve a school district from the fiscal impact of the exclusion of county-owned property from the school district tax base and provide the district with financial assistance where the county board concludes that the impact is sufficient to do so.

One of the elements that the county board would take into consideration in determining whether the impact of the exemption of the county-owned property would be sufficient for the making of a county subsidy payment, would be whether or not there are any children residing on the county property which are being educated at the expense of the remainder of the district because of such exemption. This would be taken into consideration along with other factors by the county board in making its determination. These provisions thus provide a means by which a county board could compensate a school district where it felt the fiscal impact of educating children residing on the county properties was of consequence.

It would appear that this is the rationale in making it discretionary with the county board whether to make a subsidy payment according to its provisions. When these provisions were first enacted in 1913, they were limited to a county farm, as that was the only instance of county-owned lands where there would be the fiscal impact. Since then, in the development of county government, there have arisen other types of county properties which is the reason that the provisions over the years have been expanded to their present form. The purpose in the present provisions is the same now as when first enacted.

On the other hand, from the background of sec. 40.657, it appears the provision therein is intended to cover something quite different. By ch. 457, Laws 1933, there was created a new subsec. (2m) to the then existing sec. 40.21, which section related only to common schools. The language of this new subsec. (2m) was essentially the same as present sec. 40.657 and remained unchanged until the general revision of the school laws by ch. 90, Laws 1953. By said ch. 90, it was renumbered sec. 40.657, and there was deleted "excepting county charges, as provided in subsection (2) of this section" previously therein and the words "who is a child of a parent employed and" now in the statute were inserted.

Sec. 40.657 must be construed and applied in light of the statutory provisions relating to the public school system in the state at the time it was introduced into the statutes and the basic pattern of such system as it has been continued over the years. Of great significance are the statutory provisions relative to the financing of the attendance of pupils at elementary and high schools, and particularly the attendance at schools not operated by the school district in which the pupils reside. As stated, it has been a basic part of the general scheme of public education in this state that children are to attend free and without charge the school or schools operated by their district of residence, such instruction being furnished at public expense. Where a child attends a school of a district other than his home district, his parents or guardian have been required to pay nonresident tuition to the district of attendance, except where the statutes provided for the payment of nonresident tuition therefor out of public funds. There have been various provisions authorizing the attendance of children at schools operated by other than the home district with the payment of nonresident tuition therefor as a public charge.

One instance is where the home district does not operate any school and children in that district have been authorized to attend the school of another district with nonresident tuition payable to the district of attendance. Another instance is where if a child resides more than two miles from

the school of his home district but one-half mile closer to the school of an adjacent district, attendance is permitted in the neighboring district with payment of nonresident tuition by the home district. In the instances of such permissible attendance at a school of a district other than the home district, provision has been made for charging the nonresident tuition back to be paid by the district of residence. Also over the years the rural common school districts did not operate high sschools and the statutes provided for attendance of pupils from such districts at the high schools of other districts with nonresident tuition being chargeable by the district of attendance back to the city, village or town of the pupil's residence.

The foregoing would apply to pupils residing on county-owned property which would be exempt and not a part of the tax base of the school district or municipality in which it was located. Thus, in any instance, where a child residing on the county exempt land would be authorized under the statutes to attend a school of some other district on a nonresident tuition basis at public expense, there would be charged back to the school district or the municipality in which the county land was located, nonresident elementary and high school tuition, as the case might be. The attendance outside the home district of pupils residing on county property would thus cast the financial burden of the payment of this nonresident tuition on the district or municipality of residence. The payment thereof would be directly traceable to the educating of pupils residing on the county property. Thus, the legislature apparently concluded that under such circumstances the fiscal burden of such expense of educating these children should be borne by the taxpayers of the entire county rather than only by those in the school district or municipality and enacted what is now sec. 40.657 to make it obligatory that a county do so.

Upon consideration of this background in which this provision in sec. 40.657 was enacted in 1933 and the setting in which it has been continued, it is my opinion that the purpose thereof is to require a county to pay any nonresident tuition that is chargeable for school attendance of

children residing on the county-owned exempt property. It thus does not provide for any payment to a school district within which a county institution is located for the attendance at the schools of such district of children of parents employed and residing at such county institutions. Such children are residents of that district and as such entitled to attend its schools and no nonresident tuition is chargeable therefor. Sec. 40.657 thus provides only for payment by a county of the nonresident tuition in those instances where otherwise nonresident tuition would be payable by the district in which the county institution is located for the school attendance of pupils residing at such institution.

The above stated conclusion as to your first question eliminates the necessity of answering the other two questions.

HHP:

Truck Regulations—Under sec. 341.04 the owner of an improperly registered or unregistered truck must be served with process; the driver if he is an officer of the company. For violations of Ch. 348 both owner and operator may be served and vehicle and cargo may be held as evidence.

June 3, 1965.

JAMES L. KARNS, *Commissioner*
Motor Vehicle Department

You have requested my opinion with respect to several questions relating to enforcement of truck registration and weight laws.

Your first question is whether the operator or owner should be charged for improper or unregistered vehicle under sec. 341.04.

Sec. 341.04 (1) provides that it is unlawful for *any person to operate* or for an *owner to consent* to the opera-

tion of a vehicle without proper registration. The penalty section provides a fine of $200 or imprisonment of not more than 6 months or both for an operator or owner who violates this section. Either the operator or owner may be *charged* with a violation. Your problem actually relates to the degree of proof required to sustain a conviction against the owner, in the usual case where the operator is not the owner.

Assuming that evidence of the operation of such vehicle by an employe of the owner is in the hands of prosecuting authorities, the question actually is whether the state must show actual knowledge on the part of the owner before a prosecution may proceed.

A similar question was presented and answered in 48 OAG 152, where we construed sec. 348.20 (1). We concluded that the overweight provisions of Ch. 348 of the statutes were in the classification of crimes *mala prohibita* as distinguished from *mala in se.* Thus, in spite of the general rule that an essential ingredient of a criminal offense is some blameworthy condition of mind such as negligence, guilty knowledge or intent, the legislature may in some circumstances provide for liability without fault on the part of the defendant. Examples include violation of intoxicating liquor laws, adulterated food and drug laws, and certain motor vehicle laws, among others.

It is my opinion that if it can be determined from the evidence that the improperly registered or unregistered vehicle is being used to carry on the business of the owner at the time the violation occurs, a rebuttable presumption arises that the owner consented to the illegal operation. The owner has a duty to see to it that the regulations are not violated by his acts or by the acts of another acting in his behalf. See *State v. Hartfiel,* (1869) 24 Wis. 60; *Conlin v. Wausau,* (1908) 137 Wis. 311; *State v. Grams,* (1942) 241 Wis. 493 and 48 OAG 152 at 158.

Your second question is whether a hired operator of a trucking corporation can be charged as agent of the corporation for service of process for improper or unregistered vehicle under sec. 341.04.

Prosecutions under state laws, including Ch. 341, are criminal prosecutions. Accordingly, the arrest of a misdemeanant under that chapter is governed by Ch. 954 of the statutes. Sec. 954.017 provides that if the defendant is a corporation, a summons may be issued in misdemeanor cases as is provided in sec. 954.02, returnable not less than 10 days after service. Such a summons may be served in the same manner as a summons is served in civil actions on corporations. Sec. 262.06 (5) provides that a summons may be served on a corporation by personally serving an officer, director or managing agent of the corporation either within or without the state or a copy may be left in the office of such officer, director or managing agent with the person who is apparently in charge of the office. If the defendant cannot be so served with reasonable diligence, service may be made on an officer, director or managing agent of the corporation by publication or mailing. Finally, the summons may be served upon an agent authorized by appointment or by law to accept service of the summons.

There is no statute that I know of which makes the driver of a truck the agent of the corporation for whom he works, for service of process, other than sec. 348.20 (2), which applies to the weight laws. This does not apply, however, to the operation of an unregistered vehicle under sec. 341.04. Accordingly, it is my conclusion that you cannot make service on the corporate owner of a truck for violation of sec. 341.04 by service on the driver, unless it can be shown that the driver is an officer, director or managing agent of the corporation.

Your next question is whether you should charge the owner for violation of the weight laws under Ch. 348 where the owner is an out-of-state corporation. As you point out, under sec. 348.20 (2), the operator of a vehicle is deemed to be the agent of the corporation and service of the summons may be made on the corporation by serving the operator. If the owner does not answer the summons or is in default, judgment for the amount of the fine may be entered and execution on that judgment may issue as in civil cases as provided in sec. 954.017. The judgment may then be

satisfied by execution against property of the corporation which can be found within the state of Wisconsin including personal property such as tractors and trailers. If the policy of the legislature stated in sec. 348.20 is to be carried out, all prosecutions possible should be maintained against the owners of the vehicles violating the weight laws. This is the only practical way to enforce the weight laws.

Your fourth question is whether you may charge both the operator of the overweight vehicle and the owner of that vehicle and require appearance bonds for both defendants.

I find nothing in Ch. 348 of the statutes which would limit your enforcement officers to charging either one or the other, the operator or the owner, for violation of the weight laws. Any person who operates a vehicle on the highways of this state in violation of any of the provisions of Ch. 348 can be charged with a criminal offense for such operation. In addition, if the evidence warrants, the owner may be charged with such violation in accordance with the conclusions in 48 OAG 152.

There is nothing to prevent your officers from charging the operator of the vehicle and the owner of the vehicle jointly and requiring that they both post bond for appearance on the charges. Although the vehicle and its cargo cannot be seized and held for the purpose of forcing the posting of a bond by the owner of a vehicle, the vehicle may be held as evidence of the criminal violation with which the owner is being charged. You are therefore advised that criminal charges may be brought against both the owner and the operator for violation of Ch. 348 and both may be required to post bonds.

LLD:

Constitutionality—County Court—Small Claims—Bill 401, A., amending statutes to permit laymen to represent corporations in small claims actions in county courts is subject to successful attack as an unconstitutional exercise of judicial power by the legislature.

July 8, 1965.

THE HONORABLE, THE ASSEMBLY:

By Assembly Joint Resolution No. 17 the attorney general is requested to render an opinion on the constitutionality of Bill 401, A., relating to the commencement of small claims actions by corporations and co-operatives.

It is my opinion that if enacted into law Bill 401, A., would be unconstitutional.

Bill 401, A., amends sec. 299.06 (2) (a) as follows:

"299.06 (2) (a) An individual may commence an action either in his own proper person and in his own behalf, or by an attorney regularly authorized to practice in the circuit courts of this state, but not otherwise. *A corporation or co-operative having an original, unassigned cause of action may commence the action either by a designated officer in its behalf, or by an attorney regularly authorized to practice in the circuit courts of this state, but not otherwise.* Actions on behalf of any other party shall be commenced only by attorneys regularly authorized to practice in the circuit courts of this state."

Ch. 299 of the statutes is a part of Title XXVII A entitled "Procedure in County Court in Small Claims Type Actions."

The language proposed to be added to sec. 299.06 (2) (a) relates not to procedure but purports rather to add to the classification of persons permitted to practice law in a particular type of action in county court. Thus the amendment is directed to the regulation of the practice of law and is open to the objection that it is a legislative invasion of judicial power.

It is generally conceded that while the legislature may enact statutes relating to court practice and procedure, any effort on the part of the legislature to prescribe the qualifications of applicants for admission to the bar, or to define or limit the practice of law, would be an unconstitutional attempt on the part of the legislative department to encroach upon the powers and functions of the judicial department. *Clark v. Austin,* (1937) 340 Mo. 467, 101 S.W. 2d 977.

The Wisconsin supreme court has very clearly stated on a number of occasions that control over the practice of law is a judicial power inherently vested in the courts by virtue of Art. VII, sec. 2, Wis. Const.

Integration of Bar Case, (1943) 244 Wis. 8, 11 N.W. 2d 604; *In re Integration of Bar,* (1946) 249 Wis. 523, 25 N.W. 2d 500; *In re Integration of Bar,* (1956) 273 Wis. 281, 77 N.W. 2d 602; *In re Integration of Bar,* (1958) 5 Wis. 2d 618, 93 N.W. 2d 601; *Lathrop v. Donohue,* (1960) 10 Wis. 2d 230, 102 N.W. 2d 404, 367 U.S. 820, rehearing denied 82 S. Ct. 23; *State ex rel. Reynolds v. Dinger,* (1961) 14 Wis. 2d 193, 109 N.W. 2d 685; *State ex rel. State Bar v. Keller,* (1962) 16 Wis. 2d 377, 114 N.W. 2d 796, Certiorari granted, 374 U.S. 102; 21 Wis. 2d 100 (1963), 123 N.W. 2d 905; Certiorari denied, 84 S. Ct. 1643.

Even prior to the above decisions the Wisconsin supreme court took a dim view of legislative efforts to determine the qualifications of persons to practice law.

By ch. 152, Laws 1849, it was decreed that every court of record should admit to practice any resident of the state of good moral character. Although this statute was on the books for 10 years, it was apparently disregarded by the courts, since the supreme court said in *In re Goodell,* (1875) 39 Wis. 232, 240:

"* * * We do not understand that the circuit courts generally yielded to the unwise and unseemly act of 1849, which assumed to force upon the courts as attorneys, any persons of good moral character, however unlearned or even illiterate; however disqualified, by nature, education

or habit, for the important trusts of the profession. We learn from the clerk of this court that no application under that statute was ever made here. The good sense of the legislature has long since led to its repeal. * * *"

Without going into the details of all subsequent legislative acts relating to admission to practice law, it might be mentioned in passing that until 1911 the privilege of admitting attorneys to practice was shared by the supreme court with the circuit courts. By ch. 196, Laws 1911, subsecs. 1, 2, 3 and 4 of sec. 2586 of the statutes were repealed. Subsecs. 1, 2 and 4 related to admission by the supreme court and subsec. 3 related to admission by order of the circuit court. Ch. 196, Laws 1911, created three new subsections of sec. 2586, relating to admission to practice in all courts of the state by the supreme court. These covered three methods of admission, namely, by diploma from the University of Wisconsin law school, by examination, or by reciprocity.

The evolution of the doctrine that inherent original and exclusive jurisdiction over the practice of law rests with the supreme court, and not because of any legislative act placing it there, is to be found in the three *Cannon* cases which will be discussed next.

In *State v. Cannon,* (1928) 196 Wis. 534, 221 N.W. 603, it was held that the power of the supreme court to disbar an attorney in the exercise of its original jurisdiction is inherent in the court and not a power derived from the constitution or from statute. The same is true of admission to the bar, and in that case the court referred to *In re Goodell,* (1875) 39 Wis. 232, saying at page 537:

"* * * *In re Goodell,* 39 Wis. 232, Chief Justice Ryan expressed the opinion that such power is inherent in the courts, although the question was not definitely decided. His language, however, has been quite generally accorded the force of precedent by courts and text-writers upon the subject. * * *"

This inherent power of the supreme court was again emphasized in the same volume of the Wisconsin Reports

in the case of *Motion to Admit Ole Mosness to the Bar of this Court,* (1876) 39 Wis. 509.

State v. Cannon, (1929) 199 Wis. 401, 226 N.W. 385, was an original action in the supreme court to disbar the defendant. He was disbarred for two years. Subsequently, by ch. 480, Laws 1931, the legislature provided that the license revoked by the supreme court "is hereby restored". Counsel for the defendant nevertheless recognized the supreme court's inherent powers in such matters and commenced an original proceeding in the supreme court for defendant's reinstatement as a member of the bar. *In re Cannon,* (1932) 206 Wis. 374, 240 N.W. 441. In that case this court again asserted its inherent power over the practice of law, and held that: "There is no legislative power to compel courts to admit to their bars persons deemed by them unfit to exercise the prerogatives of an attorney at law." pp. 397-8.

We do not mean to say that the legislature may not aid the judiciary in exercising its inherent control over the practice of law such as was done in the enactment of sec. 256.30 (1), which makes the unlicensed practice of law a misdemeanor punishable by fine or imprisonment or both and which at the same time recognizes that this punishment of the violater is "in addition to his liability to be punished as for a contempt" by the court.

Our court had occasion to weigh the impact of this statute upon the inherent power of the judiciary over he practice of law in *State ex rel. Junior Assoc. of Milwaukee Bar v. Rice,* (1940) 236 Wis. 38, 294 N.W. 550, where the court said at page 53:

"We need not presently consider whether the legislature in enacting sec. 256.30 (2), Stats., unconstitutionally trespassed upon the judicial department which, according to a number of decisions, has exclusive power to define what is the practice of law. *Rhode Island Bar Asso. v. Automobile Service Asso.* 55 R.I. 122, 179 Atl. 139, 100 A.L.R. 226; *People ex rel. The Illinois State Bar Asso. v. People's Stockyards State Bank,* 344 Ill. 462, 176 N.E. 901; *Meunier v. Bernich* (La. App.) 170 So. 567.

"A number of courts hold that similar statutes are properly enacted under the police power and are in aid of the judicial power vested in the courts. It has been said that although the courts have the inherent or implied power finally to decide and determine what constitutes the practice of the law, there is no occasion for the exercise of that power provided a statute passed by the legislature is constitutional and applicable and in no way frustrates or interferes with judicial functioning. *Liberty Mutual Ins. Co. v. Jones, supra.*"

It might also be noted that in *Lathrop v. Donohue, supra,* the court indicated at page 241 that while the police power is generally considered an exclusive power of the legislature, it may be exercised by the courts.

In the *Keller* case it was made clear that any legislative act to the contrary notwithstanding the exclusive power of determining what is and what is not the practice of law and to restrict such practice to persons licensed by the court to engage in it is vested in the judicial department of the government. However, as was pointed out in the second *Keller* decision this power of the state courts does not extend to lay practice before federal agencies such as the Interstate Commerce Commission where pursuant to federal legislation under the interstate commerce clause of the federal constitution licenses to practice have been issued to non-lawyers.

It might be noted further that the courts have long taken the position that corporations may appear in court only by attorney.

The essential disqualification for practice of law inherent in the nature of the corporate structure was expounded over 350 years ago in Lord Coke's report of the case of *Sutton's Hospital,* (1612) 10 Coke Reports 285, where it was pointed out that the corporation is only *in abstracto,* because a corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of law. Note the following language from page 303:

"* * * It cannot commit treason, nor be outlawed, nor excommunicated for it has no soul. *Neither can it appear in person but by attorney.* A corporation aggregate of many cannot do fealty, for an invisible body can neither be in person, nor sweare. It is not subject to imbecilities, death of the natural body, and divers other cases." (Emphasis supplied.)

There are many cases holding that since a corporation is an artificial entity it cannot act or appear for itself but only through agents or representatives which in legal matters must be licensed attorneys. *Clark v. Austin, supra.*

In *Clark* one of the respondents was an employe of a railway company in the capacity of assistant freight agent. He alleged that in hearings before the public service commission he represented the railroad in the capacity of employe and freight agent and not in the capacity of an attorney at law. The court said at page 478:

"* * * The capacity in which he appeared in such hearings must be determined by the admitted acts he performed, and not by his alleged statement of the capacity in which he appeared. The law recognizes the right of natural persons to act for themselves in their own affairs, although the acts performed by them, if performed for others, would constitute the practice of law. A natural person may present his own case in court or elsewhere, although he is not a licensed attorney. A corporation is not a natural person. It is an artificial entity created by law. Being an artificial entity it cannot appear or act in person. It must act in all its affairs through agents or representatives. In legal matters, it must act, if at all, through licensed attorneys * * *."

Numerous other cases could be cited on this point and so far as we know there are no cases holding to the contrary.

The foregoing discussion as to legal representation of corporations is important here so that there may be no confusion arising out of the fact that natural persons, unlike corporations, may be their own attorneys although not licensed to practice law, by reason of Art. VII, sec. 20,

which grants to an individual the right to prosecute or defend his suit "in his own proper person".

It is true that on occasion the courts have tolerated practices outside of court which amount to the lay practice of law. However, these are likely to be special situations such as the drafting of a conveyance by a real estate broker incidental to a transaction he is handling as a broker and subject to the strict limitations prescribed by a state licensing agency, as was the case in the 4 to 3 decision in *Dinger, supra.*

We are not aware of any situations wherein a supreme court such as ours with general superintending control over all inferior courts granted by the constitution, as in Art. VII. sec. 3, has ever relinquished such control to the legislature. Indeed it could not properly do so if the constitution is to be faithfully observed.

In closing it is necessary to pose only one illustration to show how Bill 401, A., would usurp judicial power. Under the proposed amendment a lawyer who had been disbarred one day by the supreme court could be right back in court the next day as a "designated officer" of a corporation or co-operative (which is also a corporation) and the supreme court as well as the county court could do nothing about it.

Attorneys are required to be of good moral character so that as officers of the court they will not bring discredit upon the administration of justice. In order that the public be adequately protected they must be subject to the discipline of the court. It is therefore of the utmost importance that both those who do not have satisfactory qualifications in the first instance, or who, having had them, have fallen therefrom, should not be permitted to appear in courts as officers thereof. If disbarred, such persons can no longer practice as attorneys; and it is equally clear that they would not have the right to appear and be permitted to represent any person or corporation either as attorneys, agents or otherwise. If they have such right or power their position is better than before and the judgment of disbarment is of

but little force or effect. See *Cobb v. Judge of Superior Court,* (1880) 43 Mich. 289, 5 N.W. 309.

Moreover, if the legislature can permit unlicensed persons to practice in some state courts it can permit them to practice in all such courts regardless of the amount in controversy. This is an admission that the inherent power of the judiciary to define and regulate the practice of law and to restrict its practice to persons licensed by the supreme court is gone. The result would be that the judicial department is no longer one of the three equal and coordinate branches of government since an important element of inherent judicial power would have been usurped by the legislature.

It is accordingly concluded that Bill 401, A., constitutes an invalid attempt by the legislature to exercise judicial power.

WHR

Labor Unions—Municipal Employers—A law authorizing municipal employers to enter collective bargaining agreements requiring municipal employes to pay to the bargaining representatives fees to cover costs of negotiating and administering contracts, is lawful.

July 12, 1965.

THE HONORABLE, THE ASSEMBLY

Assembly Resolution 22 requests an opinion regarding validity of a law enacted from Bill 389, A., especially with regard to opinions in 42 OAG 97 (1953), 29 OAG 82 (1940), and 27 OAG 30 (1938).

Bill 389, A., would amend sec. 111.70 so as to authorize a municipal employer to enter into an agreement with a labor organization representing a majority of employes in a bargaining unit, by which the employes are required to pay initiation fees and dues to such labor organization.

This bill appears to have been drawn in the light of the United States supreme court's decision in *Railway Employes' Dept. v. Hanson,* (1956) 351 U. S. 225, 100 S. E. 1112, 76 S. Ct. 714, in which an association of railroad employes challenged an agreement entered under the railway labor act, as violating their constitutional rights. The law involved in that case authorized union-shop agreements, with qualifying conditions. The court upheld the law as there applied, and later described its action as deciding only that the law "in authorizing collective agreements conditioning employees' continued employment on payment of union dues, initiation fees and assessments, did not on its face impinge protected rights of the association." (*loc. cit.* 367 U. S. 746, 747).

The limitations upon contracts entered under authorization of the railway labor act was further discussed in *International Assn. of Machinists v. Street,* (1960), 367 U. S. 740, 69 L. Ed. 2d 1141, 81 S. Ct. 1784, where the court refrained from deciding constitutional issues by holding that the law did not authorize contracts by which employes are required to contribute to *political* expenditures of labor organization, but are required only to contribute to "expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes." (*loc. cit.* 367 U. S. 768).

The foregoing cases indicate that a law which authorizes contracts requiring no more than payment to a labor organization of fees to cover expenses of negotiation and administration of contracts, and the like, would not violate constitutional rights of persons employed *in private enterprise.*

Regulation applicable to public employes presents, at least traditionally, some different issues. Public employment has been classified in some cases as a privilege rather than a right, so that it may be granted or withheld on whatever conditions the sovereign employer deems appropriate. Sometimes cited for such proposition is *Bailey v. Richardson,* 341 U. S. 918, 71 S. Ct. 669, 95 L. Ed. 1352. That case, however, was an affirmance by the United States supreme court, on a 4 to 4 vote, of a 2 to 1 decision of the

District of Columbia circuit court of appeals, *Bailey v. Richardson,* (1950) 182 F. 2d 46, 71-72, in which the dissenting opinion stated:

"Mr. Justice Holmes' famous statement, made in 1892 when he was a member of the Supreme Judicial Court of Massachusetts, that 'the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman' is greatly over-simplified. 'As pointed out in Frost v. Railroad Comm., 271 U. S. 583, 594, 46 S. Ct. 605, 607, 70 L. Ed. 1101 [47 A. L. R. 457], even in the granting of a privilege, the state "may not impose conditions which require the relinquishment of constitutional rights. * * *" ' including the rights of free speech, press, and assembly. * * *"

In *United Public Workers v. Mitchell,* (1947) 330 U. S. 75, 100, 67 S. Ct. 556, 569, 61 L. Ed. 754, the supreme court had indicated that the legislative body does not have unlimited power with respect to public employes:

"Appellants urge that federal employees are protected by the Bill of Rights and that Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.' None would deny such limitations on congessional power but, because there are some limitations, it does not follow that a prohibition against acting as ward leader or worker at the polls is invalid. * * *"

See also the discussion of the *Bailey v. Richardson* decisions in *Garrott v. United States,* 340 F. 2d 615, 618-619.

If the question were to be decided solely on the concept that government employment is a privilege rather than the "right to earn a livelihood by following the ordinary occupations of life" (11 Am. Jur. 1147), which is protected by the constitution, public employes would have no *greater* basis for challenging a governmental authorization of a union shop than the railroad employes involved in *Ry. Employes Dept. v. Hanson, supra.*

From such aspect, the validity of the proposed requirement would be supported by the above cited decisions of the United States supreme court and by the decision of the Wisconsin supreme court upholding the validity of a requirement for membership in the state bar association as a condition of engaging in the practice of law. See *Lathrop v. Donohue,* 10 Wis. 2d 230, 102 N. W. 2d 404, aff. 367 U. S. 820, 61 L. Ed. 2d 1191, 81 S. Ct. 1826.

There are, however, other considerations with respect to public employment which were, in part, involved in some of the attorney general's opinions to which you refer.

One of the chief of these is dealt with in *Wagner v. Milwaukee,* (1922) 177 Wis. 410, 188 N.W. 487, and *Richmond v. Lodi,* (1938) 227 Wis. 23, 277 N. W. 620. The principle followed in those cases is that responsibility for fixing conditions of public employment lies with the legislative body representing the electors, and that the legislative body may neither adbicate that function nor delegate it to a private agency.

I do not believe that the proposed law, on its face, contravenes the foregoing principles. It has been established that the legislature may delegate to governmental subdivisions power to legislate in respect to matters of local character. See, for example, *City of Milwaukee v. Sewerage Comm.,* 268 Wis. 342, 67 N. W. 2d 624.

The proposed law does not authorize a private agency to determine conditions of employment, but merely authorizes an agreement by a municipal employer with a labor organization. In that respect it is similar to the law upheld in *Railway Employes' Dept. v. Hanson, supra.* It is conceivable that a contract made by a municipal employer might exceed constitutional bounds by attempting to preclude a "change at will as to subsequent contracts by change in personnel, or views, or both, of its governing body." (*Wagner v. Milwaukee,* (1923) 180 Wis. 640, 645-646, 192 N. W. 994.) The possibility of an unconstitutional application of the law does not invalidate the law itself, however, so long as there is room for its proper exercise.

The attorney general's opinions to which you refer did not specifically discuss constitutionality of a law which would authorize contracts requiring employes to pay fees to a bargaining agent. To a large extent, the opinions dealt with limitations on governing bodies of municipalities under existing statutes, rather than with what the legislature could authorize if it chose.

The opinion in 27 OAG 30, 33, cited authorities which would indicate that, even with legislative authority, a public body could not condition tenure of employment upon membership in a labor organization. The proposed law does not authorize requirement of membership in a labor organization, but permits local authorities to contract so as to require employes to share in expenses of the organization in negotiating and administering collective agreements. The opinion of the United States supreme court in *Railway Employes' Dept. v. Hanson, supra,* is not basically inconsistent with the opinions given in 42 OAG 97, 29 OAG 82, and 27 OAG 30, since it deals with a narrow question which was not specifically considered in the opinions. Furthermore, the supreme court decision was issued subsequent to the opinions. It provides more recent and more authoritative definition of the extent of constitutional rights of employes generally.

It is my opinion that a law enacted from Bill 389, A., would be constitutional.

BL

Taxes—Lions International—Constitutionality—A statute according property tax exemption to Wisconsin Lions International would not be valid and would be violative of uniformity requirement of Art. VIII, sec. 1, Wis. Const.

July 13, 1965.

THE HONORABLE, THE SENATE

By Senate Resolution 27 you have requested an opinion as to the constitutionality of a property tax exemption as

proposed by Bill 64, S. That bill would create a new subsection of the statutes, 70.11 (10r), the effect of which would be to exempt from general property taxes:

"Property owned and used by any Wisconsin Lions International club for meeting purposes."

Amendment 1, S., which has not been acted upon, would strike the last three words of the bill.

Perhaps the best statement by the Wisconsin supreme court upon the subject of special tax exemptions is that contained in *Lawrence University v. Outagamie County,* (1912) 150 Wis. 244, 136 N. W. 619. That case involved the validity of a provision of ch. 116, Laws 1901, which attempted to exempt from property taxes all real and personal property held by the board of trustees of Lawrence university for educational purposes and for endowment of the institution. A general statute in effect at that time accorded a much more limited property tax exemption to chartered colleges or universities.

The opinion in the *Lawrence University* case conceded that a law should not be declared unconstitutional unless its invalidity is clear, and that the court should be able to point out a particular part of the constitution which is violated. The opinion further recognized that in the absence of constitutional restraint the legislature has "full power to exempt any person or corporation or class of property from taxation according to its views of public policy or expediency." 150 Wis. at 246. Then, as now, Art. VIII, sec. 1, Wis. Const., provided that the rule of taxation should be uniform and that taxes should be levied upon such property as the legislature should prescribe. This requirement of uniformity, the court held, was applicable to tax exemptions as well as to the rate or percentage of tax.

The opinion in the *Lawrence University* case, at 150 Wis. 247, quoted with approval the following language from an earlier opinion:

" 'Under sec. 1, art. VIII, Const., providing that the rule of taxation shall be uniform; and under the equality in the

protection of the laws guaranteed by sec. 1, art. I, Const., and the XIVth amendment to the federal constitution, a classification of persons or property liable to or exempt from taxation does not violate the required rule of uniformity and equality, provided such classification be founded on real differences, affording rational grounds of distinction, and the exemption be reasonable in amount.' "

Having recognized the necessity for classification in order to comply with the rule of uniformity, the opinion then states, at 150 Wis. 249:

"When we are presented with a case in which the exemption is arbitrary and in which other persons of the same class owning property of the same general description are awarded exemptions of a lesser amount, the situation is one in which the rule of uniformity is violated. It is impossible under the most liberal rule of classification to sustain it as a classification, because the class is already made and the situation is one in which a different amount of exemptions is allowed to one person of the class than to others of the same class. * * *"

Next, the opinion considered the contention of the university that numerous other statutes had exempted property of designated corporations. The court pointed out that a statute granting favored tax treatment to a named association or corporation could be valid, if there were no other members of the same class. The opinion states, at 150 Wis. 251:

"* * * If there were no other members of that class, or if property used for the purposes of the Hesperian Society constituted a class; or, in other words, was unique and distinct in its uses or purposes from any other property in the state of Wisconsin, the act would be of undoubted validity and no precedent for the interpretation sought to be placed by appellant upon the section of the constitution in question. * * *"

As pointed out in 40 OAG 419, a valid classification must meet certain tests, one of which is that the classification must be based upon substantial distinctions which make one

class really different from another. I know of no circumstances, nor can I conceive of any, which would warrant placing the Wisconsin Lions International clubs in a tax-exempt classification seperate and apart from other service clubs. I am, therefore, of the opinion that passage of this Bill will not result in a constitutional statute.

EWW

Merit Increases—Biennium Budget—Classification and compensation plan is established by director of bureau of personnel with approval of joint committee on finance. Within limits of existing appropriations and revenues merit increases may be granted in advance of adoption of budget bill.

July 14, 1965.

WAYNE F. MCGOWN, *Director*
Bureau of Management

Under date of July 6, 1965, you inquire, in substance, whether merit increases in salary for state employes in the classified service may be granted by departments in accordance with the new provisions of the classification and compensation plan for the biennium 1965-67, approved by the joint committee on finance on June 30, 1965, with an effective date of July 1, 1965.

The answer to your question is yes.

Your question arises out of the fact that a budget bill for the biennium 1965-67 had not been enacted by July 1, 1965, had not been enacted by the date of your request and has not been enacted by the date of this opinion. The provisions of the statute controlling the establishment and submission of a classification and compensation plan are found in sec. 16.105. In accordance with paragraph 16.105 (2) (a) the salary schedules are initially established by the

director of the bureau of personnel with the advice and approval of the personnel board. Thereafter the compensation plan is submitted to the joint committee on finance for its modification or approval under 16.105 (4) which reads in part:

"(4) The standard salary ranges submitted by the director, as may be modified by the joint committee on finance, shall, for the ensuing biennium, constitute the state's compensation plan for positions in the classified service; * * *"

Under the foregoing statute the compensation plan submitted in accordance with the statute for each biennium, including the provisions as to merit increases which are to be granted in accordance with the directive in 16.105 (2) (c), becomes effective as directed by the joint committee on finance, in the present case on July 1, 1965, without any further action by the legislature.

If the legislature, on such effective date, has not yet adopted the new budget bill setting forth new appropriations for the new biennium, the provisions of 20.002 (1), which reads in part as follows, will control:

"* * * If the executive budget for any biennium does not become effective on or before July 1 of the odd-numbered year, the appropriations provided for the preceding fiscal year shall be in effect in the new fiscal year until amended or eliminated by the legislature."

That is, the "budget" for 1964-65 continues as the "budget" for 1965-66, and the term "budget" wherever used should be construed in the light of this statute.

The statute last cited, together with the statutes which provide for the coming into being of the new compensation plan, clearly establish the legislative intent referred to, in particular, in 16.50 (2).

The foregoing interpretation arises ex necessitate if state government is to continue to function pending the approval of a new budget bill by the current legislature. I note that all appropriation bills which are now or have been before

the 1965 legislature contain funds to provide for the full twelve months funding of increases for the 1965-66 fiscal year.

Implicit in your question, while not specifically stated, is the query as to the action that you shall take upon quarterly estimates of the departments prepared in reliance on the new compensation plan when they are submitted to you and a new budget has not been adopted. Under the provisions of 16.50 the departments are required to submit such initial estimates or revised or supplemental estimates to you for examination. Upon submission to you, you must first determine whether there is in existence an appropriation against which the proposed expenditure of salaries can be charged and, second, whether there are revenues or "money in the till" out of which such salaries may be paid.

The necessary appropriation exists by virtue of the continuance of the previous year's appropriation under 20.002 (1) as set forth above. The existence of available funds is a matter for your determination at the time the checks are to be drawn for the payments to be made.

The action to be taken by your office in the event you determine that insufficient revenues will be available to meet the obligations of the state under the approved compensation plan are covered in the opinion of this office to the commissioner of administration, dated June 20, 1963, reported in 52 OAG 226.

Control of the management of the funds available to a department in the event a deficiency in revenues may be anticipated is vested in you. Specifically you could direct that the effects of the deficiency may be evenly distributed throughout the twelve months of the salary year, or you could approve the payment of full salary for the first month of the year, assuming available funds at the time, subject to an adjustment and correction in later months.

RGT

County Executive—Constitutionality—Sec. 59.031 (la) as proposed by Bill 735, A., would be constitutional except as it includes certain portions of 59.031 (2) (b) and (5) and such invalid portions are severable.

July 15, 1965.

THE HONORABLE, THE ASSEMBLY

By Resolution 21, you have requested my opinion as to the validity of a statute which would result from the adoption of Bill 735, A., alone, and as modified by Amendment 1, A., which establishes the elective office of county executive in certain populous counties, with certain powers.

Bill 735, A., would create section 59.031 (la), Stats., which would read:

"*Executive in counties with city of second class.* In each county containing a city of the 2nd class a county executive shall be elected for a term of 2 years at the election held on the first Tuesday in April, and he shall take office on the first Monday in May following his election from the residents of the county at large by majority vote. The first election shall be held in 1966, and a county shall qualify or cease to be eligible following the receipt of the official final census data by the secretary of state. All provisions of subs. (2) to (5) and (7) shall apply."

The effect of Amendment 1, A., is to delete the language "containing a city of the 2nd class" and substitute for it the lanugage "having a population of less than 500,000 but at least 100,000". Basically the question is whether Bill 735, A., if enacted into law, would violate the mandate of Art. IV, sec. 23, Wis. Const., which requires that there shall be but one system of town and county government which shall be as nearly uniform as practicable.

The Wisconsin supreme court considered legislation very similar to this in *State ex rel. Milwaukee County v. Boos,* (1959) 8 Wis. 2d 215, 99 N. W. 2d 139. In that case the challenged statute (sec. 59.031, as enacted in Ch. 327, Laws 1959) was practically identical with the one before us now

except that the 1959 law dealt with a county executive for each county having a population of 500,000 or more (instead of the not less than 500,000 but at least 100,000 category we have here) and also dealt with a subparagraph (6) which, in effect, conferred certain veto power upon the county executive. In that case, at page 221, the court found that although the legislation did not violate the "uniform as practicable" test, it did violate the "one system" test. The court specifically adjudged invalid (1) that portion of 59.031 (2) (b) which provided "such appointments shall not require the confirmation of the county board", (2) that portion of 59.031 (5) which conferred upon the county executive the power to veto increases or decreases in the budget, and (3) all of 59.031 (6), entitled "County executive to approve or veto resolutions or ordinances; proceedings on veto." However, the court held that these invalid portions were severable and therefore the invalidity of these portions did not invalidate the act as a whole. See, also, 52 OAG 137; 52 OAG 198.

Subsequent to the *Boos* case, supra, the Wisconsin Constitution was significantly amended. Article IV, section 23, was amended by the addition of the following language:

"But the legislature may provide for the election at large once in every four years of a chief executive officer in any county having a population of 500,000 or more with such powers of an administrative character as they may from time to time prescribe in accordance with this section."

The constitution was further amended by the creation of Art. IV, sec. 23a, which, in effect was identical with section 59.031 (6) and which, as indicated above, had been invalidated by the court in the *Boos* case. These constitutional amendments, however, are significant only as to counties having a population of 500,000 or more. It is my opinion that certain portions of a statute enacted from Bill 735, A., whether or not modified by Amendment 1, A., would violate the "one system" test of Art. IV, sec. 23, Wis. Const., and would thus be invalid, but only to the extent that such a statute contained the provision that "All provisions of subs. (2) to (5) and (7) shall apply." *State ex rel. Mil-*

waukee County v. Boos, supra. And, this provision would be invalid only insofar as it included that portion of 59.031 (2) (b), which provides "such appointments shall not require the confirmation of the county board", and insofar as it included that portion of 59.031 (5) which confers upon the county executive the power to veto any increases or decreases in the budget. These invalid portions are, in my opinion, severable from the rest of the legislation and consequently, the invalidity of these portions would not invalidate the act as a whole. *State ex rel. Milwaukee County v. Boos,* supra.

I conclude, therefore, that the proposed section 59.031 (1a) would be constitutional except for that portion which reads "All provisions of subs. (2) to (5) and (7) shall apply" and as to that portion, it is only invalid as it relates to the above mentioned portions of secs., 59.031 (2) (b) and 59.031 (5). The rest of the statute as now proposed would stand and be valid. In order to put the proposed legislation in a form reasonably safe from a successful constitutional attack, the portion which reads "All provisions of subs. (2) to (5) and (7) shall apply" would have to be amended to read "All provisions of subs. (2) (a) and (c), (3), (4) and (7) shall apply."

JEA

Tuition—Residents—Nonresidents—Discussion of residence status of student whose parents remove from the state, and armed forces on active duty within state.

July 16, 1965.

FRED HARVEY HARRINGTON, *President*
University of Wisconsin

You have requested our advice on two questions relating to residence for tuition purposes under secs. 36.16 (1) (a) and 36.16 (1) (ab), Wis. Stats.

1.

The first of these questions is whether a minor student whose parents are residents of this state loses his exemption from payment of non-resident tuititon when his parents move outside the state while the minor continues as a student at the university.

Sec. 36.16 (1) (a) so far as material here provides:

"* * * any minor student whose parents have been bona fide residents of this state for one year next preceding the beginning of any semester for which such student registers at the university, * * * shall while he continues a resident of the state be entitled to exemption from nonresident tuition, * * *."

There is nothing in sec. 36.16 (1) (a) which suggests that once a minor has derived a residence in the state for university purposes by reason of his parents' residence in the state during the year in question, his residence thereafter and while a minor is independent from that of his parents.

As was stated in 4 OAG 929, 931:

"It is a general rule of law, requiring no citation of authority, that the residence of a minor child is determined by the residence of its father if the father be alive. Upon the death of the father its residence is fixed by that of the mother."

The attorney general then goes on to point out that this ruling, however, does not apply where the child has been emancipated or abandoned by the father. This opinion relating to non-resident tuition at the university is a helpful one, and was based on a statute which then provided that no student who shall have been a resident of the state for one year next preceeding his admission at the beginning of any academic year should be required to pay tuition.

Section 36.16 (1) (a) was repealed and recreated by sec. 44, ch. 224, Laws 1963, and in its present form there are some special provisions of exceptions relating to minors

whose parents are divorced or separated or who are orphans or under guardianship. These came into the statutes by ch. 249, Laws 1953. Also, sec. 36.16 (1) (ac) relating to minors who have married nonresidents came into the statutes by ch. 595, Laws 1955. Another exemption for non-resident members of the armed forces and their families was enacted by sec. 36.16 (1) (ab), created by ch. 271, Laws 1953.

There were no statutory changes between 1939 and the above noted provisions. In 1939 by sec. 8 of ch. 513 the word "adult" was inserted in the first line of sec. 36.16 (1) (a) before the word "student", thus emphasizing the distinction between adults and minors.

It is apparent that for the most part the recent changes in sec. 36.16 (1) have been inserted because of hardship cases and inequities which arose under the older statute in special situations.

Thus, today we are in the situation where the older basic statute, if we may call it that, is controlling as it has been construed and interpreted by the university administration and the attorney general.

Accordingly we are unable to escape the conclusion that the minor whose parents are living together and who has not been emancipated, as that problem was discussed in 4 OAG 929, derives his residence from that of his parents. Such residence follows that of his parents when they remove from the state absent any of the special exceptions mentioned above. See enclosed copy of opinion to Eugene R. McPhee, Director of Wisconsin State Universities, to the effect that a minor student whose parents live in the state so as to entitle her to exemption from non-resident tuition continues to enjoy such exemption when the parents remove from the state subsequent to the twenty-first birthday of such student. (April 13, 1965, 54 OAG 27.)

2.

The second question is whether the words "stationed in this state" as used in sec. 36.16 (1) (ab) includes members of reserve components, national guard, or reserve officers

training corps units on other than full-time active duty in this state.

Sec. 36.16 (1) (ab) reads:

"(ab) Nonresident members of the armed forces who are stationed in this state and their wives and children shall be entitled to the exemptions provided in par. (a) during the period that such member of the armed forces is stationed in this state."

As mentioned above, the provisions of sec. 36.16 (1) (ab) came into the statutes by the enactment of ch. 271, Laws 1953. There have been no changes since.

It is difficult, if not impossible, to give a definitive answer to your second question in the absence of specific fact situations. This is particularly true in the case of some of the categories mentioned in your request.

Accordingly, our discussion of the second question will be more or less general in nature. Ch. 271, Laws 1953, was introduced in the 1953 legislature as Bill No. 553,S. It was sponsored by Senator Gaylord Nelson, but there is nothing in the legislative reference library's folder on this enactment which would throw any light on the question raised.

Our discussion of the problem will begin with a brief background statement of the university reserve officers training corps. For many years the first two years of this work, the basic course, was compulsory, but it is now voluntary. The second two years, the advanced course, has always been voluntary.

University credits are given for the work in both the basic and the advanced course; and it is our understanding that non-resident students enrolled in such courses are not now and have not been exempted from the payment of nonresident tuition under sec. 36.16 (1) (ab). No reason appears to require changing the foregoing administrative interpretation at this time. However, a commissioned officer who is detailed to the university as a professor of military science and tactics would be covered by sec. 36.16 (1)

(ab), as he is a member of the armed forces stationed here. The same would be true in the case of his aides.

The question you have asked with reference to reserve components and the national guard is much more perplexing and, as above indicated, probably cannot be given a categorical answer which will cover all cases when considered in the abstract. With respect to reserve components 10 USCA 510 (a) provides:

"(a) To become an enlisted member of a reserve component a person must be enlisted as a Reserve of an armed force and subscribe to the oath prescribed by section 501 of this title, or be transferred to that component according to law. In addition, to become an enlisted member of the Army National Guard of the United States or the Air National Guard of the United States, he must meet the requirements of section 3261 or 8261 of this title."

On its face sec. 36.16 (1) (ab) appears to reflect an intention on the part of the legislature to exempt from nonresident tuition those people who are regular members of the armed forces stationed in Wisconsin and who are here for that purpose rather than being here for the primary purpose of obtaining a university education with spare time being devoted to military training in order to preserve their rank and obtain promotion in the reserves.

However, the statute does not spell out all of the details and for purposes of illustrating the difficulty of the problem we quote verbatim a form of special order:

"HEADQUARTERS
CHICAGO AIR DEFENSE SECTOR
United States Air Force
Truax Field, Madison, Wisconsin

"SPECIAL ORDERS

"Under the provisions of Title 10, US Code 672(d), the folg named officers, possessing Security Clearances of SECRET, with their consent and with the consent of the Governor or other appropriate authority of the state, are ordered to active duty in grade indicated for number of

days indicated unless sooner relieved. Asgd 176th Air Alert Det, 176th FIS, Madison, Wis, and further atchd to 327th Ftr Gp (AD), Truax Fld, Wis, with dy sta at Truax Fld. On eff dt of dy, each officer will proceed from his home or temporary address of record, as indicated, to dy sta. Officer will be released from dy sta in time to arrive at his home or temporary address of record, as indicated, on dt indicated. Active duty will commence at 0001 hrs, eff dt indicated, and terminate at 2400 hrs on dt of release from active duty indicated. Off will revert to status in the Wis ANG on the dt subsequent to dt of release from active dy. Trans of dependents and shipment of household goods are not authd PCS. TDN. Allowances for tvl to and from AD will be determined IAW Part A, Ch 6, JTR. Pay and allowances are chargeable as follows:

Tvl to Active duty Sta:	5753500	325	P574.01	2121	2161	S503725
Tvl to Active duty Sta:	5753500	325	P578.01	2121	2161	S503725
Pay and Allowances:	5753500	325	P511	1111	1290	S503725

"NAME, GR, AFSN & Misc RES NR OF EFF DT TO
SUPPLEMENTAL DATA ASGMT DAYS DT ARR AT
HA."

Title 10, U. S. Code 672 (d), relating to reserve components generally, reads as follows

"(d) At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. However, a member of Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriate authority of the State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned."

The motivation behind the issuance of such an order under the above statute may be to obtain exemption from

the payment of non-resident tuition at the university. It should nevertheless be accepted as a bona fide order if there is compliance with the directives of the order as a matter of fact. In other words the university may always examine into the facts of any situation involving a claim for exemption from payment of non-resident tuition. The legislature certainly did not intend that the provisions of sec. 36.16 (1) (ab) should constitute a blank check for the writing of "free list" tickets or "passes" by the military in the form of spurious orders issued under color of federal statutes. The final determination as to compliance with sec. 36.16 (1) (ab) must in all instances be made by the Universiy rather than by federal authority.

Hence, such an order covering a member of a reserve component, or a member of the army national guard of the United States or of the air national guard of the United States should be accepted as rebuttable evidence of the fact that the individual named in the order is a member of the armed forces stationed here within the meaning of sec. 36.16 (1) (ab). While he may have enrolled at the university as a non-resident student his receipt of a bona fide order results in his then becoming a member of the armed forces stationed here so as to result in his exemption from the payment of non-resident tuition during the effective period of such order. This is not to say that he is entitled to a refund of any portion of a non-resident tuition fee paid prior to the receipt of such order. The statute does not cover refunds.

Title 10, USC relating to the armed forces covers some 9,840 sections; and it would be utterly impossible to embark here upon any uncharted voyage of discovery into the seas of pure speculation for the purpose of determining all of the possible factual situations which might arise under many of these multifarious provisions as they might relate to sec. 36.16 (1) (ab). Accordingly, we will await requests for advice upon specific situations when, as, and if, they arise, rather than to anticipate them now.

WHR

Insurance Clauses—Valued Policy Law—Clause entitled "Operation of Building Laws" would not meet requirements of the statutes and should not be approved by commissioner of insurance for inclusion on standard fire policy.

July 21, 1965.

CHARLES MANSON, *Commissioner*
Department of Insurance

The fire insurance rating bureau has submitted to you for filing and approval certain uniform standard forms to be attached to the standard fire policy in insuring buildings and contents. These forms include a clause entitled "Operation of Building Laws" which provides:

"This Company shall not be liable for loss, including debris removal expense, occasioned directly or indirectly by enforcement of any local or state ordinance or law regulating the construction, repair or demolition of building(s), or structure(s), unless such liability is otherwise specifically assumed by endorsement hereon."

You ask whether this proposed clause meets the requirements of the statutes.

The effect of the proposed "Operation of Building Laws" clause would be to relieve the insurer of any liability for loss attributable to building restrictions imposed by local ordinance or state law upon a building partially destroyed by fire.

The so-called insuring clause of the statutory standard fire policy, sec. 203.01, provides that to an amount not exceeding the amount specified, the insurer insures the insured to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, *without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair.*

Wisconsin is one of a few states which has a "valued policy law" affecting total loss. Our law, sec. 203.21, provides:

"Whenever any policy insures real property and the property is wholly destroyed, without criminal fault on the part of the insured or his assigns, the amount of the policy shall be taken conclusively to be the value of the property when insured and the amount of loss when destroyed."

The purpose of valued policy laws is two-fold: first, to prevent over insurance by requiring companies and agents to value the property before issuing a policy; second, to avoid litigation by prescribing definite standards of recovery in case of total loss. 37 Yale L. J. 825. Also, see *Reilly et al. v. Franklin Ins. Co. of St. Louis,* (1877) 43 Wis. 449, 28 Am. St. Rep. 552 and 21 OAG 634, 636.

In *Fox v. Milwaukee Mechanics Insurance Co.,* (1933) 210 Wis. 213, 216, 246 N. W. 511, the Wisconsin supreme court traced the history of our valued policy law and held that its provisions, being special, were controlling over certain provisions of the standard fire insurance policy law which were general.

The United States circuit court of appeals for the seventh circuit considered the question now before us in *City of New York Fire Insurance Co. et al. v. Chapman et al.,* (1935) 76 Fed. 2d 76. Chapman, the owner of a building, carried insurance against loss in the amount of $18,500. A fire damaged the insured property to the extent of 66.486 per cent. Chapman, however, was prevented from repairing the property which had to be demolished upon order of the city building commissioner acting pursuant to a city ordinance requiring such demolition of wooden buildings damaged more than 50 per cent by fire. Appraisers found the amount of loss to be $10,747, based upon appraised value before the fire of $16,150. The court, after quoting from the Wisconsin valued policy provision and standard fire insurance policy law (in substance as set forth here above), held that the property was "wholly destroyed"

under the Wisconsin valued policy law, and referred specifically to the statutory insuring clause language, stating at page 77:

"* * * the use of the words 'repair' and 'reconstruction' rather than 'build' or 'construct' in this section of the policy are persuasive of the fact that it was not intended to apply where the building has been wholly destroyed."

Later, in *New Hampshire Fire Insurance Co. v. Murray,* (1939) 105 F. 2d 212, this same court held:

"The law is clear in Wisconsin that the extent of the insurer's liability is determined not by the actual fire loss or by the amount of fire damage found by the common council. In these cases, where the building, after a partial fire destruction is ordered destroyed pursuant to a fire ordinance, the insurer's liability is measured by the face value of the policy as for total fire destruction."

Although these are federal court cases interpreting Wisconsin law, it is my opinion that the conclusions reached are sound and I find no reason to believe that the Wisconsin supreme court, if and when called upon to consider the question, would reach a contrary result.

It is my opinion, therefore, that the proposed "operation of building laws" clause does not meet the requirements of the Wisconsin statutes and may not be approved.

JEA

County Superintendent of Schools—County Teacher's College Board—Ch. 565, Laws 1963, abolishes office of county superintendent of schools and makes provision for election of members to the county teacher's college board.

July 22, 1965.

DANIEL J. MIRON
District Attorney Marinette, County

You ask whether under the amendment of sec. 41.37 by ch. 565, Laws 1963, made effective July 1, 1965, the present county superintendent of schools continues after June 30, 1965 as a member of the county teachers college board or is there a vacancy to be filled by the county board.

Sec. 41.37 has for years read that a county teachers college is managed by a board of 3 members, one of whom shall be the county superintendent of schools and the others elected by the county board at an annual meeting for a 3-year term. It also has provided that the county superintendent shall act as the secretary. However, ch. 565, Laws 1963, providing for cooperative educational service agencies, abolishes the office of county superintendent of schools and deletes from the statutes references thereto, effective July 1, 1965. By sec. 31, specifically made effective July 1, 1965, the provisions of sec. 41.37, are amended to delete the language that one member shall be the county superintendent and provide that all 3 members shall be elected by the county board at an annual meeting for a term of 3 years from the next January 1 after such election. The language was also changed to provide that the members shall elect one of the board as secretary.

The legislature was fully cognizant that as the result of this abolition on July 11, 1965 of the office of county superintendent of schools there thereafter no longer would be anyone having such office to serve ex officio as a member of this board. It therefore dealt with such deficiency by providing that the entire board after July 1, 1965 shall be composed of persons elected thereto by the county board. From and after July 1, 1965 only two members of the board will have been elected thereto by the county board, and therefore there occurs on that date a vacancy in the membership of the board constituted as the statute then requires. The situation thus created by this change does not fall within any of the specifically declared vacancies in sec. 17.03 unless it is covered by the provision in subsec. (10) thereof.

In *State ex rel. Martin v. Ekern,* (1938) 228 Wis. 645, 280 N.W. 383, quoted with approval the following:

" ' "The word 'vacancy' as applied to an office, has no technical meaning. An office is not vacant so long as it is supplied, in the manner provided by the constitution or law, with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it; and, conversely, it is vacant, in the eye of the law, whenever it is unoccupied by a legally qualified incumbent, who has a lawful right to continue therein until the happening of some future event." ' "

A most comparable situation to the one here under consideration was involved in *State ex rel. Knutson v. Johnson,* (1920) 171 Wis. 521, 177 N.W. 899. There one appointed to fill a vacancy in the office of sheriff for the unexpired term, then ran for and was elected at the next election for the next regular term. The court held that under the then constitutional provision specifically stating that a sheriff was ineligible for the office for the two years next succeeding a term as such, the said appointee was not eligible for the new term and therefore there was a vacancy. It there said:

"It appearing that the defendant was not and could not be legally elected in November, 1918, for the new term commencing January, 1919, there was no person qualified by law to assume the functions of sheriff for the new term commencing in January, 1919, and it must therefore necessarily be held that thereupon there was a vacancy in that office, so far as such new term was concerned, immediately after the commencement of such new term.

"The very nature of such a constitutional provision as we have here which so definitely fixes the term of office of sheriff for the period intervening between two annual elections, and which term can be neither extended nor shortened, makes the expiration of such a term of such a certain event to occur at a known time that it or itself creates necessarily a vacancy in such office in the event there is no one at the commencement of such new term who is then and

there lawfully entitled to take for such new term. *This would seem to be necessarily the rule irrespective of any precise legislative declaration to that effect. People ex rel. Bast v. Voorhis,* 227 N.Y. 167, 125 N. E. 86." (Emphasis supplied.)

In that case the vacancy would not fall within any of the provisions of sec. 17.03 unless it would be subsec. (10). Nevertheless, the court held that a vacancy did exist in that situation.

Another instance where a vacancy was held to exist and the situation was not one of the occurrences specified in sec. 17.03, was in *State ex rel. Brunkhorst v. Krenn,* (1959) 8 Wis. 2d, 116, 98 N.W. 2d 394, where under the compulsory retirement provisions of sec. 66.906 the elected register of deeds was forced to retire from office because of having reached retirement age. It was held that this gave rise to a vacancy notwithstanding that the situation would not come within any of the events set out specifically in sec. 17.03. The court held that there was a vacancy in the office and that it was properly filled by an appointment by the governor under sec. 17.21 (1). The lower court had held that a vacancy resulted under sec. 17.03 (10). This subsection provides that an office becomes vacant "On the happening of any other event which is declared by any special provision of law to create a vacancy."

The supreme court quoted and expressly said it agreed with the opinion of the circuit judge that contained the following:

" 'It has been urged that even though Brunkhorst is legally required to retire from county employment under the retirement statute, still no vacancy exists within the meaning of sec. 17.03 inasmuch as no reference is made to the word "vacancy" in the retirement law.

" 'The word "vacancy," as applied to an office, has no technical meaning. It is vacant in the eyes of the law whenever it is unoccupied by a legally qualified incumbent who has the lawful right to continue until the happening of

some future event. *State ex rel. Martin v. Ekern,* 228 Wis. 645.

" 'Our supreme court has held, without referring to any special statute using the word "vacancy," that a vacancy may be created in a public office by the election of an ineligible candidate. *State ex rel. Bancroft v. Frear,* 144 Wis. 79; *State ex rel. McKeever v. Cameron,* 179 Wis. 405.

" 'If the retirement of an employee or a public officer is mandatory upon the happening of certain circumstances, it must logically follow that upon the happening of those same circumstances there is a vacancy in the office occupied by him. When the circumstances come to pass which invoke mandatory retirement, there must be a vacancy in the office concerned within the purview of sec. 17.03 of the statutes.' "

It is therefore my opinion that whether or not this situation comes within 17.03 (10) there arises a vacancy from and after July 1, 1965 to be filled pursuant to sec. 17.22 (2), by a temporary appointment by the chairman of the county board.

Your inquiry also involves whether the person occupying the office of county supperintendent on June 30, 1965 can continue to serve as a member of the board until the vacancy is filled. The membership thereof on the board was by virtue of occupying the office of county superintendent. By the legislative act involved, that office was abolished and ceased to exist on and after July 1, 1965. Accordingly, any and all duties and authority of the office terminated and thereafter one previously occupying the position no longer had any capacity to act as such. The legislature fully recognized this in finding it necessary to enact ch. 102, Laws 1965, effective June 20, 1965, providing a special authorization for the employment after June 30, 1965 of the former county superintendent or some other competent professional educator to perform services to close this abolished office and dispose of its affairs, records and assets.

It is clear that upon the abolition of a statutory office all rights, duties and authority of that office are terminated. *Hall v. State,* (1875) 39 Wis. 79. In *State v. City of Eveleth,*

(1933) 189 Minn. 229, 249 N.W. 184, it is said that the general rule is that there can be no de facto officer unless there is a de jure office for him to fill. It was there also stated that where a law or ordinance has been held unconstitutional or repealed, no one can be a de facto officer by assuming to act in a wholly non-existing office.

While there have been a number of cases in Wisconsin involving de facto officers, in those cases where the issue of a need for a de jure office has been involved the decisions follow this general rule. *Fenelon v. Butts,* (1880) 49 Wis. 342, 5 N. W. 784; *State ex rel. Elliott v. Kelly,* (1913) 154 Wis. 482, 143 N.W. 153; *Kempster v. City of Milwaukee,* (1897) 97 Wis. 343, 72 N. W. 743. Implicit in the reasoning of the court in *State ex rel. Reynolds v. Smith,* (1963) 22 Wis. 2d 516, 126 N.W. 2d 215, and *In re Woolcott,* (1916) 163 Wis. 34, 157 N.W. 553 in finding there that a de facto officer existed was the fact that a de jure office existed in each instance.

The membership on the county teachers college board by one who holds the office of county superintendent is *ex officio.* The legislature has abolished that office and thereby terminated all rights, duties and authority of that office as of July 1, 1965. Since the office of county superintendent is abolished, there is no office by which thereafter the former county superintendent may occupy a position on that board as ex officio. Because there is no longer a de jure office of county superintendent after July 1, 1965, the former superintendent cannot thereafter serve as a de facto county superintendent.

It is also my opinion that the occupant of the office of county superintendent of schools on June 30, 1965 does not thereafter continue as a member of the county teachers college board pending the filling of the vacancy caused by the abolition of such office.

HHP

Legislature—Expense Allowances—Limitations—1965 amendement of statutes restricts 110-day limitation to full session. Non-roll-call days prior to June 5, 1965 shall not be counted nor shall expenses be allowed for such days.

July 27, 1965.

THE HONORABLE, THE SENATE

By Senate Resolution 31, you have asked my opinion on the following questions which relate to expense allowances for legislators under ch. 72, Laws 1965, which became effective June 5, 1965.

1. Are legislative days on which no roll call is taken in either house of the legislature (skeleton sessions) to be computed as part of the 110-day limitation contained in section 20.530 (1) (f) prior to the effective date of ch. 72, Laws 1965?

2. Is a legislator entitled to expense reimbursement pursuant to section 20.530 (1) (f) for days on which he was in Madison on legislative business although neither house of the legislature was in session for that period of time prior to the effective date of ch. 72, Laws 1965?

Ch. 72, Laws 1965, amending sec. 20.530 (1) (f), insofar as it concerns the questions you have raised, reads as follows:

"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 expenses incurred for food and lodging,* 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,~~ *that he is in Madison on legislative business, but not including any Saturday or Sunday unless he is in actual attendance on such day at a session of the legislature or a meeting of a standing committee of which he is a member.*

No such allowance shall be paid for any day during a recess of the legislature for 30 days or more; nor shall any such allowanse be paid for any day following the 110th day on which the legislature meets in a regular or special session, not including days on which no roll call is taken in either house. The 110-day limitation on regular and special sessions shall be computed separately, and no days of one shall be applied against the limit of the other. Each member shall certify to the chief clerk of his house, as promptly as may be following the 1st of each month, the number of days during the previous calendar month on which he was in Madison on legislative business and for which he seeks the allowance provided by this paragraph. 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 numbers of ~~actual days in attendance~~ *days in Madison on legislative business* for all members of his house. Legislators shall be entitled to an expense allowance for travel, postage, clerical assistance, toll calls, and other expenses for each full calendar month during which the legislature is not actually in session at the following rates:"

The major change in the law accomplished by ch. 72, Laws 1965, is the extension of the $15 per day allowance for expenses incurred for food and lodging from its previous limitation to days of actual attendance at a session of the legislature to days the legislator is in Madison on legislative business regardless of whether or not the legislature is in session, with stated exceptions.

The first exception states that Saturdays and Sundays may not be counted unless the legislator is in actual attendance at a session of the legislature or at a meeting of a standing committee of which he is a member.

The second exception provides that days during a recess of 30 days or more shall not be counted.

Third, the previous limitation of 110 days of payment for actual attendance at a regular session is continued but the new law provides that non-roll-call days shall not be counted

as part of the 110-day limitation as they were of necessity under the prior law.

Ambiguities in the statute should be resolved in favor of the state. I adhere to such principle.

Your first question inquiries whether non-roll-call days prior to June 5, 1965, are to be computed as part of the 110-day limitation. The answer to your question is No.

The legislature has full power to increase or decrease the 110-day limitation, no matter how computed, in any manner that it sees fit. The 110-day limitation which is accountable under the law refers to the "session" of the legislature. Accordingly, in computing the 110-day limitation specified in the new law, as amended in ch. 72, Laws 1965, only days on which a roll call was or is taken are chargeable against the 110-day limitation. It follows, that non-roll-call days prior to June 5, 1965, are not to be computed as part of the 110-day limitation.

The answer to the second question is No.

There is no word, phrase or sentence in ch. 72, Laws 1965, which indicates any intention that the auditing and disbursing officers of the state, and the reporting officers, that is, the chief clerks of either house, shall go back of the date of the effective date of the law, June 5, 1965, and compute allowances for room and board expenses which were not reimbursible under the statute as it existed on the date that such expenses were incurred. The statute as amended retains the prior provision that allowances for expenses shall be paid within one week after the calendar month in which they are incurred. Such expenses are paid upon the affidavit of the chief clerk of each house filed immediately following the close of the calendar month.

There is no machinery provided for going back of the effective date of the act, of June 5, 1965 or paying expense allowances for non-roll-call days in calendar months which have already been reported and for which presumably expense allowances have been paid. It is a cardinal rule of statutory construction that even where statutes are ambig-

uous as to their retroactive effect they are to be construed as relating to future and not to past acts. *Shaurette v. Capitol Erecting Co.,* (1964) 23 Wis. 2d 538, 128 N. W. 2d 34; *Northern Supply Co. v. Milwaukee,* (1949) 255 Wis. 509, 39 N.W. 2d 379. See also, Callaghan's Wisconsin Digest, Statutes, Volume 15, page 661, para. 302 et seq.

The foregoing interpretation renders it unnecessary to consider the question of whether payment for expenses which were not reimbursible by statute at the time they were incurred would constitute "extra compensation" payment of which is prohibited by Art. IV, sec. 26, Wis. Const.

RGT

Embalmers—Funeral Directors—Licenses—Sec. 156.045 (1) (e) as applied to funeral directors is unconstitutional but its invalidity would not affect the other provisions of sec. 156.045 (1).

July 29, 1965.

THE HONORABLE, THE ASSEMBLY

By Assembly Resolution 15, you ask my opinion on the quesion therein raised. Such resolution reads in part:

"Whereas, the Wisconsin Supreme Court found a clear distinction between the occupations of funeral director and embalmer in *State ex rel Kempinger v. Whyte,* 177 Wis. 541, and in that decision declared unconstitutional a law which would have required a funeral director to procure an embalmer's license as a condition to acting as a funeral director; now, therefore, be it

"Resolved by the assembly, That the attorney general is requested to provide an opinion as expeditiously as possible as to the validity of section 156.045 (1) of the statutes, which sets identical requirements for persons who wish to be licensed as funeral directors or embalmers, in view of

the finding by the Wisconsin Supreme Court that the 2 occupations are 'vitally different.' "

It is clear from the above-quoted resolution that you seek my advice on the constitutionality of only one of the requirements set forth in sec. 156.045 (1). Such requirement reads:

"(1) To be eligible for an original funeral director's or embalmer's license, after October 1, 1959, the person must meet all of the following requirements:

"* * *

"(e) Have satisfactorily completed 9 months or more instruction in a prescribed course in mortuary science approved by the board and committee at any time after having completed one year of college work or equivalent education."

It is my opinion that sec. 156.045 (1) (e), is unconstitutional, as violative of the due process guarantees of the Fourteenth Amendment, United States Constitution, and of Art. I, sec. 1, Wis. Const. See *Pauly v. Keebler,* (1921) 175 Wis. 428, 430, 431, 185 N.W. 554. Such opinion is based especially on *States ex rel. Kempinger v. Whyte,* (1922) 177 Wis. 541, 188 N.W. 607. Other factors supporting this opinion are the weight of authority, hereinafter discussed, on the question here involved; and certain facts relative to the burial of the dead in Wisconsin.

The *Kempinger* case, referred to in the resolution above mentioned, provides particularly strong support for my opinion above-stated. Declaring that "it was beyond the power of the legislature to make * * * valid" a statute which in effect required a funeral director in this state to have an embalmer's license, the court said at PP 545-546:

"Since embalming is not compulsory, since it is not universally practiced, why require every undertaker to have an embalmer's license before he can bury the dead? The qualifications required for obtaining an emblamer's license would add nothing to his fitness for burying an unembalmed

body. It would add nothing to public health, safety, convenience, comfort, or morals. A police regulation restricting to the extent of prohibition an ancient, honorable, and necessary calling must justify its validity on the ground that it is essential to the public health, safety, convenience, comfort, or morals. This statute [requiring a funeral director to have an embalmer's license] has no such sanction. It was beyond the power of the legislature to make it a valid enactment."

"* * * An embalmer, as such, does not bury the dead; he does not take charge of funerals; he does not dress the body, procure the coffin or do the many other things that an undertaker does. His sole function as an embalmer is to so treat the body by means of chemical substance, embalmers' fluids, gases administered either externally or internally, or both, as to disinfect and preserve the body. Embalming is not required by any law of the state. It is not essential to public health, safety, convenience, or comfort under present conditions of burials and cremations. It is not universally practiced, especially in rural communities. * * *" Ibidem, at p. 545.

In my judgment, it is extremely doubtful that our supreme court would, under our present statutes, repudiate the decision of the *Kempinger* case and adopt the minority view on the question here considered. My belief that our supreme court would stand by that decision is in part accounted for by the fact that our statutes define a funeral director as, "a person engaged in or conducting, or holding himself out, in whole or in part, as being engaged in: (a) Preparing, *other than by embalming,* for the burial or disposal, or directing and supervising the burial or disposal of dead human bodies; (c) Who shall, in connection with his name or funeral establishment, use the words, 'funeral director', 'mortician' or any other title implying that he is engaged as a funeral director as defined in this subsection." Secion 156.01 (3). This defininiton of "funeral director", in my opinion, shows that our legislature has expressed by statute the concept of a "funeral director" as one "concerned primarily with the amenities of the funeral service."

Gholson v. Engle, 138 N.E. 2d at p. 512. On the other hand, our legislature clearly takes a decidedly different view of an emblamer, defining him as, "a person engaged in, or holding himself out as engaged in, the practice of disinfecting or preserving dead human bodies, entire or in part, by the use of chemical substances, fluids or gases in the body, or by the introduction of same into the body by vascular or hypodermic injection, or by direct application into the organs or cavities for the purpose of preservation or disinfection." An embalmer, so defined, clearly needs the training in mortuary science required by the statute here in question, and the interests of public health and safetly are obviously served by requiring an embalmer to have such training. Just as clearly, in my opinion, the interests of public health and safety do not require training in mortuary science of a "funeral director" as defined by our statutes.

The *Kempinger* case, standing alone, would supply an adequate basis for the opinion above stated. It is worthy of note, however, that such case is in accord with the weight of authority as to the constitutionality of requirements such as that laid down by sec. 156.045 (1) (e). Requirements of a similar nature, appearing in statutes or in administrative rules, some of them more exacting than the one in question, have, in their application to funeral directors (sometimes called "undertakers"), also received consideration from the courts of other states. Such requirements have either demanded of the prospective funeral director that he have a certain amount of schooling in mortuary science; or have required that he have had actual experience in embalming for a specified period in the employ of a person, firm or corporation engaged therein, and that he be possessed of skill and knowledge in embalming; or have gone even further, and required him to be a duly licensed embalmer, sometimes with a specified amount of experience as such.

Most of the courts of other states which have passed on the constitutionality of such requirements, as applied to funeral directors, found them unconstitutional. See *Wyeth v. Thomas,* (1909) 200 Mass. 474, 86 N.E. 925; *Peoplee v. Ringe,* (1910) 197 N.Y. 143, 90 N.E. 451; *State v. Rice,*

(1911) 115 Md. 317, 80 Atl 1026; *Gholson v. Engle,* (1956) 9 Ill. 2d 454, 138 N.E. 2d 508; and *Cleere v. Bullock,* (1961) 146 Colo. 284, 361 P. 2d 616. In *Cleere v. Bullock,* the supreme court of Colorado struck down as unconstitutional a statutory requirement imposed on funeral directors which was virtually identical with the one here in question. In *Hart v. Board of Examiners of Embalmers,* (1942) 129 Conn. 128, 26 A. 2d 780, 783, the court, while holding that such a requirement was no longer in effect in Connecticut, clearly indicated its belief that such a requirement, had it been in effect, would have been unconstitutional. In essence, the reasoning of these cases has been that such requirements are not lawful exercises of the police power, serving the public health, safety, and welfare, because the public health does not demand that a funeral director be an embalmer, or have certain training in mortuary science which it is reasonable to require of a prospective embalmer. Illustrative of such rationale are these statements:

"No argument has been addressed to us to show that the general embalming of dead bodies is necessary for the preservation of the public health, and we know of no facts that indicate such a necessity. Except in those cases where embalming is desired for special reason, we know of nothing connected with the duties of an undertaker that calls for the work of a licensed embalmer. If such work is desired, a proper person can be procured to perform it. In cases generally it is not an essential part of the duties of an undertaker, and it has no relation to the public health." *Wyeth v. Thomas,* 86 N.E. at p. 927.

"We can see no such connection between requiring all undertakers to be licensed embalmers and the promotion of the public health as to bring the making of this regulation by the board of registration in embalming, or the refusal of a license by the board of health on account of the regulation within the exercise of the police power by the state." Ibidem at p. 928.

"The work of an embalmer and that of an undertaker can, in most instances in the interest of economy and that orderly procedure desirable in the performance of such

work, be done by the same person, but the public health does not require that an embalmer be an undertaker, or that an undertaker be an embalmer. The business of undertaking has been carried on for generations, particularly in the rural districts, by persons not holding embalmers' licenses and who have no special knowledge of the work of embalmers. There is nothing that occurs to us, or that has been called to our attention, to indicate any danger to public health in permitting a person, otherwise qualified, to carry on the business of undertaking solely because he is not a licensed embalmer." *People v. Ringe,* 90 N.E. at p. 454.

"The record does not, in our opinion, establish that public health considerations justify the requirement that a funeral director be a licensed embalmer. The funeral director is concerned primarily with the amenities of the funeral service. Proper performance of his other functions, such as removing and dressing the body, ascertaining the cause of death, and inspecting the body while it is in the coffin, does not require a year of college, nine months at an embalming school and a year's service as an apprentice embalmer. Nor are these qualifications necessary in order that he may effectively supervise the work of the embalmer. Specialized training is not required in order to recognize the conditions that require further work on the part of the embalmer." *Gholson v. Engle,* 138 N.E. 2d at p. 512.

While the weight of authority clearly condemns as unconstitutional a requirement such as that here in question, two jurisdictions have voiced a minority view, holding sterner requirements than that here involved to be constitutional. See *State Board of Funeral Directors and Embalmers for Florida v. Cooksey,* (1941) 147 Fla. 337, 3 S. 2d 502; *GcKinley v. Reilly,* (1964) 96 Ariz. 176, 393 P. 2d 268. In each of these cases, the court dealt with a statutory requirement that one desiring to take the funeral director's license examination be a licensed embalmer with a minimum of one year's experience as such prior to application. The rationale of such cases is shown in the following statements therefrom:

"When we consider the service which a funeral director is required to render to the public and the duty which he owes to the public to see that that service is properly, efficiently, honestly and promptly rendered, we can find nothing unreasonable or unwarranted in the statutory requirement that each funeral director shall be a licensed embalmer." *State Board of Funeral Directors, Etc. v. Cooksey,* 3 S. 2d at pp. 505, 506.

"By A.R.S. section 32-1321, those desiring to engage in the business of funeral directing must first procure from the State Board of Funeral Directors and Embalmers a certificate of qualification. A funeral director in Arizona is a person engaged in the management of a funeral establishment. The business of funeral directing is the business or profession of disposing of dead human bodies. A funeral director, therefore, is the person responsible for the supervision and operation of a business disposing of dead human bodies. A funeral establishment may be, in small communities particularly, a 'one-man operation.' There is no statutory requirement that funeral directors hire embalmers. Under such circumstances the legislature might have believed that the funeral director, in order to properly carry on the business, should know how to embalm bodies along with the other special knowledge applicable to conducting the final interment of a deceased. In this situation a combination of the qualifications of the embalmer and funeral director would appear to be indispensable for the satisfactory performance of the business of funeral directing.

"A funeral director, as the manager of more than a one-man operation, has of course the power to hire and fire employees including licensed embalmers and with it the right and necessarily the duty to direct that their activities conform to the standards customarily required in the profession. The Rules and Regulations of the Arizona State Board of Funeral Directors and Embalmers recognize this responsibility. * * * While the obligation is imposed upon both funeral directors and embalmers, it is the management which has the ultimate responsibility.

"* * *

"This ultimate responsibility of the funeral director demands that he determine whether the embalmer has performed his work properly. It is therefore reasonable that the funeral director be required to have the knowledge, qualifications and training of an embalmer. Accordingly, we are of the opinion that there is a reasonable basis which justifies the legislature in requiring that a funeral director have not less than one year's experience as a qualified practicing embalmer associated with a qualified practicing funeral director." *McKinley v. Reilly,* 393 P. 2d at p. 272.

It is worthy of note that while the supreme court of Arizona deems it essential that a funeral director be able to determine "whether the embalmer has performed his work properly", as shown by the language from *McKinley v. Reilly* above quoted, the supreme court of Colorado makes this statement: "It would appear that the only justification for requiring that a funeral director have all the qualifications of the embalmer is that he will be technically qualified to supervise the work of the embalmer. However, it is not shown that such supervision is appropriate or necessary." *Cleere v. Bullock,* 361 P. 2d at p. 619.

It should also be noted that the supreme court of Arizona, in reaching its decision in the *McKinley* case, was to some extent influenced by a weather condition that certainly does not prevail in Wisconsin. The court said:

"We take judicial notice that in the Great Plains area of the Western States and especially in Arizona the temperature during most of the year is such that dead bodies will rapidly decompose and disintegrate and that hence it is the common practice to embalm bodies in order to preserve them for services and later burial. The Arizona State Department of Health, by Rules and Regulations, Vital Statistics, Article 5, Part I, Regulation 3, recognizes the problem in forbidding the holding of any human body more than forty-eight hours after death unless it is embalmed or kept at a temperature below 32 degrees." *Mckinley v. Reilly,* 393 P. 2d at p. 271.

I have referred hereinabove to certain facts, relative to the burial of the dead in this state, as a factor in the production of this opinion. Now, as in 1922, when *State ex rel. Kempinger v. Whyte* was decided, embalming is not required by law in Wisconsin, except in the case of any human body to be shipped by common carrier. H 17.09 of the Wisconsin Administrative Code provides in part that, "Dead human bodies may be made ready for burial *otherwise than by embalming* when such procedure is found desirable * * *"; and H 18.02 of such code provides in part, "Any body to be shipped by common carrier shall be embalmed if its condition permits." (Emphasis supplied). Also, as was true at the time of the decision on the *Kempinger* case, we are informed that embalming is not "universally practiced" in Wisconsin today. These facts, in my judgment, go far toward showing that the requirement here in question is unconstitutional. How is the public health and safety subserved by demanding training of a funeral director which would be useful to him only in the supervision of an act - embalming - which itself is not required by law for the protection of public health and safety, except in the special case of the "body to be shipped by common carrier"? How, it should be added, can any need for such requirement, in the interests of public health and safetly, be recognized, when H 17.12 of the above mentioned code provides that, "These rules shall not prevent *any person* from preparing for burial, or conducting the funeral, of any deceased member of his family when such procedure is found desirable."? (Emphasis supplied).

In issuing this opinion I am mindful of the principle that a presumption of constitutionality exists in favor of all acts of the legislature, and the further principle that in view of such presumption, "it must be supposed that the legislature had before it when the statute was passed any evidence that was required to enable it to act." See, *State ex rel. Sullivan v. Dammann,* (1938) 227 Wis. 72, 81. But despite the existence of these principles, I am compelled to conclude, as above indicated, that when the requirement in question was enacted into law there did not exist the evidence or facts justifying such enactment as a valid exercise of the police power.

In closing, it should perhaps be noted that the provisions of sec. 156.045 (1), set forth discrete requirements, so that such requirements, other than (e), can be given effect without (e). It follows that if our supreme court were to declare (e) unconstitutional, the invalidity of (e) would not, in my opinion, affect the other provisions of sec. 156.045 (1). See sec. 990.001 (11), Stats.

JHM

Presidential Electors—Electoral College—A law resulting from enactment of Bill 792, A., 1965, relating to selection of presidential electors would be constitutional but might result in delegation composed of electors from two or more political parties.

September 27, 1965.

JAMES P. BUCKLEY
Chief Clerk, Assembly

Assembly Resolution 20 requests an opinon as to the constitutionality of a statute resulting from enactment of Bill 792, A., 1965.

This bill would amend secs. 9.04 and 9.06 relating to the selection of presidential electors, and provides, in material part:

"9.04 At the general election next preceding the time fixed for the choice of president and vice president of the United States, there shall be elected, ~~by general ticket~~, as many electors of president and vice president as this state ~~may be~~ *is* entitled to elect senators and representatives in congress. *Two electors shall be elected from the state at large and one elector shall be elected from each congressional district.* A vote for the presidential and vice presidential nominees of any party is a vote for the electors of such nominees."

"9.06 The electors of president and vice president shall convene a the capitol ~~of this state~~ *at 12 noon* on the 1st Monday after the 2nd Wednesday in December next after their election, ~~at the hour of twelve o'clock, noon, of that day,~~ ~~and~~. If there ~~shall be~~ *is* any vacancy in the office of an elector, ~~occasioned by death, refusal to act, neglect to attend or other cause~~, the electors present shall immediately proceed to fill *such vacancy* by ballot, and by plurality of votes, ~~such vacancy in the electoral college; and.~~ *Any such vacancy shall be filled by a resident of the area from which the prior elector was elected.* When all the electors ~~shall~~ appear, ~~or the~~ *and all* vacancies ~~shall~~ have been filled ~~as above provided,~~ they shall proceed to perform the duties required of such electors by the constitution and laws of the United States."

It is my opinion that a resulting law would be consitutional. There is some question however as to the effect of such a law.

Under the federal constitution, Wisconsin is entitled to twelve presidential electors, there are twelve separate offices of presidential electors and each elector casts his own vote. Electors may be chosen by the legislature, elected by popular suffrage on a general ticket or in districts, or by a combination of the last two methods.

Art. II, sec. 1, U. S. Const. provides in part:

"* * *

"Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the Congress: but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

"The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the govern-

ment of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the house of representatives shall immediately chuse by ballot one of them for president; and if no person have a majority, then from the five highest on the list the said house shall in like manner chuse the president. But in chusing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the president, the person having the greatest number of votes of the electors shall be the vice-president. But if there should remain two or more who have equal votes, the senate shall chuse from them by ballot the vice-president.

"The Congress may determine the time of chusing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

"* * *"

Also see Amendment XII to the U. S. Const. which alters the method of voting in the electoral college for president and vice president.

At 54 Am. Jur., United States, §35, 550, 551, it is stated:

"The appointment or selection of the presidential and vice presidential electors belongs exclusively to the states; while the Constitution determines the number of electors from each state and Congress may and does determine the time of choosing the electors, and the day upon which they are to give their votes, the state has the exclusive right to regulate their appointment or selection. * * *

"Since 1832 presidental and vice presidential candidates have been nominated at national party conventions,

although in many states there are preferential primaries whereby party voters of the state may express their preference for the candidates to be presented to the convention; the electors are selected or chosen by the state party organization to cast their electoral votes for the party's candidate selected at the national convention if a plurality of the voters of the state, at the general election, express their preference for such candidate. It has long been understood that the presidential candidate who receives the plurality in a state is entitled to the electoral vote of that state. The electoral college plan contemplated originally that the electors would exercise independent judgment in the selection of the Chief Executive, but in relation to the independence of the electors, the original expectation may be said to have been frustrated; experience soon demonstrated that whether chosen by the legislature or by popular suffrage on general ticket, or in districts, the electors were chosen simply to register the will of the appointing power in respects of a particular candidate. With the growth of political parties, when candidates for President and Vice President came to be chosen by party conventions, the assemblies of electors selected by the states became the agents of the successful party to meet and cast their ballots for its predetermined candidate. It is open to question wether the electors may any longer exercise discretion in voting for candidates nominated by the party or group which selected the electors; the view has been expressed that they could be compelled by mandamus to vote for the candidate for whom they were by party designation or otherwise elected to vote. However, there is nothing in the wording or the original purpose of the provisions for the election of President which can be construed as denying the electors discretion in the matter of voting in the electoral college, unless that discretion is taken away by the state laws to which they owe their appointment. * * *"

The presidential electors exercise a federal function in balloting for president and vice president but they are not federal officers or agents, and a state may authorize a political party to require a candidate for presidential elector to pledge to support the nominees of the national convention.

Ray v. Blair, (1952) 343 U.S. 214, 96 L. ed. 894, 72 S. Ct. 654.

In Wisconsin regularly organized parties which have participated in the September primary nominate their presidential electors under the provisions of sec. 5.36, and the platform convention by majority vote must nominate "one elector for president and vice president from each congressional district, and 2 such electors from the state at large."

Section 5.19 which governs independent nominations makes no special mention of presidential electors and hence sets up no requirement that independent candidates for presidential elector must be nominated one from each congressional district and two from the state at large.

Under the provisions of present statutes the names of candidates for presidential elector do not appear on the ballot. The only names on the ballot are those of candidates for president and vice president for whom the electors are pledged to vote. A voter, in a state-wide election, indirectly casts his vote for all of the candidates for presidential elector pledged to the presidential and vice presidential candidates of his choice.

In *State ex rel. Boulton v. Zimmerman,* (1964) 25 Wis. 2d 457, 461, 464, 130 N.W. 2d 753, the court stated:

"* * * Sec. 9.04, Stats., provides, 'A vote for the presidential and vice presidential nominees of any party is a vote for the electors of such nominees.'

"* * *

"Because under the provisions of sec. 9.04, Stats., the voters vote for an entire slate of presidential electors, and have no opportunity to vote separately for individual candidates for presidential electors, an ambiguity exists with respect to the meaning of sec. 5.19 (5), when applied to such candidates. * * *"

At page 464:

"* * * We conclude that the 12 independent presidential electors of the Socialists Workers Party constitutes one

composite candidate within the meaning of sec. 5.19 (5), Stats. This is because under our election statutes there is no possible way for voters to vote separately for the candidacy of one individual person for presidential elector. * * *"

Bill 792, A., 1965 would remove the words, "by general ticket" from sec. 9.04 and would provide that two electors be *elected from the state at large* and that one elector would be *elected from* each congressional district.

Enactment of the bill into law would mean that a voter in a district would either directly or indirectly vote for two state-at-large electors and one district elector rather than a slate of twelve as at present. Accordingly, Wisconsin might elect an electoral college delegation composed of presidential electors from two or more political parties. Under the twelfth amendment to U. S. Const., the Wisconsin electoral votes in such case might be cast for candidates of more than one party. It is also possible that in the election by district method, a majority of Wisconsin electoral votes would be cast for the presidential candidate who did not have a plurality in tthe state-wide election. This could happen because of variance in the population of districts, and concentrations of party strength in various districts.

The remote possibility of such an event is not sufficient grounds in itself to require an opinion that a resulting statute would violate the equal protection of the laws provision of the fourteenth amendment, U. S. Const. If such an event did occur the conflict would primarily involve possible invalidity of the statute apportioning districts rather than the proposed statute.

A law resulting from Bill 792, A., would in any event make it more difficult for minority parties to gain a position on the presidential ballot in Wisconsin. If the legislation is merely designed to require that candidates for presidential elector for independent parties be from the various congressional districts, it would be less disruptive to traditional Wisconsin procedures, to amend sec. 5.19 to provide that candidates for presidential elector pledged to independent candidates for president and vice president be nomi-

nated, one from each congressional district and two from the state at large.

RJV

Youth Camps—Appropriations—Counties—Under certain sections of the statutes counties may appropriate funds for joint operation by public authority of a "youth camp" but may not authorize such funds to a non-profit organization.

September 27, 1965.

A. W. PONATH
Corporation Counsel, Outagamie County

In your letter of June 29, 1964, you ask whether several counties may jointly establish a "youth camp" for youth recreation and educational purposes. In that regard, you also ask if the counties in which the camp will not be physically located may appropriate funds therefor, and if a county appropriation may be made to non-profit organization for operation of such youth camp.

Counties are clearly authorized to establish public parks for purposes of public recreation under secs. 27.015 and 27.05. In 27 OAG 710, this office quoted from a Minnesota case as follows:

"* * * A park is a pleasure ground for the recreation of the public to promote its health and enjoyment. A public golf course is for the same purpose. Parks are used for public recreation by indulgence in tennis, pitching horseshoes, croquet, baseball, kitten ball, golf, walking, horse back riding, picnicing, skating, bathing and general outdoor exercise. * * *"

In 44 OAG 333, we pointed out that a county may employ a recreation director to supervise recreation in such parks. We assume that the proposed youth camp will be operated as a recreational facility to promote the health and enjoyment of those who attend. Under these circumstances, it

is clear that such a camp may be established under the power of a county to establish public parks.

Counties are also authorized to operate recreational facilities under sec. 59.07 (1) (d), which provides that a county board may:

"Construct, maintain and operate all county buildings and structures including *without limitation* swimming pools, stadiums, golf courses *and other recreational facilities*, * * *"

Sec. 66.30 provides:

"**Local co-operation** (1) 'Municipality' as used herein includes a city or village, a town, county, school district or regional planning commission.

"(2) Any municipality may contract with another municipality or municipalities or the state or any department or agency thereof for the receipt or furnishing of services or the joint exercise of any power or duty required or authorized by statute.

"(3) Any such contract may provide a plan for administration of the function or project, which may include, without limitation because of enumeration, provisions as to proration of the expenses involved, deposit and disbursement of funds appropriated, submission and approval of budgets, creation of a commission, selection and removal of commissioners, formation and letting of contracts.

"(4) Any such contract may bind the contracting parties for the length of time specified therein."

Since the county board is authorized by sec. 59.07 (1) (d) to provide for recreational facilities, I am of the opinion that such may be done jointly with other counties pursuant to sec. 66.30. For example, in 40 OAG 9, this office expressed the opinion that a city and county may construct a joint city-county building for a courthouse. In 44 OAG 8, we said that two or more counties may join in setting up a mental health clinic. In 41 OAG 335, we said that two counties may jointly establish and maintain a library.

Appropriations to a non-profit organization for operation of such a facility may not, in my opinion, be made. Sec. 66.30, while quite broad in scope, does require, in my view, that the joint administration must be under the direct supervision of the counties or by a comission selected by and removable by public authority. I find no other statute authorizing appropriations to a non-profit organization for the stated purpose. Thus, I must conclude that no such appropriations would be valid, since county boards have only such powers as are expressly conferred by statute or those fairly implied from express powers. *Dodge County v. Kaiser,* (1943) 243 Wis. 551, 11 N.W. 2d 348. As specific examples on the limitation of counties with respect to appropriations, see 40 OAG 378, and, as to contracts under sec. 66.30, 51 OAG 168.

A.H.

Contracts—Constitutionality—While the issue is not entirely free from doubt, it is believed that Bill 655, A., regulating contracts made by door-to-door solicitors would be constitutional if enacted into law.

September 28, 1965.

THE HONORABLE, THE ASSEMBLY

By resolution 29 you have requested an opinion regarding the validity of Bill 655, A., which provides, according to the resolution, a "cooling off period" before contracts procured by house-to-house solicitations take effect.

Bill 655, A., as amended, provides:

"402.109 *Contracts procured by house-to-house solicitation.* (1) A party charged under any contract, order or other evidence of legal relationship for the purchase, barter, exchange or use of any merchandise, service or thing of value procured by door-to-door solicitation shall have ~~10 days~~ 48 hours after the execution thereof in which to ap-

prove or to rescind the same. During this time it shall not be binding or enforceable. Such instrument may be rescinded if notice of intention to rescind, signed by a person charged therewith, is mailed within such ~~10 day~~ 48-hour period by registered or certified mail to the solicitor, his principal or to a party for whom such instrument was procured, at his address. Unless so rescinded the instrument shall be deemed approved. If rescinded all earnest money and advancements paid on the instrument shall be refunded.

"(2) The above provisions shall not be applicable to real estate or insurance contracts."

It is my opinion that a statute resulting from Bill 655, A., would be valid. It is to be observed, however, that for reasons hereinafter stated, the statute may be too vague to be enforceable in certain fact situations.

If any reasonable factual basis exists to support the validity of a statute, it enjoys the presumption of constitutionality and it must be sustained. *State v. Texaco, Inc.*, (1962) 14 Wis. 2d 625, 111 N. W. 2d 918; *White House Milk Co. v. Reynolds*, (1961) 12 Wis. 2d 143, 106 N. W. 2d 441; *Courtesy Cab Co. v. Johnson*, (1960) 10 Wis. 2d 426, 103 N. W. 2d 17. See, also: *State ex rel. Thomson v. Giessel*, (1953) 265 Wis. 558, 565, 61 N. W. 2d 903.

The proposed legislation, in effect, declares that there is a potential and inherent evil in contracts stemming from door-to-door solicitation. This is so even though the same contract, made by the same persons under any other circumstances is not so tainted, at least not to such an extent as to require regulation. The evil sought to be remedied is a likelihood that the door-to-door solicitor may take some temporary, unfair advantage of the customer; that by undue persuasive techniques the solicitor will induce the customer to execute an unwise contract, which the customer may, upon calmer reflection, wish to disclaim. It is a matter of common knowledge that the business of so-called door-to-door solicitation attracts individuals without roots, obligations, or motivation to maintain a business good will in the community, and that it lends itself to abuses in selling.

High pressure sales personnel are able to induce individuals who are ill-equipped to fully appreciate the nature of their agreements, to enter into binding contracts which they do not understand and which are grossly unfair to them. Only after given opportunity to consider the matter more fully does the individual realize the nature of the documents which they have signed and the full extent of their contractual obligations. In my opinion, these facts constitute a reasonable basis upon which to rest this proposed bill and therefore it would be presumed valid if enacted into law.

Door-to-door sales personnel have been singled out by this proposed legislation as a special class deserving of regulation. Regarding matters of classification, the legislature has broad discretion and its judgment with respect thereto will be respected and enforced by the courts, unless the classification is so arbitrary that there is no conceivable basis for it. *State Bank of Drummond v. Nuesse,* (1961) 13 Wis. 2d 74, 108 N. W. 2d 283. In my opinion the classification chosen is not arbitrary or unreasonable and it may therefore be sustained.

The fact that the proposed legislation does not cover the entire field does not render it invalid. While all the citizens of the state are entitled to be protected against unfair dealings by others, this does not mean that the legislature must by one sweep prohibit all unfair dealing or that it cannot proceed piece meal to remedy particular types of unfair dealing which manifest themselves in particular occupations or industries. *Borden Co. v. McDowell,* (1959) 8 Wis. 2d 246, 99 N. W. 2d 146.

It should be pointed out, however, that this bill does present certain questions relating to its application and enforceability. There should be some definition of "house-to-house" and "door-to-door" solicitations. If a salesman stops at only one house in a town, is that house-to-house solicitation? If the contract is in the form of negotiable paper and is negotiated immediately, does the innocent purchaser for value take it free from the impact of the statute? Should there be a provision requiring the language of the statute to be inserted in the contract? This

would apprise the purchaser of his rights and would be a warning to subsequent holders of negotiable paper.

The bill provides that unless rescinded in the statutory 48-hour period, "the instrument shall be deemed approved." This may deprive a person of an available defense to the enforcement of the contract unless he acts within this 48-hour period. In my judgment there is a serious question whether the "approval" provision doesn't actually operate as a substantital hazard to the very persons the bill is designed to protect. These considerations indicate that it may be that the statute would be too vague to be enforceable as applied in certain specific fact situations.

In concluding that if enacted into law the proposed statute would be held valid, I am mindful of the fact that the right to contract falls within the protection of the due process clause of the fourteenth and fifth amendments to the constitution of the United States. 16 Am. Jur. 2d 704, 705, *Constitutional Law,* Sec. 373; *State ex rel. Time Insurance Co. v. Smith,* (1924) 184 Wis. 455, 470, 200 N. W. 65. See, also: *State ex rel. Wisconsin Inspection Bureau v. Whitman,* (1928) 196 Wis. 472, 515, 220 N. W. 929. On the other hand, the right to contract is subject to reasonable limitations. 16 Am. Jur. 2d 710, *Constitutional Law,* Sec. 375.

For reasons heretofore cited, it is my opinion that while the matter is not entirely free from doubt in view of the apparent vagueness of some of the terms, the bill would be constitutional if enacted into law.

BCL:JHB:JEA

County Civil Service—Deputy Sheriffs—Under certain statutes county boards may provide for the establishment of civil service procedure applicable to deputy sheriffs and may establish qualifications of reasonable relationship to the position provided they do not discriminate.

September 30, 1965.

DONALD L. HAMM
Corporation Counsel
Columbia County

You state that Columbia county has established a civil service procedure for the selection of deputies in the sheriff's department, pursuant to sec. 59.21 (8), and has provided that examinations are to be conducted by the state department of administration.

You inquire whether the county board may provide that applicants for said positions shall have certain qualifications, in addition to those expressly provided by statute, to include:

"1. Minimum and maximum age designations, ranging from a minimum of 21 years to a maximum of 50 years.

"2. Setting forth educational requirements, ranging from a required minimum of high school graduate to a stated preference for some college training in positions of responsibility.

"3. Weight to be in comparison to height, with the applicant having good physical condition, and a special requirement of a height minimum of 5' 8" for trainee traffic officers.

"4. Requiring each applicant to have a valid Wisconsin Driver's License.

"5. Expressing the preference that the applicant have had military service and first aid training.

"6. Various experience requirements ranging from a minimum of 1 year to a maximum of 10 years."

"The primary purpose of civil service laws is to improve the efficiency of the public service."

State ex rel. Esser v. McBride, (1934) 215 Wis. 574, 578, 254 N. W. 2d 657.

The office of deputy sheriff is not referred to in the state constitution, and while it is of historical origin, it is statutory in Wisconsin.

Predecessor statutes very similar to sec. 59.21 (8) have been treated in four attorney general opinions.

In 24 OAG 747 (1935) it was stated that the county board could prescribe such reasonable rules for eligibility and methods of conducting the examinations as are not directly prohibited by the provisions of the statute. In 26 OAG 22 (1937) it was stated that portions of an ordinance which added qualifications not included in the statute were invalid.

In 29 OAG 312 (1940) it was stated that the county board could not establish qualifications for the position of deputy sheriff but that the bureau was the sole authority for determining the scope of the examination. At page 314 it was stated:

"It would seem, however, that the state bureau of personnel would have a wide latitude in the selection of questions to be asked and the tests to be imposed, and that when the county desires to appoint a deputy sheriff especially skilled in some particular type of work falling in the line of duties usually performed by such officer, there is no good reason why the county board could not at least request the personnel bureau to so prepare the examination as to insure the selection of applicants having the desired qualifications."

In 29 OAG 482 (1940) it was stated that the county board is not empowered under the statute to prescribe qualifications, one of minimum and maximum age in this instance, other than the requirement that the applicant must have resided in the county for at least one full year prior to the date of the examination.

I am of the opinion that the last three references are unduly restrictive and, in the light of present statutes, are not controlling.

The present statute provides that the examination may be conducted by the county civil service commission or by the department of administration, at the option of the county board, as provided by ordinance. Where the department of administration conducts the examination, it shall conduct "such examination according to the methods used in examinations for the state civil service."

I am of the opinion that there is a difference between methods of conducting examinations and content of examinations. Sec. 16.11 (1) provides in part:

"Examination; procedure, where held. (1) *All examinations* for positions in the classified service *shall be of such character as to determine the qualifications, fitness and ability of the persons examined to perform the duties of* the class for which the register is being established. The examinations may be written, oral, pysical, evaluation of training and experience, demonstration of skill, or any combination of such types. The examinations may take into consideration such factors, including education, experience, aptitude, capacity, skill, knowledge, character, physical fitness and other qualifications, as in the judgment of the director, enter into the determination of the relative fitness of the applicants. * * *"

The purpose of an examination is not to establish basic qualifications for a position but is to determine whether an applicant has the required or desired qualifications which have been established by statute and the appointing or examining authority.

The examination should be tailored to the position which is to be filled in view of the required and desired qualifications established for said position. When properly constructed and given to a number of job applicants, it is a reliable method of testing the relative qualifications and abilities of those tested for the position.

The present statute does not provide what "methods of conducting examinations" shall be followed when the county civil service commission performs the task, except that the

provisions of secs. 63.01 to 63.17, except 63.03, 63.04, and 63.15, are to apply as far as consistent.

Classification of a job position and conduct of an examination for said position are two separate functions. See secs. 16.105, 16.11.

Sec. 16.12 provides that the director of the bureau of personnel shall require applicants to file formal applications and may require certificates of citizens and physicians or others having knowledge of the applicant to be filed.

Sec. 16.13, provides that the director may refuse to examine an applicant who is found "to lack any of the preliminary requirements established for the examination", or for certain other causes specified.

The county boards of supervisors could establish reasonable preliminary requirements for use by the department of administration.

Sec. 59.07 (20) authorizes a county to establish a civil service system of *selection,* tenure and status. A system of selection includes methods of recruitment, examination both as to content and procedure, certification of eligibles and appointment.

Since the opinion in 29 OAG 482 was written, sec. 59.21 (8) has been amended by ch. 524, Laws 1951, so that it now provides:

"* * * *The ordinance or an amending ordinance may provide for employe grievance procedures and disciplinary actions, for hours of work, for tours of duty according to seniority and for other administrative regulations.* * * *"

Ch. 524, Laws 1951, also substantially revised the general power of the county board to establish a civil service system.

"Any county may proceed, under section 59.07, to establish a civil service system of selection, tenure and status, and said system may be made applicable to all county personnel, including personnel authorized by statute to be appointed by officers, boards, committees or commissions,

except the members of the governing body, elective constitutional officers, members of boards and commissions and members of the judiciary. Such system may * * * *include also uniform provisions in respect to classification of positions and salary ranges, pay roll certification, attendance, vacations, sick leave, competitive examinations, hours of work, work tours of duty or assignments according to earned seniority, employe grievance procedure and disciplinary actions, lay-offs, and in separations for cause subject to approval of a civil service commission or the county board. Existing county board regulations consistent herewith are by this amendment validated.*"

This provision appears in the 1963 statutes as sec. 59.07 (20), in substantially the above form. A single sentence has been added: "The board may request the assistance of the department of administration and pay therefor, pursuant to s. 16.055."

Section 59.15 (2) (a), (b), (c) and (4) provide:

"(2) APPOINTIVE OFFICIALS, DEPUTY OFFICERS AND EMPLOYES. (a) The board has the power set forth in this subsection and sub. (3) as to any office, board, commission, committee, position or employe in county service (other than elective offices included under sub. (1), supervisors and circuit judges) created under any statute, the salary or compensation for which is paid in whole or in part by the county, and the jurisdiction and duties of which lie within the county or any portion thereof and the powers conferred by this section shall be in addition to all other grants of power and shall be limited only by express language.

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

"(c) The board may provide, fix or change the salary or compensation of any such office, board, commission,

committee, position, employe or deputies to elective officers without regard to the tenure of the incumbent (except as provided in par. (d)) and also establish the number of employes in any department or office including deputies to elective officers, *and may establish regulations of employment for any person paid from the county treasury,* but no action of the board shall be contrary to or in derogation of the rules and regulations of the state department of public welfare pursuant to s. 49.50 (2) to (5) relating to employes administering old-age assistance, aid to dependent children, aid to the blind and aid to totally and permanently disabled persons or ss. 63.01 to 63.17.

"* * *

"(4) INTERPRETATION. In the event of conflict between this section and any other statute, this section to the extent of such conflict shall prevail."

This statute is indicative of the broad powers the legislature has delegated to county boards where positions created by statute are concerned. For limitations see 49 OAG 26.

It does not appear reasonable to me that the legislature intended that the only basic qualification for a deputy sheriff be that he shall have been a resident of the county for one full year prior to examination. Nor do I believe that the legislature delegated to the department of administration or county civil service commission the sole authority to establish basic qualifications an applicant must possess.

If a local legislative power has been delegated, and establishment of minimum qualifications for applicants for deputy sheriff is of that nature, it could be delegated to the county board but not to a county civil service commission. *Marshall v. Dane County Board of Supervisors,* (1940) 236 Wis. 57, 59, 294, N.W. 496.

Sec. 59.15 provides that the county board can abolish and recreate statutory positions, hence for purposes here, the qualifications of a deputy sheriff are basically local in nature.

It is clear that sec. 59.21 (8) is not the exclusive provision dealing with civil service for deputy sheriffs. The last sentence provides in part:

"(d) * * * Notwithstanding the provisions of this subsection the county board may enact a civil service ordinance for county employes under s. 59.07 (20) which civil service ordinance may include deputy sheriffs or traffic patrolmen, or both."

I am of the opinion that the county board, acting under the provisions of secs. 59.07 (20), 59.15, and 59.21 (8), may provide for the establishment of a civil service procedure applicable to deputy sheriffs and may provide that applicants for said positions possess certain qualifications in addition to those expressly provided by statute so long as the qualifications have a reasonable relationship to the physical and mental demands of the position and provided that they do not discriminate between qualified applicants.

In 15 Am. Jur. 2d, 483, 484, it is stated:

"A common preliminary requirement for applicants seeking civil service employment is that they be citizens and residents of the employing territory for not less than a prescribed period prior to the date of examination. It is also usually required that applicants be in ordinary good health, and civil service commissions may raise the physical standards above the minimum prescribed by charter where the higher standards are not unreasonable or arbitrary. However, the commission may not add a physical requirement which has nothing to do with the ability of the candidate to discharge the duties called for.

"In addition to the general requirements for employment, special requirements for the particular positions must be met, such as certain experience and education. Civil service commissions generally have power to substitute a given experience for educational requirements. Educational requirements must be reasonable and must not discriminate between qualified applicants."

The qualifications set forth in your letter, although stated in general terms in some instances, appear to have a reasonable relationship to the position of deputy sheriff, and if enacted would be presumed valid unless and until set aside by a competent tribunal in an appropriate proceeding. This is a law enforcement position and reasonable qualifications as to age would appear permissible by reason of sec. 111.32 (5) (e).

RJV

Constitutionality—WERB—Legislation enacted from Bill 209, A., imposing more restrictive conditions on remedies to be granted by the WERB against employes and employe organizations than against employers, would not be invalid.

October 4, 1965

THE HONORABLE, THE ASSEMBLY

Your Resolution 23 asks an opinion as to the constitutionality of Bill 209, A., if enacted into law. The basis for the request is stated in the resolution to be that: "an analysis of Assembly Bill 209, relating to labor-management relations, discloses that it proposes a double standard for securing relief before the Wisconsin Employment Relations Board, discriminating against employers and in favor of Labor Unions as classes. It violates the fundamental law of the United States and of the state of Wisconsin by depriving employers of the equal protection of law in that it so delays an employer from obtaining, from the Wisconsin Employment Relations Board, injunctive or preventive relief against unlawful labor practices that irreparable injury and damage from unlawful labor practices by unions of necessity must take place before injunctive relief, temporary or permanent, can be procured, and then only after prolonged hearings followed by making of detailed findings by the Board, while violations of their statutory and constitutional rights could continue unabated by judicial intervention."

Bill 209, A., would add to sec. 111.07 (4) the following:

"No order under s. 111.06 (2) (a), (b), (e) to (h), (L) and (m) shall be issued unless supported by the findings required of a court under s. 103.56 (1), nor shall such order be issued if the complainant has failed to comply with s. 103.57."

Since the enumerated sections in the provision last quoted define unfair labor practices by employes and employe organizations, the amendment would have the effect of imposing restrictions upon issuance of relief *to* employers

against employes and labor unions, which are not applicable when relief is sought *against* employers by employes and employe organizations.

The question whether the original National Labor Relations Act (Wagner Act) was discriminatory because it afforded remedies to employe organizations without providing comparable remedies to employers was considered in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, (1937) 301 U.S. 1, 46, 81 L. ed. 893, 57 S. Ct. 615.

The court said:

"The Act has been criticised as one-sided in its application; that it subjects the employer to supervision and restraint and leaves untouched the abuses for which employes may be responsible; that it fails to provide a more comprehensive plan,—with better assurances of fairness to both sides and with increased chances of success in bringing about, if not compelling, equitable solutions of industrial disputes affecting interstate commerce. But we are dealing with the power of Congress, not with a particular policy or with the extent to which policy should go. We have frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach. The Constitution does not forbid 'cautious advance, step by step,' in dealing with the evils which are exhibited in activities within the range of legislative power. * * *"

The rule is stated in 12 Am. Jur. 184:

"Employers, as distinguished from employes, do not constitute a class within the constitutional prohibition against class legislation. A statute applying to all employers similarly situated is not open to such objection. * * *"

In holding the Workmen's Compensation Law to be valid in *Borgnis v. Falk Co.*, (1911) 147 Wis. 327, 353-354, 113 N.W. 209, 37 L.R.A. (n.s.) 489, the Wisconsin supreme court ruled that the question of need for classification in legislation lies largely with the legislature. One of the challenges there made was that the coverage of the law should extend only to employers in hazardous trades rather than to all employers. A part of the court's discussion follows:

"But because there is room for classification it does not follow that legislation without classification is unconstitutional. * * * We see absolutely no ground for the contention that these defenses may be lawfully abrogated as to the more hazardous industries, but must be forever held sacred as to the less hazardous industries. There may be a less persuasive reason for the change in the case of the latter class of industries, but this does not deprive the legislature of the power to make it.

"* * *

"The rules governing classification are familiar and are in brief as follows: It must be based on substantial distinctions which make real differences; it must be germane to the purposes of the law; it must not be limited to existing conditions only; and must apply equally to each member of the class. It seems to us that this classification fully meets these requirements. * * *"

Since Bill 209, A., would impose different restrictions for one class of litigants before the Wisconsin Employment Relations Board (i.e. employers) than for other litigants, the courts might consider it violative of Art. I, sec. 9, Wis. Const., which recites that every person is entitled to equal protection of the law and to a remedy in the law for injury. There are, however, many statutes that provide remedies before administrative agencies for certain classes and not others; for example, under the workmen's compensation law, where the remedy is available only to employes. That law was upheld in *Borgnis v. Falk, supra.*

The fact that the bill now under consideration recognizes both employers and employes as potential litigants before the board, but imposes more stringent conditions on employers, is no greater discrimination against employers than to deny them access to the board completely as was the case under ch. 51, Laws 1937, which preceded the present statutes. That law was apparently presumed by the supreme court to be valid, without discussion, in

Folding Furniture Works v. Wisconsin L. R. Board, (1939) 232 Wis. 170, 285 N.W. 851;

Wisconsin L. R. Board v. Fred Rueping L. Co., (1938) 228 Wis. 473, 279 N.W. 673;

United Shoe Workers, etc. v. Wisconsin L. R. Board, (1938) 227 Wis. 569, 279 N.W. 37.

In view of the broad field for judgment which the Wisconsin court has recognized as belonging to the legislature, it is my opinion that our courts would follow the ruling of the United States supreme court in *National Labor Relations Board v. Jones & Laughlin Steel Co., supra;* and would not hold a law enacted from Bill 209, A., invalid by reason of imposing more restrictive conditions on remedies before the Wisconsin employment relations board for employers than for employes or employe organization.

BL

Words and Phrases—Lobbying—"For hire" as used in sec. 13.62(2) defining "lobbyist" means for compensation paid for services and excludes one who is only reimbursed for his expenses.

October 11, 1965

THE HONORABLE, THE SENATE

You have requested an opinion by Senate Resolution No. 22, which provides:

"Resolved by the senate, That the attorney general is requested to provide an opinion as expeditiously as possible as to the application of Wisconsin's lobbying laws, and specifically the requirements for registration with and licensing by the secretary of state, to an individual who represents only nonprofit civic organizations and who receives no salary or other compensation from the organizations represented, except for partial reimbursement of expenses incurred in such representation."

Sec. 13.66 provides in part:

"**Restrictions on practice of lobbying.** (1) No person shall practice as a lobbyist unless he has been duly licensed under the provisions of s. 13.63 and unless his name appears upon the docket as employed in respect to such matters as he shall be promoting or opposing. No principal shall directly or indirectly authorize or permit any lobbyist employed by him to practice lobbying in respect to any legislation affecting the pecuniary interest of such principal until such lobbyist is duly licensed and the name of such lobbyist is duly entered on the docket. * * *"

Sec. 13.63 provides for the licensing of lobbyists, and the suspension or revocation of such license. Sec. 13.63 (1) provides in part:

"**Licenses for lobbyists; suspension or revocation.** (1) LICENSES; FEES; ELIGIBILITY. Any person of full age and good moral character who is a citizen of the United States and otherwise qualified under ss. 13.61 to 13.71 shall be licensed as a lobbyist as herein provided. The secretary of state shall provide for the form of application for license. Such application may be obtained in the office of the secretary of state and filed therein. Upon approval of such application and payment of the license fee of $10 to the secretary of state, a license shall be issued which shall entitle the licensee to practice lobbying on behalf of any one or more principals. * * *"

The terms "lobbying", "lobbyist", "principal", and "pecuniary interest" as applied to the lobbying law are defined by sec. 13.62 (1), (2), (4) (a) and (7):

"13.62 **Definitions.** The following words and phrases shall have the meaning respectively ascribed to them:

"(1) LOBBYING. The practice of promoting or opposing the introduction or enactment of legislation before the legislature or the legislative committees or the members thereof.

"(2) LOBBYIST. Any person who engages in the practice of lobbying for hire except in the manner authorized by s.

13.70. Lobbying for hire shall include activities of any officers, agents, attorneys or employes of any principal who are paid a regular salary or retainer by such principal and whose duties include lobbying.

"(3) * * *

"(4) PRINCIPAL. (a) Any person, corporation or association which engages a lobbyist or other person in connection with any legislation, pending before the legislature or to be proposed, affecting the pecuniary interest of such person, corporation or association.

" * * *

"(7) PECUNIARY INTEREST. The term includes without limitation any legislation which creates, alters or repeals any statutory charge by way of tax, license fee, registration fee or otherwise, or which creates, alters or repeals any statutory privilege, power, restriction or obligation of any principal, or which creates, alters or repeals the powers or duties of any court or governmental agency before which the principal does business."

Since no provision of the lobbying law relating to licensing or registration refers to the classifications of profit or non-profit, civic or non-civic, the fact that the individual represents only non-profit civic organizations is not determinative of the question whether that person is subject to the licensing and registration provisions of the lobbying law.

The lobbying law requires that persons falling within the class of "lobbyists" be licensed and registered with the secretary of state and the term "lobbyist" is defined by sec. 13.62 (2) as any person who engages in the practice of *lobbying for hire* except in the manner provided for in sec. 13.70. The question presented, therefore, is whether an individual who receives no salary or other compensation from the organizations represented, except for partial reimbursement of expenses incurred in such representation, is engaged in the practice of lobbying "for hire".

It is my opinion that the phrase "for hire" denotes a relationship in which one compensates another for labor or

services performed. Mere reimbursement for monies expended or obligations incurred as expenses incidental to the rendering of such labor or services does not constitute compensation for such labor or services performed. Black's Law Dictionary states:

"HIRE, n. Compensation for the use of a thing, or for labor or services. State v. Kenyon, Inc., Tex. Civ. App., 153 S.W. 2d 195, 197.

"A bailment in which compensation is to be given for the use of a thing, or for labor and services about it. 2 Kent 456; Story, Bailm. sec. 359. * * *"

See also:

Ozark Minerals Co. v. Murphey, (1943) 384 Ill. 94, 51 N.E. 2d 197, 201;

State ex rel. Murphey v. Welch and Brown, (1940) 187 Okl. 470, 103 P. 2d 533, 534;

Aleksich v. Industrial Accident Fund, (1944) 116 Mont. 127, 151 P. 2d 1016, 1018.

Wisconsin has a general rule of statutory construction embodied in sec. 990.01 (1):

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

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

Sec. 13.66 requires the licensing only of those persons engaged in the practice of a "lobbyist". Since a "lobbyist" is defined as one who lobbies for hire, an individual not within the exception contained in sec. 13.70 (1) lobbying, but not for hire, is not required to be licensed by the Wis-

consin lobbying law. Furthermore, the second sentence of sec. 13.66 (1) provides:

" * * * No principal shall directly or indirectly authorize or permit any lobbyist employed by him to practice lobbying in respect to any legislation affecting the pecuniary interest of such principal until such lobbyist is duly licensed and the name of such lobbyist is duly entered on the docket. * * *"

It is clear that this section applies only to "lobbyists employed" to lobby in respect to matters "affecting the pecuniary interest" of the principal. The section does not prohibit lobbying in respect to matters affecting the pecuniary interest of the principal by persons not receiving compensation for their labor and services.

It is my opinion that a person receiving compensation for lobbying must be registered whether or not the subject matter on which he is lobbying affects a pecuniary interest of a principal, but a person engaged in lobbying but not receiving compensation for his labor and services (beyond reimbursement for expenses), is not required to be licensed and registered unless falling within the exception contained in sec. 13.70 (1), which applies to persons who are officers, agents, appointees, or employes of the State of Wisconsin or of the United States and who lobby with respect to legislation pending or to be proposed which affects their pecuniary interests.

BCL:JHB:WAP:

Constitutionality—Discrimination—The exclusions set forth in proposed sec. 101.60 (1) (a) would not render the resulting law unconstitutional.

October 11, 1965

THE HONORABLE, THE ASSEMBLY

By Assembly Resolution No. 30 you have requested my opinion as to the constitutionality of the exclusions in sec.

101.60 (1) (a) as proposed by Bill 852, A., sec. 4, in view of the prohibitions and penalties in said section against discrimination in housing and the basic reasons for such prohibitions.

In my opinion the exclusions in the proposed statutory section would not render the statute unconstitutional.

Bill 852, A., sec. 4, would create sec. 101.60 relating to equal opportunities in housing. Subsec. (1) (a) would provide:

"(a) 'Housing' means any improved property, including any mobile home as defined in s. 66.058, which is used or occupied, or is intended, arranged or designed to be used or occupied, as a home or residence, but does not include:

"1. Any building or structure containing living quarters occupied or intended to be occupied by no more than one family and which is used by or was last used by the owner thereof as a bona fide residence for himself and any members of his family forming his household;

"2. Any building occupied by the owner as his residence, in which single rooms are rented out for occupancy by 4 or less individuals, not members of the owner's family.

"3. Any building consisting of four or less dwelling units, all in one structure, in which at least one of such dwelling units is occupied by the owner of such building as his residence."

Discrimination is defined to mean unequal treatment of any person because of race, color, religion, national origin or ancestry. Subsec. (2) of the proposed sec. 101.60 would make it unlawful for any person to discriminate by refusing to sell, lease, finance or contract to construct housing; by refusing to permit inspection or refusing to negotiate or exacting more stringent conditions for the sale, lease or rental of housing; by refusing to finance or sell an unimproved residential lot or to construct a home thereon; or by issuing any advertising which indicates discrimination in connection with housing. The proposed sec. 101.60 also would empower the industrial commission to administer the stat-

ute, including the issuance of enforceable orders, would provide for judicial review, and would impose a forfeiture for violation of the section.

In order to answer your question it is necessary to understand the effect of the three exemptions to the definition of housing quoted previously.

The language of the first exemption or exception, set forth in proposed sec. 101.60 (1) (a) 1., requires construction. Literally, the wording would exempt from the operation of the section a 1,000-unit apartment building, if the owner used one of the apartments as his residence. This follows from the fact that the exception is not expressly limited to a building containing only one apartment or dwelling unit. However, such a construction would render meaningless the exception contained in subparagraph 3., which applies to a building consisting of 4 or less dwelling units, one of which is occupied by the owner as his residence.

It seems obvious that what is intended by subparagraph 1., is to exclude from the operation of the section a single-family residence or other building containing only one dwelling unit, which is used, or was last used, by the owner as his family's residence. Thus this exception would, for example, exclude from the operation of the section an ordinary single-family residence which might be rented once during the temporary absence of the owner.

If the foregoing construction of the first exception is adopted, the third exception then becomes meaningful. The third exception would remove from the operation of the section a 4-apartment building, one apartment of which is occupied by the owner as his residence. The exception or exemption would be lost, however, if the owner temporarily moved away from his apartment and rented it to another.

The second exception, of course, would remove from the operation of the section a building occupied by the owner as his residence, if single rooms were rented to no more than 4 individuals not members of the owner's family.

In my opinion each of these exclusions is reasonable. In reaching this conclusion I am cognizant of the language of

the resolution requesting my opinion, in which it is stated that the bill "arbitrarily and unreasonably excludes" certain buildings and the owners thereof. Despite that language, it cannot be presumed that the assembly deliberately passed a bill containing an arbitrary and unreasonable classification. Furthermore, if the bill is passed by the senate, it would have to be presumed that in enacting the bill the legislature thereby determined that there was need for such legislation and that the classifications made were reasonable.

A measure somewhat comparable to Bill No. 852, A., came before the supreme court of Ohio recently. *Porter v. City of Oberlin,* (1965) 1 Ohio St. 2d 143, 205 N.E. 2d 363. The court there had no difficulty in sustaining the constitutionality of a fair housing ordinance which applied to an owner of 5 or more dwelling units and to a real estate broker, salesman or lending institution. The ordinance there was attacked on the grounds that it permitted an owner of only one property to practice racial discrimination but prohibited a realtor serving such an owner from so discriminating. This attack the court brushed aside on the grounds that if such an owner could not obtain the services of a real estate broker, the owner would himself be discouraged from indulging in racial discrimination.

The Oberlin Ordinance also was attacked on the ground that there was no reasonable basis for treating owners of 5 or more dwelling units differently from owners of less than 5 such units. The court held that this distinction did not violate the equal protection clause, stating at 1 Ohio St. 2d 152:

"Equal protection provisions of the federal and Ohio Constitutions do not require resort to close distinctions or the maintenance of a precise scientific uniformity and do not prohibit distinctions not shown to be substantial or which are based on differentiations not shown to be arbitrary or capricious. * * *

"Furthermore, it is generally recognized that a legislative body, when it chooses to act to correct a given evil, need not correct all the evil at once, but may proceed step by step.

* * *

"Certainly, a legislative body is not unreasonable because it elects to proceed slowly in such an emotionally involved field as race relations."

The decision in the *Porter* case went on to state that an owner of more than 4 dwelling units, who desired to practice racial discrimination in the sale or rental of such units, was potentially a greater threat to those who would be hurt by such discrimination than was the owner of less than 5 such units.

The reasoning of the decision in the *Porter* case is equally applicable to the question you propound. Each of the exclusions set forth in proposed sec. 101.60 (1) (a) applies only to a building containing few dwelling units. The second and third exclusions apply only to buildings in which the owner has his residence. The first exclusion, construed as previously discussed herein, would apply to a single-family residence last used by the owner as his residence, but the exclusion would be lost if the owner rented the property to a second tenant.

In my opinion the decision in *Porter v. City of Oberlin, supra,* contains a complete answer to a constitutional attack which might be made upon the exclusions from the definition of housing contained in proposed sec. 101.60.

EWW

Constitutionality—Bong Air Base—Lands—Bill 408, A., if enacted into law, would be constitutional so far as it affects the land of Bong Air Base being transferred to the conservation commission for use or disposal.

October 12, 1965

THE HONORABLE, THE ASSEMBLY

You have asked for my opinion as to the constitutionality of Bill 408, A., principal provisions of which are contained in section 1 of the bill, reading as follows:

"SECTION 1. 15.995 (4) of the statutes is created to read:

"15.995 (4) *Bong air base.* (a) Subsections (1), (2) and (3) do not apply to and the commission is not authorized to acquire any interest of any kind in the federally-owned lands within the Bong air base in Kenosha county.

"(b) All lands within the Bong air base in Kenosha county which have been conveyed by the United States to the state of Wisconsin or to the federal surplus property development corporation on or before the effective date of this subsection (1965) pursuant to this section or s. 182.60 are transferred to the state conservation commission.

"(c) All agreements and contracts made or entered into by the commission which relate to or affect the lands within the Bong air base in Kenosha county are hereby canceled and terminated.

"(d) All files, records and reports of every kind relating to the Bong air base in Kenosha county and in the possession or custody of the commission are hereby transferred to the state conservation commission."

Assembly Resolution 32 reads as follows:

"Requesting an opinion from the attorney general on the constitutionality of Assembly Bill 408, relating to lands within Bong air base.

"Whereas, Assembly Bill 408 provides that all agreements and contracts made or entered into by the Wisconsin Federal Surplus Property Development Commission (Bong Base Commission) which relate to or affect lands within the Bong air base are hereby canceled and terminated; and

"Whereas, the Bong Air Base Corporation has acquired title to certain lands within the Bong air base and has given a mortgage to the United States; and

"Whereas, the Bong Air Base Corporation has granted options to purchase other lands within the Bong air base; and

"Whereas, Article 1, section 12, Wisconsin constitution, provides that the legislature shall pass no law impairing the obligation of contracts; and

"Whereas, Article 1, section 13, Wisconsin constitution provides that the property of no person shall be taken for public use without just compensation; now, therefore, be it

"Resolved by the assembly, That the attorney general be and he is hereby requested to render to the assembly at his earliest convenience his official opinion as to the constitutionality of Assembly Bill 408 with reference to the above and other applicable provisions of the constitution."

Sec. 24.085 (1) reads as follows:

"The state conservation commission is authorized and empowered to sell at public or private sale, lands and structures owned by the state under the jurisdiction of the state conservation commission when said commission determines that said lands are no longer necessary for the state's use for conservation purposes. Upon request of the Wisconsin federal surplus property development commission, the commission shall sell any lands thus requested within Bong air force base when owned by the commission in outright fee to the Wisconsin federal surplus property development commission, or its designee, at fair market value."

Sec. 15.995 creates the Wisconsin federal surplus property development commission. Subsec. (2) (a) and (b) reads:

"(2) POWERS AND DUTIES. The commission shall have the following powers and duties:

"(a) To ascertain the feasibility of acquiring surplus federal lands and improvements and appurtenances thereto within this state in order to assure that such property will be properly integrated into the economic, social and governmental institutions of the state.

"(b) If, after study of any available federal surplus property, it is determined by a majority of the commissioners that the procurement of such property is in the public interest, the individual members of the commission may, by

and with the consent of the governor, incorporate under the federal surplus property development corporation laws and develop and dispose of any such available property."

Sec. 182.60 (1) reads:

"(1) CREATION. Non-profit federal surplus property development corporations hereafter known as development corporations may be created by the Wisconsin federal surplus property development commission when a majority of the commissioners determines that the acquisition of federal surplus property is feasible. Such corporations may be organized under ch. 181 and shall have the powers enumerated therein except as otherwise provided in this section. The members of such corporations shall constitute the board of directors thereof."

Pursuant to these statutes, negotiations have been carried on with appropriate federal agencies for the acquisition of certain lands at the Bong air base. There are three parcels of land involved.

The first parcel of 1988 acres will be deeded by the federal government to the state of Wisconsin to be used by the conservation commission for conservation purposes. There will be no charge for this land. The federal government has not yet made this conveyance.

The second parcel of 1591 acres is described as interim conservation land. The conservation commission has made an offer to purchase this parcel for the sum of $245,000.00, and this amount of money has been encumbered for this purpose. The federal government has accepted this offer but neither of these two parcels has as yet been conveyed to the state.

Pursuant to secs. 15.995 and 182.60 the Wisconsin federal surplus property development commission, hereinafter referred to as the commission, has organized a surplus property development corporation, hereinafter referred to as the corporation. The federal government has deeded the third parcel of 977 acres to the corporation for the sum of $90,000.00. The corporation has given a mortgage back to the

federal government. The corporation has sold this third parcel to a private developer, Herro and Associates, on a land contract. Herro has paid $20,000 to the corporation and has agreed to pay an additional $70,000 over a ten year period.

It is anticipated that the federal government will convey the second parcel of 1591 acres to the conservation commission, hereinafter referred to as conservation. It is further anticipated that, pursuant to sec. 24.085, upon the demand of the commission, conservation will sell this second parcel to the corporation at market value. Based upon the anticipation that these contingencies will occur, the corporation has granted to Herro option rights to purchase this second parcel from the corporation at fair market value.

The foregoing constitutes a summary of the fact situation as it exists at the present time.

Bill 408, A., proposes to make the following changes:

Section 1 of the bill prohibits the commission from acquiring Bong air base lands. It also provides that such lands which have already been conveyed by the federal government to the state or the corporation before the effective date of this new section, are transferred to conservation. It also cancels all agreements and contracts made by the commission relating to Bong air base lands and transfers all commission files relating to Bong air base lands to conservation.

Section 2 of the bill authorizes conservation to acquire Bong air base lands and use them for conservation purposes.

Section 3 of the bill authorizes conservation to sell such lands if such lands are not needed for conservation purposes, but removes the requirement that conservation must sell such lands to the commission or the corporation on demand of the commission.

Section 4 of the bill provides that the corporation may not acquire Bong air base lands.

Your question is whether these proposed changes made by Bill 408, A., would impair the obligation of contracts in vio-

lation of Art. I, sec. 12, Wis. Const., or take private property for public use without just compensation in violation of Art. I, sec. 13, Wis. Const. It will be necessary to answer these questions as to each of the three parcels of land.

As to parcel one, Bill 408, A., makes no changes in the law. This parcel is to be given without charge by the federal government to the state to be used by the conservation commission for conservation purposes only. The federal government still owns this land and is ready to give it to the state as soon as conservation is ready to accept it. There is no provision for private rights to attach to this land and no such private rights have, in fact, attached. There is no question as to the constitutionality of Bill 408, A., in respect to parcel one.

As to parcel two, the federal government still holds title. Conservation has made an offer to purchase and this offer has been accepted by the federal government. Conservation has encumbered the necessary funds. The federal government is ready to convey the land as soon as conservation is ready to accept it. As the law presently stands, if conservation did take title to these lands, conservation would be required to turn them over to the commission or the corporation at the request of the commission. It is in anticipation of this that the corporation has granted to Herro and Associates an option to purchase these lands.

Bill 408, A., now proposes to change the law so that conservation can receive these lands, but not be required to turn them over to the commission or the corporation. The question thus arises whether the commission, the corporation, or Herro and Associates have at this time acquired any vested property or other contractual rights which cannot now be disturbed without violating the constitutional provisions relating to impairment of contracts and taking private property without just compensation.

The commission is a state agency created by statute and having certain statutory powers and duties. This commission has caused to be organized, as previously pointed out, a corporation which in turn has granted to Herro and As-

sociates an option to buy parcel two. Any property or contractual rights which the commission, the corporation, and Herro may now have, are strictly contingent on whether conservation gets the land from the federal government and turns it over to the commission or the corporation. This contingency may never occur. For example, sec. 24.085 (1) presently provides that conservation shall sell Bong lands to the commission "when owned by conservation in out right fee". As of today, conservation does not have any ownership in these lands. Suppose they never buy such lands or take less than a fee title. Under such circumstances, conservation would never be bound to convey the lands to the corporation. Or suppose the governor should disapprove the sale as he has a right to do under sec. 24.085 (2). It is clear that any rights that the corporation or Herro have under present law are contingent on events which may never occur. Such options are subject to the further contingency that the law may be changed as is here proposed.

The question is whether the commission, the corporation, or Herro and Associates, have acquired any vested rights in the continued existence of the present statutes. It is clear that the Commission, as a state agency, has no such right. In *State v. Mutter,* (1964) 23 Wis. 2d 407, the statute created a contract between the state and the county for the management of county forests. The legislature then amended the statute to restrict further the rights of the county in this respect. The question was raised whether this statutory change impaired the obligation of the contract. The court held that it did not. The court said that the legislature is not obliged to heed a prior legislative expression and that a state agency such as a county does not have a vested right in an enactment of the legislature. This would seem to be particularly applicable to a state agency such as the surplus property commission here involved.

In *Butler v. Pennsylvania,* (1850) 51 U.S. 402, 416, 13 L. Ed. 472, the court held that the contracts protected by the impairment of contract clause of the United States constitution "are contracts by which perfect rights, certain definite, fixed private rights of property, are vested".

In 16 C.J.S. Constitutional Law §215, it is said:

"Rights are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. The right must be absolute, complete, and unconditional, independent of a contingency, and a mere expectancy of future benefit, or a *contingent interest in property founded on anticipated continuance of existing laws, does not constitute a vested right.* * * *"

In *State ex rel. McIndoe v. Comissioners of School Lands,* (1858) 6 Wis. 334, there was an application for the purchase of certain school lands under an existing statute. Before the sale of these lands was complete, the legislature changed the law to require certain additional conditions to such a purchase including a limitation as to total amount of land which could be acquired. The applicant did not attempt to comply with these new conditions, but contended he had a right to rely on his application under the prior law. The court held he had acquired no vested right under the prior law which could not be divested by the subsequent legislative enactment. The court said that an application to purchase is not a purchase, nor is an attempt to acquire a right to be adjudged a right vested. Since no vested right had been previously acquired, subsequent legislation imposing new conditions was permissible.

From the foregoing, it is clear that the corporation and Herro have no vested contract rights because any rights they have are clearly in anticipation of a number of future contingencies, including the possibility that the legislature may change the law.

In *Pott v. Sheboygan County,* (1870) 25 Wis. 506, the county board, pursuant to statute, entered into a contract with a private person to print the delinquent tax list. Before commencement of this work, the legislature changed the law to require that the county treasurer let the contract for such printing. The question arose whether this change in the law was an unconstitutional impairment of the contract already let by the county board. The court held

that the contractor had no vested right in the prior law which precluded the repeal of such law by the legislature. The legislature could have abolished the requirement for the printing entirely and provided that the notice as to delinquent taxes should be given in some other way. At page 509, the court said:

"And when Ziller [the contractor] made his proposition to the board for publishing the list, and it was accepted, he must be deemed to have acted with reference to the fact that the matter of publishing the list was within the control of the legislature, and that the law for publishing the same might be changed before he would enter upon the performance of the work. * * *"

In *State ex rel. Board of Regents v. Donald,* (1916) 163 Wis. 145, there was an appropriation to the Normal School Regents for a gymnasium. On the strength of this appropriation, contracts were let for the construction of the building. A question arose whether a subsequent amendment to the statute repealed this appropriation. The court held that it did not, but stated at page 147:

"Undoubtedly the legislature can repeal a statute carrying an appropriation and thus put an end to the appropriation, so far as it is unexpended, at any time. If contracts are thereby breached the contractors must resort to other remedies; they cannot insist that the appropriation remains available simply because of an outstanding contract entered into on the faith of it."

From these authorities, we conclude that any rights which the corporation or Herro and Associates may have are anticipatory and contingent upon a number of events, including the possibility that the legislature may change the law or repeal the necessary appropriation to the conservation commission. This being so, their rights are not vested rights subject to the protection of the constitutional provisions against impairment of contracts.

As to parcel three, the federal government has already conveyed this land to the corporation and taken a mortgage

back. The corporation then sold the land to Herro and Associates on a land contract. Bill 408, A., purports to transfer such land to conservation and to cancel the contracts relating thereto. Since this is clearly private property, the bill would be constitutional as applied to this parcel three, if conservation purchases or condemns the private rights involved. Conservation is presently authorized to purchase or condemn interests in land under sec. 23.09 (7) (d) for the purposes enumerated therein, and under sec. 32.02 (1).

AH

Clerk of Court—Divorce—Sec. 69.52 clearly imposes on the clerk of court the duty to provide the registrar of vital statistics such information described in 69.52 (2) regarding divorce action as well as action in legal separations.

October 14, 1965

SENATOR ALLEN J. BUSBY, *Chairman*
Advisory Council for Home and Family

The above-named council has asked my opinion on this question: are the provisions of sec. 69.52 of the Wisconsin statutes mandatory so that the clerk of every court having divorce jurisdiction is required to report to the state registrar, statistics on all actions for divorce and legal separation initiated by the filing of a summons, including the number of actions where the complaint was filed and the action subsequently dropped or dismissed?

Sec. 69.52 reads in part as follows:

"(1) The clerk of every court having jurisdiction of divorce proceedings shall, within 30 days after January 1 of each year, return to the state registrar of vital statistics upon the blanks provided for that purpose, statistics relative to each action for annulment of marriage or divorce brought or acted upon in said court during the preceding year.

"(2) Said record shall contain the following items: The record number, full name, age, color and occupation of plaintiff and defendant, date and place of marriage, residence of each at time of marriage and at time action was brought, date of separation, date of filing the action, the alleged causes for annulment or divorce, kind of relief prayed for, manner of service of summons, whether or not the action was contested, date and nature of decree, final disposition of case; whether alimony was asked and granted, number of children by the marriage, number of children affected by the decree and such other information as the state registrar shall determine is necessary and useful to a proper study of divorces in this state."

The above-quoted statute clearly imposes on the clerk of the court in question the duty to provide to the state registrar of vital statistics (hereinafter called "the registrar") so much of those items of information, described in sec. 69.52 (2) as may be available to the clerk with reference to any action for divorce or legal separation (or for annulment as well) "brought or acted upon" in the court of which he is clerk. The statutory language "brought *or acted upon*" clearly shows that the obligation of the clerk to supply such information or statistics exists with reference, not only to the case "acted upon", i.e., the case dismissed or in which a decree is entered, but also with reference to the case which has merely been "brought" during the preceding year, i.e., the case which has, in such year been commenced by serving and filing of the summons, and in which the complaint, or both complaint and answer, may have been filed, but upon which the trial court has not acted during the preceding year through order of dismissal or by entering a decree.

It is my further opinion that the clerk of court in question, under sec. 69.52, has the duty, as to a case in which the complaint has been filed and the action subsequently dismissed, to report such dismissal to the registrar as "final disposition of case" within the meaning of such term as employed in 69.52 (2). In my opinion, however, where a complaint has been filed in an action for divorce or legal

separation, and the action has been subsequently "dropped", no obligation to report that fact to the above-mentioned registrar exists. I take it that in referring to such an action as "dropped" you mean that for some reason not evident in the court record of such case nothing has been done by either party thereto to bring about action thereon by the court, and it further appears that nothing will be done in that regard. A typical example of such case would be one wherein the aggrieved plaintiff-wife has reconciled with her husband after filing of the complaint, has abandoned any idea of prosecuting the case, and in which no attorney for either party does anything to obtain a dismissal of the case. As to such case, there has clearly been no "final disposition of case" within the meaning of that term as employed in 69.52 (2), i.e., a disposition of record, readily available to the clerk in his files. Sec. 69.52 plainly imposes no duty upon the clerk of court here in question to go questing among attorneys for information as to the "dropping" of divorce or legal separation actions wherein no further action has been taken after filing of the complaint; and it is therefore my opinion that such clerk, under sec. 69.52, has no duty to report to the registrar the number of such actions "dropped" after filing of the complaint.

It should here be noted that while your above-stated question refers to "actions for divorce and legal separation" and the duty of a clerk of court to report statistics relative thereto, pursuant to sec. 69.52, such statute makes reference to that duty only as it relates to "each action for annulment of marriage or divorce", and makes no mention of an action for legal separation. As you know, the latter action was formerly one for a "divorce from bed and board", and was clearly encompassed within the term "an action for divorce" used in sec. 69.52 (1), and in its predecessor statutes, including the first of them, namely, L. 1907, c. 469 (Section 1022-54). As legislative council notes referring to sec. 247.03 show, the sole intention of the 1959 legislature, in adopting the term "legal separation" in lieu of "divorce from bed and board" was merely to better distinguish the latter action from an action for absolute divorce. It was manifestly not the intention of such legislature, in making that change, to

relieve the clerks of those courts referred to in sec. 69.52 of their duty to report to the registrar, inter alia, statistics relative to actions for legal separation. Nevertheless, it might be advisable for the Advisory Council for Home and Family to seek amendment of sec. 69.52, so that its wording would leave not a scintilla of doubt that the statistics reporting duty imposed thereby embraces actions for legal separation as well as those for annulment and divorce.

JHM

Savings and Loans—Procedures—Savings and loan commissioner is without authority to impose additional procedural requirements on associations considering conversion from state to federal charter. Approval may not be withheld if procedures conform to statute.

October 15, 1965

LEO MORTENSEN, *Commissioner*
Savings and Loan Department

The management of a state-chartered savings and loan association contemplates initiating action to convert the association to one that is federally-chartered. The Wisconsin statutes impose certain procedural requirements to effect such a conversion. Also, by statute, the written approval of the savings and loan commissioner must be secured. You ask whether the savings and loan commissioner may impose, in addition to the procedures specifically required by statute, the following conditions:

(1) That the notice of the meeting of the members called for the purpose of considering such conversion include an impartial statement from management as to the advantages and disadvantages of operating under a federal charter as compared to operating under the state charter.

(2) That such notice include a statement from management that it favors and recommends a vote for the proposed conversion.

(3) That any proxies sent by management to members in advance of such meeting include a statement from management advising that a member may, in effect, vote "no" on the proposed conversion by not signing and not returning the proxy submitted to him.

You state that such additional requirements are necessary in order to inform the members of the association, who determine the proposal to convert, of the purpose of the conversion so that the members may vote intelligently. It is my conclusion that the savings and loan commissioner is without authority to impose procedural requirements in addition to those required by sec. 215.29 with respect to contents of notice and proxies for meeting of association considering conversion from state to federal charter. Where conversion procedure conforms to statute, approval may not be withheld.

The procedure necessary to effect the conversion of the state-chartered savings and loan association into a federal association is established by sec. 215.29 (1) which provides in part:

"* * * Any state-chartered savings and loan association may convert itself into a federal association, and any federal association may convert itself into a state-chartered savings and loan association, by the following procedure:

"(a) A meeting of the members shall be held upon not less than 10 days' written notice to each member, served either personally or by mail, directed to him at his last known post-office address, stating the time, place and purpose of such meeting.

"(b) At such meeting, the members may be the affirmative vote in person or by proxy of 66 2/3 per cent of the dollar value of savings accounts of the association declare, by resolution, to convert such association into a federal association or into a state-chartered association. A copy of the minutes of such meeting, verified by the affidavit of the chairman and the secretary of the meeting, shall be filed in the office of the commissioner within 10 days after the

meeting. Such copy, when so filed, shall be evidence of the holding of and of the action taken at such meeting."

In 215.29 (4) there is a requirement that before any such conversion of any association shall be filed and in effect, the written approval of the commissioner must be secured.

Thus it appears that the statutes, although prescribing in some detail the conversion procedure, are silent with respect to what, if any, discretion is vested in the commissioner in connection with his granting or withholding approval. Clearly the commissioner could withhold approval if any of the statutory procedural steps were omitted or improperly taken. If the commissioner has power to impose additional requirements, upon which the granting or withholding of his approval may be conditioned, then such power must be found within the scope of the statute under which the agency is operating. The principle is stated in *American Brass Company v. State Board of Health,* (1944) 245 Wis. 440, 448, 15 N. W. 2d 27:

"* * * No proposition of law is better established than that administrative agencies have only such powers as are expressly granted to them or necessarily implied and any power sought to be exercised must be found within the four corners of the statutes under which the agency proceeds. * * *"

Sec. 215.02 (12) (a) provides:

"(a) In addition to performing such duties and functions prescribed in this chapter, the commissioner shall, with the approval of the advisory committee, issue orders prescribing reasonable rules for conducting the business of associations, subject to the requirements of ch. 227. All orders issued by the commissioner shall be known as 'Wisconsin Administrative Code, Rules of the Savings and Loan Department.' "

If these additional conversion procedure requirements which you propose are to have any validity, they must derive it from the statute just quoted.

I have examined the Wisconsin Administrative Code and find that it does not contain any rules on this subject matter. Even if I were to conclude that the savings and loan commissioner has the statutory authority to impose the requirements referred to as a condition of approval of conversion to a federal charter, the commissioner could only impose such requirements by following the rule-making procedures set forth in the above quoted sec. 215.02 (12) (a). Not having adopted such rules, the commissioner cannot impose these conditions at this time.

Assuming the commissioner did adopt rules pursuant to section 215.02 (12) (a), which in substance contained the three requirements set forth above, I conclude that such rules would probably be held invalid as beyond the commissioner's statutory authority.

It is my opinion that "reasonable rules for conducting the business of associations" was not intended to cover such a basic transaction as the conversion of an association's charter, especially where the legislature has seen fit elsewhere to deal specifically with the procedures to be followed by associations seeking to convert. For example, it is required by statute that at least ten days' written notice be given each member of a meeting to determine such a conversion question and that such notice state the time, place and *purpose* of such meeting. The legislature has empowered the membership of an association to make the determination with respect to conversion by an affirmative vote of 66-2/3%, not of the members present at the meeting nor of the dollar value of the savings accounts of the members present at the meeting, but 66-2/3% of the dollar value of all of the savings accounts of the association.

The following language from *Opdyke v. Security Savings and Loan Company,* (1952) 157 Ohio St. 121, 105 N. E. 2d 9, 22, 23, is helpful:

"Where, as here, all stockholders are given sufficient notice of a meeting duly called to consider the question of approving such a conversion, and the majority of the votes cast are for approval of the conversion, it is reasonable to

determine that the self-interest, in protecting their stockholder rights, of those stockholders who are sufficiently interested to attend the meeting and vote for approval will ordinarily be a sufficient protection to similar stockholder rights of those stockholders who either voted against approving the conversion or were not even sufficiently interested to attend such a meeting."

Thus, the legislature has determined that the wisdom of any decision respecting conversion of a charter of a savings and loan association shall be left entirely to the membership of the association. Having assured that each member shall be notified as to the time, place and purpose of such meeting, the legislature did not concern itself with the perilous task of inquiring into how intelligently each member voted or the quantum of information in addition to the items specified a member might need in order to vote intelligently.

It is my opinion that if the notices sent to the members comply with the statute, which requires, of course, a fair statement of the purpose of the meeting, the savings and loan commissioner is without power to require that the notices contain additional information such as the relative merits of a question to be considered or the position of management on such a question. 48 OAG 162, 167 (1959). If the procedure effecting charter conversion is in conformity with statutory requirements, the commissioner may not disapprove such conversion. Ibid.

In general, the statutes confer on the members the right to vote in person or by proxy at any meeting. Sec. 215.08 (6) (b). Further, at a meeting for the purpose of considering a charter conversion, each member is specifically authorized by statute to vote in person or by proxy. Sec. 215.29 (1) (b).

A proxy to vote shares of stock is an authority given by the holder of the stock who has the right to vote it to another to exercise his voting rights. The term "proxy" is also used in the sense of proxy holder—that is, the person to whom such authority is given. 19 Am. Jur. 2d 174, Corporations, Sec. 669. A corporation will not be permitted to limit

or impair the right to vote by proxy when such right is conferred by statute. Ibid; 8 OAG 47, 48 (1919).

In the absence of statutory charter or by-law requirements, no particular form of words is necessary to constitute a proxy. It is sufficient that the proxy on its face confer the requisite authority and be free from all reasonable grounds of suspicion of its genuineness and authenticity. 18 C. J. S. 1251, Corporations, Sec. 550.

The legislature has acted to authorize proxy voting as to savings and loan associations generally and as to a meeting considering a question of conversion specifically, but has remained silent with respect to delegating authority to impose further requirements with respect to proxies. Again, finding no provision in the statutes from which a grant of such power may reasonably be implied, I conclude that the savings and loan commissioner is without authority to impose a requirement that each member be informed of the legal consequences of a certain course of action with respect to his proxy, i.e., his failure to execute or return a proxy.

A wide variety of controversies concerning proxies can become involved in court proceedings. Where the solicitation of proxies was misleading because of non-disclosure or misstatement, appropriate legal or equitable relief, either before or after the election, might be sought in the courts. *Handbook of the Law of Corporations and Other Business Enterprises,* Harry G. Henn, Sec. 198, p. 313; see, 73 Harv. L. Rev. 1041 (1960).

The requirement here sought to be imposed with respect to informing a member as to the legal consequences of a certain course of action, i.e., not executing a proxy, could become a subject of misinterpretation because of incompleteness. For example, if a member does not execute a proxy (or even if he does) he still may go to the meeting and vote. Regardless of the character of his proxy, he may vote affirmatively or negatively. Sec. 215.08 (6) (c). Also, where a member has already issued one proxy to one side, then later issues a second proxy to another, if both have been truthfully dated, under standard practice the later proxy auto-

matically revokes the earlier. *Corporation Law and Practice,* Hornstein, Vol. 1, Sec. 330, p. 433. Also, if a member has previously executed a proxy and filed it with the secretary of the association, it might well remain in force and only revocable by filing a notice with the secretary. Sec. 215.08 (6) (d).

I conclude that, in the absence of a statute from which a grant of such authority can reasonably be implied, the savings and loan commissioner may not impose procedural requirements in addition to those set out by sec. 215.29 governing charter conversion. See *Federal Home Loan Bank Board v. Greater Delaware Valley Federal Savings and Loan Assoc.,* (1960) 277 F. 2d 437.

JEA

Taxation—Mineral Rights—The provisions contained in Bill 334, S., relative to taxing mineral rights would be in violation of the uniformity clause of Art. VIII, sec. 1, Wis. Const., and the 14th amendment of the U. S. Const.

October 25, 1965

THE HONORABLE, THE SENATE

Senate Resolution 28 requests my opinion as to the constitutionality of the provisions contained in Bill No. 334, S., regarding the reservation of mineral rights in certain lands and the taxation of such mineral rights.

Bill 334, S., would create sec. 70.428 consisting of seven subsections. Subsec. (1) would define mineral rights or reservations to include the reservation of any organic or inorganic substance which can be extracted from the earth for profit. Subsec. (2) provides that an owner of mineral rights reserved separately from the surface rights, except for governmental entities, should record with the register of deeds, prior to 1967, a reaffirmation of such rights and

proof of ownership thereof and pay a filing fee therefor. Failure to record such a statement prior to 1967 would result in extinguishment of such rights. Subsec. (3) would require the county treasurer, commencing 90 days prior to December 31, 1966, to publish notices to owners of mineral rights reserved separately from the surface rights that failure to record the statement required by sub. (2) would extinguish such rights.

Subsec. (4) provides that any person, except a governmental entity, who acquires mineral rights in land subsequent to December 31, 1966, shall record with the register of deeds a statement of such fact and pay a filing fee therefor. The bill provides no time limit for recording such a statement nor any sanction for enforcement of the subsection.

Subsec. (5) provides that starting in 1967 mineral rights shall be assessed and taxed to the person who has filed or who hereafter files such a statement, at the rate of 10¢ per acre. The subsection further provides that such tax shall be "in addition to all other taxes provided by law and shall be levied concurrently with any other real property tax on the land and shall be used for the same purposes as real property taxes". If the tax is not paid, the mineral rights of such a person shall be sold as in the case of other real property.

Subsec. (6) requires the register of deeds to cooperate with the assessor, while subsec. (7) provides that all provisions of law not in conflict with the new section, relating to the assessment, collection and payment of real estate taxes, the correction of errors in assessment and tax rolls, and the procedure upon failure to pay such taxes, shall apply to the tax imposed by the new section.

This bill raises several constitutional questions. Separately reserved mineral rights, acquired prior to 1967, would be extinguished upon the failure of the owner to record a reaffirmation prior to 1967. Similar rights acquired in 1967 or later would not be extinguished by reason of the failure of the owner to record a statement of ownership. This presents a question of equal protection of the law.

Separately reserved mineral rights, under the bill, would be assessed at 10¢ per acre. In addition, the property would continue to be assessed at full value under sec. 70.32 (1) including the value of minerals on the property. Thus, a piece of property not subject to a separate reservation of mineral rights would be assessed at full value, while identical property which was subject to a reservation of mineral rights would be assessed at full value and taxed upon that assessment plus an additional tax of 10¢ per acre for the reserved mineral rights. Furthermore, a reservation of mineral rights having a known and substantial value would be assessed at the same rate as a reservation of mineral rights without any appreciable, known value. This raises questions of equal protection and of uniformity in taxation, under Art. VIII, sec. 1, Wis. Const.

As previously pointed out, one acquiring separately reserved mineral rights prior to 1967 would be required to record his reaffirmation of such rights before 1967, or else suffer the extinguishment of his rights. As applied to one acquiring such rights on December 31, 1966, it is obvious that in many situations it would be impossible to record a reaffirmation on the same day. This presents questions of equal protection and of taking property without due process of law.

As the bill is drawn, a person acquiring separately reserved mineral rights in 1967 or later would be required, by subsec. (4) of the proposed statute, to record a statement of such fact and pay a filing fee. However, since there is no sanction provided for enforcement of that provision, the owner of such rights acquired subsequent to 1966 could refuse to record the statement. The effect of this would be to prevent the assessment of his reserved mineral rights, since subsec. (5) of the proposed statute would require that reserved mineral rights be assessed and taxed to the person who has recorded such a statement. This again poses problems both of equal protection and of uniformity.

Art. VIII, sec. 1, Wis. Const., provides, so far as here material:

"The rule of taxation shall be uniform * * *. Taxes shall be levied upon such property with such classifications as to forests and minerals including or separate or severed from the land, as the legislature shall prescribe. * * *"

The section as originally adopted did not expressly provide for any classifications as to forests and minerals. In its original form it was held to mean that, while certain classes of property may be exempted entirely from property taxes, all property subjected to such taxation must be assessed and taxed on a uniform basis. *Knowlton v. Supervisors of Rock County,* (1859) 9 Wis. *410. Later cases, particularly *Lawrence University v. Outagamie County,* (1912) 150 Wis. 244, 250, 136 N. W. 619, recognized that "the rule of uniformity may be as effectually abrogated by arbitrary exemptions from taxation as by arbitrary impositions of unequal amount."

Bill 334, S., would impose a greater tax upon a property subject to a reservation of mineral rights than upon a property of equal value but not subject to such a reservation, thus in effect, granting a partial exemption for the latter. While I have found no case directly in point upon this particular question, I consider it very likely that this aspect alone might result in the law being held unconstitutional under the uniformity clause.

Certainly the amendment to Art. VIII, sec. 1, empowers the legislature to make classification as to forests and minerals for tax purposes. The classification made by this bill, however, is not of forests or minerals but of the nature of the title thereto. If the mineral rights are owned by the owner of the surface rights, one tax rate is applicable. If the mineral rights are reserved separately from the surface rights, a different tax rate is applied.

Entirely aside from the rule of uniformity, it is well established that the equal protection of the laws provision of the 14th amendment to the federal constitution imposes restrictions on the granting of tax exemptions. A tax exemption classification must be founded upon real differences affording rational grounds of distinction. *Lawrence Univer-*

sity v. Outagamie County, supra; *Welch v. Henry,* (1937) 223 Wis. 319, 323, 271 N. W. 68; and *Will of LeFeber,* (1937) 223 Wis. 393, 398-399, 271 N. W. 95. In the latter case the court held that a classification for tax purposes must be reasonable and must rest upon some difference having a substantial relation to the object of the law, so that all similarly circumstanced persons should be treated alike.

Tested by these requirements, in my opinion a law enacted in the language of Bill 334, S., would not be constitutional. I cannot conceive any reasonable basis for extinguishing reserved mineral rights acquired in December, 1966, if the owner of such rights fails to record in that month a reaffirmation of his rights, and permitting the owner of reserved mineral rights acquired in January, 1967, to hold such rights indefinitely, whether or not he records a statement of his ownership.

For the foregoing reasons, even without considering some of the other constitutional problems involved, it is my conclusion that Bill 334, S., if enacted, would not create a valid law.

EWW

Water Quality—Water Pollution—The committee on water pollution has no power to establish water quality criteria for surface waters within Wisconsin. If such power did exist, the constitutionality of the delegation of such power would be doubtful.

October 25, 1965

THEODORE F. WISNIEWSKI
Director, Committee on Water Pollution

You ask my opinion on these questions:

(1) Is the Committee on Water Pollution authorized to establish water quality criteria for surface waters within the jurisdiction of the state?

(2) If the Committee has such authority, is it required to set uniform standards applicable to all surface waters in the state or may it set different standards for different streams?

It is my opinion that the first of such questions must be answered "No", so the second need not be answered.

As you well know, the committee on water pollution is a creature of statute. See sec. 144.52. As such, it possesses only those powers expressly conferred upon it by statute, or powers necessarily implied from those expressly conferred. *American Brass Co. v. State Board of Health,* (1944) 245 Wis. 440, 448; *Nekoosa-Edwards P. Co. v. Public Serv. Comm.,* (1959) 8 Wis. 2d 582, 593. Any power sought to be exercised by an administrative agency "must be found within the four corners of the statute under which the agency proceeds". *American Bross Co., supra.* at p. 448.

The statutes under which the committee proceeds clearly contain no express grant of power to that agency to establish water quality criteria for surface waters within the jurisdiction of the state. If such power were to exist, it would therefore be a power necessarily implied from one expressly granted to the committee. It is my opinion that the powers expressly granted to the committee do not by implication confer the power to create water quality criteria for surface waters.

In my judgment, there are only two express grants of power to the committee which need or can be considered as possibly implying existence of the above-mentioned power. They are found in secs. 144.53 (1), and 144.53 (4).

Sec. 144.53 (1) empowers the committee, "To exercise general supervision over the administration and enforcement of all laws relating to the pollution of the surface waters of the state". This is plainly a grant of general power to the committee to supervise administration and enforcement of certain specified laws, including administrative rules, which have the effect of law; but manifestly this grant of supervisory power does not, necessarily or otherwise, imply a power in the committee to engage in a certain

kind of rule-making, namely, the creating of water quality criteria or standards for surface waters. The administration and enforcement of such criteria or standards, as rules, would be subject to the committee's supervision under sec. 144.53 (1); but that they would be so certainly implies no power in the committee to create such criteria.

Sec. 144.53 (4) empowers the committee, "To issue general orders, and adopt rules and regulations applicable throughout the state for the installation, use and operation of practicable and available systems, methods and means for controlling the pollution of the surface waters of the state through industrial wastes, refuse and other wastes." This statute expressly grants a rule-making power, but it is clearly not the power to create rules in the form of water quality criteria for surface waters. It might be argued that such criteria are "methods" or "means" for controlling pollution of surface waters, and therefore that their creation is authorized by sec. 144.53 (4). Such argument, however, would ignore the fact that the "methods" and "means" referred to in such statute (together with "systems") are things installed, used, and operated, not mere standards or cirteria. Sec. 144.53 (4) does not grant the committee a power to make rules with reference to systems, methods and means for controlling the pollution of the surface waters of the state through industrial wastes, refuse, and other wastes. Instead, it confers on the committee the power to adopt rules "for the *installation, use, and operation* of practicable and available *systems, methods and means*" to effect the above-mentioned control. Clearly, such power does not embrace a water quality criteria-creating power, nor is such latter power in any sense implied by the language of sec. 144.53 (4), quoted above.

In conclusion, it is my opinion that no power exists in the committee to establish water quality criteria for surface waters within the jurisdiction of this state. Further, it is my opinion that if such power could be said to exist, it is highly doubtful that there can be found in the statutes relating to the committee the standards or guides essential to

the constitutionality of a delegation of such power to the committee.

No doubt you are aware of the recent enactment of The Water Quality Act of 1965 (Public Law 89-234), approved by the President on October 2, 1965, and going into effect that day. It amends the Federal Water Pollution Control Act, and among other things provides for the establishment of water quality criteria applicable to interstate waters or portions thereof within the several states. Such criteria and the plan for their implementation and enforcement adopted by a state shall be the water quality standards applicable to the interstate waters or portions thereof within that state if its governor or state water pollution control agency files within one year from enactment of the above-mentioned act a letter of intent that the state, after public hearings, will adopt such criteria and such a plan before June 30, 1967, and if the secretary of health, education and welfare determines that the criteria and plan are consistent with the purposes for which standards are to be established. If a state does not file a letter of intent or does not establish satisfactory standards, or if the secretary or a governor desires a revision in the standards, the secretary may, after reasonable notice and a conference of federal, state, interstate agency, municipal, and industry representatives, prepare a regulation setting forth standards of water quality to be applicable to interstate waters or portions thereof. If, within 6 months after the secretary has published the regulations, the state has not adopted satisfactory standards, or if the governor of an affected state has not petitioned the secretary for a hearing, the secretary shall promulgate the standards.

In view of my foregoing opinion and the above-mentioned provisions of the Water Quality Act of 1965, it is clear that in the best interests of the state of Wisconsin legislation is needed — and needed soon — empowering the committee on water pollution, the state board of health, or both, acting jointly, to adopt the water quality criteria contemplated by such act before June 30, 1967. It seems to me highly desirable that such legislation be enacted at some time substan-

tially prior to the expiration of the one-year period for filing of the letter of intent referred to in such act, so that the governor or water pollution control agency filing such letter for Wisconsin can do so knowing that a statute empowers the agency or agencies possessed of the expertise necessary for the formulation of sound and scientific water quality criteria to formulate and adopt them.

JHM

Obscene Material—Constitutionality—Sub. amend. 1, A., to sub. amend. 3, S., to Bill 102, S., if enacted into law would be an unconstitutional abridgment of the rights granted by the first and fourteenth amendments to the U. S. Const.

November 2, 1965

THE HONORABLE, THE ASSEMBLY

By Assembly Resolution 27 you have requested my opinion as follows:

"Resolved by the assembly, That the Attorney General be and he is hereby requested to render to the assembly at his earliest convenience, his official opinion on the constitutionality of Senate Bill 102 (as shown by Substitute Amendment 3, S.) as adopted and passed in the senate and messaged to the assembly."

Sec. 3 of the amendment would create secs. 947.09 to 947.095 of which sec. 947.09 (2) (a) reads:

"(2) **Penalty.** (a) Whoever wilfully or knowingly sells, lends, gives away or distributes to any person under the age of 18 any lewd, lascivious, pornographic, obscene or indecent motion picture, still picture or photograph, or any article of indecent or immoral use, or any book, pocket book, pamphlet or magazine, the cover or content of which expoits, is devoted to or is principally made up of descriptions of illicit sex or sexual immorality, or which is obscene, lewd,

lascivious, pornographic or indecent, or which consists of pictures of nude or partially denuded figures posed or presented in a manner to provoke or arouse lust or passion or to exploit sex, lust or perversion or which advertises services, facilities or articles for sexual deviation shall be fined not more than $2,000 or imprisoned not more than 2 years or both."

There is pending in the assembly Substitute Amendment 1, A., to Bill 102, S. This amendment makes several changes in the language of the bill as passed by the senate, and these changes will be discussed where applicable.

I. Existing Statutes

Before discussing the merits of Bill 102, S., I must point out that in my opinion we have existing obscenity laws which have been upheld by our courts, and which provide much stricter penalties for dissemination of obscene material to persons under the age of 18 than does the proposed bill.

Sec. 944.21 provides in part:

"(1) Whoever intentionally does any of the following may be fined not more than $5,000 or imprisoned not more than 5 years or both:

"(a) Imports, prints, advertises, sells, has in his possession for sale, or publishes, exhibits, or transfers commercially any lewd, obscene or indecent written matter, picture, sound recording, or film; or

"(b) Has in his possession any lewd, obscene or indecent sound recording or motion picture film; or

"(c) Has in his possession, with intent to transfer or exhibit to a person under the age of 18 years, any matter prohibited by this section; or

"(d) Advertises, produces or performs in any lewd, obscene or indecent performance."

Passage of the bill in its present form would confuse the law dealing with possession and dissemination of obscene material.

This opinion recognizes the following accepted and well settled rules: The attorney general is obligated to uphold the constitutionality of proposed legislation where it is possible to do so; where the language is susceptible to more than one interpretation the language must be construed to reach an opinion of constitutionality; in matters of policy the judgment and discretion of the legislature is to be given deference; and the sole criterion is the constitutionality of the proposed legislation and not its wisdom.

Freedom of speech and press is guaranteed to all citizens by the first and fourteenth amendments of the United States constitution. On the other hand, obscenity and obscene materials are not within the protections and rights granted by these amendments. *Roth v. United States,* (1957) 354 U. S. 476, 485, 77 S.Ct. 1304, 1309, 1 L.ed. 2d 1498.

II. **The Definition of Obscenity**

Manifestly, what is not "obscene" is protected, and the determinative question is whether the material is "obscene".

The most concise statement of the test to be applied in determining whether or not given material is obscene is found in *Roth v. United States,* supra, 77 S.Ct. at 1311:

" * * * whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. The Hicklin test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity."

The following pronouncements of the court in the *Roth* case, supra, are also important to our discussion:

"All ideas having even the slightest redeeming social importance * * * have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history

of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. * * *" (77 S.Ct. 1309.)

"However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. * * *" (77 S.Ct. 1310.)

The court then stated in a footnote at 77 S.Ct. 1311:

"We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I., Model Penal Code, § 207.10(2) (Tent. Draft No. 6, 1957), viz.:

" '* * * A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. * * *' See comment, id., at 10, and the discussion at page 29 et seq."

In *Manual Enterprises v. Day,* (1962) 370 U.S. 478, 82 S. Ct. 1432, 1434, 1436, 8 L.ed 2d 639, the court clarified the elements of the test when it stated:

" * * * These magazines cannot be deemed so offensive on their face as to affront current community standards of decency—a quality that we shall hereafter refer to as 'patent offensiveness' or 'indecency.' Lacking that quality, the magazines cannot be deemed legally 'obscene,' and we need not consider the question of the proper 'audience' by which their 'prurient interest' appeal should be judged." (82 S.Ct. 1434.)

"The Court of Appeals was mistaken in considering that Roth made 'prurient interest' appeal the sole test of obscenity. Reading that case as dispensing with the requisite of patently offensive portrayal would be not only inconsistent with § 1461 and its common-law background, but out of keeping with Roth's evident purpose to tighten obscenity standards. The Court there both rejected the 'isolated excerpt' and 'particularly susceptible persons' tests of the

Hicklin case * * * and was at pains to point out that not all portrayals of sex could be reached by obscenity laws but only those treating that subject 'in a manner appealing to prurient interest.' * * *" (82 S.Ct. 1436.)

In *State v. Chobot,* (1960) 12 Wis. 2d 110, 106 N.W. 2d 286; App. Dism. 368 U.S. 15, 82 S.Ct. 136, 7 L.ed 2d 85; Reh. Den. 368 U.S. 936, 82 S.Ct. 136, 7 L.ed 2d 85, the Wisconsin supreme court affirmed a conviction for violation of sec. 944.21 (1) (a), and defined the statutory word "obscene" in the statute as the equivalent of the definition stated by the United States supreme court in the *Roth* case and held that the statute did not violate the state constitutional guarantee of freedom of speech, writing and publication contained in Art. I, sec. 3, Wis. Const.

The Wisconsin supreme court was again faced with interpretation of the *Roth* test in *McCauley v. Tropic of Cancer,* (1963) 20 Wis. 2d 134, 121 N.W. 2d 545, and there held that the true test of obscenity is whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. The question of whether the material is "obscene" is to be answered by the process of identifying the dominant theme and the degree of its appeal to prurient interest. Before material can be held "obscene", however, it must be found both to appeal to prurient interest and to be patently offensive.

The court emphasized that it must balance the purposes, artistic quality or ideas of the work's dominant theme against the degree of prurient interest appearing, and noted that where the purpose is serious the scales would not readily tip toward a finding of "obscenity."

The court noted that the decisions of the United States supreme court were binding on the Wisconsin court on the question of whether the legislature violates the fourteenth amendment in suppressing material as "obscene", but that these decisions were only persuasive on the meaning of the term "obscene" in the Wisconsin statutes. The court also stated that a state may permit greater freedom of speech and press than the fourteenth amendment would require.

III. **The Constitutionality of Proposed Sec. 947.09 (2) (a), Stats.**

The proposed sec. 947.09 (2) (a) is the penalty portion of the bill, and because of its length will be considered here on a piecemeal basis.

(A) **The ban on material which is "devoted to or is principally made up of descriptions of illicit sex or sexual immorality."**

The first question is whether the provision which prohibits the sale of published matter

" * * * the cover or content of which exploits, is devoted to or is principally made up of descriptions of illicit sex or sexual immorality, or which is obscene, lewd, lascivious, pornographic or indecent * * *."

is in violation of the first amendment as an abridgment of the freedoms of speech and press. An ancillary question is whether the phrase violates the due process clause of the fourteenth amendment on the ground of vagueness.

Section 484-h of the New York Penal Law, ch. 40, contained identical language to proposed section 947.09 (2) (a), quoted above. In *People v. The Bookcase, Inc.*, (1964) 14 N.Y. 2d 409, 417-418, 252 N.Y.S. 2d 433, 201 N.E. 2d 14, 18-19, the New York Court of Appeals held that statute unconstitutional and stated in part:

"The issue shapes itself into whether the Legislature can constitutionally restrict the sale, circulation or exhibition of pictures or printed material to minors under 18 years, for the reason that it is principally devoted to the subjects of illicit sex or sexual immorality. These words are either too vague to apprise possible defendants of what they mean, or, if they are to be interpreted as referring exclusively to extra-marital sex or sexual perversion, then they would forbid all publications or pictures mainly devoted to those subjects, regardless of the manner in which they are presented, whether by way of fiction, sociological discussion, moralizing, or otherwise. The Oedipus legend is classic Greek drama would be forbidden because it is principally devoted to in-

cest, the Tristan and Isolde legend and Hawthorne's 'Scarlet Letter' would be illicit reading for the young because it is principally made up of adultery, Bernard Shaw's 'Mrs. Warren's Profession' would be outlawed for obvious reasons, as well as all writings dealing with homosexuality. Such a list could be extended almost indefinitely. * * * It seems to us that this statute is drawn so broadly as to render criminal sales or other exhibition to the young of pictures and publications of all kinds which are principally devoted to these subjects, in however serious or dignified a manner, and in our view, it is so broad and so obscure in its coverage as to abridge the constitutionally protected freedom of speech and of the press as well as the due process clauses in the Federal and State Contitutions."

In *State v. Settle,* (1959) 90 R.I. 195, 156 A. 2d 921, 923, the Rhode Island court considered section 11-31-10 of the Rhode Island General Laws (1956), which read in part:

" 'Every person who shall wilfully or knowingly sell, lend, give away, show, advertise for sale or distribute commercially to any person under the age of eighteen (18) years * * * any book, * * * the cover or content of which exploits, is devoted to, or is principally made up of descriptions of illicit sex or sexual immorality *or which is obscene, lewd, lascivious, or indecent, or which consists of pictures of nude or partially denuded figures posed or presented in a manner to provoke or arouse lust or passion or to exploit sex, lust or perversion for commercial gain* * * *." (Emphasis added.)

The defendant in the *Settle* case contended that the underscored phrase was unconstitutionally vague and violative of the first and fourteenth amendments to the United States constitution. The court held the phrase constitutional on the ground that the words "lewd", "lascivious", and "indecent" were but synonyms of "obscene" citing *Swearingen v. United States,* (1896) 161 U.S. 446, 16 S.Ct. 562, 40 L.ed. 765, and held that the alternatives were nothing more than examples of what is obscene, lewd, lascivious, and indecent and were to a degree explanatory of the words used earlier. However, it does not appear that the court considered the appropriateness of the test. In the case of *State v. Chobot,* (1960) 12

Wis. 2d 110, 106 N.W. 2d 286, the Wisconsin court held that the words "lewd, obscene, or indecent' used in sec. 944.21 (1) (a) were not unconstitutionally indefinite. Mr. Justice Murphy, speaking for the majority in *Thornhill v. State of Alabama,* (1940) 310 U.S. 88, 101-102, 60 S.Ct. 736, 744, 84 L.ed. 1093, discussed the essence of the constitutional guarantees of free speech and a free press. In the *Roth* case the court quoted from *Thornhill v. Alabama* with approval, as follows:

" 'The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully *all matters of public concern* without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for *information and education with respect to the significant issues of the times.* * * * Freedom of discussion, if it would fulfill its historic function in this nation, must embrace *all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.*' (Emphasis added.)" 77 S.Ct. 1310-1311.

The standard is not whether a book exploits, is devoted to, or is principally made up of descriptions of illicit sex or sexual immorality. Such a standard might include material not falling within the accepted and approved standard requiring (1) patent offensiveness, and (2) an appeal to prurient interest. Under the standard contained in proposed sec. 947.09 (2), many great and commonly accepted works of art, literature and science could be deemed obscene. Clearly this is not consistent with the requirements of the first and fourteenth amendments as interpreted by the supreme court. It is my opinion, therefore, that the first quoted provision of proposed sec. 947.02 (2) is an unconstitutional infringement upon the freedoms of speech and press guaranteed by the first and fourteenth amendments to the United States constitution. *People v. The Bookcase, Inc.,* (1964) 14 N.Y. 2d 409, 252 N.Y.S. 2d 433, 201 N.E. 2d 14.

The proposed Amendment 1, A., deletes the words "cover or" from the first line of sec. 947.09 (2) (a) as appearing in the quoted excerpt above (page 3, line 15 of the senate bill). While this deletion makes the proposed statutory standard clearer, it does not remove the constitutional objections to that subsection discussed above.

(B) **The ban on certain material containing nude, or partially nude figures**

Proposed subsec. 947.09 (2) (a) makes it a punishable offense for any person to transfer any publication the cover or content of which:

"* * * consists of pictures of nude or partially denuded figures posed or presented in a manner *to provoke or arouse lust or passion* * * *."

It has frequently been held that nudity is not in and of itself obscenity. *Manual Enterprises v. Day,* (1962) 370 U.S. 478, 82 S. Ct. 1432, 1438, 8 L. Ed. 2d 639, *City of Newark v. Licht,* (1964) 83 N.J. Super. 499, 200 A. 2d 508, 510; *Excellent Production, Inc. v. United States,* (CA 1st Cir. 1962) 309 F. 2d 362, *Hearn v. District of Columbia,* (Mun. Ct. App. Dist. Col. 1962) 178 A. 2d 434, 437, 94 A.L.R. 2d 1348.

The question then is whether the phrase underscored above permits the classification of a publication containing such figures as "obscene" and thus illegal. Under the holdings of the *Roth* and *Manual Enterprises* cases, the proposed standard is unlawful. The test is whether the material is "patently offensive" and has "prurient interest appeal". The test is not whether the figures are posed nude, but whether they are "obscene". Therefore, this provision must also fail as violative of the first and fourteenth amendments to the United States constitution.

Proposed Amendment 1, A, makes no change in the above-quoted language; and the constitutional objection remains.

(C) **The "under age 18" provision**

The next question is basically whether a legislature may constitutionally set one standard for dissemination of ma-

terial to adults and set a more stringent standard for dissemination of material to juveniles.

The principal case on the relation of obscenity statutes to juveniles is *Butler v. Michigan,* (1957) 352 U. S. 380, 77 S. Ct. 524, 1 L. Ed. 2d 412. Butler was convicted of violating a statute making it an offense to make available to the general public any:

"* * * obscene, immoral, lewd or lascivious prints, pictures, figures or descriptions, tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth * * *." (Michigan Penal Code, sec. 343, Comp. Laws Supp. 1954, sec. 750.343)

The United States supreme court reversed the conviction stating:

" * * * The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig. Indeed, the Solicitor General of Michigan has, with characteristic candor, advised the Court that Michigan has a statute specifically designed to protect its children against obscene matter 'tending to the corruption of the morals of youth.' But the appellant was not convicted for violating this statute.

"We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society. We are constrained to reverse this conviction." *Butler v. Michigan* (1957) 352 U. S. 380, 383-384, 77 S. Ct. 524, 525-526, 1 L. ed. 2d 412. (Footnotes omitted.)

The conclusion from the *Butler* case is that a criminal statute proscribing the sale to the general public of mater-

ials "tending to the corruption of the morals of youth", but not obscene by appropriate standards of the adult community, is unconstitutional as violative of the due process clause of the fourteenth amendment.

This case is distinguishable from Amendment 3, S., to Bill 102, S., since the statute there involved made it a criminal offense to sell to *any person,* even an adult, publications which tended "to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of youth". Amendment 3, S., to Bill 102, S., prohibits dissemination to persons under 18 years of age. The rationale of the *Butler* case is that the statute unduly restricted the adult population in what they could read. This element is not present in Amendment 3, S., for there the restriction bears only upon dissemination, and not upon the test itself. In my opinion the amendment is not unconstitutional on that ground. Proposed Amendment 1, A, makes no significant change in the age provisions, and therefore the opinion expressed thereon is not altered by this amendment.

(D) Indefiniteness of "indecent or immoral use"

The next question is whether sec. 947.09 (2) (a) is a violation of due process of law on the grounds of indefiniteness. Sec. 947.09 (2) (a) prohibits the dissemination of:

" * * * any article of indecent or immoral use, or any book, * * * which advertises services, facilities or articles for sexual deviation * * *."

In *State v. Arnold,* (1935) 217 Wis. 340, 344, 258 N.W. 843, the court quoted the following general rule found in *Connally v. General Construction Co.,* (1926) 269 U.S. 385, 46 S. Ct. 126, 70 L. ed. 322:

" ' * * * a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' "

The court then continued that if, by construction, a practical or sensible meaning may be given to the act, it is not

void for uncertainty. The proposed section must be presumed valid until the violation is shown beyond reasonable doubt.

In 16 Am. Jur. 2d Constitutional Law, sec. 552, pages 952-954, it is stated that:

"The due process requirement of definiteness is especially important in its application to penal and criminal statutes. The legislature, in the exercise of its power to declare what shall constitute a crime or punishable offense, must inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain, understandable rule of conduct and know what acts it is his duty to avoid. The constitutional vice in a vague or indefinite statute is the injustice to the accused in placing him on trial for an offense of whose nature he was given no fair warning."

In *State v. Givens,* (1965) 28 Wis. 2d 109, 117, 135 N.W. 2d 780, 784, the court stated:

"The fact that a statute fails to itemize with particularity every possible kind of conduct which would violate such statute does not make it constitutionally vague. * * *"

The opinion in the *Givens* case also noted the comment of Mr. Justice Holmes in *U.S. v. Wurzbach,* (1930) 280 U.S. 396, 399, 50 S. Ct. 167, 169, 74 L. Ed. 508, that:

" * * * 'Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk.' "

The problem becomes one of semantics. The word "article" is used in proposed sec. 947.09 (2) in the following phrases:

(1) " * * * any article of indecent or immoral use * * *"

(2) "* * * articles for sexual deviation * * *"

The word "article" may have several different meanings. If the term "article" in the phrase "article of indecent or immoral use" means non-printed objects or devices, then it

is clear that the phrase is unconstitutionally vague, for human ingenuity might well devise immoral or indecent uses for almost any object. The phrase might even include clothing, and it is reasonable to conclude that a person subjected to the statute would not contemplate clothing as within a pornography statute.

In proposed sec. 947.09 (1) the legislature declares that the publication and the sale, distribution or exhibition of books, magazines or other printed matter specified in sec. 947.09 (2) has certain effects on persons under 18 years of age. It is clear that the intent was to proscribe and prohibit the dissemination of printed material only. The amendment to Bill 102, S., offered by the assembly omits the phrase "or any article of indecent or immoral use" contained in line 14, page 3, of the bill as passed by the senate. This deletion obviates this need for interpretation.

It is my opinion that with the *Roth-Manual* standard of obscenity implied in the phrase "indecent or immoral", that phrase alone is not an unconstitutional abridgment of the first amendment to the United States constitution nor of Art. I, sec. 8, Wis. Const.

It is, however, my opinion that the phrase

" * * * which advertise services, facilities, or articles for sexual deviation * * *."

is unconstitutionally vague on two grounds: (1) the word "article" cannot be reasonably construed to mean "printed matter" and therefore does not give adequate notice to persons subjected to this provision of this pornography statute; and (2) the term "sexual deviation" does not have a definite and ascertainable meaning. Therefore, the proposed statute is a violation of the due process clause of the fourteenth amendment to the federal constitution. The amendment proposed by the assembly makes no change in the above quoted phrase, and thus does not cure the constitutional objection.

IV. Definition of "knowingly" in proposed sec. 947.09 (2) (b)

The next question is presented by proposed sec. 947.09 (2) (b) which reads:

"(b) In this section 'knowingly' means having knowledge of the character and content of the publication or failure on notice to exercise reasonable inspection which would disclose the content and character of such publication."

The question is whether the subsection violates the constitutional requirement of "scienter" — or actual knowledge; that is, whether a person may be convicted of a violation of an obscenity statute when he did not have specific knowledge of the contents of the obscene material.

Although the practice is not universal, the majority of courts have implied the element of scienter in obscenity statutes and have held the statutes constitutional even where the element was lacking on the face of the statutes. See for example: *State v. Andrews,* (1962) 150 Conn. 92, 186 A. 2d 546, *State v. Locks,* (1962) 91 Ariz. 394, 372 P. 2d 724, *State v. Hudson County News Co.,* (1963) 41 N.J. 247, 196 A. 2d 225. *State v. Roufa, supra. People v. Finkelstein,* (1961) 9 N.Y. 2d 342, 214 N.Y.S. 2d 363, 174 N.E. 2d 470, *Cohen v. State,* (Fla. 1961) 125 So. 2d 560, *State v. Jackson,* (1960) 244 Or. 337, 356 P. 2d 495, *Demetropolos v. Commonwealth,* (1961) 342 Mass. 658, 175 N.E. 2d 259. *State v. Oman, supra.*

In *State v. Hudson County News Co., supra,* the court said:

"Actual knowledge of the contents of the material is not the *sine qua non* to establish *scienter.* Otherwise, a bookseller need only close his eyes to the material he handles to avoid prosecution under an obscenity statute. * * * " Id, 196 A. 2d at 231. Emphasis in original.

See also *State v. Cercone,* (1963) 2 Conn. Cir. 144, 196 A. 2d 439, 445, and *People v. Sikora,* (1965) 32 Ill. 2d 260, 204 N.E. 2d 768, 772.

In *Smith v. California,* (1959) 361 U.S. 147, 154, 80 S. Ct. 215, 219, 4 L. ed. 2d 205, 212, the court held unconstitutional a city ordinance prohibiting the keeping of obscene material on the grounds that as construed by the state court it lacked the element of scienter. Mr. Justice Brennan indicated in the opinion that there may be circumstances under which a bookseller may be required to investigate material in his control or explain his failure to do so.

Mr. Justice Frankfurter, concurring in the *Smith* case, said (80 S. Ct. at 224-225):

"A bookseller may, of course, be well aware of the nature of a book and its appeal without * * * having knowledge of the book." *Id.,* 361 U.S. 164, 165, 80 S. Ct. 224, 225, 4 L. ed. 2d 215, 217.

The 1962 proposed official draft of the Model Penal Code, sec. 251.4 (2) provides:

"A person who disseminates or possesses obscene material in the course of his business is *presumed* to do so knowingly or recklessly." (Emphasis supplied).

In *State v. Chobot,* (1960) 12 Wis. 2d 110, 106 N.W. 2d 286, app. dism. 368 U.S. 15, 82 S. Ct. 136, 7 L. Ed. 2d 85, the defendant contended that he could not be found guilty of possessing obscene literature if he did not have knowledge of the contents, and cited *Smith v. California,* supra. The defendant testified that he had looked at the covers and paged through the magazines but did not read them. The trial court was of the opinion that even the most cursory examination of the material would have made him aware of the contents, and the supreme court agreed. Thus it may be concluded that the Wisconsin supreme court has implied the element of scienter and will not require absolute knowledge.

It is my opinion that proposed sec. 947.09 (2) (b), if enacted into law, would not be unconstitutional for a lack of the element of scienter.

Amendment 1, A, would eliminate everything following the first use of the word "publication" in proposed sec. 947.09 (2) (b). The change strengthens the subsection inso-

far as any objection to its constitutionality is concerned, and it does not alter my opinion.

V. **The "U.S. Postal Regulations" Provision**

Proposed 947.093 (1), provides:

"It is unlawful to send or receive by any public or commercial vehicle or conveyance, within this state, any matter which is unmailable under U.S. postal regulations because it is deemed obscene, lewd, lascivious or filthy."

This subsection presents two questions: Whether it is a valid incorporation by reference of the law of another government; whether it is a proper delegation of legislative power.

In 16 C.J.S., Constitutional Law, sec. 133 (b) at pages 563-564, it is said that:

"The state legislatures may not delegate their sovereign powers to the federal government. While a statute is valid which adopts existing statutes, rules, or regulations of congress by reference, an attempt to make future regulations of congress part of the state law is generally held to be unconstitutional."

In 16 Am. Jur. 2d Constitutional Law, sec. 240, pages 491-492, it is said that:

"Since under the doctrine of separation of powers of government the law making function is assigned exclusively to the legislature, it is a cardinal principle of representative government * * *, that except when authorized by the constitution * * * the legislature cannot delegate the power to make laws to any other authority or body. The legislature may not in any degree abdicate its power; it may not make the effectiveness of a specific act dependent upon the will of another whether in form or effect. Any attempt to abdicate legislative power in any particular field, although valid in form, is unconstitutional and void."

Citing:

In re Incorporation of Village of North Milwaukee, (1896) 93 Wis. 616, 67 N.W. 1033;

Dowling v. Lancashire Ins. Co., (1896) 92 Wis. 63, 65 N.W. 738;

State ex rel. Adams v. Burdge, (1897) 95 Wis. 390, 70 N.W. 347;

State ex rel. Mueller v. Thompson, (1912) 149 Wis. 488, 137 N.W. 20;

Milwaukee v. Sewerage Comm., (1954) 268 Wis. 342 67 N.W. 2d 624.

Art. IV, sec. 1, Wis. Const. provides:

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

In the case of *Milwaukee v. Sewerage Commission,* (1954) 268 Wis. 342, 350-351, 67 N.W. 2d 624, 629, the court set out the following rules:

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

"* * *

"* * * The true test and distinction whether a power is strictly legislative, or whether it is administrative and merely relates to the execution of the statutory law, is be-

tween the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done. To the latter, no valid objection can be made. *State ex rel. Adams v. Burdge* (1897), 95 Wis. 390, 70 N. W. 347; *State ex rel. Buell v. Frear* (1911), 146 Wis. 291, 131 N. W. 832. * * *"

In *State v. Wakeen,* (1953) 263 Wis. 401, 57 N.W. 2d 364, the defendant had sold aspirin, milk of magnesia and camphorated oil and was convicted in the county court of violating sec. 151.04 (1951) which prohibited the sale of "drugs" by other than registered pharmacists. The circuit court held that the statute was an unconstitutional delegation of legislative power on the grounds that the statute defined "drugs" in terms of recognition in two official pharmacopoeias. The Wisconsin supreme court reversed the circuit court on the appeal, stating at pages 407-408:

"* * * This court has recognized also the rule that the legislature may enact a statute, the operation of which is dependent on the happening of a contingency fixed therein, and that such contingency may consist of the determination of some fact, even if said fact is determined by private individuals. * * *"

The term "drug" was defined by sec. 151.06 (1951) in four alternative ways, one of which was articles recognized in the two pharmacopoeias.

In reversing the lower court the supreme court took note of the fact that the term was defined in the alternative.

"* * * In the present case we have a complete act of the legislature which was not, at the time of its passage, dependent on the act of any other person or organization. * * * (p. 411)"

The circuit court relied on *State ex rel. Wisconsin Inspection Bureau v. Whitman,* (1928) 196 Wis. 472, 220 N.W. 929, and *Gibson Auto Co. v. Finnegan,* (1935) 217 Wis. 401, 259 N.W. 420. The Wisconsin supreme court said of these cases, at p. 412:

"* * * These cases and the others cited are clearly distinguishable as to the facts and as to the law. Nothing we have said herein will conflict in any way with what was said in those cases. *We are here dealing with an entirely different rule.*" (Emphasis supplied)

In both 50 OAG 107, 111 and 50 OAG 117, 120, the case of *State v. Wakeen,* supra, was distinguished from the general rule that incorporation by reference of prospective federal legislation, or federal administrative rules thereafter to be passed is an unconstitutional delegation of legislative power on the grounds that the case was concerned with the establishment of *standards* by reference.

I affirm those prior opinions of this office which have distinguished this case on the grounds that it is concerned with the establishment of standards by reference. 50 OAG 107, 111, 50 OAG 117, 120. See also *State v. Urquhart,* (1957) 50 Wash. 131, 310 P. 2d 261; *Dawson v. Hamilton,* (Ky. 1958), 314 S.W. 2d 532.

Proposed sec. 947.093 (1), refers only to "U.S. Postal Regulations", does not identify them, does not set their provisions out in detail, and does not provide for their publication. Sec. 947.093 (1) does not inform or give the public notice of the regulations to which they must conform their conduct. In addition proposed sec. 947.093 (1) could subject to liability a recipient of obscene materials delivered by a public or commercial vehicle even though that person did not request the delivery.

It is my opinion that proposed sec. 947.093 (1) violates Art. VII, sec. 21, Wis. Const. The amendment proposed by the assembly retains proposed sec. 947.093 in its entirety, and is, therefore, subject to the same constitutional objection.

VI. *Conclusion*

In determining the constitutionality or unconstitutionality of a law, we must be guided not by emotion or personal feelings, but by the law of the land as expressed in our statute books and court decisions.

No one is required to purchase so-called "obscene" materials as a result of this opinion, nor is anyone obliged to let his teenage children read such works. All we say here is what the law requires us to say. Our existing obscenity laws, which have been upheld by the courts, provide stricter penalties than those proposed by the bill under discussion, and I doubt whether the ends sought by this bill would be served by weakening the penalty now applicable for one who distributes obscene matter to persons under the age of 18. See sec. 944.21.

The proposed sec. 947.09 (2) is the heart of Bill 102, S., and all other portions thereof refer to and are dependent upon said proposed section. Because it is my opinion that proposed sec. 947.09 (2) is unconstitutional, it follows that the entire bill must fail, and it becomes unnecessary to discuss the other portions individually.

For the reasons stated above, it is my opinion that Bill 102, S., as amended, would be unconstitutional if enacted into law.

BCL:JHB:WFE:

Land Contract—Banks—Generally, under secs. 221.04 (1) and 221.14, a state bank may not purchase and hold the vendor's interest in a land contract for investment purposes. Exceptions in secs. 219.01 and 219.03 discussed.

November 8, 1965

WILLIAM E. NUESSE
Commissioner of Banks

You inquire whether a state bank may, under powers granted in secs. 221.04 (1) and 221.14, purchase and hold as an investment the vendor's interest in a land contract where said vendor possesses legal title in fee to the real estate covered by the contract. The vendor would assign the

land contract to the bank and would convey title to the premises to the bank on purchase.

You have advised that pursuant to long standing administrative interpretation of these statutes, banking commissioners have not permitted state banks to acquire such an interest.

The answer to your question is in the negative. For reasons hereinafter discussed such interest could be acquired where it amounted to an advance of credit insured by the federal housing administrator or was an evidence of indebtedness guaranteed by the administrator of veterans' affairs of the United States veterans' administration. See secs. 219.01 (2), (4) and 219.03.

Sec. 221.14 strictly limits the purposes for which a bank may purchase real estate and provides that any real estate acquired in satisfaction of debts previously contracted or purchased at sale on judgments, decrees or mortgage foreclosures under securities held by it should not be held for a longer time than five years.

Sec. 221.04 is the general grant of powers section relating to state banks, and subsec. (1) (f) provides in part:

"To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be usual and necessary to carry on the business of banking; *by buying, discounting, and negotiating* promissory notes, bonds, drafts, bills of exchange, foreign and domestic, *and other evidences of debt;* by buying and selling coin and bullion; by receiving commercial and savings deposits under such regulations as it may establish; by buying and selling exchange, and by loans on personal and real security as hereafter provided; * * *"

It can be argued that the bank would not be purchasing real estate, but an evidence of a debt because a contract for the sale of land operates as an equitable conversion. The vendee's interest under the contract becomes realty and the vendor's interest constitues personalty. 55 Am. Jur. 782. However, whereas the purchaser is the equitable owner of

the land, he does not have legal title. The legal title is held by the vendor in trust. 55 Am. Jur. 781, *Security State Bank v. Monona Golf Club,* (1934) 213 Wis. 581, 252 N.W. 287.

At 10 Am. Jur. 2d 250, 251, it is stated:

"It is generally beyond the powers of banks to engage in the business of buying, developing, and selling real estate beyond the extent to which real estate transactions are necessary to enable a bank to protect itself against loss on loans made by it. Among the many statutory regulations and restrictions placed upon banking corporations are almost always to be found restrictions upon the acquisition and conveyance of real estate. The purpose of these provisions is to prevent speculation in real estate by banks. * * *"

It is held elsewhere that a bank may take an assignment, from a vendor of real estate of the purchaser's agreement to pay the purchase money, where the taking of such assignment is necessary to secure a debt previously contracted. 10 Am. Jur. 2d 254.

The *Security State Bank case, supra* seems to assume that a bank may take an assignment of the vendee's interest in a land contract as security for a loan. We are not concerned with a loan here, however, but with the question of a bank's authority to purchase the vendor's interest as an investment. I am of the opinion that such interest includes an interest in real estate as that term is used in sec. 221.14, and since such purchase is not specifically permitted by some other section of the statutes, is improper.

This conclusion is in line with long standing administrative interpretation of the statutes involved. Such long continued practical construction of a statute is entitled to great weight in determining the meaning of the law.

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

State v. Fisher, (1962) 17 Wis. 2d 141, 115 N.W. 2d 553.

If a change in such administrative practice is to be made, legislative clarification should be sought.

You state that the United States veterans' administration has taken over many home properties in Wisconsin and is selling these properties and wishes to sell these land contracts to state banks with a guaranty that if such contracts go into default the administration would repurchase them from the bank. The administration does not give the bank a deed to the property at the time of purchase but agrees to execute a deed to the purchasing bank or in favor of the vendee under the contract at any time notice is given by the holding bank to the administration.

You inquire whether the provisions of sec. 219.01 (4) would permit a state bank to purchase and hold a land contract under the above set of facts.

Sec. 219.01 provides in part:

"**Loans, advances of credit, investment in securities, insured under National Housing Act, authorized or guaranteed by veterans' administration or insured by secretary of agriculture through farmers home administration (Title I Bankhead-Jones Farm Tenant Act as Amended).** Credit unions, savings and loan associations, investment associations, state banks, savings banks, trust company banks, land mortgage associations, insurance corporations, including life companies, and fraternal benefit societies, executors, guardians, trustees, administrators, and other fiduciaries, except where it is contrary to the will or other instrument of trust, the state of Wisconsin and its agencies and its municipalities, districts, and other subdivisions, and all institutions and agencies thereof, and all other persons, associations, and corporations, subject to the laws of this state, are authorized:

"* * *

"(4) To invest their funds and moneys in their custody or possession (which are eligible for investment and which they are by law permitted or required to invest) in notes, bonds or other forms of evidence of indebtedness guaranteed by the administrator of veterans' affairs of the United States veterans' administration or otherwise guaranteed or secured under service men's readjustment act of 1944, United States

Public Law 346, 78th Congress, and acts amendatory thereof and supplemental thereto."

The evidence of the vendor's interest, the land contract, is a form of an evidence of indebtedness of the vendee, and *if the same is guaranteed* by the administrator of veterans' affairs of the United States veterans' administration, a state bank may invest its funds in the same by purchase. The guaranty in your statement of facts would appear sufficient; however, it is the primary responsibility of the bank to secure an adequate guaranty in each case.

Sec. 219.03 provides:

"Restrictions upon loans, security, interest rates, etc. not applicable. No law of this state requiring security upon which loans or investments may be made, or limiting the amount of the loan to any stated proportion of the value of the security, or prescribing the nature, amount or form of such security, or prescribing or limiting interest rates upon loans or investments, or prescribing or limiting the period for which loans or investments may be made, or prescribing or limiting periodical instalment payments upon loans or securities, or prescribing or limiting the right to buy, sell, have serviced or assign such loans or investments and the security given therefor, shall be deemed to apply to loans or investments made pursuant to this chapter."

See 26 OAG 481 for construction to be placed on secs. 219.01 and 219.03 where there is an apparent conflict between general and specific statutes. See, also, 36 OAG 595; 44 OAG 249.

RJV

Sales Tax—Constitutionality—Sec. 77.51 (12) (b) 4, which in effect exempts from the imposition of the sales tax that portion of the purchase price of an article which is paid by trading another article of lesser value, is constitutional.

December 3, 1965

THE HONORABLE, THE ASSEMBLY

In view of pending Bill 1033, A., which proposes to amend sec. 77.51 (12) (b) 4., you have, by Assembly Resolution 38, requested my opinion as to the validity of the present provision of the statute.

The effect of sec. 77.51 (12) (b) 4. is to impose the sales tax, when an article of taxable tangible personal property is traded toward the purchase of an article of greater value, only upon the difference between the full purchase price of the new article and the amount allowed for the article traded. If, however, the customer sells the old article to a third party and pays the full purchase price of the new article in cash, the sales tax is imposed upon the full purchase price.

In my opinion the present statute is constitutional.

The legislature has broad discretion in granting exemptions or exceptions from taxation. *Hillside Transit Co. v. Larson,* (1954) 265 Wis. 568, 583, 62 N. W. 2d 722, and *Associated Hospital Service v. Milwaukee,* (1961) 13 Wis. 2d 447, 470, 109 N. W. 2d 271.

Even in the exercise of police power, where the legislative discretion in matters of classification is more restricted than is the case in the exercise of the power of taxation, I believe the classification adopted by the present sec. 77.51 (12) (b) 4. would be upheld by the courts.

In a typical purchase of an automobile, where the purchaser pays the price partly in cash and partly by trading his old vehicle, the dealer upon whom is placed the responsibility of collecting the sales tax knows the difference between the allowance on the old car and the purchase price of the new car. The dealer, without reliance upon information from other sources, can compute the sales tax which he must collect from the purchaser. If the same partial exemption or exception were to be allowed in the case of a purchaser who sells his old vehicle to a third party and then

uses the proceeds from such sale together with additional cash to purchase a new car, the dealer would be unable to determine from his own knowledge the amount upon which the sales tax should be computed. The difficulty in administration and enforcement of such law is obvious. This factor alone should be sufficient to warrant the classification which the legislature has made in enacting the present statute.

EWW

Industrial Commission—Salaries—The industrial commission has no authority under existing statutes to loan employes to, or to pay salaries of employes, of private corporations even though the corporation may serve a public purpose.

December 6, 1965

JOSEPH C. FAGAN, *Chairman*
Industrial Commission

You ask whether the industrial commission may pay the salary of the "director" of a private non-profit corporation which was formed for the purpose of promoting public safety, and whether it may pay the salary of such director's secretary. You indicate that both the director and his secretary work in the corporation's headquarters, which are separate from the quarters occupied by your commission. You do not give details as to the duties, supervision, and control of the director and his secretary, but I am assuming from the designation of the positions that control lies with the corporation, so that the employes would in contemplation of the law be its employes.

Assuming for purposes of this opinion that the public functions served by the corporation are such that the legislature might provide assistance to it under the rules of *Wisconsin Development Authority v. Dammann,* (1938) 228 Wis. 147, 277 N.W. 278, 280 N.W. 698, it does not necessari-

ly follow that the commission may provide similar assistance without statutory authorization.

The director and secretary involved in your question have previously been employes of the commission and possibly retain their civil service *status* so as to be entitled to employment by the commission. Whether the arrangement by which they are assigned to work for the corporation be regarded as a loan of state civil service employes by the commission, or as payment of salaries of employes of the corporation, the problem is still whether the legislature has given the commission authority to pay the salaries in question. By way of analogy, it would surely not be contended that the board of health, *without legislative authorization,* could assign state-paid employes from its civil service staff to the many charitable corporations which serve the public health.

The rule has long been observed in this state that administrative bodies have only such powers as the statutes expressly confer or necessarily imply. For example, the supreme court stated in *American Brass Co. v. State Board of Health,* (1944) 245 Wis. 440, 448, 15 N.W. 2d 27:

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

See, also, *Nekoosa-Edwards Paper Co. v. Public Service Comm.,* (1959) 8 Wis. 2d 582, 99 N. W. 2d 821; *South Side Roofing & Material Co. v. Ind. Comm.,* (1948) 252 Wis. 403, 31 N. W. 2d 577, and *Kelly v. Tomahawk Motor Co.,* (1932) 206 Wis. 568, 249 N. W. 141.

The question to be determined, then, is whether there is any statute which expressly or by necessary implication authorizes the industrial commission to loan employes to, or pay salaries of employes of, a private corporation.

Sec. 101.10 (1) authorizes the commission:

"(1) To employ, promote and remove deputies, clerks and other assistants as needed, to fix their compensation, and to assign to them their duties; and to appoint advisors who shall, without compensation, assist the industrial commission in the execution of its duties."

The limitation of authority to appoint advisors to those who act "without compensation" signifies that the authority of the commission to provide compensation is limited to its own "deputies, clerks and other assistants". The definitions of "appointing officer" and "employe" in sec. 16.02 (3) and (4) of the civil service statutes, contemplate that civil service employes shall be subject to the control of state personnel rather than of third parties.

You have called my attention to no statute, and I find none, which either expressly or by necessary implication authorizes the commission to loan employees to, or pay salaries of employes of private corporations.

BL

Permits—Fees—Vehicle hauling overweight loads by virtue of a special permit pursuant to 348.175 are liable for registration fee set forth in 341.25 for such permitted excess loads.

December 13, 1965

JAMES L. KARNS, *Commissioner*
Motor Vehicle Department

You have requested my opinion whether or not a permittee under sec. 348.175, hauling overweight loads of forest products, is required to register his vehicle for such permitted loads under sec. 341.25.

The answer to your question is "Yes".

A vehicle operating under a special permit issued pursuant to the provisions of sec. 348.175, for the transporting of overweight loads of forest products cut crosswise, should pay the registration fee prescribed by sec. 341.25. This fee is based on the gross weight of the vehicle which should include the special or permitted overweight load.

Sec. 348.175 provides in part:

"The transportation of peeled or unpeeled forest products cut crosswise shall not be restrcted because of gross weight limitations during the winter months when the highways are so frozen that no damage may result thereto by reason of such transportation. * * *"

This section contains no exemption from the registration fees prescribed in Ch. 341, and in the absence of any other statutory authority to the contrary, it is my opinion that sec. 341.25 governs the registration fee for vehicles operating under sec. 348.175.

Sec. 341.25 (1) (c) and (e) provide:

"(c) For each motor truck, a fee to be determined in accordance with sub. (2) on the basis of the maximum gross weight of the vehicle. Maximum gross weight shall be determined by adding together the weight in pounds of the vehicle when equipped to carry a load and the maximum load in pounds which the applicant proposes to carry on the vehicle.

"* * *

"(e) For each truck tractor, a fee to be determined in accordance with sub. (2) on the basis of the maximum combined gross weight of such truck tractor and any semi-trailer which the applicant proposes to combine with such truck tractor. The maximum combined gross weight shall in every case be determined by adding together the weight in pounds of the combination of vehicles when equipped to carry a load and the maximum load in pounds which the applicant proposes to carry on the combinations of vehicles."

These subsections set the registration fee upon the maximum gross weight of the vehicle which includes the maximum load the applicant proposes to carry.

Consequently, if the trucker proposes to increase his hauling capacity by virtue of a special permit his vehicle shoud be correspondingly licensed.

This office ruled in a 1940 opinion — 29 OAG 391 — that vehicles operating under a special permit for overweight loads should pay a registration fee based on the actual gross weight carried even though such load was in excess of permissible gross weights. This opinion was premised in part on the fact that the registration fee was based on a formula method of determination and that the legislature had not placed any ceiling on registration fees by sec. 85.01.

Under our present registration fee schedule, as contained in sec. 341.25 (2), a maximum fee of $1,000.00 based on a gross weight of 73,000 pounds is prescribed. Therefore, the motor vehicle department has no authority to collect a registration fee in excess of this sum even though an operator is carrying loads in excess of 73,000 pounds by reason of a special permit issued pursuant to sec. 348.175. However, the department can collect a registration fee based on the actual gross weight of a single or combination unit vehicle up to the maximum fee set forth in sec. 341.25, when excess loads are being transported by authority of sec. 348.175.

In conclusion, it is my understanding that at the present time the department is collecting registration fees for vehicles hauling overweight loads as permitted by secs. 348.26 and 348.27 on the actual gross weight of the vehicle. I see no reason why this same administrative practice should not apply to vehicles hauling overweight loads under sec. 348.175.

CAB

Reciprocity—Architects—Discussion of the rules and regulations governing the issuance of certificates of registration to architects on the basis of reciprocity.

December 14, 1965

C. F. HURC, *Secretary*
Registration Board of Architects
and Professional Engineers

Your letter requests my opinion on several questions involving the powers and duties of the registration board of architects and professional engineers and more specifically the architectural division thereof. These concern the application for and issuance of certificates of registration to architects on the basis of reciprocity.

Sec. 101.31 (11) (a) and (b) provide:

"(11) CERTIFICATE OF REGISTRATION OR RECORD; PERMIT; RECIPROCITY PROVISIONS. (a) The board may, upon application therefor, and the payment of the required fee, issue a certificate of registration as an architect, or as a professional engineer to any person who holds an unexpired certificate of similar registration issued to him by the proper authority in any state or territory or possession of the United States or in any country in which the requirements for the registration of architects, or of professional engineers are of a standard not lower than specified in this section.

"(b) The board may, upon application therefor and payment of the required fee, issue a certificate of registration as an architect, or as a professional engineer to any person who holds an unrevoked card or certificate of national reciprocal registration, issued by any state, province or country in conformity with the regulations of the national council of state board of architectural, or engineering examiners, and who complies with the regulations of this board, except as to qualifications and registration fee."

I understand that the practice of the architectural division upon receipt of an inquiry or a request for application forms from an architect who desires registration by reciprocity is to send out a form letter, A-9, which reads in part:

"In reply to your inquiry regarding registration as an Architect in Wisconsin, we advise you that you may proceed in one of two ways:

"* * *

"2. *Reciprocity* —Either as resident or non-resident, if you hold a current Architect registration with another Board, you must arrange to have a verified Council Record submitted to this office on your behalf through the National Council of Architectural Registration Boards. Arrangements must be made directly with NCARB, 521 Eighteenth Street, N. W., Washington 6, D. C."

This form letter, which under the decision in *Frankenthal v. Wis. R. E. B. Bd.*, (1958) 3 Wis. 2d 249, 89 N. W. 2d 825, probably is a "rule", makes it a condition precedent to consideration of an architect for registration on the basis of reciprocity that he arrange and pay for the submission to the board of a "council record" from the national council of architectural registration boards.

The national council of architectural registration boards appears to be a standard-setting agency whose membership is composed of members of state architectural registration boards. It has no official governmental status and as stated in its informational bulletin, "The examination, registration and licensing of architects is a function reserved to the states. The NCARB has no licensing or registration authority". The "council record", referred to by the board in its form letter, is a verified compilation of an applicant's education, training, experience, examinations and registrations. It is available only to state boards and "in no event can the Record be made available to the holder thereof". Despite the fact that the applicant cannot see or examine the record, he must pay the various fees of the organization such as $50 for the preparation of the council record, an additional $25 for the processing of an application for a council certificate, an additional $25 for transmittal of the record or certificate to another state, etc. The council also issues a "council certificate" which consists of the council record supplemented by a record of the council examinations which have been passed and a certification to the effect that the applicant has complied with various requirements, has passed an examination, and is recommended to all registration authorities

for registration as an architect without further written examinations.

I am informed that if an architect who is currently registered in another state, whose requirements for registration are not lower than in Wisconsin, desires to apply for registration by reciprocity in Wisconsin, the board will not furnish application forms, will not act upon any application which may be submitted and will refuse to do anything unless and until the architect arranges and pays for the transmittal of the council record to the board. Those who do so arrange and whose confidential record indicates that they are qualified, are registered on the basis of reciprocity upon payment of the required fees.

With this background information, I will address myself to your specific questions. Your first question is "Can the Board refuse to accept an application under the provisions of sec. 101.31 (11) (a) and can the Board refuse to act upon an application filed under this subsection"?

In attempting to answer this question I find that I am immediately faced with a roadblock in that the architectural division does not comply with the statutory requirements as to applications and their handling. Sec. 101.31 (12) provides in part:

"(12) APPLICATIONS FOR REGISTRATION, FEES, CONTENTS OF CERTIFICATION, EXPIRATION. (a) Applications for registration * * * shall be on forms prescribed and furnished by the board and shall contain statements made under oath showing the applicant's education and detail summary of his technical work and not less than 5 references, of whom 3 or more shall have personal knowledge of his architectural * * * experience in the case of an application for registration * * *."

Further, administrative rule A — E 1.02 (1) states:

"Application blanks for registration will be furnished to individual applicants but will not be furnished in quantities to intermediaries."

Despite this statutory provision and the administrative rule, I am informed that in reciprocity situations the architectural division of the board has not prescribed application forms and, therefore, does not furnish them to applicants nor do applications contain the sworn statements required by the statute. The architectural division should immediately remedy this situation for it has no discretion as to the recognition of and obedience to the statute. 2 Am. Jur. 2d, Admin. L., §188, p. 21.

The board must prescribe application forms and must provide them upon request by an architect who holds an unexpired certificate of similar registration in another state where registration requirements are not lower than in Wisconsin. Upon receipt of proper application and the required fee, the board must under the provisions of sec. 101.31 (5) (b), enter such application on its register and keep a record of its proceedings together with all other information deemed necessary by the board. The board is not limited to the application and can request any other information deemed necessary by it. Upon receipt of the necessary information, the board then has a duty to act on the application within a reasonable time.

Your second question is "Can the Board register a person under Section 101.31 (11) (b) who submits a record or certificate issued by the National Council of Architectural Registration Boards, in lieu of the card or certificate of national reciprocal registration issued by the state"?

Administrative agencies are creatures of statute and their power is dependent upon the statute. Their claim of authority must be based upon statute, since they have only the powers expressly or by implication conferred upon them by the law. See I Am. Jur. 2d, Admin. L., §70, p. 866.

As further expressed in 2 Am. Jur. 2d, Admin. L., §188, p. 21:

"An administrative agency has only such powers as have been conferred upon it by law and must act within the granted authority for an authorized purpose. It may not

validly act in excess of its powers, nor has it any discretion as to the recognition of or obedience to a statute. * * *"

"An administrative agency must conform to the requirements of the statute delegating a power or it is without authority to act. The power of an administrative agency must be exercised in accordance with, and in the mode prescribed by, the statute or other law bestowing such power, * * *."

Our court has so held many times. In *Basic Products Corporation v. Department of Taxation,* (1963) 19 Wis. 2d 183, 186, 120 N.W. 2d 161, the court said:

"* * * An administrative rule, even of long duration, may not stand at variance with an unambiguous statute. *State ex rel. Irany v. Milwaukee County Civil Service Comm.* (1962), 18 Wis. (2d) 132, 135, 118 N.W. (2d) 137; *Plain v. Harder* (1955), 268 Wis. 507, 68 N.W. (2d) 47. In the latter case, at page 511, this court said:

" 'The rule-making power does not extend beyond the power to carry into effect the purpose as expressed in the enactment of the legislature. "A rule out of harmony with the statute is a mere nullity." ' "

In *American Brass Company v. State Board of Health,* (1944) 245 Wis 440, 448, 15 N. W. 2d 27, it was stated that:

"* * * No proposition of law is better established than that administrative agencies have only such powers as are expressly granted to them or necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds."

Sec. 101.31 (11) (a) and (b) provide the only basis for registration of architects by reciprocity. The board, therefore, cannot grant an application for registration by reciprocity, except in situations squarely covered by (a) or (b). Under (b), the board may grant a certificate of registration to an architect "who holds an unrevoked card or certificate of national reciprocal registration, *issued by any state,*

province or country in conformity with the regulations of the national council of state board of architectural * * * examiners".

Since a council record or certificate of the national council of architectural registration boards is not "issued by a state, province or country" the board cannot issue a certificate of registration on the basis thereof. The board does not have power to modify the express provisions of sec. 101.31 (11) (b) and accept the certificate of a non-governmental standard-setting organization in lieu of a card or certificate "issued by a state, province or country".

Nationwide standard-setting organizations frequently provide a valuable and sometimes irreplaceable service, but a state administrative agency cannot abdicate its responsibility to such an organization and it cannot by its actions clothe such an organization with powers reserved by statute to other governmental units. The legislature has recognized the value of the services of national councils by providing in sec. 101.31 (11) (b) for reciprocity on the basis of a card or certificate of national reciprocal registration issued by a state, province or country "in conformity with the regulations of the national council of state board of architectural * ** examiners", but this does not allow the board to register on the basis of a record or certificate issued by the council.

I understand that there presently is no such thing as a "card or certificate of national reciprocal registration, issued by a state, province or country". If this is so, then at this time sec. 101.31 (11) (b) is meaningless and cannot provide a basis for reciprocal registration, which must then be based upon sec. 101.31 (11) (a).

Your third and last questions are interrelated and therefore I will answer your last question and in so doing will also cover the third question. Your last question is, "What discretion can the Board exercise in granting or denying an application for reciprocal registration under Section 101.31 (11) (a) or (b), where the applicant is currently registered in a state having standards not lower than those in Wisconsin"?

Both sec. 101.31 (11) (a) and (b), quoted above, provide that the board "may" issue a certificate of registration to those covered by the provisions of (a) and (b).

Our court has many times defined the meaning of the word "may". Its most recent statement and discussion of the meaning of this word is found in *Wauwatosa v. Milwaukee County,* (1963) 22 Wis. 2d 184, 125 N. W. 2d 386. The court there held that "may" was permissive and not mandatory and in so holding wrote, pp. 191-192, that:

"* * * Generally in construing statutes, 'may' is construed as permissive and 'shall' is construed as mandatory unless a different construction is demanded by the statute in order to carry out the clear intent of the legislature. *Scanlon v. Menasha* (1962), 16 Wis. (2d) 437, 114 N. W. (2d) 791. The courts have construed language couched in permissive, directory, or enabling language as mandatory where the circumstances so indicate an intention of the legislature or the context and subject matter compel such a construction. 50 Am. Jur., Statutes, p. 53, sec. 31. This is sometimes done when public rights or interests demand such a construction. 6 McQuillin, Mun. Corp. (3d ed.), p. 141, sec. 20.58.

"At an early date and since this court held and has held the natural and ordinary meaning of the word 'may' is permissive and may but not necessarily mean 'must' or 'shall' in a statute only in cases (1) where public interests or rights are concerned and (2) where the public or third persons have a claim *de jure* which demands the power should be exercised for the benefit of such right. *Cutler v. Howard* (1859), 9 Wis. 282 (*309); *Curry v. Portage* (1928), 195 Wis. 35, 217 N. W. 705; *Wisconsin Hydro Electric Co. v. Public Service Comm.* (1940), 234 Wis. 627, 291 N. W. 784. * * * But, prerequisite conditions for such a construction are that the third person in whose favor the power ought to be exercised has a claim *de jure* calling for the exercise of the power and that claim is independently established or exists independently from the creation of the power. The claim *de jure* cannot arise from the exercise of the power any more than one can pull himself up by his bootstraps."

Prior to a revision of the registration statutes by ch. 510, Laws 1949, the word "shall" was contained in the reciprocity provisions. Since 1949, however, the statute reads that the board "may" issue a certificate of registration. It has been argued that the change was inadvertent and that it really means "shall". This argument was rejected in a comparable situation by our court in *Polzin v. Industrial Commission,* (1958) 4 Wis. 2d 600, 606, 91 N. W. 2d 109, when the court wrote:

"As originally enacted in 1931 this section provided that the commission 'shall' order the examination when the employer or injured employee requests it. It was later amended to read 'may' as set out above. The amendment clearly showed the legislature's intent to make the appointment of an independent medical examiner discretionary with the commission."

Sec. 101.31 (11) (a) and (b) provide that the board "may" issue a certificate of registration. This means that the board has discretion and can exercise that discretion in situations when the architect holds an unexpired certificate from authorities in another state where the requirements are not lower than in Wisconsin. For some of the many cases which hold that a licensing authority which "may" issue to or transfer licenses for eligible persons has reasonable discretion and may under certain circumstances deny the application see: *State ex rel. Edge v. Meyer,* (1946) 249 Wis. 154, 23 N. W. 2d 599; *State ex rel. Higgins v. Racine,* (1936) 220 Wis. 107, 264 N. W. 490; *Bernstein v. City of Marshalltown,* (1933) 215 Iowa 1168, 248 N. W. 26; *Ford Hopkins Company v. Iowa City,* (1933) 216 Iowa 1286, 248 N. W. 668; *Lyons v. Gram,* (1927) 122 Ore. 684, 260 P. 220; *Ross v. State Racing Com.,* (1958) 64 N. M. 478, 330 P. 2d 701.

As stated in 53 C. J. S., Licenses, §37b and §38, pp. 631-632:

"The board or officer vested with the power to grant or to refuse licenses may prescribe reasonable qualifications or adopt reasonable rules or regulations for the issuance of licenses.

"* * *

"As a general rule, unless the statute is mandatory in terms, the power is vested in the board or officer to grant licenses carries with it, either expressly or impliedly, the power to exercise a reasonable discretion in granting or refusing licenses."

As further stated in the same work, pp. 633-634:

"Licensing boards or officers must not exercise the discretion vested in them arbitrarily or capriciously, and they must act in accordance with what they believe to be in the interest of public safety or public welfare. * * *"

The board has the power to make reasonable rules and regulations which are necessary to carry out its duties. Sec. 101.31 (3) (d). Since it has discretion in the granting of a certificate of registration by reciprocity, it may make reasonable rules on that subject. It may not, however, make unreasonable rules or act in an arbitrary or capricious manner. The board has a duty to issue a certificate of registration upon payment of registration fee to any applicant who, "in the opinion of the board, has satisfactorily met all of the requirements" of the law. Sec. 101.31 (12) (h). In order to form its "opinion" the board has a right to make reasonable demands for information from an applicant and does not have to issue a certificate of registration upon a mere showing that the applicant has an unexpired certificate of registration from another state whose standards for registration are not lower than ours.

As stated in 2 Am. Jur., 2d, Admin. L., §296, pp. 123-124:

"* * * Only when discretion has been arbitrarily exercised, resulting in injustice or unfairness, do the courts intervene to strike down a rule promulgated by the proper agency designed to give appropriate effect to the provisions of the act involved. * * *"

Any rule adopted by the board which makes it absolutely mandatory that an applicant arrange for a "council record" and pay to a private organization fees therefor may well be held to be an unreasonable and arbitrary rule if the board

can, in fact, determine the qualifications of the applicant from his sworn application, any reasonable additional information requested, from his prior registrations, and by contacting the state of basic registration and the references required by sec. 101.31 (12) (a).

BRB

County Board of Supervisors—Compensation—County board of supervisors can increase the number of days a supervisor can be compensated for committee service even after services have been rendered, but cannot validate excessive payments. A suit to recover such payments could be started.

December 15, 1965

DANIEL J. MIRON
District Attorney
Marinette County

You indicate that the county board of supervisors, by resolution enacted in 1944, set the maximum number of compensable days for supervisor committee work at 60 and that the resolution is still in effect. You state that certain supervisors have claimed and have been paid for days in excess of that figure. Marinette county has a population in excess of 34,000.

Your first question is whether the board of supervisors may retroactively increase the number of days a supervisor may be compensated for committee work and thereby legalize such payments.

The answer to your question is "no".

A related question was considered in 27 OAG 181, and the then attorney general was of the opinion that then sec. 59.06 (2) (b) would authorize a county board by a two-thirds vote to increase the number of compensable days even

after the services were rendered. The opinion did not state that any other than the present year could be considered or that authorization could be given after payment had been made. In view of the statutes then existing, the reasoning is sound.

It is necessary to review statutes dealing with compensation for board services, by salary or per diem, as well as compensation for services on committees to determine whether there can be any effective retroactive action, before payment, which would allow compensation for services already performed.

Sec. 59.03 (1) (c) provides that supervisors in counties over 500,000 population shall be compensated on a salary basis.

Compensation for supervisors in counties of less than 500,000 and more than one town shall be by per diem except where a county board elects to establish a salary basis.

In counties where an annual salary is in effect, such salary constitutes compensation for all services including all committee services, except the per diem allowance to county highway committee members for services in acquiring highway rights of way pursuant to sec. 84.09 (4). By reason of sec. 59.03 (2) (j), per diem for committee meetings in excess of 40 committee and board meetings could be authorized where supervisors are on a salary basis.

Section 59.03 (2) (f), (h) (as amended by ch. 20, Laws 1965) (i) (as amended by ch. 226, Laws 1965) and (j) provide:

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

"* * *

"(h) *Limitation on compensation.* Except for services as a member of a committee as provided in s. 59.06 no super-

visor shall be paid for more days' attendance on the board in any year than is set out in this schedule: In counties having a population of less *than 25,000,* 20 days; *at least 25,000* but less than 100,000, 25 days; more than 100,000 but less than 500,000, 30 days.

"(i) *Alternative compensation.* As an alternative method of compensation, in counties having a population of *less than 500,000 including those containing only one town,* the board may at its annual meeting, by a two-thirds vote of the members entitled to a seat, fix the compensation of the supervisors to be next elected at annual salary for all services for the county including all committee services, except the per diem allowance for services in acquiring highway rights of way set forth in s. 84.09 (4) The board may, in like manner, allow additional salary for the members of the highway committee and for the chairman of the board. In addition to the salary, the supervisors shall receive mileage as provided in par. (g) for each day's attendance at board meetings *or for attendance at not to exceed 2 committee meetings in any one day.*

"(j) *Supplementary compensation.* The county board, in establishing an annual salary, may provide by ordinance for a per diem for all committee meetings attended in excess of 40 committee and board meetings."

Section 59.06 (2) provides:

"(2) Committeemen shall receive such compensation for their services as the board allows, not exceeding the per diem and mileage allowed to members of the board and such committee members shall receive such compensation, mileage and reimbursement for other expenses as the board allows for their attendance at any school, institute or meeting which the board directs them to attend. No supervisor shall be allowed pay for committee service while the board is in session, nor for mileage except in connection with services performed within the time herein limited. The number of days for which compensation and mileage may be paid a committee member in any year, except members of committees appointed to have charge of the erection of any

county building, and except as otherwise provided by law, are limited as follows:

"(a) In counties containing less than 25,000 population, to 20 days, not more than 10 of which shall be for services on any one committee, except that the board may increase the number of committee meetings as provided in par. (b) and similarly fix the compensation of the members for the additional meetings.

"(b) In other counties, to 30 days for services on committees, except that the board may, by a two-thirds vote of the members present, increase the number of days for which compensation and mileage may be paid in any year and fix the compensation for each additional day."

Assuming that the 1944 resolution was effective to increase the compensable days to 60 for succeeding years, the present board can take no action to attempt to legalize the *payments already made* to supervisors for committee services in this or other years which exceed 60 per supervisor. Certain supervisors may be entitled to compensation for in excess of 60 days if they were members of committees appointed to have charge of the erection of a county building.

The excessive payments were unauthorized by law and the county is entitled to be reimbursed for the overpayments.

Henry v. Dolen, (1925) 186 Wis. 622, 203 N.W. 369;

St. Croix County v. Webster, (1901) 111 Wis. 270, 87 N.W. 302.

In the *St. Croix* case it is stated at pages 273, 274:

"* * * A public officer takes his office *cum onere,* and all services performed by him within the scope of his official duties, or which are voluntarily performed as such officer, are covered by his salary or compensation as fixed by law. A municipal corporation has no jurisdiction to allow to such officer additional compensation not authorized by law for the performance of such services, and if such allowance be in fact made it is a void act. If such officer receives such

additional compensation from the municipal corporation whose officer he is, even with its consent, he obtains no title thereto, but it may be recovered by the corporation in a proper action at law. If the proper corporate officers in such case refuse or neglect to bring such action, an equitable action may be successfully maintained by any taxpayer to recover such moneys for the benefit of the corporation, if the action be a timely one and there are no equitable considerations which will operate as an estoppel. * * *"

Your attention is invited also to the following sections of the criminal code:

Sec. 946.12, provides in part:

"946.12 **Misconduct in public office.** Any public officer or public employe who does any of the following may be fined not more than $500 or imprisoned not more than one year or both:

"* * *

"(4) In his capacity as such officer or employe, makes an entry in an account or record book or return, certificate, report or statement which in a material respect he intentionally falsifies; or

"(5) Under color of his office or employment, intentionally solicits or accepts for the performance of any service or duty anything of value which he knows is greater or less than is fixed by law."

Also see sec. 939.22 (30).

Bill 31, A., 1961, as introduced, was intended to prohibit the governing body in counties of over 500,000 from increasing salaries of supervisors in such a way that the increase would be effective during current terms of office. As finally enacted, in the form of ch. 573, Laws 1961, it had a much broader effect. It created the last sentence of sec. 59.03 (1) (c), to provide:

"Section 66.196 also applies to this paragraph."

It also created sec. 66.196 to provide:

"**Compensation of governing bodies.** An elected official of any county, city, town or village, who by virtue of his office is entitled to participate in the establishment of the salary attending his office, shall not during the term of such office collect salary in excess of the salary provided at the time of his taking office. This provision is of state-wide concern and applies only to officials elected after October 22, 1961."

The drafting record in the legislative reference bureau clearly shows that sec. 66.196 was in part adopted to prevent any county board from increasing the *salaries* of supervisors during their respective terms of office irrespective of the emergency salary increase statute then in effect, sec. 66.195. However, the limitation refers only to salary. Substitute amendments were offered to prevent any increase in compensation, which would include salary and per diem for board services and services on committees, however the words "compensation" and "compensation or salary" were rejected.

Sec. 59.15 (1) requires the board to establish the total compensation for elective offices to be voted on in the county prior to the earliest time for filing nomination papers. The section expressly excepts supervisors.

Sec. 59.03 (2) (f) provides that a board in a county under 500,000, may, at its annual meeting by a two-thirds vote of its members, fix the compensation of the board members to be next elected. The implication is clear that the board cannot, absent some other express statute, increase the compensation to be paid to incumbent members for board services. However, neither this section, nor sec. 66.196, would prevent a county board from increasing the number of days a supervisor could be paid for committee services on a per diem rate by reason of secs. 59.03 (2) (h) and (i) and the special provisions of sec. 59.06 (2). The board could also fix the compensation to be paid for additional days at a rate not to exceed the per diem the respective supervisor is entitled to receive for board meetings. 38 OAG 238. The rate for the additional days of service could be at a lesser rate than that previously established. While a county board su-

pervisor takes his office *cum onere* and is obliged to fulfill the duties of his office for the compensation provided, and is subject to forfeiture for refusal or neglect of duty by reason of sec. 59.10, the legislature evidently intended that a county board could, within a given year and by a two-thirds vote, increase the number of days for which a supervisor could be compensated for committee meetings. In order to expedite the business of the county, the board could increase the number of compensable days before the services were performed.

Retroactive increases in compensation are not permitted absent a statute which expressly or impliedly authorizes it.

Pugnier v. Ramharter, (1957) 275 Wis. 70, 81 N.W. 2d 38.

I am of the opinion that sec. 59.06 (2) and other statutes referred to permit an increase on a retroactive basis even after the services were performed. Any such authorization could not have the effect of validating excessive per diem claims already paid for and could not authorize an increase for a period prior to beginning of the calendar year in which the action was taken.

Both sec. 59.03 (2) (h) and sec. 59.06 (2) use the word "year" without defining the term. I am of the opinion that the word year means calendar year.

Section 990.01 (49) provides:

" 'Year' means a calendar year, unless otherwise expressed; * * *."

The statutes do not state that year shall be given any other meaning. Counties are on a calendar year for financing purposes which is further reason for saying that any limitation relates to the calendar year. Sec. 990.01 (49) became law in 1951, after the opinion appearing in 20 OAG 730 was rendered.

Your second question is whether supervisors who received excessive compensation can be compelled to refund such amounts to the county.

The answer is "yes".

A suit for recovery may be instituted by the county on authorization of the board of supervisors or any taxpayer could bring suit.

See secs. 59.01, 59.07 (1) (b).

St. Croix County v. Webster, (1901) 111 Wis. 270, 87 N.W. 302;

Douglas County v. Sommer, (1904) 120 Wis. 424, 98 N.W. 249;

Henry v. Dolen, (1925) 186 Wis. 622, 203 N.W. 369;

Pugnier v. Ramharter, (1957) 275 Wis. 70, 81 N.W. 2d 38.

Laches and statutes of limitation are matters of defense which must be asserted. These matters are discussed in the cases cited above. It is not likely that the facts would permit the defense of laches to be applied in case the action were brought by a taxpayer. Apparently no bond is involved which would invoke the three year statute of limitations provided in sec. 330.20 (2). In *Dodge County v. Kaiser,* (1943) 243 Wis. 551, 561, 11 N.W. 2d 348, the court held, in a somewhat similar action, that the six year statute of limitations, sec. 330.19, was applicable.

The county board could properly authorize a suit to be commenced for all overpayments, regardless of their date, and if the defense of limitations were asserted, could leave the determination regarding the applicable statute to the courts.

Your third question is whether a county board of supervisors may raise the maximum of per diem applicable to members of the county highway committee after payment for services has been made.

Sec. 83.015 (1) (a) provides in part:

"* * * The members of such committee shall be reimbursed for their necessary expenses incurred in the performance of their duties, and shall be paid the same per diem for time necessarily spent in the performance of their duties as is paid to members of other county board committees,

not, however, exceeding $500 for per diem, in addition to necessary expenses, to any member in any year. A different amount may be fixed as a maximum by the county board."

For the reasons stated above the board of supervisors is without authority to raise the maximum of per diems applicable to members of the county highway committee after payment for services has been made. The board could increase the maximum $500 per diem limit during any given year before payment had been made, even though the services had been rendered, but it could not legalize excessive payments already made in the current or previous years.

I note that you state that it does not appear that Marinette county has ever raised the $500 limit with respect to highway committee members.

Your fourth question is whether the 1944 action in raising the number of per diems supervisors could claim for regular committee work would have the effect of increasing the monetary limit for per diems allowed supervisors for highway committee work.

In my opinion it would not.

Sec. 59.03 (2) (f), 1943 Stats., expressly limited the per diem a supervisor could be paid to $4 per day with provision that the county board by a two-thirds vote could increase the per diem to $5. At that time sec. 83.015, limited the county highway committeemen to "$500 for both per diem and expenses" but permitted the county board to establish a different maximum.

Sec. 59.03 (2) (f) was later amended to remove the statutory per diem limits and the county board was authorized to establish the per diem for supervisors to be next elected.

While sec. 83.015 was amended to provide that expenses were not to be included in the $500 limit, the $500 monetary limit was retained. It effectively limits the total amount a highway committee member can receive for services on the

highway committee for per diems, unless a larger amount is specified by the board.

In 1944 a Marinette county board supervisor could have collected for 125 days of highway committee work at the $4 rate. I understand that Marinette county currently has a $14 per diem rate for services prior to April 1, 1965 and which is applicable to supervisors who cannot qualify for the $17.50 per diem rate which became effective on April 1, 1965. Either rate would allow a supervisor a much lesser number of days for highway committee services than he was entitled to under the 1944 rate. If the highway committeeman served on other committees he could be paid per diems for services on such committees over and above the $500 limit applicable to highway committee work.

A county highway committee is elected by the county board, but its members need not be supervisors. It is an agency of the county rather than a committee of the county board. 48 OAG 241.

Sec. 59.06 (2) is applicable to county highway committeemen in some respects (see 51 OAG 183), however the limitations on per diem services contained in sec. 59.06 (2) are limitations on service on committees of the county board and are separate and distinct from the limitations on highway committee members.

You do not indicate that the 1944 resolution increasing the maximum per diems for county board committee work, pursuant to sec. 59.06 (2) (b) expressly or impliedly was intended to cover highway committee services. If the highway committee was referred to therein, it could be argued that the resolution effectively increased the $500 maximum even though a monetary figure was not included. However, since no monetary limit was set, the number of per diems being increased to 60, and since at the then per diem rate of $4 a highway committeeman could collect for 125 days, it is presumed that the resolution did not apply to the highway committee.

RJV

Insurance Commission—License Fees—Under sec. 76.34, the annual license fee for a domestic insurance company is computed on gross premiums received without deduction for dividends applied to purchase of additional paid up insurance.

December 16, 1965

ROBERT D. HASSE, *Commissioner of Insurance*

Examination by your department of the Northwestern Mutual Life Insurance Company (hereafter, the company) disclosed that during 1962 and 1963 $547,134.36 in premium considerations, i.e. accumulated dividends used by insureds to purchase paid-up additions on policies of life insurance, had not been reported to the state of Wisconsin for inclusion as a factor in determination of its annual license fee under sec. 76.34. The company claims that it is not required to pay a fee on these transactions (dividend funds used to purchase additional insurance) because it had already paid a fee based on the premiums for the policies involved. Your office has asked for my opinion as to the liability of the company with respect to such dividends.

As of December 31 of the relevant years, the company had in excess of $750,000,000 of insurance in force, thus bringing it within sec. 76.34 (2) instead of sec. 76.34 (1).

The pertinent portion of sec. 76.34 provides:

"Every company * * * transacting the business of life insurance within this state, * * * shall, * * * pay into the state treasury as an annual license fee for transacting such business the amounts following:

" * * *

"(2) * * * (such company) * * * shall pay into the state treasury, as such annual license fee, two per centum upon the excess of the gross premiums received in money or otherwise during the preceding calendar year on all policies or contracts of insurance on the lives of residents of this state after deducting therefrom all sums apportioned to

premium paying policies on the lives of residents of this state from annual distribution of profits, savings, earnings or surplus which before the expiration of the calendar year next succeeding such apportionment have been either (1) paid in cash or (2) applied in part payment of premiums."

The words "sums apportioned to premium paying policies on the lives of residents of this state from annual distribution of profits, savings, earnings or surplus" mean dividends.

Generally, insurance companies granting dividends on life policies permit several options. The policy holder, for example, may elect to (1) receive his dividend in cash (2) apply it to reduce the amount of his premium (3) apply it to purchase paid-up additional life insurance (4) leave it with the company to accumulate interest.

Sec. 76.34 is explicit in imposing a liability on the company for annual license fee purposes based on gross premiums received on all policies. The statute permits a deduction in only two instances, i.e., (1) dividends paid in cash before the expiration of the calendar year next succeeding the apportionment of such dividends and (2) dividends applied in part payment of premiums within a similar period.

It has been argued that paid-up additional insurance is merely an extra benefit under an existing policy, not a premium payment on new insurance. This is contrary to the definition of a premium as all sums which must be paid before insurance protection is granted. *Duel v. State Farm Mutual,* (1942) 240 Wis. 161, 175, 1 N.W. 2d 887.

Application of dividends to the purchase of paid-up additional insurance (for example, a policy holder may have $10,000 in life insurance and purchase an additional $500 of insurance in exchange for his accumulated dividends) is not the same as an application of dividends in part payment of a premium. Even if it were, it would be subject to the calendar year limitation which has not been complied with here. I understand that Wisconsin is one of the few states where the legislature has seen fit to impose such a restricted category of dividends deductible from gross premiums for annual license fee determination purposes. Also, I am aware

of court decisions in other states which reach conclusions differing from this but they turn on the peculiar language of the state's statutes. See *Prudential Insurance Co. v. Green,* (1942) 231 Iowa 1371, 2 N.W. 2d 765; *Prudential Insurance Co. v. Kavanaugh,* (1952) 125 Colo. 93, 240 P. 2d 508. The determination of the basis for the measurement of this fee for the license to transact business in the state is strictly a matter of legislative discretion.

Thus, it is my opinion that under sec. 76.34 the annual license fee payable by a domestic life insurance company is computed upon the basis of gross premiums received without any deductions for dividends applied to the purchase of additional paid-up insurance.

JEA

Barber Apprentice—Permits—The state board of health may issue a second apprentice barber permit to one previously possessing a permit and whose five year apprenticeship has expired.

December 17, 1965

DR. E. J. JORRIS
State Health Officer

You ask my advice as to whether the state board of health can issue subsequent apprentice permit to an individual who held an original apprenticeship permit for a full 5-year period.

As you know, apprentice barbers in Wisconsin receive their apprentice permits under sec. 158.09, which reads in part:

"(1) Any person may receive an apprentice permit:

"(a) Who is at least 16 years of age; and

"(b) Who is of good moral character and temperate habits; and

"(c) Who, as shown by affidavits, has completed the eighth grade or has an equivalent education as determined by the state board of vocational and adult education or the extension division of the university of Wisconsin; and

"(d) Who is indentured as an apprentice or is attending an approved school or college teaching barbering in this state.

"* * *

"(5) The period of apprenticeship shall be 3 years and shall begin on the date of registration and terminate after a period of not more than 5 years from the time of first registration. * * *"

I see nothing in the above quoted statute and find nothing elsewhere in our statutes which would prohibit the state board of health from issuing a second apprentice permit to a person who had previously been issued such a permit and whose 5 year period of apprenticeship in connection therewith had expired. If the applicant for such second permit meets the requirements of sec. 158.09 (1) (a) through (d), it is my opinion that the board is free to issue him such permit.

JHM

Liability Insurance—Policy Forms—Commissioner of insurance may not approve certain policy forms for automobile liability insurance which are contrary to or inconsistent with state law.

December 20, 1965

ROBERT D. HASSE
Commissioner of Insurance

You have asked whether certain provisions contained in automobile liability insurance policies issued in this state by several insurance companies are inconsistent with the

applicable law in Wisconsin and, if so, whether you may disapprove the use in this state of insurance policy forms which contain such provisions.

Following are the policy provisions about which you have inquired:

1

"In the event of an accident, occurrence or loss, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable * * *."

The requirement of giving of notice to the insurer "as soon as practicable" is inconsistent with secs. 204.29 (1), and 204.34 (3) which provide that the time for giving notice of injury shall not be limited to a period of less than twenty days. A policy which contained only the "as soon as practicable" notice requirement without referring to the statutory 20 day minimum would clearly be misleading.

In *Parrish v. Phillips,* (1938) 229 Wis. 439, 282 N.W. 551, the court held that since sec. 204.29 (1) provides that an insurer cannot limit the period of notice to less than 20 days, a provision in a policy requiring the insured to give notice "as soon as practicable" does not lessen the statutory notice period, and is effective if given "as soon as practicable" after the expiration of the 20 day period. The court in *Corwin v. Salter,* (1927) 194 Wis. 333, 216 N.W. 653, held that the policy's requirement of giving notice of an accident within 5 days was contrary to the provisions of the statute and thus inoperative and of no effect.

It should also be noted that sec. 204.30 (2) requires the inclusion of a provision that failure to give notice within the time specified in the policy shall not invalidate a claim if it shall be shown that notice was given as soon as reasonably possible and that it was not reasonably possible to give such notice within the time prescribed. This section expressly

declares that no policy shall be issued or delivered in this state unless it does contain such a provision.

It is my opinion that the above quoted policy provision must be disapproved.

2

The next proposed policy provision in question reads:

"No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

"* * * No person or organization shall have any right under this policy to join the company as a party to any action against the insured to determine the insured's liability, nor shall the company be impleaded by the insured or his legal representative * * *"

Sec. 260.11 (1) provides that any insurer having an interest in the outcome of a controversy which is adverse to the plaintiff or any of the parties involved therein is a proper party defendant. The court in *Perlick v. Country Mut. Casualty Co.*, (1957) 274 Wis. 558, 561, 80 N.W. 2d 921, held that a "no-action clause" providing that no action shall be brought against insurer until the amount of the claim or loss is finally determined by judgment or agreement between the parties with the written consent of insurer, cannot be effectively included in a policy issued in Wisconsin because it would violate the public policy of this state as expressed in sec. 260.11 (1). See also: *Ritterbusch v. Sexmith*, (1950) 256 Wis. 507, 41 N.W. 2d 611, *Oertel v. Williams*, (1934) 214 Wis. 68, 251 N.W. 465.

Sec. 204.30 (4) provides in part:

"* * * That the insurer shall be liable to the persons entitled to recover for the death of any person, or for injury to person or property, irrespective of whether such liability

be in praesenti or contingent and to become fixed or certain by final judgment against the insured, * * *."

Thus, it is evident that the indicated policy provisions are inconsistent with secs. 260.11 (1) and 204.30 (4) and must be disapproved.

3

The next proposed policy provision in question reads:

"Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy * * *"

In *Gans v. The St. Paul Fire & Marine Ins. Co.*, (1877) 43 Wis. 108, the court held that knowledge on the part of an agent of an insurance company of facts which render the contract voidable at the insurer's option, is knowledge of the company and constitutes a waiver of the breach, and estops the company to claim a forfeiture of the policy. See also: *Ziebarth v. Fidelity & Guaranty Fire Corp. of Baltimore Md.*, (1950) 256 Wis. 529, 41 N.W. 2d 632. *Hoenisch v. Underwriters Casualty Co.*, (1933) 211 Wis. 483, 248 N.W. 481. An agent's knowledge is knowledge of the company he represents. *Jeske v. General Accident Fire & Life Assurance Corp.*, (1957) 1 Wis. 2d 70, 87; 83 N.W. 2d 167. Also applicable is sec. 203.13 (1) providing that knowledge of an agent is knowledge of the insurer and any fact which breaches a condition of the policy and is known to the agent when the policy is issued does not void the policy nor defeat recovery thereon in the event of loss. *Newburg v. U. S. Fidelity & Guaranty Co.*, (1932) 207 Wis. 344, 350, 241 N.W. 372.

Thus, the above quoted provision in a policy dealing with notice to or knowledge possessed by an agent and the effect thereof is manifestly inconsistent with the law of Wisconsin, and must be disapproved.

4

The last proposed policy provision in question reads:

"By acceptance of this policy, the insured named in Item 1 of the declarations agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance."

Sec. 209.06 (1) provides that unless the false statement, representation or warranty made by the insured in the negotiation of a contract of insurance increased the risk or contributed to the loss or was made with intent to deceive, it shall not be deemed material or defeat or avoid a policy. Subsec. (2) of this section also provides that unless the breach of warranty existed at the time of the loss, contributed to the loss or increased the risk at the time of the loss, it shall not defeat or avoid the policy.

In *Taluc v. Fall Creek Farmers Mut. Fire Ins. Co.*, (1931) 203 Wis. 319, 234 N.W. 364, the court held that the failure to disclose the existence of an incumbrance, contrary to a provision contained in a fire insurance policy, did not avoid same unless such failure was intentional or increased the risk. The court in *Granzow v. Oakland Mut. Fire Ins. Co.*, (1943) 244 Wis. 300, 12 N.W. 2d 57, stated that the statute requiring that the misrepresentation must be intentionally false or increase the risk in order to avoid a policy, was enacted to prevent the insured from losing the benefit of the policy where he acted in good faith and without fraud.

The proposed policy provision is inconsistent with sec. 209.06 and therefore cannot be approved. Permitting the use of such a policy provision would result in a circumvention of the clear meaning and purpose of the statute. It should also be noted that if this provision is construed together with the "no-action clause" or provision the insurer could deny coverage in the event of a false representation.

Finally, it may be useful to refer to some general principles in this area.

An insurer may limit its liability by the terms of the insurance, unless restriction is prohibited by statutes or consideration of public policy. *Schneider v. Depies,* (1954) 266 Wis. 43, 62 N.W. 2d 431. Statutes enacted by a state legislature constitute the public policy of the state. Appleman, *Insurance Law and Practice,* Vol. 12, Sec. 7043, p. 63. Where a statute declares as the public policy of the state that insurance policies shall contain specific conditions, it is controlling as against any contract the parties may enter into varying therefrom. *Ottens v. Atlas Assur. Co.,* (1937) 226 Wis. 596, 275 N.W. 900. An agreement is against public policy if it violates some public statute. *Pedrick v. First Nat. Bank of Ripon,* (1954) 267 Wis. 436, 66 N.W. 2d 154.

The insurance commissioner implements the public policy of the state; he represents policy holders and the state in the enforcement of insurance laws. Appleman, *Insurance Law and Practice,* Vol. 19, Sec. 10393, p. 71.

The foregoing analysis of the several proposed policy provisions establishes that to the extent discussed they are inconsistent with statutory law and contrary to the established public policy of the state. The commissioner of insurance may not give approval to or countenance for use in this state a policy form which contains a provision of such content. The conflict of the content of such provisions with the policy of the law would render the form sufficiently misleading to be subject to disapproval in accordance with rule, 5 Wis. Adm. Code, Ins. 6.05 (5).

HHP:JEA:

Liability—Automobile Accidents—Discussion of the liability of state for automobile accidents causing damage to person or property in the course of state business.

December 29, 1965

JOSEPH C. FAGAN, *Chairman*
Industrial Commission of Wisconsin

The industrial commission has submitted several requests for opinions concerning liability of the state for accident and injury resulting from state employes' use of automobiles at work. The questions relate to various circumstances and a vast body of tort and insurance law. Therefore, this opinion provides only a guide, not a definitive statement, as to the state's liability. The following outline sets forth the general limits of state responsibility.

I. STATE EMPLOYE USING OWN AUTOMOBILE FOR STATE BUSINESS

a. Employe's negligence causing injury or damage to another

If the employe's negligence in the use of his own automobile on state business causes injury or death either to a fellow employe or to another person or causes damage to property, the employe or his insurer or both may be held liable in a tort action for damages resulting from such negligence.

The employe may insure against personal liability for injury and property damage. Automobile insurance liability policies often specifically exclude coverage when the automobile is used for business purposes unless an additional premium is paid to cover such use. Responsibility for such business coverage is upon the employe.

The state cannot be held liable for damage to other persons or property merely because it reimburses the employe for his expenses on state business. The allowance for the use of automobiles, sec. 20.941, provides for reimbursement of automobile expense at 7¢ per mile. This sum represents reimbursement for *all* automobile operating expenses including cost of automobile insurance premiums.

b. Employe injury or death

The workmen's compensation act, Ch. 102, Wis. Stats., provides for payment of workmen's compensation benefits to state employes injured in the course of their state employment, and to their dependents in case of fatal injury. The compensation act is the exclusive remedy against the state, as employer. Sec. 102.03 (2). Negligence short of

wilful conduct will not defeat an employe's recovery under the act. Sec. 331.27. The workmen's compensation act does not apply if an employe is injured or killed "when engaged in a deviation for a private or personal purpose". Sec. 102.03 (1) (f). Whether an employe has deviated from his employment depends upon the particular facts in each case.

c. Damage to own automobile

A state employe may not recover from the state for damage to his own automobile while he is using it in state business, except through legislative action as provided by secs. 15.94, 16.53 (8) and 285.01. Recovery may be sought by the employe against a third party tort feasor under sec. 102.29 (1), or against an insurer under a personal collision insurance policy.

d. State employe on state business as passenger of fellow employe

As noted above, the state, which is self-insured, is liable for payment of benefits under the workmen's compensation act in cases of injury or death to its employes while at work. The act applies whether the employe is injured at work while driving his own automobile or while riding as a passenger with a fellow employe. Under sec. 102.29 (1), the state employe may also bring an action in tort against the co-employe driver for his negligence, if any. As provided by the statutory formula of sec. 102.29 (1), recovery would be diminished to the extent that the state is reimbursed for compensation benefits paid or payable to the plaintiff.

II. EMPLOYE OPERATING STATE OWNED AUTOMOBILE ON STATE BUSINESS

Sec. 345.05, entitled "State and municipal liability for motor vehicle accidents", provides in part as follows:

"(2) Any of the following may file a claim for damages against the state or municipality concerned and the governing body thereof may allow, compromise, settle and pay the same:

"(a) A person suffering any damage proximately resulting from the negligent operation of a motor vehicle owned

and operated by the state or a municipality, which damage was occasioned by the operation of such motor vehicle in the course of its business. For the purposes of this subsection, a motor vehicle shall be deemed owned and operated by the state or a municipality if such vehicle is either being rented or leased, or is being purchased under a contract whereby the state or municipality will acquire title.

"* * *

"(4) Failure of the governing body to pass upon the claim within 90 days after presentation constitutes a disallowance. Disallowance by the governing body bars any action founded on the claim unless brought within 6 months after disallowance. Actions against the state and payment of the amount recovered shall be as provided in ss. 285.01 and 285.04. * * *"

The state may procure insurance coverage for state vehicles. Sec. 20.945.

The state supreme court in *Holytz v. Milwaukee,* (1962) 17 Wis. 2d 26, 41, 115 N.W. 2d 618, abrogated the doctrine of governmental tort immunity established by previous judicial decisions. However, in doing so it carefully pointed out that its decision "removes the state's defense of nonliability for torts, but * * * has no effect upon the state's sovereign right under the constitution to be sued only upon its consent". It noted that the right to sue the state is subject to Art. IV, sec. 27, Wis. Const. which provides: "The legislature shall direct by law in what manner and in what courts suits may be brought against the state". Proceeding under this constitutional provision, the legislature, in enacting sec. 345.05, clearly gave the right to sue the state thereunder only to those persons described in subsec. (2) (a) and (b). The waiver of sovereign immunity by such statute is a limited one, plainly not permitting suit against the state for personal injury incurred in a motor vehicle accident except in the situations set forth in the statute.

JPA

Health Assistance Payment Act—Prescriptions—Physicians may lawfully dispense medicines and drugs to recipients under the health assistance act and welfare department may authorize payment therefor. Payment for legend drugs is permitted to registered drug stores only.

December 30, 1965

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

You have inquired whether payment can be made to a physician for drugs dispensed by the physician to a patient beneficiary under Ch. 163, Wis. Stats., the health assistance payments act.

You state that during the short period of administration of this chapter, you have construed the phrase "pharmaceutical services" which appears in sec. 163.05 (1) as limited to services rendered by a registered pharmacist only, thereby excluding payment for drugs dispensed by a physician. The present contract, authorized under sec. 163.06, authorizes the insurance company to pay only registered drug stores for legend drugs. See schedule D, par. 8 under A and schedule E, par. 9 under A.

Sec. 163.05 (1) provides:

"**Benefits; exclusions.** (1) The department shall determine the maximum allowances of a health plan to be administered pursuant to s. 163.06, which, subject to applicable deductible coinsurance and other provisions established by it, shall pay part or all of the charges to beneficiaries for the following: inpatient hospital care in a semi-private room; skilled nursing home care when authorized by a physician; professional services performed by a physician or doctor of dental surgery in a hospital or skilled nursing home; outpatient services provided through a hospital or by a physician in a hospital; and the following additional services when prescribed by a physician: care by a visiting nurse, diagnostic services which require X-ray or laboratory procedures and pharmaceutical services."

The phrase "pharmaceutical services" is not defined in Ch. 163 or Ch. 151. Sec. 990.01 provides in part:

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

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

The manifest intent of Ch. 163 is that the persons eligible for care be given the needed care by persons, businesses or institutions authorized to provide such care or services.

Where the law permits the care or services to be performed by more than one class of persons, professions or facilities, the statute establishes no preference as to which class shall perform the care or services nor is any person or business entity within a class given any preference.

Sec. 163.12 gives the beneficiary freedom of choice in the selection of the person or facility. It provides in part:

"**Free choice.** Nothing contained in this chapter shall alter the right of each eligible person to the free choice of physician, dentist, pharmacist, hospital or skilled nursing home. * * *"

Sec. 163.03 (2), (9), and (10) provide:

"(2) 'Charge' means the customary, usual and reasonable demand for payment for services, care or commodities which does not exceed the general level of charges by others who render such services or care, or provide such commodities, under similar or comparable circumstances within the community in which the charge is incurred.

"(9) 'Physician' means a person licensed to practice medicine and surgery, and includes graduates of osteopathic colleges holding an unlimited license to practice medicine and surgery.

"(10) 'Prescribed' means a written order or an oral order later reduced to writing by a licensed physician or dentist for a product or service."

Sec. 163.05 (5) and (6) provide:

"(5) Payment for services provided by a plan established under this section shall be made directly to the hospital, skilled nursing home, other organization or individual providing such services pursuant to the provisions of any contract that may be entered into under s. 163.06.

"(6) No source of service may bill the beneficiary of a plan established hereunder, except for or to the extent that benefits are not provided by it."

The word pharmacist appears only once in Ch. 163, at sec. 163.12, quoted above.

A registered pharmacist can, of course, perform pharmaceutical services, and where he provides such service for an eligible beneficiary under the act, pursuant to prescription by a physician, his claim is for the drugs themselves as well as services rendered in compounding or dispensing them. In *State v. Donaldson,* (1889) 41 Minn. 74, 42 N.W. 781 it was stated that "pharmacy" cannot be construed as meaning the service or art of preparing and compounding medicines as distinguished from their sale, but includes the sale to the public of drugs and medicine. In this country the business of pharmacist or apothecary and druggist is one.

Sec. 151.04 prohibits the sale, gift, barter, compounding or dispensing of drugs or the maintenance of any pharmacy therefor in municipalities having a population of 500 or more except by or under the supervision of a registered pharmacist. Sec. 151.04 (3) provides in part:

"This shall not interfere with the dispensing of drugs, medicines or other articles by physicians, * * *"

Sec. 151.07 (1) (e) and (3) provide:

"(1) (e) 'Practitioner' means a person licensed by law to prescribe and administer dangerous drugs.

"(3) No person, except a registered pharmacist or a practitioner shall prepare, compound, dispense or prepare for delivery for a patient any dangerous drug."

It is generally held that a physician has no right from the nature of his profession to keep a drug store. However, he may as a licensed practicing physician, supply his patients with such articles as he may deem proper and compound his own prescriptions. He has a right to sell drugs to his own patients but cannot make a practice of filling prescriptions sent to him by others.

State v. Evans, (1907) 130 Wis. 381, 110 N.W. 241

State v. Hovorka, (1907) 100 Minn. 249, 110 N.W. 870, 8 LRA NS 1272

41 OAG 23

28 CJS 506

17—A Am. Jur. 518

Pharmaceutics is the science of preparing, using or dispensing medicines. *Ballard v. Goldsby,* (1917) 142 La. 15, 76 So. 219.

" 'Pharmaceutical' is defined as pertaining to pharmacy, or the art of preparing drugs. A pharmaceutical preparation is primarily a combination of drugs compounded for medicinal uses." 28 CJS 500.

Webster's Third International Dictionary defines the following terms:

" 'pharmaceutic': to administer drugs"

" 'pharmaceutical': (1) of or relating to pharmacy or pharmacists; (2) a pharmaceutical preparation: medicinal drug"

" 'pharmaceutics': the science of preparing, using or dispensing medicines"

" 'pharmacy': (1) the administering of drugs: treatment by drugs (2) the art or practice of preparing, preserving, compounding, and dispensing drugs, of discovering new drugs through research, and of synthesizing organic com-

pounds of therapeutic value (3) a place where medicines are compounded or dispensed (a hospital —) broadly: DRUGSTORE."

While a physician is not a pharmacist, it is my opinion that he may perform and be reimbursed for pharmaceutical services under the act, when such services are rendered to a patient who is an eligible beneficiary.

He may be paid, under the act, for general professional services when the services are performed in a hospital or skilled nursing home, including outpatient services performed by him in a hospital. If he prescribes and dispenses drugs as such times he may be paid for them under the statute.

The statute also provides for payment for part or all of the charges for additional services when prescribed by a physician. When a physician prescribes diagnostic services which require X-ray or laboratory procedures, the physician can, if he has the facilities and skill, perform such services and be paid therefor, although he would not qualify for payment for general professional services performed where the patient beneficiary is not an inpatient of a hospital or skilled nursing home or where outpatient services are not performed in a hospital. By the same token, a physician could examine a patient beneficiary in his office or the patient's home, and although he would not be entitled to payment under the act for general professional services, such as the office call or home call, if he prescribed drugs to such patient and dispensed them with the consent of said patient, he could be paid under the statute for the drugs or medicines furnished.

The act is intended to assist those eligible with the more costly incidents of medical care, and it is recognized that beneficial and necessary medicines and drugs may be expensive.

A physician may lawfully prescribe, compound, dispense and administer medicines and drugs to his patients and in doing so is performing services which are pharmaceutical in nature. When he does furnish medicines and drugs to an

eligible beneficiary, with the latter's consent, your department could authorize payment under the act. The contract with the insurance company administering the plan could be revised to authorize such payments.

RJV

Teacher's Certificate—Words and Phrases—The grandfather provision in sec. 40.43 (3) applies to any teacher who taught in the public schools during or prior to the 1937-38 school year and without any limitation that the teaching subsequent to that school year be continuous.

December 30, 1965

ANGUS B. ROTHWELL
State Superintendent of Public Instruction

So far as here material, sec. 40.43 provides:

"40.43 **Teachers' certificates and licenses.** (1) Any person who desires to teach in any of the public schools, or in schools maintained and operated by county homes for dependent children or other county or state institutions or schools in which children are received for care or education shall procure a certificate from the state superintendent.

" * * *

"(3) Until the end of the 1971-1972 school year no certificate to teach in any public school shall be issued unless the applicant has completed 2 years of school work beyond the work of the high school, which shall be devoted to pedagogical instruction and training; any teacher who has taught in any public school in the school year of 1937-1938 or prior thereto may continue to teach in the public schools without complying with the requirements of this subsection."

You state that in applying said sec. 40.43 (3) you consider that the words "may continue to teach" in the so-called

grandfather provision require continuous teaching service in the public schools of the state since the school year 1937-1938. Accordingly, certificates to teach will not be issued where an applicant therefor has not taught in the public schools without interruption during the period subsequent to that school year. An opinion is requested whether this is the proper application to be given this provision.

The antecedent of this provision came into the statutes by ch. 227, Laws 1937, which created a new sec. 39.05 (3) (b) which provided that beginning with the school year of 1939-1940 no certificate to teach in any common school should be issued unless the applicant had the required two years beyond high school now still in the provision and contained this grandfather clause language. In the change made by ch. 53, Laws 1939, abolishing the prior system of issuance of teachers' certificates by county superintendents and providing thereafter for the issuance of all teachers' certificates and licenses by the state superintendent, such provision was preserved and became sec. 39.05. Then in the general revision of the school laws by ch. 90, Laws 1953, the provision was amended, along with certain inconsequential editorial changes, to delete the words "Beginning with the school year of 1939-1940" and numbered to be sec. 40.43 (3), but continued as applicable only to certificates to teach in the common schools of the state. The present form thereof in sec. 40.43 (3) is the result of ch. 240, Laws 1963, which amended the provision by adding the words "Until the end of the 1971-1972 school year" as the first words thereof, changed the word "common" therein to "public" in the three places, and substituted the word "may" for "shall be allowed to" in the grandfather clause. Said ch. 240 also created what is now sec. 40.43 (3a), that beginning with the school year 1972-1973 a bachelor's degree is prerequisite for a certificate to teach in the public schools.

In the few instances that have arisen over the years you and your predecessors have deemed these provisions to mean that for a teacher to be excepted under the grandfather provision there must be uninterrupted teaching service after the school year 1937-1938. This has been rested

upon reading the words "continue to teach" as implying continuity in the sense of uninterruption in time or without cessation. However, the word "continue" is also used to mean "keep on" or "go on with" a course of action, without any restriction of uninterrupted sequence. Upon consideration of this statutory language in the light of what was the purpose of the enactment, it does not appear reasonable that the word "continue" was used with any intention of grounding the exemption from these new requirements upon the existence of a continuity of teaching service. Nothing therein suggests that the legislative objective expressed in the grandfather provision was that teachers who then and prior thereto were deemed to have the qualifications to teach in the public schools should be allowed to teach thereafter only where it would be a part of an uninterrupted or unbroken period of teaching service. Rather, it seems apparent that the sole purpose of the language used was to express the concept that the eligibility to teach of those who possessed the qualifications theretofor required of one to be a teacher was prolonged and preserved without the necessity of their compliance with the newly prescribed qualifications.

The language of the grandfather provision includes not only those teachers who were teaching in the 1937-1938 school year during which the provision was enacted; it also includes specifically any teachers who taught in the public schools prior to that school year, which clearly includes any who taught at any time before that school year regardless of the fact that such teacher had not taught continuously prior to 1937-1938. Thus, such prior teacher falls within this language and is authorized to resume teaching after the enactment without complying with the newly prescribed requirements. The words "or prior thereto", would be meaningless unless this effect is given to them. In such case there is an interruption or break in teaching service of such prior teacher so that the resumption of teaching after the enactment would not be tacked on to or a part of an unbroken period of continuity of teaching. This shows that the inclusion of the word "continue" in the law was not

intended to limit the exception to instances of continuous teaching service.

Construing the language to authorize teachers who were then or who prior thereto had been teaching, to continue to teach subsequent to the enactment even though not possessing the newly established standards, conforms to the customary employment and usage of grandfather provisions. The purpose is to permit persons to do in the future what they have been doing in the past without meeting certain regulatory requirements that will apply to those who thereafter enter the field. Considering this, it is to be expected that if the legislature had intended a more restrictive exemption (future continuous teaching) it would have so stated in clear and unequivocal language to that effect. It did not do so and therefore it is only reasonable to give the provision the customary construction.

It is therefore my opinion that teachers who taught in the public schools of the state during or prior to the school year of 1937-1938 come within the grandfather provisions of sec. 40.43 (3) without any restriction that their future teaching must be of a continuous character.

HHP

Veterans—Civil Service—Sec. 63.05 (2) provides for a preference to honorably discharged veterans in certification of eligibles, but is inapplicable in a county which has not adopted the civil service system.

December 30, 1965

FREDERICK K. FOSTER
Corporation Counsel
Fond du Lac County

You inquire whether a person is entitled to a preference in appointment or promotion to a position in county employment, in a county which has not adopted a civil service

system, by reason of the fact that he is an honorably discharged veteran.

The answer to your question is "no". Absent a statute authorizing it, a veteran's preference in public employment is not sanctioned. Statutes which permit a veteran's preference, after it has been established that the veteran is eligible and qualified, have generally been held valid. *Beghin v. State Personnel Board,* (1965) 28 Wis. 2d 422, 137 N.W. 2d 29.

See also 15 Am. Jur. 2d *Civil Service,* §26, §27, 487-490, wherein it is stated that statutes granting preferences in employment to veterans are to be strictly construed.

The legislature, in sec. 63.05 (2) has provided that a county civil service commission, in the certification of eligibles, other conditions being equal, shall give a preference to veterans in the manner described. The preference applies to certification of eligibles and not directly to appointment. Sec. 63.04 provides that the provisions of secs. 63.01 to 63.16 are applicable to the classified service. The provision of sec. 63.05 (2) does not apply to positions not within the classified service and of course does not apply where a county has not adopted a civil service system pursuant to secs. 59.07 (20), and 63.01-63.16 or 59.21 (8). I am unaware of any other statute which would require a preference under the facts stated.

RJV

Group Life Insurance—Premiums—Under sec. 66.919 (15) (e) a municipality participating in the group life insurance plan may not contribute a greater or lesser portion of the premiums for its insured employes. Sec. 66.185 is not applicable.

December 30, 1965

C. M. SULLIVAN, *Director*
Group Insurance Board

Your predecessor asked whether, under sec. 66.919, your board may permit a municipality participating in the state group life insurance program to pay a different proportion of the premiums for its personnel than the proportion which a participating municipality is required to pay pursuant to sec. 66.919 (15) (e).

In my opinion you may not permit such a variation.

The state group life insurance program was made available to municipalities by the passage of ch. 412, Laws 1959, which created sec. 66.919 (15). Subsec. (15) (b) makes all provisions of the section pertaining to the state and state employes with respect to group life insurance applicable to participating municipalities and their employes. Subsec. (15) (e) provides that a participating municipality shall pay the employer cost for its personnel pursuant to subsec. (8) (d) which, in turn, requires that the state contribute an amount equal to the difference between an employe's contribution and the gross premium for the employe.

Employe is defined to include retired employes, or annuitants, and subsec. (8) (a) requires that there be withheld from earnings of each insured employe under age 65 and from retirement benefits of each insured annuitant under age 65 an amount to be determined by the board but not to exceed 60 cents per month per $1,000 of insurance.

From the foregoing summary of the relevant parts of sec. 66.919 it is clear that the life insurance provided under that section for state employes is to be purchased by state *and* employe contributions and such insurance for municipal employes is to be purchased by municipal *and* employe contributions, with the employe contribution for each group being determined by the board. There is nothing in section 66.919 which would authorize the board to set a different amount for the contributions by employes of one municipality than for those by employes of another municipality.

Sec. 66.919 (20), pertaining to *health* insurance, in par. (e) provides that each municipality "may pay any part of

the cost for its personnel. * * *" That subsection was enacted by ch. 112, Laws 1961, and the above quoted language was inserted in Bill 216, A., by amendment, in lieu of the words, "shall pay the employer cost for its personnel pursuant to sub. (9) (b)". Thus the legislature expressly authorized municipalities to pay the full premiums for *health* insurance, or any lesser part thereof, but did not amend the previous statutory requirements as to the employe contribution toward the *life* insurance premium.

Despite the foregoing it has been suggested that a municipality may absorb the full cost of state group life insurance for its employes, under sec. 66.185, which provides:

"Nothing in the statutes shall be construed to limit the authority of the state or municipalities as defined in s. 345.05, to provide for the payment of premiums for hospital, surgical and other health and accident insurance and life insurance for employes and officers and their spouses and dependent children, and such authority is hereby granted. A municipality may also provide for the payment of premiums for hospital and surgical care for its retired employes."

The authority granted by sec. 66.185 to provide for payment of life insurance premiums was added to the section by ch. 313, Laws 1955, and is limited to employes and officers and their spouses and dependent children. The last sentence of the section, expressly expanding the authority so as to apply to *health* insurance premiums for retired employes, was added by ch. 533, Laws 1959. The authority granted by that sentence has not been made applicable to life insurance.

Thus the legislature by 1955 had authorized municipalities to provide for payment of premiums for life and health insurance for their active *employes,* before there was any state group insurance program. The state group life insurance was made available to municipalities by ch. 412, Laws 1959. The language of sec. 66.919, as amended by that act, requires contributions by both municipalities and employes, with the contributions of employes to be determined by the board, within certain limits, and with no discretion in the board to set a different rate of employe contributions for one municipality than for another. Also, sec. 66.919 makes

the life insurance applicable to certain retired employes of any participating municipality, with no discretion left in the board or the municipality to restrict the coverage to active employes. Later in the same session sec. 66.185 was amended by ch. 533, Laws 1959, so as to authorize municipalities to provide for payment of premiums for health, but not life, insurance for retired employes.

If a municipality elects to participate in the state group life insurance program, the municipality's annuitants, as well as its active employes, are entitled to the insurance. There is nothing in sec. 66.919 to warrant the board's establishing one amount for the contribution by active employes, whether state or municipal, and a different amount for the contribution by retired employes. A strained construction of the section would have to be adopted in order to support any such power of the board. Also, such a construction would create a conflict with sec. 66.185, were that section construed to empower a municipality to pay the full premium for state group life insurance, since sec. 66.185 does not authorize a municipality to pay any of the life insurance premiums for its retired employes.

It is my conclusion that there is no conflict between secs. 66.185 and 66.919. Sec. 66.185 is a general statute authorizing municipalities to obtain health and life insurance protection for their employes, while sec. 66.919 is a specific statute providing the method of operation of the state group insurance program. The municipal contributions toward state group life insurance are governed solely by the requirements of sec. 66.919.

EWW

Rule Making—Time Lapse—Ch. 227, statutes, does not place time limit on adoption of rules and regulations after hearing and investigations.

December 30, 1965

JAMES J. BURKE
Revisor of Statutes

You indicate that a state agency gave notice, in April, 1963, of a hearing to consider the adoption, amendment or repeal of rules. In such notice the general subject matter to be considered was described. The public hearing was held May 14, 1963. The state agency waited until November, 1965, before it took formal action to adopt rules which were filed. In the interim, meetings with representatives of industry and members of advisory committees were held. These conferences may or may not have received publicity.

You inquire whether the rules are valid.

This opinion is limited to a consideration of the provisions of Ch. 227, Stats., relative to rule making. Specific statutes applicable to various state agencies may require the agencies to act within prescribed time limits. See sec. 227.022 (4).

The rules are presumed to be valid, since the statutory requirements as to notice and hearing were complied with prior to adoption and filing.

Nowhere in secs. 227.01 to 227.06 is there any requirement that an agency must adopt any proposed rule or amend or repeal current rules within any given number of days, months or even years after hearing is held.

Sec. 227.018 provides:

"**Advisory committees and informal consultations.** An agency may use informal conferences and consultations as means of obtaining the viewpoints and advice of interested persons with respect to contemplated rule making. Each agency also is authorized to appoint committees of experts or interested persons or representatives of the general public to advise it with respect to any contemplated rule making. The powers of such committees shall be advisory only."

The statutory hearing requirement was not intended to bar administrative agencies from investigating the need for and the desirability of certain rules before proceeding to hearing, nor was it intended to bar the use of post hearing

investigative techniques including conferences and consultations with interested and informed parties and reliance on reports of advisory committees.

At pages 194-200, of State Administrative Law by Cooper, there is a discussion of the ways in which interested persons can participate in administrative rule making. At page 194, it is stated:

"Substantially all of the states which have enacted codes of administrative procedure have embraced the general principle that in adopting rules, agencies must afford reasonable opportunity to interested persons to submit their views to the agency as to the content of the proposed rule, and thus afford the public at least a minimal opportunity to participate in the rule-making procedure."

The author then describes the hearing on notice requirements of the Wisconsin Statutes, and the alternative method of adoption, after publication in the administrative register without hearing, unless hearing is requested by the interested persons specified.

At pages 198-200 the author discusses the importance of informal discussions with agency representatives and the use of unofficial advisory committees.

Davis, Administrative Law & Procedure, Vol. 1, Ch. 6, pp. 360-406, discusses at length administrative rule making. At no point does he suggest that an agency is required to act within any given period after hearing, if one is required.

In the absence of statute, notice and hearing would not be necessary before the agency could adopt rules. In adopting administrative rules, the agency is acting in a ministerial or legislative capacity depending on the nature of the rule.

In *Milwaukee v. Utech,* (1955) 269 Wis. 132, 138, 68 N.W. 719, the court stated:

"* * * The giving of reasonable notice is a necessary prerequisite of any hearing which a body or agency is required to conduct when acting in a quasi-judicial capacity, but this is not the case when acting in a legislative capacity."

In 2 Am. Jur 2d, *Administrative Law*, §283, p. 112, it is stated:

"Hearings in administrative rulemaking procedure are usually either investigatory or designed to permit persons who may not have been reached in a previous process of consultation and conference to come forward with evidence or opinion. The purpose is not to try a case, but to enlighten the administrative agency, and to protect private interests against uninformed and unwise action. * * *"

At page 113, 114 it is stated:

"Where a hearing is required, there is an implied command to do whatever may be necessary to make the hearing fair, a duty which varies with all the changing circumstances whereby fairness is conditioned. The appeal is to the sense of justice of administrative officers clothed by the statute with discretionary powers. Their resolve is not subject to impeachment for unwisdom without more. It must be shown to be arbitrary. * * *

"An administrative agency in the exercise of legislative power is not limited to hearings required or provided by statute but may conduct an independent investigation and survey to determine facts as a basis of an order or regulation, * * *"

At page 115 it is stated:

"An agency in the exercise of its legislative or rulemaking function must consider the claims and information afforded at a hearing required by statute. It may also be justified in taking into consideration not only the facts presented at the public hearing, but also those which came to it subsequently from interested bodies or were disclosed by its own investigation into the facts and the literature bearing upon the subject."

In most instances it is a matter within the discretion of the agency as to whether any rules are to be adopted and in nearly all cases it is within the discretion of the agency as to which specific rules are to be adopted.

Although the statute sets no time requirement in which an agency may act to adopt rules following a public hearing, the time interval which passes between the hearing and the filing of any rules based on the notice given and hearing had, would be one of the matters a court might consider in determining whether the action of the agency was arbitrary and capricious. The length of the time interval would be considered in view of all of the circumstances then and there existing and it cannot be fairly stated that the passage of any specific period of time would bar an agency from adopting valid rules. The doctrine of laches, however, may be applicable.

"In other situations there may be no statutory time limitations applicable to particular administrative proceedings and the question of whether or not there is a bar by time may turn on the question of laches. * * *" 2 Am. Jur. 2d *Administrative Law*, §321, 146.

There is a presumption that public officials discharge their duties or perform acts required by law in accordance with law and authority conferred on them, and that they act fairly, impartially and in good faith.

State ex rel. Wasilewski v. Bd. of School Directors, (1961) 14 Wis. 2d 243, 111 N.W. 2d 198.

Accordingly, it is my opinion that the rules adopted by the agency in question are valid.

RJV

Retirement—County Judge—County board does not have power under sec. 59.15 to restrict the circuit and county judges from appointing a family court commissioner over 65 years of age.

December 31, 1965

BURTON A. SCOTT
Corporation Counsel
Kenosha County

You have requested an opinion on the question of whether or not a retired county judge over the age of 65 is eligible to hold the position of family court commissioner in a county which requires employes to retire at age 65 in the absence of a written request from the county board to the contrary.

The facts as stated in your request and as supplemented by information which we have obtained from the office of the Wisconsin retirement fund are as follows:

The county judge in question was retired from service as county judge on April 30, 1965, after reaching the age of 70. His final rate of earnings as such judge was $13,483.44. On July 1, 1965, he was appointed family court commissioner by the county judges and circuit judge of the county at a salary of $7,570.50 per year, plus an allowance of $2,700.00 per year for office rent and expenses such as secretarial assistance.

His appointment as family court commissioner was made pursuant to sec. 247.13 (1), which provides:

"247.13 **Family court commissioner (formerly divorce counsel); appointment; powers; oaths; assistants; Menominee county.** (1) In each county of the state, except in counties having a population of 500,000 or more, the circuit and county judges in and for such county shall, by order filed in the office of the clerk of the circuit court on or before the first Monday of July of each year, appoint some reputable attorney of recognized ability and standing at the bar family court commissioner (formerly divorce counsel) for such county. Such commissioner shall, by virtue of his office and to the extent required for the performance of his duties, have the powers of a court commissioner. Such court commissioner shall be in addition to the maximum number of court commissioners permitted by s. 252.14. The office of the family court commissioner, or any assistant commissioner, may be placed under a county civil service system by resolution of the county board. Before entering upon the discharge of his duties such commissioner shall take and file the official oath. The person so appointed shall continue to act until his successor is appointed and qualified, except

that in the event of his disability or extended absence said judges may appoint another reputable attorney to act as temporary family court commissioner, and except that the county board may provide that one or more assistant family court commissioners shall be appointed by the judges of the county. Such assistants shall have the same qualifications as the commissioner and shall take and file the official oath."

The county board has gone on record as opposing authorization for continuing employment beyond the age of 65. It is your recollection that the only exception which has ever been made to the rule involved the employment of an individual for an extra period of three or four months because of difficulty in finding a replacement.

It perhaps should be pointed out before attempting to answer your question that this situation precipitates certain problems under the Wisconsin retirement law and that there has been correspondence with respect thereto between the judge and representatives of the Wisconsin retirement fund. However, this opinion will not touch upon those problems but will be confined strictly to the question you have raised.

The question you have raised is by no means a simple one and it requires some consideration of possible conflicts in the applicable statutes.

Sec. 59.15, gives the county board very broad powers with respect to county officers and employes.

Sec. 59.15 (2) provides in part:

"(2) **Appointive Officials, Deputy Officers and Employes.** (a) The board has the powers set forth in this subsection and sub. (3) as to any office, board, commission, committee, position or employe in county service (other than elective offices included under sub. (1), supervisors and circuit judges) created under any statute, the salary or compensation for which is paid in whole or in part by the county, and the jurisdiction and duties of which lie within the county or any portion thereof and the powers conferred by this section shall be in addition to all other grants of power and shall be limited only by express language.

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

"(c) The board may provide, fix or change the salary or compensation of any such office, board, commission, committee, position, employe or deputies to elective officers without regard to the tenure of the incumbent (except as provided in par. (d)) and also establish the number of employes in any department or office including deputies to elective officers, and may establish regulations of employment for any person paid from the county treasury, but no action of the board shall be contrary to or in derogation of the rules and regulations of the state department of public welfare pursuant to s. 49.50 (2) to (5) relating to employes administering old-age assistance, aid to dependent children, aid to the blind and aid to totally and permanently disabled persons or ss. 63.01 to 63.17.

"(d) The board or any board, commission, committee or any agency to which the board or statutes has delegated the authority to manage and control any institution or department of the county government may contract for the services of employes, setting up the hours, wages, duties and terms of employment for periods not to exceed 2 years."

Sec. 59.15 (4) provides:

"(4) INTERPRETATION. In the event of conflict between this section and any other statute, this section to the extent of such conflict shall prevail."

The above quoted provisions of sec. 59.15, and other provisions thereof which have not been quoted such as sub. (1) and sub. (3), in general confer upon the county board the authority to abolish, create, or re-establish an office or employment as well as the authority to fix or change the salary or compensation, reimbursement for expenses and to transfer the duties as well as to "establish regulations of employment for any person paid from the county treasury".

(Elective officers, supervisors and circuit judges are excepted.) Presumably "regulations of employment" could include provisions relating to maximum age. While the county board apparently had sec. 66.906 (1) of the retirement law in mind when it adopted the resolution, there is nevertheless the question of whether it had the power to do so under sec. 59.15 (2) (c).

The county board does not have the power to repeal a statute such as sec. 247.13 (1). In 30 OAG 15, 17, for example, it was concluded that the county board does not have the power to abolish the board of trustees of a county agricultural school established pursuant to sec. 41.47. If the legislature were to attempt to delegate to the county board the power to amend or repeal a statute such attempted delegation of power would be subject to attack on the grounds that it constituted an improper delegation of legislative power, since legislative power is vested in the legislature. Art. IV, sec. 1, Wis. Const. There are, of course, many situations wherein statutes may properly provide for the granting of options to municipalities. See *State ex rel. Smith v. Outagamie County,* (1921) 175 Wis. 253, 259, 185 N.W. 184.

Sec. 247.13 provides for no options, nor does it give to the county board the power to prescribe qualifications for the family court commissioner. That discretion is vested solely with the circuit and county judges of the county in the absence of a resolution placing the office under civil service.

Thus, we have a clear conflict between the provisions of sec. 59.15, which authorize the county board to abolish, create or re-establish any office [other than those excepted in subsec. (2)] or to transfer its functions, duties, etc., to any other agency and establish regulations of employment, on the one hand, and the provisions of sec. 247.13 on the other hand, which vests the unrestricted choice in the circuit and county judges.

On the surface, this conflict is to be resolved by giving precedence to sec. 59.15, since subsec. (4) provides that in the event of conflict with other statutes the provisions of sec. 59.15, are to prevail. The difficulty with this position as

applied here is that it gives rise to an unconstitutional result which must be avoided if possible.

It is therefore concluded that if the provisions of sec. 59.15 were to be construed to authorize the county board, in exercising its authority to establish regulations of employment, to compel the retirement of a family court commissioner selected by the judges of the county under sec. 247.13 (1), at 65 years of age, it would amount to an amendment of the provisions of sec. 247.13 (1) by the county board, and sec. 59.15 as so construed would constitute an invalid attempt on the part of the legislature to delegate legislative authority to the county board to amend an existing statute.

This being so it becomes unnecessary to consider other questions which might suggest themselves such as whether the county board resolution interferes with the inherent power of the courts to provide for the proper and efficient performance of their functions.

There is, however, one more question which deserves consideration and this has nothing to do with the county board's authority under sec. 59.15.

Sec. 247.13 (4) provides:

"(4) In any county one or more retired or former judges may be appointed as temporary or temporary assistant family court commissioners by a majority of the judges presiding over a family court branch in such county. Such temporary or temporary assistant family court commissioners shall be compensated by the county for their services at the rate of $25 per half day, but shall be considered officers of the court or courts appointing them and not employes of the county."

It might be argued that this evidences a legislative intent that retired judges are to serve only as temporary family court commissioners or assistants.

Nevertheless, this cannot be said to constitute a prohibition of the appointment of a retired judge as a full time family court commissioner. Rather it prescribes the terms and conditions under which he is to be employed as a temporary or temporary assistant family court commissioner.

You are therefore advised that the county board, acting pursuant to sec. 59.15, may not restrict the freedom of choice of a family court commissioner by the circuit and county judges.

We wish to make it clear that no question has been asked on the authority of the county board under sec. 247.13 (1) to adopt a civil service system for the office of family court commissioner with a 65 year age limit, and nothing said here should be construed as constituting an answer to that question.

WHR

Revolving Charge Accounts—Interest—Usury—Discussion of legal rate of interest and effect of secs. 115.04 to 115.06 on five types of charge accounts.

December 31, 1965

WILLIAM E. NUESSE
Commissioner of Banks

You have inquired whether the transactions set forth in fact situations 1 to 5 below involving installment sales and revolving charge account plans, constitute loans or forbearances subject to the provisions of the usury statutes, or whether all or any one of them qualify as time sales under the "time price doctrine".

This opinion will primarily examine the applicability of the provisions of secs. 115.04, 115.05, 115.06, to these transactions.

For more than 100 years, beginning with the United States supreme court decision in *Hogg v. Ruffner,* (1861) 66 U.S. 115, 17 L. Ed. 38, both state and federal courts have made a clear-cut distinction between a sale on time and a loan of money or a forbearance on the collections of money due. The courts have held that in the case of a true sale

of property on time, there is only one price — and that is the time price. The time price is a matter of bargaining between the parties, and is determined in the same manner as in the sale of any other property. In other words, the courts have said that a person may sell his property for cash or he may sell it on time and the differential between these two prices is not interest.

The time price doctrine has long been recognized in Wisconsin with respect to sales of both real estate and chattels. Wisconsin does not have an all goods or all goods and services installment sales act. It does have acts regulating the sale of motor vehicles and mobile homes on installment and regulates the amount of the time price differential which may be charged. See, secs. 218.01 (6) and 218.10, Stats. We need not decide here whether such regulatory acts are a recognition of the time price theory and regulate that segment of installment sales in which the legislature has found that abuses required regulation, or whether they are lending or loan laws which are an exception to the provisions of secs. 115.04, 115.05, 115.06.

In 91 C.J.S. *Usury*, sec. 16, p. 587 — the general law in the United States with respect to usury and time sales is discussed:

"Since the purpose of usury statutes is to prevent excessive charges for the use of money, * * * they apply only to those contracts which in substance involve a loan of money or forbearance to collect money due. Where there is no loan or forbearance, there can be no usury. In a few states, however, by a narrow and literal construction of peculiar statutes, the courts have held that no loan is necessary to bring a transaction within the terms of such statutes.

"* * *

"In order to constitute a loan there must be a contract whereby, in substance, one party transfers to the other a sum of money which that other agrees to repay absolutely, together with such additional sums as may be agreed on for its use. If such be the intent of the parties, the transaction will be considered a loan without regard to its form.

"* * * Where services rendered form wholly or in part the consideration for obligations taken, if such obligations are received in good faith, they are valid even though the nominal compensation may be greater than usually paid for services of a like kind. Such arrangement is invalid if made for the purposes of hiding usury.

" * * *

"It is manifest that any person owning property may sell it at such price and on such terms as to time and mode of payment as he may see fit, and such a sale, if bona fide, cannot be usurious, however unconscionable it may be, and this is so even though a bonus and commission are included in the purchase price. On the other hand, the law will not permit a usurious loan to hide itself behind the form of a sale. A transaction is not a loan of money as distinguished from a sale of realty because title is conditionally to be conveyed, because it is held as security, or because the debt is absolute; ** *

" * * *

"A vendor may fix on his property one price for cash and another for credit, and the mere fact that the credit price exceeds the cost price by a greater percentage than is permitted by the usury laws is a matter of concern to the parties but not to the courts, barring evidence of bad faith. If the parties have acted in good faith, such a transaction is not a loan, and not usurious. This rule is particularly applicable where the article sold is subject to depreciation in value, as, for instance, an automobile. On the other hand some courts have departed from the 'credit price' rule, and the determination of whether a transaction is a loan or forbearance or a sale on time or on credit is controlled by the intention of the parties, and each case must be decided on its particular facts.

"A pretended sale on credit will not be allowed to cloak a usurious loan. If the contract of sale on deferred payments is but colorable and the real transaction a loan providing for illegal profit, it will be held usurious. Where the sale is made on a cash basis and for a cash price and the vendor forbears to require the cash payment agreed on in considera-

tion of the vendee's promising to pay at a future day a sum greater than such agreed cash value with lawful interest, in such case there is a forbearance to collect an existing debt, and the excessive charge therefor is usurious. So, a stipulation providing for an increase in the price in the event that there is a delay in making payment renders the contract usurious. If, after a buyer is in default on a current account, the seller undertakes to add to the selling price and collect retroactively an amount of interest in excess of the legal rate, he violates the usury laws.

" * * *

"According to the weight of authority, where a vendor fixes the credit price of his property in terms of the cash price plus an increment expressed as interest on such cash price at a higher rate than allowed by law on loans, such a contract may be expressed in notes taken for the deferred payments, bearing a seemingly unlawful rate of interest, and be nevertheless valid and enforceable, provided the parties have acted in good faith. There are, however, some cases which repudiate this doctrine, and hold that notes bearing unlawful interest are none the less usurious forbearances because taken for deferred payments of purchase money. In other cases such contracts for deferred payments have been held usurious because they are considered to violate the peculiar terms of the local statutes."

A similar view of the general law is stated at 55 Am. Jur. 336-348.

Intent is considered by many authorities to be a necessary element to constitute usury. However, if the contract on its face imports usury, the necessary intent will be implied. If the usury is not apparent from the contract itself, the intent must be gathered from the circumstances of the case. Where a contract is in fact usurious, the mere incorporation of a disclaimer of any ursurious intent on the part of the lender will have no effect. 55 Am. Jur. 348, 349.

At 91 C.J.S. 598, attention is given to the term forbearance:

"The term 'forbearance' as used in the usury acts signifies the contractual obligation of the creditor to forbear during a given period to require of the debtor payment of an existing debt then due and payable. Where there is no existing debt there can be no forbearance to collect it, whatever form the transaction may take. The forbearance, or giving time for the payment, of a debt is, in substance, a loan, and when there is an existing and matured debt, a charge made by the creditor for his binding promise to forbear for a definite period to collect it, greater than that allowed by law, will subject the debt forborne to all the penalties prescribed by the law for usury. If the transaction is in reality an agreement for forbearance, the fact that it takes the form of, and that the parties agree that it shall be considered, an exchange of paper, cannot change its usurious nature, and it is immaterial that the parties did not regard an added sum as interest if it was in fact paid for forbearance. * * *"

The Wisconsin court has not had an opportunity to consider cases involving revolving charge accounts (and certain of the other problems raised by your examples) nor has it considered cases involving installment sales of automobiles. Certain Wisconsin cases on related subjects, however, do offer some insight into the manner in which the Wisconsin court might act in consideration of the examples posed.

The right to charge interest is statutory.

McLoughlin v. Malnar, (1941) 237 Wis. 492, 297 N.W. 370

Schlesinger v. State, (1928) 195 Wis. 366, 218 N.W. 440

Interest is the compensation allowed by law or fixed by the parties for the use or detention of money.

Daniel and Dillard v. First National Bank of Birmingham, (1956) 228 F. 2d 803

Laycock v. Parker, (1899) 103 Wis. 161, 186, 79 N.W. 327

The law against usury is intended for the benefit and protection of the borrower who is himself obliged to submit to and suffer the exactions of the usurer, and not for

the protection of strangers or those not borrowers or standing in that relation to the lender. *Zang v. Schumann,* (1952) 262 Wis. 570, 55 N.W. 2d 864.

It is not competent for the parties to a transaction, by any device, arrangement or agreement among themselves to defeat the policy of the statute of usury, and all such devices, arrangements, agreements or undertakings may be inquired into and sifted, in order to discover their real nature, and if found to be really intended to avoid the statute, will be held void.

Cooper v. Tappan, (1859) 9 Wis. *361.

In *Root v. Pinney,* (1860) 11 Wis. *84, defendant requested a loan of money from plaintiff. For the purpose of evading the usury laws he required the borrower to purchase a quantity of wheat at a price twice its real value, and to perform services. The stated price of the wheat and the money loaned were made the principal sum of the note. The court held that the principal was the money actually paid plus the real value of the wheat less the value of the services performed by the defendant and that it was the trial court's duty to determine the fair value of the goods and labor in order to determine whether or not there has been usury.

In *Zang v. Schumann,* (1952) 262 Wis. 570, 578, 579, 55 N. W. 2d 864, the court reviewed the four elements which must be necessary to establish usury, after referring to earlier Wisconsin cases which held certain transactions not ursurious, and stated:

"In *Randall v. Home Loan & Investment Co.,* (1944) 244 Wis. 623, 627, 12 N.W. (2d) 915 which was an action brought under sec. 115.07 (1), Stats., for treble damages, this court held that a provision in a note requiring the borrower to pay an additional one per cent per month in the event of default was not to be treated as a usurious interest charge, but would be considered as having been inserted for the purpose of compelling payment at maturity. The court cited and quoted from several Wisconsin decisions and those of other jurisdictions, among them *Tallman v. Truesdell* (1854), 3

Wis. *443, which involved an agreement that the borrower would pay compound interest in the event of a default.

"The court in its decision in *Tallman v. Truesdell, supra,* stated (p. *450):

" 'We do not think the agreement to pay compound interest in case of default in paying the interest stipulated is necessarily usurious. It is not a positive undertaking to pay compound interest at all events, but only in case of default in complying with the other covenants of the mortgage, and may be regarded in the light of a penalty of forfeiture.'

"The Wisconsin cases on this point are in accord with Restatement, 2 Contracts, p. 1037, sec. 536:

" 'Unless especially forbidden by statute a provision in a bargain for a loan that after maturity interest at a higher rate shall be charged than is permissible before maturity, does not render the bargain usurious unless the parties when entering into it contemplate that the loan shall not be paid at maturity.'

"It seems clear under the authorities that where no usurious interest was provided for in the original note or loan agreement, and none was contemplated between the parties at the time of the inception of the transaction, a subsequent payment made by the borrower for the use of the money borrowed in excess of the rate permitted by statute does not constitute usury. The law on this point is well summarized in 55 Am. Jur., Usury, p. 331, sec. 12, as follows:

" 'The definition of usury imports the existence of certain essential elements generally enumerated as (1) a loan or forbearance, either express or implied, of money, or of something circulating as such; (2) an understanding between the parties that the principal shall be repayable absolutely; (3) the exaction of a greater profit than is allowed by law; and (4) an intention to violate the law. The presence of these elements infallibly indicates usury irrespective of the form in which the parties put the transaction; on the other hand, the absence of any one of them conclusively refutes the claim of usurious practice. In order that a trans-

action be considered usurious, these elements must exist at the inception of the contract, *since a contract which in its inception is unaffected by usury can never be invalidated by any subsequent usurious transaction. It is the agreement to exact and pay usurious interest, and not the performance of the agreement, which renders it usurious.* The test to be applied in any given case is whether the contract, if performed according to its terms, would result in producing to the lender a rate of interest greater than is allowed by law, and whether such result was intended.' (Emphasis supplied.)"

Cases from other states point out the elements which the courts will consider in determining whether a loan or forbearance existed or whether the transaction was a valid sale within the time price doctrine.

"Whether a particular transaction is usurious is a fact question, where the evidence is conflicting. Decision is not to be made according to any hard and fast test. The case is not to be determined simply by what the parties represent the transaction to be, but by considering the whole evidence to ascertain whether or not it is in substance a contracting to receive usurious interest for a loan or forbearance of money. The process involves looking through the form to the substance. No device or shift may be employed to conceal the true character of the transaction." *Dunn v. Midland Loan Finance Corp.* (1939), 206 Minn. 550, 289 N.W. 411, 413.

See, also, *Hillman's v. Em'N Al's,* (1956) 345 Mich. 644, 77 N.W. 2d 96.

The Nebraska and Texas courts have held that a transaction cannot be a valid time sale unless the buyer at the time of the sale was informed of and was given an opportunity to choose between a cash price and a valid time sale price. The *Berg* and *G.M.A.C.* cases also hold that it is a question of fact as to whether a particular transaction is a bona fide time sale or the financing of a cash purchase price.

Wood v. Commonwealth Trailer Sales, Inc., (1961) 172 Neb. 494, 110 N. W. 2d 87.

Berg v. Midwest Laundry Equipment, (1963) Neb. 122 N. W. 2d 250, 129 N. W. 2d 699.

G.M.A.C. v. Mackrill, (1963) 175 Neb. 631, 122 N. W. 2d 742.

Lloyd v. Gutgsell, (1963) 175 Neb. 775, 124 N. W. 2d 198, 176 Neb. 354, 126 N. W. 2d 224.

Mossler Acceptance Co. v. McNeal, (Tex. Civ. App. 1952) 252 S. W. 2d 593.

The courts are interested in determining whether the sale was in fact at an *agreed cash price,* with financing charges added, in which case it would be subject to the usury statutes, or whether it was at an *agreed time price* in which case it would not be subject to the usury law. The courts will disregard the language of the contract itself if the evidence shows that the sale was in fact at an *agreed cash price. Sebold v. Eustermann,* (1944) 216 Minn. 566, 13 N. W. 2d 739.

The courts examine whether the parties treated the financing charge as "interest", that is compensation for the use or forbearance or detention of money, or whether they intended that it be an addition to the price charged for merchandise sold on an extended credit basis, over the price of the merchandise when sold on a current basis, at current prices. If they intended the latter, such charge is a legitimate time price transaction. The courts, in making their determination, investigate whether a third party finance company had agreed to advance and did in fact pay to the seller the balance of the cash price. If such were the case the difference between the deferred balance and the note, except for the insurance charge, actually represented the amount charged by and paid to the third party finance company for the use of its money and hence was interest on a loan.

Associates Invest. Co. v. Thomas, (Tex Civ. App. 1951) 210 S. W. 2d 413.

In making its determination, the court may place great weight on the fact that the financing charge was arrived at from forms furnished by a bank or finance company or

was actually computed by such agency or that the credit company had agreed prior to the sale to finance the transaction on the basis of the difference between the cash price and the stated time price.

Daniel and Dillard v. First National Bank of Birmingham, (C. A. 5th 1955) 227 Fed. 2d 353, 228 Fed. 2d 803.

Jackson v. Commercial Credit Corporation, (1954) 90 Ga. App. 352, 83 S. E. 2d 76.

Ryan v. Indiana Loan & Finance Corp., (1930) 91 Ind. App. 622, 171 N. E. 812.

Krim v. Morris Plan Industrial Bank of New York, (N. Y. Mun. Ct. 1939) 173 Misc. 141, 17 N. Y. Supp. 2d 472.

Benton v. Sun Industries, (1950) 277 App. Div. 46, 97 N. Y. Supp. 2d 736.

If the transaction is a three party transaction, one that involves the finance company as well as the vendor and vendee, at the time of the sale, the financing charge will be regarded as interest on a loan.

White v. Disher et al. d/b/a Commercial Motors of Winston Salem and Commercial Finance Co., (1950) 232 N. C. 260, 59 S. E. 2d 798.

United Tire and Investment Co. v. Trone, (1941) 189 Okla. 120, 113 P. 2d 977.

Nazarian v. Lincoln Finance Corp., (1951) 77 R. I. 497, 78 A. 2d 7.

Higgins v. Mossler Acceptance Co., (Tex. Civ. App. 1940) 140 S. W. 532.

G.F.C. Corp. v. Williams, (Tex. Civ. App. 1950) 231 S. W. 2d 565.

Associates Investment Company v. Baker, (Tex. Civ. App. 1949) 221 S. W. 2d 363.

Frankfurt Finance Corporation v. Cox, (Tex. Civ. App. 1940) 142 S. W. 2d 553.

Gifford v. State, (Tex. Civ. App. 1950) 229 S. W. 2d 949.

Massachusetts, however, has held that a credit card arrangement whereby the corporation issued credit cards on entering into a contract with holders, and whereby the holders could not receive cash, even on returning merchandise to stores, was essentially a time sales arrangement and that neither interest nor a loan was involved. *Uni-Serv Corp. v. Commissioner of Banks,* (Mass. 1965) 207 N. E. 2d 906.

In *Associates Investment Company v. Sosa,* (Tex. Civ. App. 1951) 241 S. W. 2d 703, the court noted that the sales tax had been computed on the cash price only and reasoned that there could not be a time sale.

Arkansas has held that if the vendor has reasonable assurance that he could discount the paper, the transaction amounted to a loan. *Hare v. General Contract Purchase Corporation,* (1952) 220 Ark. 601, 249 S. W. 2d 973.

In *Sloan v. Sears Roebuck Co.,* (1957) 228 Ark. 464, 308 S. W. 2d 802 the court went so far as to state that no contract could carry a charge of more than ten per cent per annum simple interest. It stated that the word "forbearance" as used in its usury statute simply means that the person to whom money is owed waits for all or part of the money after the consummation of the contract in which money is involved, or that the seller foregoes payment in cash and waits for all or part of his money. This is contrary to the great weight of authority as most courts hold that a debt must be due before there is a forbearance. 91 C.J.S., *Usury,* sec. 23, p. 598. In the *Sloan* case, the court stated that the facts and circumstances existing at the instant the installment contract is consummated determine whether it is usurious and that the test is not whether the seller at a later date transfers the paper to a finance company. In the *Sloan* case the sales tax was paid only on the stated cash price. The court held that where the sale is really made on a cash estimate and time is given to pay the same, and an amount is assumed to be paid greater than the cash price, with legal interest, would amount to, it is as agreement for forbearance and is usurious. The sales ticket carried a total cash price of $393.98, carrying charge $37.17 for a total of

$431.15, a cash payment of $40.00 leaving a balance of $391.15 payable in monthly installments.

The definition of forbearance in the *Sloan* case is approved in *Universal C.I.T. Corp. v. Hudgens,* (1962 Ark.) 356 S. W. 2d 658.

In *Wyatt v. Commercial Credit Corp.,* (1960 Missouri) 341 S. W. 2d 348, the court refused to follow the Arkansas and Georgia cases and held that, where buyers had signed an order for refrigeration equipment stating a cash price, but later executed a chattel mortgage for a time payment price which included a finance and recording charge, the purchase had not resulted from the act of signing the initial cash price order and that the sales contract was not usurious.

Secs. 115.04 to 115.06 are commonly referred to as the usury statutes, but in their present form, they also govern disclosure, refunds on prepayment, and interest or penalty in extensions or defaults.

Sec. 115.04 establishes the legal rate and provides:

"**Legal rate.** The rate of interest upon the loan or forbearance of any money, goods or things in action shall be $5 upon the $100 for one year and according to that rate for a greater or less sum or for a longer or a shorter time; but parties may contract for the payment and receipt of a rate of interest not exceeding the rate allowed in s. 115.05, in which case such rate shall be clearly expressed in writing."

It should be noted that in order to charge a higher rate, as permitted by sec. 115.05, there must be a contract of agreement between the parties and the rate must be clearly expressed in writing. This in itself does not require the signature of the party to be charged and a signature is not required unless the party exacting the higher charge is exacting the higher rates permitted under sec. 115.05 (1) (c).

We are primarily concerned with sec. 115.05 (1), Stats., which provides:

"**Maximum rate; prepayment, disclosure; corporations.** (1) Except as authorized by other statutes, no person shall,

directly or indirectly, contract for, take or receive in money, goods or things in action, or in any other way, any greater sum or any greater value, for the loan or forbearance of money, goods or things in action, than:

"(a) At the rate of $12 upon $100 for one year computed upon the declining principal balance of the loan or forbearance;

"(b) With respect to loans or forbearances repayable in substantially equal weekly or monthly instalments and the face amounts of which include predetermined interest charges, at the rate of $6 upon $100 for one year computed upon that portion of the original principal amount of any such loan or forbearance, not including interest charges, for the time of such loan or forbearance, disregarding part payments and the dates thereof; and

"(c) With respect to loans or forbearances repayable in instalments other than of the type described in par. (b), the amount of interest may be predetermined at the rate set forth in par. (a) at the time the loan is made on the basis of the agreed rate of interest and the principal balances agreed to be outstanding and stated in the note or loan contract as an addition to the principal; provided that if any agreed balance of principal or principal and interest combined or any instalment of principal or principal and interest combined is prepaid in full by cash or renewal the unearned interest shall be refunded as provided in sub. (2) (b). In the computation of interest upon any bond, note, or other instrument or agreement, interest shall not be compounded, nor shall the interest thereon be construed to bear interest, unless an agreement to that effect is clearly expressed in writing, and signed by the party to be charged therewith."

The statute is a broad one, as is sec. 115.04. The general statutory limitation on interest charges is not restricted to loans but applies to forbearances also and it is not limited to charges for loans and forbearance of money only but applies to loans or forbearances of goods and of things in action. In the usual retail transaction, however, there is no loan or forbearance of goods or things in action. The seller

has parted with his goods and the contract of sale contemplates payment in money, not payment in goods of like or other kind. In retail sales by installment or revolving charge accounts we are not then, concerned with loans or forbearances of goods. Such a situation could arise and the statute is broad enough to cover it; however, it would be an exceptional case. The fact that a conditional sale is involved, under which the seller may retake the goods in case of default, does not in and of itself make the situation one of forbearance of goods. And under the statute the prohibition is not limited to interest in the traditional sense, but applies to the taking or receiving of "any greater sum or any greater value" than that specified.

The statutes contemplate regulation of all charges exacted to compensate a creditor for the debtor's use or withholding of money or its equivalent loaned or forborne by the creditor. As pointed out earlier, however, in order for there to be a forbearance, there must be an existing debt which is due and payable.

See also secs. 214.01 (3), and 214.19 to 214.22 relating to small loans.

With this background, your five complex examples will be considered.

Fact Situation One

"Buyer A takes his car to a garage for service. The retail seller, B, has the buyer sign a work order form at the time the car is left for repair, which reads as follows: 'The above repairs are hereby authorized. I understand that all charges are due within 30 days from billing date. If payment in full is not made by then, I hereby agree to pay a service charge at the rate of 1½% per month (18% per annum) on the declining unpaid balance until paid in full.'

"On January 2, 1960, the date the agreement is signed, buyer's car is serviced with the resulting cost of service accessories and parts totaling $400. Thirty days later a bill was sent to the buyer for the $400 repair bill. No payment was received and on March 3, 1960 seller B billed buyer A

for a service charge of $12. The [claimed] time price of $412 was not known or stated at the time the agreement was signed. * * *"

You inquire whether the $12 charge is an interest charge, and therefore usurious, or whether the entire transaction comes within the time price doctrine.

The transaction does not come within the provisions of sec. 218.01 permitting a time price differential to be charged on the sale of motor vehicles. Only car parts and service are involved.

The buyer was not quoted a cash price and time price and given a choice of payment. The prices in fact were not determined prior to the time the agreement was signed. The bill in the amount of $400 became due 30 days from the billing date, which was February 1, 1960. The debt was then due and existing. The merchandise and services were sold and billed at the cash price. Credit was extended for payment on time. In light of the above it would seem that the charge of 1½% per month was for the forbearance of money due the creditor, was in excess of the rate permitted by secs. 115.04, 115.05, and was usurious. The facts do not disclose a good faith attempt to sell on a time price basis and the necessary intent to evade the usury law can be implied from the fact of the contract.

Fact Situation Two

"Buyer C purchases merchandise at a cash selling price of $100 on January 2, 1960 with the understanding that the merchandise be charged to his account and billed as of the first of the month. No contract or agreement was signed at or prior to the date of sale or at any time. When payment was not received on March 3, 1960, the seller D billed buyer C a 'service charge' of 1½% per month or 18% per annum on the declining balance. This service charge amounted to $3.00 on the $100 purchase price. * * *"

You inquire whether the $3.00 charge is usurious. The merchandise was sold for and billed at a cash price. There was no agreement as to a time price and no choice between a

cash and time price. A court could find that the $3.00 charge was interest for the forbearance of an existing debt which was due and payable and in excess of that permitted by statute, and therefore usurious.

Fact Situation Three

"Buyer E signs an agreement which reads as follows:

" 'I/We hereby apply for a continuous budget account and agree that all purchases made on this account shall be subject to the following terms and conditions: (a) I/We agree to pay a carrying charge of 1½% per month. (b) It is understood that each monthly payment on this account shall become due not later than 30 days after billing date as set forth in monthly statement, and the amount of each instalment shall be determined by the total balance outstanding from time to time as new purchases are made on this account in accordance with the schedule set forth below, but in no event shall any monthly payment be in a lesser amount than the previous monthly instalment, unless authorized by Company F. (c) Failure to make a monthly payment shall, at the option of Company F render the entire unpaid balance due and payable immediately. (d) When a new purchase increases the balance to more than the original purchase, the monthly payment will be increased to conform with the following schedule:

Balance after Purchase	Continuing Mo. Payment	Balance after Purchase	Continuing Mo. Payment
$ 15 - $ 49	$ 5	$ 400 - $449	$22
50 - 74	7	450 - 499	25
75 - 99	9	500 - 549	27
100 - 149	10	550 - 599	30
150 - 199	13	600 - 699	34
200 - 249	14	700 - 799	39
250 - 299	15	800 - 899	44
300 - 349	17	900 - 999	49
350 - 399	20	1000 or more	
		Approx. 1/20 of total'	

"The purchaser signed the above agreement on December 3, 1959, and during the month of December, 1959 made pur-

chases totaling $100 for which he received a bill on January 2, 1960 listing the amount of purchases in the amount of $100; on February 2, 1960 he received a bill which shows the billing date as February 2, 1960 with a previous balance of $100 due and owing on the account. To this amount was added $1.50 as a service charge and, in addition, were listed purchases made during the month of January totaling $158.50. The purchaser also made payments on the account during the month totaling $60.00 which left a balance due as of February 2, 1960 of $200.

"On the March 2, 1960 billing date, Seller F sent a statement to Buyer E showing a previous balance due of $200 to which was added a service charge of $3.00. The seller then listed purchases made during the month of February of $147.00. Payments were made during the month of February totaling $50.00 leaving a balance due as of the billing date of $300 including charges. On the April 4 billing date, a bill was sent out showing the previous balance as $300 to which was added a service charge at 1½% or $4.50. On each of the purchases made, only the cash selling price was stated on the sales check. The amount of the time price was not stated in a dollar and cent amount or in any other way. On the monthly statement there was no identification of the charge except that the amount of charge $3.00+ was listed in a column containing the legend 'Purchases and Service Charge+' per example.

Billing Date	Previous Balance	Purchases and Service Charge+	Payments and Credits	Balance
March 2, 1960:	$200.00	$ 3.00+		
		44.50		
		60.40	$10.00	
		30.10	20.00	
		12.00	20.00	
				$300.00

"In your opinion is the charge to be considered as an interest charge or as a time price charge?"

The plan set forth, is commonly referred to as a revolving charge account plan. The charge exceeds 1 per cent per month.

If we assume that the plan could comply with the time price theory if the purchaser were timely in all his payments, it is nevertheless common knowledge that users of such plans do not always make their payments on time, or in the amount called for by the plan. The time price doctrine is applicable only to payments for the agreed time price of the merchandise purchased, although, if agreed upon, a penalty may be exacted for the nonpayment of amounts not paid on time. The plan in example three contemplates the exaction of a service charge or carrying charge of 1½ per cent on the balance of the account. If in fact, when the required monthly payment is not paid in time, such charge becomes one of interest for the forbearance of an existing debt due and payable, it is usurious. The carrying charge for the previous month is also added to the balance due and results in the application of a carrying charge, which is really interest, on a carrying charge.

An agreement to pay interest on interest past due may be regarded as a penalty. While the parties may agree to the payment of a penalty in case of default, the language of plan three does not indicate whether that is the intent of the parties.

Randall v. Home Loan & Investment Co., (1944) 244 Wis. 623, 628, 12 N.W. 2d 915.

The question whether the plan is usurious cannot be determined except by a court given the opportunity to decide the question after having viewed all circumstances connected with its operation.

It is impossible from a view of the facts stated to determine whether the seller and buyer, in good faith, intended to and did treat the transactions as a time price sale. There is some indication that the seller views the carrying charge

as interest. Only the cash price was stated on each sales slip. On a trial, inquiry would have to be made as to whether the carrying charges made were determined by the seller or whether they were suggested or set by any bank or finance company with whom the seller had an agreement to finance said charge accounts. The seller would argue that it was a time price sale and that the buyer knew the cash price and knew the percentage which would be added on and could figure it out and thus had a choice between a cash price and a time price. The difficulty is that there can only be one price in a time price sale and that is the time price, but here the buyer did not have to decide until after 30 days whether he would treat it as a cash purchase, payable in 30 days or a claimed time price, in which case he would only have to make the required continuing monthly payment. Such option in the buyer indicates an intent on the part of both parties that the sale was at a cash price, and that the carrying charge was for the extension of credit.

The example does not indicate whether a sales tax was applicable. If it were and if it were computed on the cash price only, the court would probably view it as evidence of a sale at a cash price. The plan here contemplates or at least permits, additional or continuing purchases.

The time price doctrine is best adopted to single transactions which may cover more than one item. Under plan three the account might never become due and payable in total unless the seller exercises his option to declare it due and payable.

The account appears to be an open account or mutual account. It runs for an indefinite period and hence there is no definite time sales price or definite day on which the purchase money for any single purchase becomes due. In passing it is noted that the contract does not provide that the purchaser can require the seller to sell him any items the seller may have for sale and add the items to the account.

As stated in 1 Am. Jur. 2d *Accounts and Accounting*, sec. 7, p. 377:

"Property sold, services rendered and money advanced may all create an open or a mutual account depending upon the facts and circumstances."

The following Wisconsin cases discuss the question of interest on open or mutual accounts:

Ryan Drug Co. v. Hvambsahl, (1896) 92 Wis. 62, 65 N.W. 873;

Marsh v. Fraser, (1875) 37 Wis. 149;

Yates v. Shepardson, (1875) 39 Wis. 173;

Pahl v. Komorowski, (1919) 168 Wis. 553, 170 N.W. 950;

Maslow Cooperage Corp. v. Weeks Pickle Co., (1955) 270 Wis. 179, 192, 70 N.W. 2d 577;

Georgiades v. Glickman, (1956) 272 Wis. 257, 273, 75 N.W. 2d 573.

Whether the account is an open account or a mutual account is not material. If the plan does not meet the tests of a valid time price sale, it is usurious since the carrying charge exceeds the maximum rate.

The charges appear to be interest charges because they are monthly percentage charges computed on principal balances due from a debtor and are measured by the period of time for which the amounts are owed and the time for payment of the total amount due for any single purchase can be extended by the debtor-purchaser by the act of making additional purchases, providing he makes his required monthly payment.

Under the plan, assuming there are continuing purchases, it appears to be virtually impossible for a purchaser to determine the ultimate claimed time price for any single item. This is partly true because the carrying charge is paid on the unpaid balance of the account which in most cases includes carrying charges imposed in previous months. Neither seller nor purchaser are in a position at the time the sale is made to determine with finality the amount of any claimed time price. The plan appears to be one for the establishment

of a continuing charge account, in which purchases are made at a cash price and a carrying charge in the nature of interest is agreed upon for the extension of credit to enable the purchaser to pay the cash price over a period of time.

In *Lloyd v. Gutgsell,* (1963) 175 Neb. 767, 782, 783, 124 N.W. 2d 198, 126 N.W. 2d 224, the court stated:

"There seems to be an impression that if a cash price is quoted and the buyer is unable to pay cash, it is then possible to apply a certain schedule of rates or charges to the cash price in order to determine the time sale price, the difference being denominated a time price differential. It is possible to do so if the resulting charge does not exceed 9 percent simple interest. If it does, we have a usurious transaction. Where a time sale price is determined by applying a certain schedule of rates or charges to the cash price, the resulting product is interest. This is merely a sale for a cash price, with the difference between the money the buyer has and what he needs being financed. When we look through the form, can we come to any other conclusion but the one that the difference between the price and what the buyer finally pays is the cost of carrying the balance of the cash price? To put it another way, the charge is for the forbearance to collect the full cash price, or for the use of money. A rose is still a rose though we may label it a violet. This charge, regardless of its label, is interest. See General Motors Acceptance Corp. v. Mackrill, *supra.* A transaction handled in this manner is essentially a loan to finance the balance of the cash purchase price, and if payable in instalments must meet the requirements of the law covering finance transactions."

Fact Situation Four

"On this transaction all of the circumstances are the same as Item 3 above with the exception of the agreement signed by the buyer. The agreement used by Seller H reads as follows: 'If my application for a budget account is accepted, and in consideration of credit made available for purchases by me or members of my family from time to time, I agree:

" '(1) that each purchase (including mail or telephone orders) made under this Agreement and charged to my account shall be evidenced by a salescheck furnished by Seller H. Each charge for merchandise so purchased is referable to this Agreement, and all charges so made shall be paid in accordance with this Agreement;

" '(2) to pay in monthly instalments, within ten days after statement is mailed, the unpaid balance of the total purchase price, plus service charges in accordance with Seller H's terms generally in effect at the time of each purchase, so long as any part of my balance remains unpaid, in accordance with my selection of a monthly payment, indicated below:

MONTHLY PAYMENT: $20.00

" '(3) that if I shall fail to make a monthly payment when due, the entire balance owing shall, at the option of seller H become immediately due and payable, and that if I shall charge more than the limit of my account, by mistake or otherwise, I shall pay together with my next monthly payment, the amount by which my balance exceeds the limit of my account;

" '(4) that seller H reserves the right to decline further sales under this agreement at any time, and that this agreement may be ended at any time by me or by seller H upon notice to the other, but such termination shall not effect my obligation to pay any amount due under this agreement.' "

You inquire whether these additional facts would alter the conclusion reached with respect to plan three above.

It is my opinion that they would not. But the question whether this plan is usurious cannot be determined until all of the material circumstances have been brought to the attention of an appropriate court. The wording of the agreement states that "in consideration of credit made available for purchases" payments are to be in monthly instalments to apply on "the unpaid balance of *the total purchase price, plus service charges*". This appears to be language of an agreement to purchase at a cash price and to pay a carrying

charge in return for the right to pay the cash price over a period of time. A court might so find.

Fact Situation Five

"The purchase plan on transactions for buyer I are identical of those for buyer E in transaction 3 above except that at the time each purchase is made, the sales person uses a sales check which contains the following legend:

" 'These purchases are at a time price. See monthly statement for explanation of time price differential.'

"The monthly statement form contains the following legend:

" 'Charge account purchases are made at a time price, which consists of the cash price plus a percentage of that price computed as follows: add 1.5% of the cash price for each deferred payment required by the schedule in your agreement. In accordance with your agreement, the service charge is billed each month in an amount equal to 1.5% of the last previously billed balance.'

"The time price is not stated in a dollar and cent amount at any time."

You inquire whether these additional facts would alter the conclusion reached with respect to plan three above.

It is my opinion that they would not. But the question whether this plan is usurious cannot be determined until all of the material circumstances have been brought to the attention of an appropriate court.

The facts additional to fact situation four merely place in written form the claim of the seller and apparent agreement of the purchaser that the items are being sold at a time price.

A court would, however, inquire into all of the circumstances and would look to the substance rather than the form in determining whether the items were sold for a cash price or at a time price.

A large segment of the retailing industry and many members of the consuming public feel that there is a need for the credit arrangements described above. If they are properly conceived so as not to violate the maximum rate set forth in the usury laws and they otherwise comply with the requirements of the usury laws, such as disclosure and refunds for prepayment, they can of course be upheld.

There are in Wisconsin no controlling judicial opinions on the questions raised by your inquiry. A substantial part of the retailing industry in Wisconsin has adopted revolving credit plans which charge between 8 and 18 per cent per year on the unpaid balance of the account until the account is paid in full.

Whether or not such contracts are usurious is a question of vital importance to the consuming public as well as to the retail businesses in this state. If a contract is found to be usurious the principal amount up to $2000 may be forfeited, and the party imposing the usurious rates of interest is subject to severe penalties. Sec. 115.06.

It is clear that the rights of the parties can only be settled by an authoritative decision by a court. While your inquiry contains a general description of the operation of the various plans, these plans vary in many details. An authoritative decision as to whether or not such plans are usurious can only be rendered after all of the detailed facts have been marshalled and such facts applied to the applicable law. A general statement that such plans are usurious or that they are not usurious would not be in the public interest. After careful consideration of the nature of the problem involved, and in view of the importance of obtaining an authoritative court decision on this matter to resolve the rights of the respective parties, I conclude that this is a matter which must be resolved with finality by the courts, not by the attorney general. See September 1, 1961, opinion of the attorney general of Minnesota.

RJV

STATUTES AND CONSTITUTIONAL PROVISIONS, SESSION LAWS, LEGISLATIVE BILLS, AND RESOLUTIONS REFERRED TO AND CONSTRUED

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