OPINIONS

OF THE

ATTORNEY GENERAL

OF THE

STATE OF WISCONSIN

VOLUME 55

January 1, 1966 through December 31, 1966

BRONSON C. LA FOLLETTE
Attorney General

MADISON, WISCONSIN

1966

750—177

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

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ARLEN C. CHRISTENSON**	Deputy Attorney General
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THOMAS A. LOCKYEAR[6]	Assistant Attorney General, Trainee
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DONALD R. SIMON	Special Agent
HERBERT L. KRUSCHE	Special Agent
FRANK A. MEYER[9]	Special Agent

1. Retired Dec. 16, 1966
2. Retired July 18, 1966
3. Terminated Aug. 31, 1966
4. Terminated June 10, 1966
5. Appointed Feb. 1, 1966
6. Appointed June 13, 1966
7. Appointed Sept. 12, 1966
8. Appointed Oct. 31, 1966
9. Appointed March 1, 1966

* Terminated April 15, 1966

** Appointed April 18, 1966

OPINIONS

OF THE

ATTORNEY GENERAL

Volume 55

Registered Agent—Corporations—Discussion of Chs. 180 and 181 relative to domestic and foreign corporation registration.

February 23, 1966.

ROBERT C. ZIMMERMAN
Secretary of State

You have requested my opinion on the following questions:

"Can a corporation not organized or authorized under Chapter 180, such as a state or national bank, an insurance corporation, a state or federal savings and loan association, or similar corporations, be designated as a registered agent, as provided in Section 180.09 (2)? Can a corporation organized under Chapter 181 be so designated?"

The answers to your questions are "no".

Sec. 180.09 (2) provides:

"A registered agent, which agent may be either an individual resident in this state whose business office is identical with such registered office, or a domestic corporation,

or a foreign corporation authorized to transact business in this state, having a business office identical with such registered office."

The terms "domestic corporation" and "foreign corporation" are defined in sec. 180.02 (1) and (2) as:

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

"(2) 'Foreign corporation' means a corporation, joint stock company or association organized otherwise than under the laws of this state, except a railroad corporation, an association created solely for religious or charitable purposes, an insurance company or fraternal or beneficiary corporation, society, order or association furnishing life or casualty insurance or indemnity upon the mutual or assessment plan, a building and loan association, a common law trust, or a corporation not organized or conducted for profit."

A corporation to act as a registered agent under sec. 180.09 (2) must meet the statutory definition of the term "domestic corporation" as contained in sec. 180.02 (1), or a foreign corporation as defined in sec. 180.02 (2), and qualified under Ch. 180, and all the definitive elements must be present with the possible exception of "organized for profit". There is some question as to the necessity of this element due to the ambiguous language of sec. 180.97, which provides that all domestic stock corporations are subject to the provisions of Ch. 180 regardless of whether organized for profit. The presence or absence of this element is, fortunately, not material as all the institutions mentioned in your question are organized for profit.

Even though a corporation is organized under the laws of this state, if it does not meet all of the requirements of the statutory definition of sec. 180.02 (1) it is not a "domestic corporation" within the purview of sec. 180.09 (2).

State banks and insurance companies are prohibited from incorporating under Ch. 180 by sec. 180.03. National banks and federal savings and loan institutions receive their charter and are organized under federal law. State savings and loan associations are organized under Ch. 215. All of the corporations mentioned in your questions are either prohibited from organizing under Ch. 180 or are organized under other specific state or federal laws. One of the elements of a "domestic corporation", as used in Ch. 180, is that the corporation be subject to the provisions of Ch. 180. If a corporation may not organize under Ch. 180, it is not subject to the provisions of Ch. 180 as those terms are synonymous.

None of the institutions mentioned in your question comply with the statutory definition of the term "domestic corporation". Consequently, these and similar corporations are ineligible to act as registered agents under sec. 180.09 (2).

Similarly, a foreign corporation engaged in a type of business that is not subject to the provisions of Ch. 180, would likewise be barred from acting as a registered agent by sec. 180.807, which provides in part:

"* * * No foreign corporation shall transact in this state any business which a corporation organized under the laws of this state is not permitted to transact. * * *"

For the purpose of clarifying your second question, I will restate it as: May a corporation organized under Ch. 181 be designated as a registered agent under the provisions of sec. 180.09 (2), Stats.?

The answer to this question is "no".

A corporation organized under Ch. 181 is defined by sec. 181.02 (1) as:

"(1) 'Corporation' or 'domestic corporation' means a nonstock nonprofit corporation subject to the provisions of this chapter, except a foreign corporation."

The definition of a "domestic corporation" in Ch. 181 is totally incompatible with the definition of a "domestic cor-

poration" in Ch. 180. Therefore, a "domestic corporation" under Ch. 181 can never be within the meaning of the term "domestic corporation" as used in sec. 180.09 (2), and may not act as a registered agent under sec. 180.09 (2).

You have asked the further question:

"Can a corporation not organized or authorized under Chapters 180 or 181, such as a state or national bank, an insurance corporation, a state or federal savings and loan association, or similar corporations, be designated as registered agent as provided in Section 181.08 of the Statutes?"

The answer to this question is "no".

Sec. 181.08 provides:

"Registered agent. Each corporation shall have and continuously maintain in this state a registered agent, which agent may be either an individual, resident in this state or a domestic corporation, whether profit or nonprofit, or a foreign corporation, whether profit or nonprofit, authorized to transact business or conduct affairs in this state. The name and adddess of the registered agent shall be filed with the secretary of state."

The legislature by providing in sec. 181.08 that the "domestic corporation" may be either profit or nonprofit created an ambiguity in that a "domestic corporation" is defined by sec. 181.02 (1) as nonprofit. Nor is there anything in the language of sec. 181.08 that restricts the term "domestic corporation" to the definition of sec. 180.02 (1).

It would appear then that any domestic corporation such as a state bank or domestic insurance company would be eligible to act under sec. 181.08 as a registered agent.

However, "domestic corporation" as used in Chs. 180 and 181 has a well defined meaning and usage. In interpreting sec. 181.08 it is proper to consider other statutes dealing with the same subject. *State v. Welkos,* (1960) 14 Wis. 2d 186. Considering the statutes of Chs. 180 and 181 in *pari materia* it is obvious that the legislature did not intend state banks, domestic insurance companies and the like to

be "domestic corporations" within the meaning of either Ch. 180 or 181, for such institutions are incorporated under and subject to the provisions of other specific chapters of the statutes. As the term "domestic corporations" has such a well defined meaning in Chs. 180 and 181, it is proper to restrict the term as used in sec. 181.08 to this technical and well established meaning. *Harnischfeger Corp. v. I.C.*, (1953) 263 Wis. 76, 56 N.W. 2d 499.

It is my opinion that a corporation to act as a registered agent, under sec. 181.08 must meet the statutory definition of the term "domestic corporation" of either secs. 181.02 (1) or 180.02 (1), or qualify as a foreign corporation under Chs. 180 or 181. The institutions in question do not meet either of these definitions and therefore are barred from acting.

Likewise, a foreign corporation engaged in activity that is not within the scope of either Ch. 180 or Ch. 181 would be barred from acting as a registered agent by sec. 180.807 or sec. 181.66.

Therefore, in conclusion, it is my opinion, (1) that a corporation to act as a registered agent, under sec. 180.09 (2) must be either a domestic corporation organized under or governed by Ch. 180, or a foreign corporation qualified under that chapter, and (2) that to act as a registered agent under sec. 181.08 a corporation must be either a domestic corporation organized under or governed by Ch. 180 or Ch. 181 or a foreign corporation qualified under Ch. 180 or Ch. 181. The institutions in question do not meet either of these definitions and therefore are barred from acting.

CAB

Milwaukee County—Courts—Sec. 246.22 which prohibits the drafting of legal papers and the giving of legal advice by court personnel is applicable to Milwaukee county. Special court act for Milwaukee county has been repealed.

March 2, 1966.

EUGENE M. HAERTLE

Register in Probate, Milwaukee County

You state that:

"Since the enactment of Chapter 29, Laws of Wisconsin, for the year 1901, and the amendments thereto, Chapter 58, Laws of 1941, and Chapter 298, Laws of 1947, the Register in Probate of Milwaukee County has been the attorney for petitioners who adopt children from public and private agencies in the State, and the attorney for personal representatives and guardians in estates of $1,000.00 or less, and also the attorney in the appointment of guardians for minors who wish to enlist in service or who wish to get married.

"In these matters the Register in Probate appears as attorney of record, prepares all the documents, and appears at the hearings in court, being represented by the Probate Counselor, who is an attorney in his office. No fees are charged for this service."

We are asked if the foregoing practice may be continued in view of the fact that ch. 315, sec. 29, Laws 1957, and ch. 495, sec. 161, Laws 1961, both provide:

"All special or local acts conferring jurisdiction on county courts are repealed, effective the first Monday in January, 1962. * * * "

Among other things ch. 29, Laws 1901, applicable only to Milwaukee county, provided that the register of probate "shall, if required by the parties, draw petitions, orders and other papers required in matters pending or intended to be brought before said court or judge, until some contest or dispute shall arise in reference to the same, in estates the value of which as shown by the petition does not exceed two thousand dollars; * * *"

By ch. 58, Laws 1941, sec. 2 of ch. 29, Laws 1901, was amended by changing the $2,000 figure to $1,000. Sec. 2 of ch. 29, Laws 1901, as amended by ch. 58, Laws 1941, was further amended by ch. 298, Laws 1947, by imposing upon the register of probate the duty of drafting "any papers necessary in any proceeding for the adoption of dependent,

neglected, or delinquent children, as defined in chapter 48 of the statutes; * * *"

Perhaps at this point it would be well to discuss the impact of the court reorganization plan adopted by the legislature by ch. 315, Laws 1959. There is a discussion of this subject in the *Wisconsin Bar Bulletin* for October, 1959, Vol. 32, No. 5, at page 20 and following:

"The act sets up the basic structure of a *new* Wisconsin court system. Its principal features are:

"1. It reorganizes the courts below the circuit level into a single court system. This means that all present municipal, superior, district, civil, children's, etc., courts are abolished and are replaced by branches of the *new county court.*" (Emphasis added) P. 20.

Sec. 14 of ch. 315, Laws 1959, created sec. 253.01 to read:

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

Section 253.02 sets up the branches of the county court for counties having more than one branch and provides that the county court for Milwaukee county has 11 branches. In sec. 253.02 (2), it is provided that "each branch of the county court constitutes a court with all the *powers* and jurisdiction possessed by county courts having one judge only".

Among other things ch. 315, Laws 1959, created sec. 253.32 relating to the duties of the register in probate. We will not enumerate these duties here but suffice it to say that such duties do not include the duty of advising executors or of preparing petitions, orders and other papers if required by the parties.

It would seem clear that except as otherwise provided in ch. 315, Laws 1959, or in other legislation subsequent thereto the county courts of the state are no longer governed by earlier special legislation such as ch. 29, Laws 1901. One of the underlying purposes of court reorganization was to unify the court system and to do away with the hodgepodge of

special provisions relating to county courts of particular counties.

Moreover, the legislative policy with respect to legal advice and drafting of papers by court personnel is now quite contrary to that provided by ch. 29, Laws 1901.

The present policy is set forth in sec. 256.22. This section was last amended by ch. 407, Laws 1963. This section with the amendatory language of the 1963 legislature underscored reads as follows:

"256.22 Judge not to act as attorney, etc.; attorneys not to have office with judge.

"(1) No judge, while holding such office, shall be in any manner engaged or act as attorney or counsel; and no *judge or his clerk or any person employed by him in or about his office,* court commissioner or other judicial officer shall be allowed to give advice to parties litigant in any matter or action pending before such *judge or* officer, or which he has reason to believe will be brought before him for decision, or draft or prepare any papers, *including wills,* or other proceedings relating to any such matter or action except when expressly authorized by law; and no court commissioner or other judicial officer shall be allowed to demand or receive any fees or compensation for services as such commissioner or judicial officer, except those expressly authorized by law, upon penalty, for any violation hereof, of removal from office."

This gives rise to the application of the doctrine that while a statute directed towards a special subject is ordinarily preponderant over a later and more general statute, that is not true when the earlier statute is special only in the sense it applies to a specific situation and the later statute is general in its operation and applies to all such cases. Then the earlier one is deemed to be superseded and repealed by the later one so far as it is inconsistent therewith. *Gymnastic Assoc. v. Milwaukee,* (1906) 129 Wis. 429, 109 N.W. 109.

In any event the practice in question should not be continued.

In the first place it is in direct conflict with sec. 256.22, which makes no exception in favor of Milwaukee county.

Also, it is doubtful that the legislature can regulate the practice of law since such regulation rests with the judiciary.

As was said in an opinion from this office to the Assembly on July 8, 1965, 54 OAG 49:

"It is generally conceded that while the legislature may enact statutes relating to court practices 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. Donahue,* (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 control the practice of law.

In re Goodell, (1875) 39 Wis. 232, 240; *State v. Cannon,* (1928) 196 Wis. 534, 221 N.W. 603; *State v. Cannon,* (1929) 199 Wis. 401, 226 N.W. 385; and *In re Cannon,* (1932) 206 Wis. 374, 240 N.W. 441.

The preparation of probate papers very clearly involves the practice of law over which the probate court has inherent power. *State ex rel. Baker v. County Court,* (November 30, 1965) 29 Wis. 2d 1, 138 N.W. 2d 162. This being true there would be some strong doubts whether the special legislation relating to drafting of papers by the register in probate was within the proper field of legislative competence; but in any event there is no conflict today between legislative and judicial policy in the area here under discussion.

Sec. 256.22 is completely in harmony with the decision in the *Baker* case, and there is consequently no need of exploring the question of whether sec. 256.22, or the earlier special statutes relating to the furnishing of legal services by the register in probate of Milwaukee county, constitute a legislative invasion of the power of the judiciary. In *State ex rel. Junior Bar v. Rice,* (1940) 236 Wis. 38, 294 N.W. 550, our court discussed the question of whether sec. 256.30 (1) constituted such an encroachment because it defined and provided a punishment for the illegal practice of law. 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.*"

Accordingly, you are advised that the special county court act for Milwaukee county as enacted by ch. 29, Laws 1901, and amended by ch. 58, Laws 1941, and ch. 298, Laws 1947, is no longer of any force or effect. The provisions of sec. 256.22 now control by reason of ch. 315, Laws 1959, and ch. 495, Laws 1961, which repealed the earlier special act.

Sec. 991.10 provides that general statutory provisions do not affect or repeal special acts in the absence of express language, but here the special act had been repealed prior to the enactment of the prohibition contained in sec. 256.22, as amended by ch. 407, Laws 1963. Therefore Milwaukee county court personnel are subject to the prohibitions contained in sec. 256.22.

WHR

Schools—Taxation—Handicapped Children—Property in a school district not included in a county program of special instruction for handicapped children is not subject to county taxation therefor.

March 22, 1966.

ROBERT J. RUTH
Corporation Counsel, Rock County

There has been established in your county a program for handicapped children under Ch. 41, Stats. All school districts in the county are participants except the city of Beloit school system district which has been excluded ever since the program started operating. The county board has given approval to and made appropriation for the construction by the county of a building to be used and operated by it under the program as a school for handicapped children. You ask whether you are correct in your opinion that the property in the city of Beloit school district is not subject to county taxation to pay the cost of constructing and equipping such building.

It is provided in sec. 41.01 (1m) that a county may establish, maintain and discontinue a program of furnishing instructional centers or special schools and provide other services for handicapped children "for all school districts which indicate approval by formal action of the board of education". In subsec. (1r) (a) it is provided that an application for the authorization of a county program shall "state whether such classes or centers are to be available to the county at large, or only certain school districts". There is provision in subsec. (1r) (e) that a school district which operates an approved program for handicapped children may be excluded or withdraw from participation in a county program. The provisions in secs. 41.01, et seq., thus contemplate and provide that a county program may furnish instruction and schools for handicapped children as a needed specialized training and educational service that is not available in some school districts and thereby supply the same upon behalf of and for less than the entire county.

The background of providing this plan of county operated specialized education and training is that such service was needed but not generally available or furnished in most school districts. Some school districts, primarily those operating city school systems, supplied special instruction for handicapped children either as part of their regular school program or by special arrangements. This plan of county operated programs was designed to fill the gap and provide the needed special education for children in those areas where not available through the local school district. The county program is not to furnish such specialized instruction and training for the excluded school district territory since the same or comparable instruction is already supplied by the school district as a part of its own educational program. The expense or cost of such local special instruction falls upon and is borne by the property in the excluded district through the taxes levied by it.

The underlying concept in the provisions for a county operated program is thus clearly that such arrangements are designed for and intended as a medium or method to provide specialized instruction and service to handicapped children only for the area in the county which it serves.

That such is its intended scope is further evidenced by the provisions in sec. 41.01 (1m) (a), limiting compositon of the children's education board and the advisory committee to persons from the area of the county served.

This concept clearly implied from the provisions as a whole, is borne out by and carried into the provision in sec. 41.01 (1r) (b), which provides that "The tax for the operation and maintenance of classes or centers for handicapped children * * * shall be levied against the area of the county participating in the program". It is also further evidenced by the fact that the board or committee in charge of the county program is empowered, among other things, to erect buildings subject to county board approval. It is also provided that the handicapped children's board prepare an annual budget for county board approval, which shall include, but not be limited thereto, "the purchase of materials, supplies and equipment and the operation and maintenance of buildings or classrooms". It thus seems evident that the intention of the legislature is that the cost to the county in providing and operating special classes, instruction and schools for handicapped children pursuant thereto is to be at the cost or expense of only so much of the area of the county as thereby benefits by the furnishing and operating of such classes, instruction and treatment in lieu of the same being furnished through and by the local school district.

The quoted provision in sec. 41.01 (1r) (b) exempts any area of the county not included in the program from the burden of any county tax levied to pay the cost of constructing and equipping a building for use thereof unless providing a building and equipping it for such use is not within the intended meaning of "operation and maintenance of classes or centers" as used therein. Considering all of the provisions for the county operated programs and consistent with the overall objective, the word "maintenance", being used along with "operation", cannot be given a restricted meaning as covering only expenditures to preserve the physical school building and its equipment, such as cleaning, painting, refurbishing and replacement to keep them in satisfactory operating condition. The cost of such

things would be an expense within "operation" of the school building and its equipment. Considering the program as a whole operation, it is indicated therefrom that the word "maintenance" was not used in any such limited sense, but rather in the broader meaning of "keeping in existence and continuing the carrying on" of the activity embodied in the program of furnishing of such specialized instruction and services. It is inconceivable that the legislature could have intended by the provision that the county tax to support the program imposed on the area served should be limited to only the expense of the day to day conduct of classes and its special schools, but the burden of paying the cost of buildings and equipment for use therein should fall also on an area of the county not served by the program, which already bears the burden of providing equivalent specialized instruction in such area.

It is therefore my opinion that the legislature intended that whatever cost the county would have in providing and carrying on such a program, however it might be done, including providing the necessary buildings and equipment, should be borne as a tax upon only that area in the county that participates in it and is thus served by it.

HHP

Plats—Discussion of the affect of ch. 361, Laws 1963, on regulations governing preparation and filing of plats.

March 22, 1966.

WALTER K. JOHNSON, *Deputy Director*
Department of Resource Development

You ask my opinion with respect to several questions regarding ch. 361, Laws 1963. The chapter amends sec. 236.20 (1) (b) and (2) (e), which formerly provided:

"(1) All plats shall be legibly prepared in the following manner:

"* * *

"(b) With a binding margin 1½ inches wide on one side, as designated by the register of deeds of the county in which the land is located, and a one inch margin on all other sides.

"* * *

"(2) The final plat shall show correctly on its face:

"* * *

"(e) All lots in each block consecutively numbered. Outlots shall be lettered in alphabetical order. If blocks are numbered or lettered, outlots shall be lettered in alphabetical order within each block."

Ch. 361, Laws 1963, provides that all plats shall be prepared "with a binding margin 1½ inches wide on the left side," and strikes out the last 2 sentences of 236.20 (2) (e) as above quoted.

Your first question asks:

"Is the director [of the planning division] required to object to a plat which has not been prepared in accordance with the binding margin requirements of Chapter 361, Laws of 1963?"

In my opinion, the answer must be "yes". The director is required by sec. 236.12 (a) to examine plats for compliance with secs. 236.15, 236.16, 236.20 and 236.21 (1) and (2). Since the legislature has deliberately taken away the discretion formerly vested in the register of deeds in this regard, I conclude that the binding margin requirement is mandatory, and that the director must object to any variance therefrom.

Your second question asks:

"Is there any way in which the director may waive this requirement?"

In my opinion, no. It is true that sec. 236.20 (2) (1) provides:

"(1) When strict compliance with a provision of this section will entail undue or unnecessary difficulty or tend

to render the plat more difficult to read, and when the information on the plat is sufficient for the exact retracement of the measurements and bearings or other necessary dimensions, the director of the planning function in the department of resource development or, in cities of the first class, the city engineer may waive such strict compliance."

It is my opinion, however, that it cannot reasonably be said that a strict compliance with the binding margin requirement "will entail undue or unnecessary difficulty or tend to render the plat more difficult to read". Whether the binding is on the right or left margin, or whether the margin is more or less than 1½ inches in width, the mechanics of binding are basically the same.

The third question is:

"Must outlots be identified in any way, and if the answer is in the affirmative, then should that identification be by letter or number?"

The answer is that outlots should be identified by consecutive number.

Elimination of the last 2 sentences of sec. 236.20 (2) (e), ch. 361, Laws 1963, it might be argued, is indicative of a legislative intent that outlots are not to be identified at all. The preamble to ch. 361, Laws 1963, however, states one of the purposes to be the "elimination of *lettering* outlots". Nothing appears therein with respect to numbering. Furtheremore, outlots within a plat are obviously defined, mapped parcels of that plat. Sec. 236.01 (4). Were any identification thereof to be prohibited, conveyances of such outlots would have to be by metes and bounds descriptions. This, it seems to me, would defeat one of the basic purposes of a plat, which is to provide for conveyancing and describing of the parcels therein by lot number (and block number, where applicable) rather than by the more cumbersome metes and bounds.

Ch. 361, Laws 1963, made a further change by repealing sec. 236.36, which prescribed the conditions under which a vacation of a plat was required to be accomplished by court action prior to a replat. You then ask:

"Is the dividing of a large block, lot or outlot in a recorded plat to be treated as a replat or as a new subdivision?"

Sec. 236.36, now repealed, provided:

"**Replats.** A replat of all or any part of a recorded subdivision may not be made or recorded except after proper court action has been taken to vacate the original plat or the specific part thereof; provided that such replat may be made and recorded without taking court action to vacate the original plat or the specific part thereof when all the parties in interest in writing agree thereto."

Sec. 236.02 (13), not affected by ch. 361, Laws 1963, provides:

"(13) 'Replat' is the process of changing, or the map or plat which changes, the boundaries of a recorded subdivision plat or part thereof. The legal dividing of a large block, lot or outlot within a recorded subdivision plat without changing exterior boundaries of said block, lot or outlot is not a replat."

By its terms, sec. 236.02 (13) provides that so long as the exterior boundaries of a legally divided large block, lot or outlot within a recorded subdivision plat are not changed by the dividing, no replat occurs. Whether a subdivision would occur depends on whether the act of division creates 5 or more parcels or building sites of 1½ acres each or less in area, or whether, in case of successive divisions, 5 or more such parcels are created within a 5 year period. Sec. 236.02 (8). *Scheer v. Weis,* (1961) 13 Wis. 2d 408, 108 N.W. 2d 523.

You then ask:

"Will a court vacation be necessary before a replat is approved?"

Because of the provisions of secs. 236.40, 236.41 and 236.42, as construed in 49 OAG 113, I am constrained to say that in my opinion, court action to vacate a plat or part thereof affected by a replat will be required, notwithstanding the repeal by ch. 361, Laws 1963, of sec. 236.36.

Sec. 236.36 was created by ch. 214, Laws 1961. In my opinion, its repeal by ch. 361, Laws 1963, simply reinstated the law on the matter as it existed prior to 1961 and as construed in 49 OAG 113 referred to in the discussion next following.

You then ask:

"May such legal division be accomplished by land subdivision plat, recorded certified survey map or metes and bounds descriptions?"

As to the use of a certified survey map, the question has already been answered in the negative by 49 OAG 113. This office there stated its opinion to be that plats could not, under the then exisiting law, be altered by certified survey map, since a method for altering plats by court action was (and still is) provided by secs. 236.40 to 236.44. No statutory change has since been made in that regard. The same reasoning must, in my view, apply with respect to subdividing by metes and bounds, since no statute is found which authorizes any such method. Therefore, such legal division necessitates, in my opinion, a land subdivision plat.

Your last two questions concern changes in building setback and sideyard lines shown on a recorded land subdivision plat. You inquire:

"Would such a change require a replat or may it be accomplished by a correction instrument?"

Since a replat is a change in the boundaries of all or part of a recorded subdivision plat [sec. 236.02 (13)], the replat method would not be required. Obviously, setback and sideyard lines are "use" boundaries only, not boundaries of title or in the sense employed in sec. 236.02 (13).

Sec. 236.295, providing for correction instruments, provides in material part:

"**Correction instruments.** (1) Correction instruments may be recorded in the office of the register of deeds in the county in which the plat is recorded and may include:

"(a) Affidavits to correct distances, angles, directions, bearings, chords, block or lot numbers, street names or other details shown on a recorded plat; and

"(b) Ratifications of a recorded plat signed and acknowledged in accordance with s. 235.19."

While, as observed in 49 OAG 113, such an instrument is to correct errors, and should not be used for boundary changes, I am of the opinion that such an instrument may be used to indicate proper changes in setback or sideyard lines. First, such instrument for that purpose does not purport to alter *boundaries,* for the reason above referred to. Second, if a proper change in setback and sideyard lines has been lawfully accomplished, the plat as recorded prior to the change would not show the true fact with respect thereto; and hence can, in my opinion, be "corrected" accordingly by such instruments.

Your final question asks:

"Would such change require further review by the Director of the Planning Function?"

I am not aware of any statute requiring that the director must review any such change. In my opinion, therefore, such review is not necessary.

RDM

Health Assistance Payments—Claims—Repeal of sec. 163.09 by chs. 353 and 355, Laws 1965, precludes filing of any claims for health assistance payments on or after November 17, 1965.

March 23, 1966.

WILBUR J. SCHMIDT
Director, Department of Public Welfare

You ask whether claims for recovery of health assistance payments accrued under sec. 163.09, Stats. 1963, may be

filed after November 17, 1965, the effective date of chs. 353 and 355, Laws 1965, which repealed sec. 163.09 (1).

Sec. 163.09 (1), Stats. 1963, a part of the health assistance payments act, provided:

"On the death of a person who has received medical assistance under this chapter, and his surviving spouse, the total amount of such assistance paid shall be filed by the department as a claim against his estate, but such claim shall not take precedence over the allowances under s. 313.15, or over any other claim for care or maintenance furnished by the state or its political subdivisions. The court may provide for the maintenance or support of a surviving minor or incapacitated adult children, and thereupon the claim shall be waived to the extent of the amount disallowed and that amount assigned to such children for maintenance or support."

Chs. 353 and 355, Laws 1965, are identical, except for their titles, and each provides, without any saving clause, that:

"163.09 (1) of the statutes is repealed."

Ch. 353 is entitled "An Act to Repeal 163.09 (1) of the Statutes, Relating to Recovery of Health Assistance Payments on the Death of a Recipient"; and ch. 355 is entitled "An Act to Repeal 163.09 (1) of the Statutes, Removing from the Wisconsin Kerr-Mills Act the Lien on the Estate of the Deceased Recipient of Health Assistance Payments".

The effect of repeal of a statute involving policy was described in *State ex rel. McKenna v. District No. 8,* (1943) 243 Wis. 324, 328, 10 N.W. 2d 155, 147 A.L.R. 290:

"When the legislature repealed sec. 39.40, Stats., without any qualification or saving clause, they repealed all teachers' tenure law effective in the state of Wisconsin. They placed teachers and school district officers in the same position they were in before the passage of the tenure law in 1937. They abolished the public policy created at the time of the passage of the law. To hold otherwise would be failure to

give effect to a repealing act, except as to transactions passed and closed.

"Sec. 370.04, Stats., does not apply to a repealing act on policy. It preserves pending actions and has no reference to status acquired before the repeal. The law as laid down in 59 C.J. p. 1185, sec. 722, as follows:

" 'The general rule against the retrospective construction of statutes does not apply to repealing acts, and, in the absence of a saving clause or other clear expression of intention, the repeal of a statute has the effect, except as to transactions passed and closed, of blotting it out as completely as if it had never existed, and of putting an end to all proceedings under it. However, the repeal of a statute will not operate to impair rights vested under it, or to revive rights lost or taken away under the repealed statute, or to affect acts performed or suits commenced, prosecuted, and concluded under the former law.'

applies in this case."

See, also, 50 Am. Jur. 532.

The right to file claims for assistance under sec. 163.09 (1) was one created by statute. According to *Dillon v. Linder,* (1874) 36 Wis. 344, 349, a right created by statute is extinguished by its repeal:

"Whatever a statute gives, which has not ripened into a vested right, a repeal of the statute may take away. 'The effect of a repealing statute I take to be, to obliterate the statute repealed as completely from the records of parliament, as if it had never been passed; and that it must be considered as a law that had never existed, except for the purpose of those actions or suits which were commenced, prosecuted and concluded while it was an existing law.' *Key v. Goodwin,* 4 Moore & P., 341. 'A repealing clause in such an enactment as necessarily divests all inchoate rights which have arisen under the statute which it destroys.' *Butler v. Palmer,* 1 Hill, 324."

Since the right created by sec. 163.09 (1) was in favor of the state, the state's abandonment of its statutory right

would not involve constitutional provisions relating to deprivation of property or impairment of the obligation of contracts. See *Firemen's Ins. Co. v. Washburn County,* (1957) 2 Wis. 2d 214, 225, 85 N.W. 2d 840.

Chs. 353 and 355, Laws 1965, do not themselves contain saving clauses with respect to claims against estates of decedents who died prior to repeal of sec. 163.09 (1), Stats. 1963, but sec. 990.04, which is a general saving clause, should be considered, and reads:

"**Actions pending not defeated by repeal of statute.** The repeal of a statute hereafter shall not remit, defeat or impair any civil or criminal liability for offenses committed, penalties or forfeitures incurred or rights of action accrued under such statute before the repeal thereof, whether or not in course of prosecution or action at the time of such repeal; but all such offenses, penalties, forfeitures and rights of action created by or founded on such statute, liability wherefor shall have been incurred before the time of such repeal thereof, shall be preserved and remain in force notwithstanding such repeal, unless specially and expressly remitted, abrogated or done away with by the repealing statute. And criminal prosecutions and actions at law or in equity found upon such repealed statute, whether instituted before or after the repeal thereof, shall not be defeated or impaired by such repeal but shall, notwithstanding such repeal, proceed to judgment in the same manner and to the like purpose and effect as if the repealed statute continued in full force to the time of final judgment thereon, unless the offenses, penalties, forfeitures or rights of action on which such prosecutions or actions shall be founded shall be specially and expressly remitted, abrogated or done away with by such repealing statute."

The foregoing statute relates to "civil or criminal liability for offenses committed, penalties or forfeitures incurred or rights of action accrued". Sec. 163.09 (1) creates no right of action against an individual. It gives the state only the right to file a claim against the estate after the death of a person receiving assistance.

It is my opinion that the repeal of the statute precludes the filing of any claims on or after the date of the repeal of sec. 163.09 (1), even though the recipients of payments died prior to the repeal.

BL

Corporations—Addresses—Words and Phrases—Filing and fee requirements of Ch. 180 have to be met when the address of a corporation is renumbered or renamed by municipal act.

April 22, 1966.

ROBERT C. ZIMMERMAN
Secretary of State

You have requested an opinion on the applicability of the provisions of Ch. 180, Stats., pertaining to filing procedures, to the situation where a municipal act renames a street or renumbers a street address so as to affect the registered office of a corporation. You also inquire whether the secretary of state is authorized to make such a change in the records without requiring payment of a filing fee.

I find no distinction, legal or semantical, between the street number and the street name as components of an "address". Cases defining the term for other purposes have adopted the traditional dictionary definition of an "address" as the place where mail can reach the person in question, and have stated that "address" and "residence" are not synonymous. *Munson v. Bay State Dredging & Contracting Co.*, (1943) 314 Mass. 485, 50 N.E. 2d 633, 646; *Enter v. Crutcher,* (1958) 159 Cal. App. 2d 841, 323 P. 2d 586, 589-590. It follows that whether the street is renamed or the number altered is immaterial. In either situation the result is a change of "address", as that term is commonly understood.

The articles of incorporation, which are essential to the existence of a private corporation, must contain "the address, including street number" of the initial registered office of the corporation. Sec. 180.45 (1) (i). Sec. 180.09 requires that all corporations "continuously maintain" a registered office and a registered agent within the state. The underlying purpose of these requirements is to insure that all corporations maintain a convenient and accessible agent for the service of process, and for other matters pertaining to the general supervisory control of the state of Wisconsin

over its corporations. This principle had its origin in the common law and is specifically recognized by sec. 180.11. See *State ex rel. Attorney General v. Milwaukee L. S. & W. Ry. Co.*, (1878) 45 Wis. 579.

Anticipating that periodic changes in the registered agent or the registered office are inevitable, the legislature provided a simplified alternative procedure for notifying the secretary of state of such a change without formal amendment or restatement of the articles of incorporation. This procedure is embodied in sec. 180.10, which provides in part:

"(1) A corporation may change its registered office or change its registered agent, or both, by executing, filing and recording a statement setting forth:

"* * *

"(c) If the address of its registered office be changed, the address, including street and number, if any, to which the registered office is to be changed;"

When a municipality renames or renumbers a street, the result is a change of address in the common and accepted usage of the word. When this occurs private citizens, as well as corporations, may well be inconvenienced and perhaps put to some expense in correcting their "address" for a variety of purposes. As far as corporations are concerned, these inconveniences include payment of the $5 fee prescribed by sec. 180.87 (1) (h) for filing the change with the secretary of state. Note also that under sec. 180.87 (3) the secretary of state is prohibited from filing "any document relating to any corporation" until the applicable filing fees have been paid.

There being no specific authority, statutory or otherwise, for the secretary of state to change or alter any corporate records in his possession other than through filing, it is my opinion that in the situation you describe the statutory filing requirements and procedures must be followed including the charge of applicable fees.

WFE

Signs—Gasoline—Bill 435, S., is an invalid exercise of the police power of the state to the extent that it regulates size and placement of price signs at gasoline sales areas.

April 29, 1966.

THE HONORABLE, THE ASSEMBLY:

By Resolution 37, A., you have requested my opinion as to the validity of bill 435, S., as amended by amendment 1, A., which would create sec. 100.185 of the statutes and would read:

"100.185 SALE OF GASOLINE AND OTHER PETROLEUM PRODUCTS. (1) Placards posted where gasoline sold. It is unlawful for any person to sell or offer for sale at retail for use in internal combustion engines in motor vehicles any gasoline unless the seller posts and keeps continuously posted on the individual pump or other dispensing device from which the gasoline is sold or offered for sale a sign or placard not less than 7 by 8 inches nor larger than 24 by 30 inches stating clearly and legibly in numbers of uniform size the selling price per gallon of the gasoline sold or offered for sale from the pump or other dispensing device together with the name, trade name, brand, mark or symbol, and grade or quality classification, if any, of the gasoline.

"(a) The amount of tax to be collected in connection with the sale of the gasoline shall be stated on the sign or placard, separately and apart from the selling price.

"(b) No sign or placard other than the signs or placards provided for under this section shall be posted or maintained on, at, near or about the premises on which the gasoline is sold or offered for sale.

"(2) Placards posted where petroleum products sold. It is unlawful for any person, in connection with the sale or offer for sale at retail of any petroleum products for use in motor vehicles, other than gasoline, to post or maintain at the place of sale or offer for sale, any sign, placard or other display that states, relates or refers to the price at

which the petroleum products are sold or offered for sale, except as follows:

"(a) The sign, placard or other devise [sic] shall be not less than 7 by 8 inches, nor larger than 24 by 30 inches.

"(b) The price stated, mentioned or referred to on the sign, placard or other display, shall be by the unit of measure at which the petroleum products are customarily sold at retail.

"(c) The name, trade name, brand, mark or symbol, and grade or quality classification if any, of the petroleum products, shall be clearly stated on the sign, placard or other display, and if the petroleum products are sold without identification by name, trade name, brand, mark or symbol, the sign, placard or other display shall refer clearly to the petroleum products as unbranded.

"(d) If the petroleum products are sold or delivered by or through the means of dispensing equipment, the sign, placard or other display shall be posted and maintained on the dispensing equipment and at no other place.

"(3) Fraudulent practices prohibited. It is unlawful for any person to sell or offer for sale gasoline or other petroleum products for use in motor vehicles at retail in any manner so as to deceive or tend to deceive the purchaser as to the price, nature, quality or identity thereof, or to sell or offer for sale from any pump, dispensing device or container any gasoline or other petroleum products other than gasoline or other petroleum products manufactured or distributed by the manufacturer or distributor marketing the gasoline or other petroleum products under the name, trade name, brand, symbol or mark affixed to or contained on the pump, dispensing device or container, or to substitute, mix or adulterate gasoline or other petroleum products sold or offered for sale under a name, trade name, brand, symbol or mark.

"(4) Penalty. Whoever violates this section may be fined not more than $250 or imprisoned for not to exceed 60 days or both."

The legislation proposed in amended bill 435, S., would impose a number of restrictions upon the retail gasoline industry in Wisconsin. In patricular, the right to post the selling price of gasoline and other petroleum products upon gas station premises would be severely confined. Though such legislation in many respects is new to Wisconsin, numerous other states have enacted substantially identical legislation which has been subjected to considerable judicial scrutiny. Thus, there exists a sizeable body of case law that has addressed itself to the question of the validity of statutes containing provisions similar to those of amended bill 435, S. This case law will be referred to in connection with the discussion of those provisions of the proposed statute that raise questions of constitutionality.

REQUIREMENT THAT THE PRICE BE POSTED

The bill provides that a retail seller of gasoline must post and keep continually posted a sign or placard "stating clearly and legibly * * * the selling price per gallon of the gasoline sold or offered for sale. * * *". The courts of other states that have examined the validity of similar provisions requiring the posting of signs stating the selling price of gasoline have uniformly upheld such provisions as reasonable exercises of the police power to control deception and fraud upon the public. *Serve Yourself Gasoline Stations v. Brock,* (1952) 39 Cal. 2d 813, 249 P2d 545, app. dism'd. 345 U. S. 980, 97 L. Ed. 1394, 73 S. Ct. 1130; *State v. Hobson,* (1951) 46 Del. 381, 83 A 2d 846; *State v. Woitha,* (1939) 227 Iowa 1, 287 N. W. 99, 123 ALR 884; *Slome v. Godley,* (1939) 304 Mass. 187, 23 N. E. 2d 133; *People v. Arlen Service Stations,* (1940) 284 N. Y. 340, 31 N. E. 2d 184; *State v. Guyette,* (1954) 81 R. I. 281, 102 A 2d 446. The general view expressed in these cases is that requiring the posting of gasoline prices not only relates to the public welfare by limiting the possibility for misrepresentation of gasoline prices but also by serving as a convenience to the motorist in plainly disclosing the amount at which gasoline may be purchased.

Our supreme court has recently held that regulation of gasoline station billboards and signs is a valid exercise of a municipality's police power. *J. & N. Corporation v. City*

of Green Bay, (1965) 28 Wis. 2d 583, 137 N. W. 434 (citing *People v. Arlen Service Stations,* supra). Moreover, it has long been established in Wisconsin that the police power of the state may legitimately be exercised for the prevention of fraud and deception. *State ex rel. Carnation Milk Products Company v. Emery,* (1922) 178 Wis. 147, 189 N. W. 564. The police power of the state to prevent fraud and deception has been extended into the area of price posting and advertising. In *Ritholz v. Johnson,* (1944) 246 Wis. 442, 17 N. W. 2d 590, and *Bedno v. Fast,* (1959) 6 Wis. 2d 471, 95 N. W. 2d 396, cert. den. 360 U. S. 931, 3 L. ed. 2d 1545, 79 S. Ct. 1451, legislation prohibiting the advertising of the price of eye glasses was held to be a valid exercise of the police power. And in *Modern System Dentists, Inc. v. State Board of Dental Examiners,* (1934) 216 Wis. 190, 256 N. W. 922, a rule of the state board of dental examiners prohibiting the advertising of particular dental services at certain prices "and up" was held to be a valid exercise of the police power on the ground that such price advertising had a tendency to deceive and mislead the public.

In light of the thrust of the Wisconsin case law on related subjects and the decisions from other states upholding statutes containing virtually identical language, it is my opinion that the portion of bill 435, S., imposing upon gasoline stations the requirement that the selling price per gallon of gasoline be posted is valid.

REQUIREMENT THAT THE SELLING PRICE BE STATED IN NUMBERS OF UNIFORM SIZE

The bill provides that the selling price per gallon of the gasoline shall be stated "clearly and legibly in numbers of uniform size. * * *". Similar statutes and ordinances regulating the figures or lettering of the price of gasoline have been upheld in other states as a valid exercise of the police power. See *Serve Yourself Gasoline Stations Assoc. v. Brock,* (1952) 39 Cal. 2d 813, 249 P. 2d 545, app. dism'd. 345 U. S. 980, 97 L. ed. 1394, 73 S. Ct. 1130; *State v. Woitha,* (1939) 227 Iowa 1, 287 N. W. 99; *Slome v. Godley,* (1939) 304 Mass. 187, 23 N. E. 2d 133; *People v. Arlen Service*

Stations, (1940) 284 N. Y. 340, 31 N. E. 2d 184; *Commonwealth v. Pollock,* (1951) 169 Pa. Super. 272, 82 A. 2d 261; *State v. Guyette,* (1954) 81 R. I. 281, 102 A. 2d 446.

It is clear that a requirement that the selling price of gasoline be stated "clearly and legibly in numbers of uniform size" relates to the purpose of preventing deception of the consuming public. The case of *People v. 25 Stations, Inc.,* (1957) 3 N. Y. 2d 488, 146 N. E. 2d 691, though not exactly in point, illustrates the potential for fraud and deception from the use of non-uniform lettering and numerals. The defendants were there convicted of violating a city ordinance disallowing any signs other than those designated that referred directly or indirectly to the price of gasoline. The sign in question was held to indirectly refer to the price of gasoline by reason of the manner in which it was lettered. The court described the sign as follows [at 146 N. E. 2d 692]:

" * * * Defendants, corporate owner of a gas station and its president-manager, maintained a sign measuring 5 feet in length and 3½ feet in width, reading 'Owned and operated by 25 Stations Inc.' on the pumps used for dispensing gasoline at the station. The numerals '25' were painted in red and measured 36 inches in height. The words 'owned and operated,' appearing above the '25', were painted in a less striking black and measured only 6 inches in height. 'Stations' appeared beneath the numerals, also in black and also only 6 inches in height. The abbreviation 'Inc.' was in still smaller letters beneath the word 'Stations'."

It was implicit that the unusual lettering of the sign was designed to give the impression to the passing motorist that gasoline could be purchased at the station for 25 cents per gallon.

People v. 25 Stations, supra, clearly demonstrates that a requirement that the selling price of gasoline be stated "clearly and legibly in numbers of uniform size" would be a reasonable regulation for the purpose of protecting the public from misleading or deceptive advertising by gasoline stations. It is therefore my opinion that this requirement in bill 435, S., is valid.

REGULATION OF THE SIZE OF SIGNS

Subsec. (1) of the proposed statute requires that the sign or placard posting the price of gasoline be "not less than 7 by 8 inches nor larger than 24 by 30 inches. * * *". Subsec. (2) similarly regulates the size of signs or placards posting the price of all other petroleum products.

The great weight of authority is that statutes prescribing the maximum size of gasoline price posting signs are not reasonably related to preventing false or misleading advertising, the end sought to be achieved, and therefore amount to a taking of property without due process of law. *State v. Miller,* (1940) 126 Conn. 373, 12 A. 2d 192; *State v. Hobson,* (1951) 46 Del. 381, 83 A. 2d 846; *Miami Springs v. Scoville,* (1955, Fla.) 81 So. 2d 188; *Lake Charles v. Hasha,* (1959) 238 La. 636, 116 So. 2d 277; *State v. Union Oil Co.,* (1956) 151 Me. 438, 120 A. 2d 708; *Levy v. Pontiac,* (1951) 331 Mich. 100, 49 N. W. 2d 80; *State v. Redman Petroleum Corp.,* (1961) 77 Nev. 163, 360 P. 2d 842; *Regal Oil Co. v. State,* (1939) 123 N.J.L. 456, 10 A. 495; *Gambone v. Commonwealth,* (1954) 375 Pa. 547, 101 A. 2d 634; *Pride Oil Co. v. Salt Lake County,* (1962) 13 Utah 2d 183, 370 P. 2d 355. As said in *Lake Charles v. Hasha,* supra, at 116 So. 2d 280:

"It is difficult to see how restriction in the size of signs on which is printed the price at which petroleum products are sold or offered for sale bears any relationship to the prevention of fraud. Placing larger signs at places where passing motorists may see them is less conducive to fraud. Business practices, such as the one against which this ordinance is directed, have no detrimental effect on public health, peace, morals, safety or welfare.

"Nor are we impressed with the statement in the preamble that 'beautification of the City will be the natural result' of the adoption of the ordinance. It is not a zoning ordinance which prohibits the operation of gasoline stations nor one which prohibits the use of billboards or advertising signs generally. As pointed out by the City Judge, it does not prohibit the use of signs of any size whatever by 'liquor stores, meat markets, grocery stores, barber shops,

cafes, food stores, garages and a multitude of other types of establishments.' The ordinance on its face accomplishes little or nothing of an aesthetic value. * * *"

Only the states of Massachusetts and New York have upheld such statutes as a reasonable exercise of the police power. See *Slome v. Godley,* (1939) 304 Mass. 187, 23 N. E. 2d 133; *People v. Arlen Service Stations,* (1940) 284 N. Y. 340, 31 N. E. 2d 184. However, both of the above cases appear to assume the relationship between possible fraud and a maximum limitation of the size of price signs. This assumption was criticized as follows in *State v. Hobson,* supra, at 83 A. 2d 858:

"With due respect to the courts that decided those cases, we do not think that the relation may be so readily assumed. That a requirement of a minimum size of price signs has a relation to the prevention of deception is obvious; but how can the establishment of a maximum limitation have any connection with such an end? As is said in the Regal Oil case, supra [123 N.J.L. 456, 10 A. 2d 498]: 'If the regulation sign serves to prevent fraud and misrepresentation then surely * * * larger signs should even more effectively tend to accomplish the same result.' "

Some of the other above cited cases also indicate that it is a reasonable exercise of the police power to establish a minimum size for price signs and that it is only the requirement that the signs not exceed a stated size that raises due process objections.

The reasoning of those cases holding that there is a relationship between minimum size requirements for signs and the prevention of fraud is, in my opinion, sound. However, it is likely that the courts of this state would strike down the provision of the bill establishing a maximum size for price signs in light of the case authority from other states. It is therefore my opinion that those portions of bill 435, S., which prescribe a minimum size for signs posting the price of gasoline and other petroleum products are valid, but that those portions of bill 435, S., which prescribe a maximum size for such signs would probably be held invalid as unreasonable exercises of the state's police power.

REQUIREMENT THAT THE BRAND NAME AND GRADE OF THE GASOLINE AND OTHER PETROLEUM PRODUCTS BE STATED

Subsec. (1) of the proposed statute requires that the selling price of the gasoline be posted "together with the name, trade name, brand, mark or symbol and grade or quality classification, if any, of the gasoline". Subsec. (2) (c) of the proposed statute requires that signs relating to petroleum products other than gasoline clearly state the brand name and grade of the petroleum products unless such products are sold without identification, in which case "the sign, placard or other display shall refer clearly to the petroleum products as unbranded".

There is very little discussion in the existing case law as to the constitutionality of a statutory requirement that the brand name and grade of gasoline be stated. In *City of Lake Charles v. Hasha,* (1959) 238 La. 636, 116 So. 2d 277, and *State v. Redman Petroleum Corp.,* (1961) 77 Nev. 163, 360 P. 2nd 842, statutes containing such provisions were struck down but on the basis that prescribing the maximum size of price posting signs violates state and federal due process provisions. On the other hand, statutes containing such provisions have been upheld in the states of California and New York. *Serve Yourself Gasoline Stations v. Brock,* (1952) 39 Cal. 2d 813, 249 P. 2d 545, app. dism'd. 345 U. S. 980, 97 L. ed. 1394, 73 S. Ct. 1130; *People v. Arlen Service Stations,* (1940) 284 N. Y. 340, 31 N. E. 2d 184.

Of the above cited cases, only *Serve Yourself Gasoline Stations v. Brock* addresses itself to the validity of requiring the posting of the gasoline brand name and grade [at 249 P. 2d 550]:

"Gasoline is a unique commodity in that few people, if any, can distinguish between grades or brands by the use of the senses. Unlike many other commodities, its sale is final in the sense that there is no practical way for the motorist to return or exchange the purchased commodity, if dissatisfied. Price and brand name are the principal factors in its sale, and therefore, advertising of these elements in a misleading manner is peculiarly subject to abuse.

Furthermore, it must be presumed that the Legislature has made a careful investigation in the field, and that it has properly determined that the interests of the public require this legislation."

It is my opinion that the reasoning of the California supreme court in *Serve Yourself Gasoline Stations v. Brock,* supra, should be followed absent any authority to the contrary. Furthermore, the reasoning of the decision is equally applicable to other petroleum products. Assuming there exists a need for corrective legislation relating to misbranding of petroleum products other than gasoline, a requirement that the brand name and grade of such products be stated on any signs that are posted seems to be a reasonable regulatory measure for the protection of the public.

Thus, it is my opinion that the provisions in the proposed statute requiring the posting of the brand name and grade of gasoline sold or offered for sale and requiring any signs relating to other petroleum products to state the brand name and grade of such petroleum products are valid.

REQUIREMENT THAT THE AMOUNT OF TAX BE LISTED SEPARATELY FROM THE SELLING PRICE

The only case that has discussed the validity of a statutory provision similar to this aspect of proposed sec. 100.185 is *State v. Guyette,* (1954) 81 R. I. 281, 102 A. 2d 446. In that case the defendant attacked the validity of a statute that required that the "amount of governmental tax to be collected in connection with the sale of such motor fuel shall be stated on such sign or signs separately and apart from such selling price or prices". The court upheld the statute and commented as follows as to its reasonableness [at 81 R. I. 286]:

"The legislature, as the representative of the general public, might well have desired to prevent the governmental tax from being concealed, misstated, or otherwise misused to defraud the purchasing public. Conceivably unwary purchasers might be induced by a sign to enter premises to purchase fuel in the belief that the amount displayed was the total price to be paid, only to find after the fuel had

been dispensed that the amount of the governmental tax was not included in the price advertised on the sign and had to be paid in addition. The legislature might also have concluded that it was necessary and desirable in the existing circumstances to help to prevent a dealer from concealing the amount of the tax and from collecting more than the actual tax, while ostensibly advertising the sale of certain gasoline for a cheaper price than that of his competitors."

In *State v. Woitha,* (1939) 227 Iowa 1, 287 N. W. 99, the Iowa supreme court upheld a more elaborately worded statute that required separate posting of the price per gallon, the state license fee per gallon, the federal excise tax per gallon, and the total thereof. On the other hand, no case has been found which has expressly struck down a price posting statute because it contained a provision requiring the statement of the tax separately from the selling price.

The decisions of the few cases that have been confronted with provisions requiring a separate listing of the tax to be collected lead me to the opinion that such a requirement is a reasonable regulation of the retail gasoline industry. The proposed statute is somewhat vague in defining the type of tax posting that would be permitted, but it is my opinion that whatever vagueness exists does not render the provision unconstitutional.

RESTRICTION OF NUMBER OF SIGNS

Bill 435, S., as amended provides that "No sign or placard other than the signs or placards provided for under this section shall be posted or maintained on, at, near or about the premises on which gasoline is sold or offered for sale". As originally drafted, however, the foregoing language was tempered by the words "stating or referring directly or indirectly to the price of gasoline" following the word "placard".

Even in its original form the language of bill 435, S., restricting the number of signs on gasoline station premises was of questionable validity. At least eight states have held that legislation restricting the maintenance of signs relating to the price of gasoline to those specifically author-

ized is an invalid exercise of the police power. *State v. Miller,* (1940) 126 Conn. 373, 12 A. 2d 192; *Miami Springs v. Scoville,* (1955, Fla.) 81 So. 2d 188; *State v. Union Oil Co.,* (1956) 151 Me. 438, 120 A. 2d 708; *Levy v. Pontiac,* (1951) 331 Mich. 100, 49 N. W. 2d 80; *Regal Oil Co. v. State,* (1939) 123 N.J.L. 456, 10 A. 2d 495; *Moreson v. Akron,* (1941) 20 Ohio Ops. 298, 34 Ohio L Abs 24; *State v. Guyette,* (1954) 81 R. I. 281, 102 A. 2d 446; *Pride Oil Co. v. Salt Lake County,* (1962) 13 Utah 2d 183, 370 P. 2d 355. The contrary view that such restrictions are valid has been taken in at least three jurisdictions. *State v. Hobson,* (1951) 46 Del. 381, 83 A. 2d 846; *Slome v. Godley,* (1939) 304 Mass. 187, 23 N. E. 2d 133; *People v. Arlen Service Stations,* (1940) 284 N. Y. 340, 31 N. E. 2d 184.

The amended bill 435, S., goes much further than the legislation involved in the above cases by not only restricting the number of signs relating to the price of gasoline but by prohibiting any other signs of whatever nature that are not expressly permitted by the statute. Moreover, the sign prohibition applies to all signs "maintained on, at, near or about the premises on which the gasoline is sold," which could very likely be construed to encompass the entire gasoline station premises. It is doubtful whether any court faced with such a strict and comprehensive statutory regulation of gasoline station signs would uphold such a statute as a reasonable exercise of the police power to prevent fraud or deception of the public.

Subsec. (2) (d) of the proposed statute prohibits signs or placards relating to the price of petroleum products sold or delivered by means of dispensing equipment at any place other than on the dispensing equipment. Only one case has been found that has passed on the constitutionality of legislation containing such a restriction, but it struck down the city ordinance there involved on other grounds. See *Lake Charles v. Hasha,* (1959) 238 La. 636, 116 So. 2d 277. However, the restriction as to petroleum signs contained in subsec. (2) (d) of proposed sec. 100.185 is quite similar in effect to provisions restricting gasoline price signs found in other states. And, as has been previously discussed, such

restrictions are invalid according to the present weight of judicial authority.

Thus it is my opinion that the provision of bill 435, S., prohibiting any sign or placard upon the premises where gasoline is sold other than the signs or placards specifically permitted, is an unreasonable exercise of the police power of the state and is therefore invalid. It is my further opinion that a court of this state would most likely also declare the provision of the bill restricting the location of signs relating to the price of other petroleum products to be invalid.

The remaining portions of the proposed statute do not appear to present any additional questions of constitutionality. In particular subsec. (3), which relates to fradulent practices generally in the sale of gasoline or other petroleum products, appears to be a valid designation of practices considered by the legislature to be fraudulent. Subsec. (3) is also clearly severable from the rest of the proposed statute. See *Muench v. Public Service Commission,* (1952) 261 Wis. 492, 53 N. W. 2d 514; *Weco Products Co. v. Reed Drug Co.,* (1937) 225 Wis. 474, 274 N. W. 426. Consequently, those portions of the proposed statute which are unconstitutional should not render the general prohibitions of subsec. (3) void and unenforceable. Sec. 990.001 (11).

BCL:JDJ:

Shoplifters—Constitutionality—Discussion of the constitutionality of Bill 31, S., and its amendments regarding the detention of suspected shoplifters.

May 3, 1966.

THE HONORABLE, THE ASSEMBLY

By Assembly Resolution 25 you have requested my opinion on the constitutionality of senate bill 31, as shown by substitute amendment 1, S., as amended.

The bill as amended and passed by the senate provides:

"954.031 Anti-Shoplifting Law. A merchant, merchant's employe or peace officer who has probable cause for believing that goods held for sale by said merchant have been unlawfully removed or taken by a person is privileged, without arresting such person, to detain him in a reasonable manner on the premises for the time necessary to make an investigation of the facts, not exceeding 30 minutes. Such taking into custody and detention upon probable cause by a merchant, merchant's employe or peace officer shall not render such merchant, merchant's employe or peace officer criminally or civilly liable. Failure to permit such detained person reasonable telephone calls during such period of detention shall terminate the privilege set forth herein."

Legislation of this type, often called an "anti-shoplifting law", is not new to the halls of our legislature. Similar bills were passed in 1961 and 1963, only to be vetoed by the governor in each instance. The desire on the part of merchants and store owners to secure such legislation is understandable, for shoplifting is a significant problem in Wisconsin, as in other states. In an effort to cope with the problem many states have enacted laws granting merchants and their employes a privilege, under certain circumstances, to detain persons suspected of shoplifting. To this privilege is added a corresponding immunity from civil and criminal liability if the detention is shown to have been reasonable.

Such legislation, although avoiding fatal constitutional objections, contains many inherent dangers to the rights of the individual consumer. The law proposed by bill 31, S., as contained in substitute amendment 1, S., is just such a law. It does not fail the present tests of constitutionality, but its application in particular circumstances may well give rise to grave constitutional questions in the future.

The bill contains several purported "safeguards" to the individual liberties of the shopper, which are common to most similar laws. These "safeguards" may be summarized as follows:

1. *Limitations on the purpose of the detention.* In order to avoid constitutional attack, this type of legislation must

provide that the detention be for a particular, stated purpose. The purpose expressed in bill 31, S., as amended is "to make an investigation of the facts". Similar statements of purpose are found in comparable laws in Illinois, Kansas, Louisiana, and Massachusetts.

2. *The requirement of "probable cause".* The bill provides that the merchant, his employe, or a peace officer may exercise the privilege when they "have probable cause for believing that goods held for sale by said merchant have been unlawfully removed or taken by a person". This provision, or one requiring "reasonable grounds" for a similar belief, is found in most comparable legislation in other states.

3. *Limitation on the manner, length and place of detention.* The bill requires that the detention be "in a reasonable manner on the premises for the time necessary to make an investigation of the facts, not to exceed 30 minutes". In this respect, although the language is somewhat vague, more protection is furnished to the detained person than is usual in similar legislation. The same is true of the sentence dealing with telephone calls by the person under suspicion. Most states merely provide for detention "in a reasonable manner for a reasonable time". The Louisiana and New Mexico statutes have a time limit not exceeding one hour. Most states do not specify the place of detention, although a provision requiring that the detention be "on the premises" is also found in the Louisiana statute.

4. *Access to a telephone.* The provision regarding termination of the privilege for failure to "permit such detained person reasonable telephone calls" appears to be a unique and desirable qualification.

Under the terms of the bill, detention upon probable cause "shall not render the merchant, merchant's employe or peace officer criminally or civilly liable". Most states merely provide that no liability shall arise in certain specified types of civil actions. Illinois and Utah, however, have provisions similar to that contained in the bill under discussion. This provision does not, of course, entirely eliminate actions by persons improperly detained for suspected shoplifting, since "probable cause" is a prerequisite.

Despite the multitude and variety of comparable statutes I have discovered no case in which such a statute has been declared unconstitutional. On the other hand, the constitutionality of statutes creating a specific criminal offense of shoplifting has been upheld in *State v. Hales,* (1961) 256 N.C. 27, 122 S. E. 2d 768, 90 A.L.R. 2d 804; *Sullivan v. State,* (1962 Tex. Crim.) 354 S.W. 2d 168, and *Henderson v. State,* (1962 Tex. Crim.) 362 S.W. 2d 322. For a discussion of existing Wisconsin law on the subject of the rights of merchants and their employes in dealing with suspected shoplifters, see *Radloff v. National Food Stores,* (1963) 20 Wis. 2d 224, 121 N.W. 2d 865, 123 N.W. 2d 570, and in particular the opinion on rehearing. (See also the note on shoplifting and false imprisonment found in 1964 Wis. L. Rev. 478.)

The existence of these safeguards coupled with the presumption of constitutionality attaching to all legislative enactments leads me to the conclusion that bill 31, S., as amended would be constitutional if signed into law.

Although the lack of certainty in the language of the bill does not render the proposed law unconstitutional *per se,* this uncertainty plants the seed of constitutional violation which may easily blossom in the future.

It should be emphasized that the bill authorizes a merchant to detain a shopper if he has probable cause for believing that the shopper has unlawfully removed or taken the merchant's goods. There is no requirement that the merchant actually witness the taking.

The bill sets forth the ostensible limitation that the detention must be for the purpose of "investigation". The merchant is not required to inform the suspected shopper of the reasons underlying the detention, nor is there any express limitation on the methods used to detain the shopper. The "investigation" may well include a personal search or a search of the shopper's packages or bundles. Such a search, if it be made without consent and without a warrant raises serious procedural due process questions which cannot be answered in advance, but will have to be dealt with on a case by case basis.

The bill specifies that the shopper must be detained "in a reasonable manner". Does this mean that the merchant or his employe may use whatever force they might feel is required to "detain" a shopper who is militant in his opposition to the detention? To say that a merchant can lock a shopper in a room or closet for up to half an hour, without stating any reason for doing so, would shock the conscience of most citizens. Bill 31, S., as amended appears to authorize such conduct—subject, of course, to the provisions for "reasonable use" of the telephone.

Some courts have held that detention of a suspected shoplifter is for all intents and purposes an "arrest". *People v. Mirbelle,* (1954) 276 Ill. App. 533, 111 N.E. 2d 530. See also 10 *Western Res. L. Rev.* 585, 586. If the detention authorized by this bill is the equivalent of an arrest, a suspected shoplifter who is detained pursuant to its terms may be an "accused". This could well raise serious questions concerning right to counsel and the self-incrimination privilege under the recent trend of United States supreme court decisions in this area. See discussion in 44 Neb. L. Rev. 681, 688-689.

On October 21, 1965, the assembly passed a series of amendments to the final senate version of bill 31, S. These amendments have the cumulative effect of revising proposed sec. 954.031 to read:

"954.031 ANTI-SHOPLIFTING LAW. A merchant or employe over 21 years of age who has probable cause to believe that goods held for sale by such merchant have been unlawfully removed by a person may hold such person in temporary custody in a reasonable manner only if such merchant or employee has at the time of such apprehension notified the nearest law enforcement authority. Such person shall not be held in temporary custody for longer than 30 minutes or until the arrival of such law enforcement authority, whichever is sooner. Failure to permit such detained person reasonable telephone calls during such period of detention shall terminate the privilege set forth in this section.

"Any merchant desiring to invoke the provisions of this section shall be subject to civil liability in the event of false arrest and shall file proof of liability insurance with the clerk of circuit court of the county in which the business is located to cover possible legal action."

It is my opinion based upon the above discussion that the assembly version of bill 31, S., is constitutional. The assembly amendments make the following major changes in the senate version of the bill:

(1) The merchant may detain a suspected shoplifter only if he immediately notifies the nearest law enforcement authority.

(2) The provision granting civil immunity is omitted, and the merchant is expressly subject to civil liability in the event of false arrest.

(3) All references to "detention" have been changed to "temporary custody".

(4) All references to the purpose of the detention (e.g. for investigation of the facts) have been omitted.

(5) In the event of an arrest, the merchant must file proof of liability insurance with the clerk of circuit court to cover possible legal action arising out of the detention.

Omission of any reference to the purpose of the investigation compounds the procedural due process problems inherent in a law such as this which permits detention by private citizens. The assembly version of the bill speaks in terms of "temporary custody", and requires immediate notification to the police. Such taking into custody is clearly analogous to an arrest, and the problems of possible self-incrimination and denial of the right to counsel are present in this version of proposed law as well.

Aside from these additional comments, all that has been said in relation to the senate version of the bill is equally applicable to the bill as amended by the assembly. Both versions in my opinion present significant potential constitutional problems.

In spite of the foregoing defects, it cannot be said that the proposed law is unconstitutional, for 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. Thompson v. Giessel*, (1953) 265 Wis. 558, 565, 61 N.W. 2d 903.

BCL/WFE:

Trading Stamps—Constitutionality—Discussion of the probable constitutionality of Bill 197, A., regarding the prohibition of giving trading stamps and other similar devices with the sale of motor fuel.

May 6, 1966.

THE HONORABLE, THE ASSEMBLY

You have requested my opinion of the constitutionality of bill 197, A., which if enacted into law would prohibit giving trading stamps and other similar devices with the sale of motor fuel. The bill is intended to amend sec. 100.15 (1), and reads as follows:

"AN ACT to amend 100.15 (1) of the statutes, relating to prohibiting the use of trading stamps in connection with the sale of motor fuel.

"The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

"100.15 (1) of the statutes is amended to read:

"100.15 (1) No person, ~~firm, corporation, or association~~ within this state shall use, give, offer, issue, transfer, furnish, deliver, or cause or authorize to be furnished or delivered to any other person, ~~firm, corporation, or association~~

within this state, in connection with the sale of any goods, wares or merchandise, any trading stamp, token, ticket, bond, or other similar device, which ~~shall entitle~~ *entitles* the purchaser receiving the same to procure any goods, wares, merchandise, privilege, or thing of value in exchange for any such trading stamp, token, ticket, bond, or other similar device, except that any manufacturer, packer, or dealer may issue any slip, ticket, or check with the sale of any goods, wares or merchandise, which ~~slip, ticket or check shall bear~~ *bears* upon its face a stated cash value and ~~shall be~~ *is* redeemable only in cash for the amount stated thereon, upon presentation in amounts aggregating 25 cents or over of redemption value, and only by the person, ~~firm or corporation~~ issuing the same; ~~provided that~~ *No such trading stamp, token, ticket, bond or other similar device shall be given or issued within this state in connection with the sale of motor fuel as defined in ch. 78.* The publication by or distribution through newspapers, or other publications, of coupons in advertisements other than their own, shall not be considered a violation of this section; ~~and provided further, that~~ This section shall not apply to any coupon, certificate or similar device, which is within, attached to, or a part of any package or container as packed by the original manufacturer and ~~is~~ directly redeemed by such manufacturer."

Bill 197, A., is identical to bill 172, A., which was introduced in the 1963 session of the legislature. In 52 OAG 131 my predecessor concluded that bill 172, A., if enacted, would probably be a constitutional statute. In my opinion that conclusion was sound.

The basic constitutional issue raised by this legislation is whether or not it results in a denial of equal protection of the laws. (Art. I, sec. 1, Wis. Const.; Amend. 14, U. S. Const.) It is well established that the guarantee of equal protection of the laws is subject to the legislature's right to make reasonable legislative classification. Bill 197, A., makes two separate classifications: first, it places trading stamps in a separate classification from other trade promo-

tion devices; and second, it classifies the motor fuel industry separately from other businesses.

The Wisconsin supreme court, as was pointed out in 52 OAG 131, has left little doubt that trading stamps may be separately classified and their use limited or even prohibited entirely. *Ed. Schuster & Co. v. Steffes,* (1941) 237 Wis. 41, 295 N.W. 737; *Trading Stamp Cases,* (1917) 166 Wis. 613, 166 N.W. 54.

The remaining question is whether the use of trading stamps may be prohibited in the motor fuel industry while it is permitted in other industries. To be sustained such a classification must be based upon real differences between the classes and such differences must be germane and relevant to the evil sought to be remedied (*State v. Evans,* (1907) 130 Wis. 381, 385, 110 N.W. 241). The Wisconsin legislature has separately classified the motor fuel industry for other purposes. (See, e.g., sec. 100.18 (8).) In *State v. Texaco,* (1961) 14 Wis. 2d 625, 637, 111 N.W. 2d 918, the Wisconsin supreme court upheld the separate classification of the motor fuel industry for the purpose of price discrimination regulation. The court said:

"* * * We can take judicial notice of many differences between the organization of the business of distributing gasoline and other types of business. It would be presumed that imposition of unique regulations upon a distinct type of business would be reasonably related to the peculiarities of the business until the contrary clearly appears."

The motor fuel industry has certain obvious differences when compared with other retail businesses. It is predominantly a one-product industry consisting of sole proprietorships, with facilities leased from suppliers. Gasoline prices tend to be uniform. Trading stamps may lend themselves to violations of the price posting law which affects retail gasoline sales.

If the legislature enacts this legislation on the basis of these facts and others which it may have in mind, it certainly cannot be said to have exceeded the bounds of reason. As the Wisconsin supreme court has said:

" 'If there is any reasonable basis upon which the legislation may constitutionally rest, the court must assume that the legislature had such fact in mind and passed the act pursuant thereto. The court cannot try the legislature and reverse its decision as to the facts. All facts necessary to sustain the act must be taken as conclusively found by the legislature, if any such facts may be reasonably conceived in the mind of the court.' " *State ex rel. Carnation Milk Products Co. v. Emery,* (1922) 178 Wis. 147, 160, 189 N.W. 564, quoted in *White House Milk Co. v. Reynolds,* (1960) 12 Wis. 2d 143, 150-151, 106 N.W. 2d 441.

The previous opinion in 52 OAG 131 renders a further discussion largely redundant. The Wisconsin court has held that the use of trading stamps may be limited and even prohibited entirely. The court has upheld the separate classification of the motor fuel industry for other purposes. There are differences between the motor fuel industry and other industries which use trading stamps which can justify a separate classification for the purpose of prohibiting stamps. There is a strong presumption in favor of the validity of a legislative classification. I therefore conclude that bill 197, A., if enacted into law, would probably be held constitutional.

BCL/ACC

Internal Improvement—Debt Limitations—Constitutionality—Discussion of Bill 802, A., which would amend the statutes to permit industrial construction by municipalities for commercial benefit, and the prohibitions governing internal improvement and debt limitations.

May 10, 1966.

THE HONORABLE, THE ASSEMBLY

You ask my opinion concerning the validity of assembly bill No. 802 (1965). Bill 802, A., proposes to amend sec. 66.52 (3), which reads as follows:

"(1) It is declared to be the policy of the state to encourage and promote the development of industry to provide greater employment opportunities and to broaden the state's tax base to relieve the tax burden of residents and home owners. It is recognized that the availability of suitable sites is a prime factor in influencing the location of industry but that existing available sites may be encroached upon by the development of other uses unless protected from such encroachment by purchase and reservation. It is further recognized that cities, villages and towns have broad power to act for the commercial benefit and the health, safety and public welfare of the public. However, to implement that power, legislation authorizing borrowing is necessary. It is, therefore, declared to be the policy of the state to authorize cities, villages and towns to borrow for the reservation and development of industrial sites, and the expenditure of funds therefor is determined to be a public purpose.

"(2) For financing purposes, the purchase, reservation and development of industrial sites undertaken by any city, village or town is a public utility within the meaning of s. 66.066. In financing under that section, rentals and fees shall be considered as revenue. Any indebtedness created hereunder shall not be included in arriving at the constitutional debt limitation.

"(3) Sites purchased for industrial development under this section or pursuant to any other authority may be developed by the city, village or town by the installation of utilities and roadways but not by the construction of buildings or structures. Any such sites may be sold or leased for industrial purposes but only for a fair consideration to be determined by the governing body."

Bill 802, A., proposes to repeal and recreate sec. 66.52 (3) to read:

"Sites purchased for industrial development under this section or pursuant to any other authority may be developed by the city, village or town by the installation of utilities, roadways and such buildings or structures as the governing

body of such city, village or town deems necessary to obtain industrial occupancy of the land. Any such site, including buildings or structures, may be sold or leased for industrial purposes, but only for a fair consideration to be determined by the governing body."

Substitute amendment 1, A., to bill 802, A., also has been presented. It proposes to change sec. 66.52 (3) as follows:

"Sites purchased for industrial development under this section or pursuant to any other authority may be developed by the city, village or town by the installation of utilities and roadways and may, after approval by a referendum, and in combination with private capital, invest funds of the city, village or town in a) county development corporations or b) such building or structures as may be necessary to obtain industrial occupancy of city, village or town industrial lands or in both a) and b). Any such investment shall be in revenue bonds and shall not be counted in computing the city, village or town debt limit. Any such sites, including buildings or structures may be sold or leased for industrial purposes, but only for a fair consideration to be determined by the governing body."

Assembly resolution 24 requests that the attorney general provide an opinion as to the "validity" of the bill. For purposes of this opinion, I shall assume that "validity" means "constitutionality".

Your request raises the following issues under the constitution of the state of Wisconsin:

(1) May the legislature constitutionally authorize municipalities to borrow and to expend public funds for the purpose of acquiring and improving industrial sites including the construction of buildings and structures?

(2) May the legislature consistent with the constitution exclude the indebtedness created for the purpose of acquiring and improving such sites from the constitutional debt limitation imposed by Art. XI, sec. 3, Wis. Const.?

I.

THE POWER TO BORROW AND EXPEND PUBLIC FUNDS.

Art. VIII, sec. 10, Wis. Const., provides in part:

"The state shall never contract any debt for works of internal improvement, or be a party in carrying on such works * * *."

Art. VIII, sec. 10, clearly prohibits the state from contracting any debt for "works of internal improvement". Such prohibition, however, does not extend to municipalities. In *Redevelopment Authority v. Canepa,* (1959) 7 Wis. 2d 643, 651, 97 N.W. 2d 695, the court said:

"* * * It has been held from almost the beginning of the state that while the state is subject to the prohibitions limiting the power of the state to contract a debt and prohibiting the carrying on of works of internal improvement, governmental units created by the state and carrying on their public functions in particular localities or geographical subdivisions of the state are not so subject. *Bushnell v. Beloit* (1860), 10 Wis. *195; *Clark v. Janesville* (1859), 10 Wis. *136; *Jensen v. Board of Supervisors* (1879), 47 Wis. 298, 2 N.W. 320."

In *Bushnell v. Beloit,* (1860) 10 Wis. *195, the legislature by statute had authorized the town of Beloit to subscribe $100,000 in town bonds to the capital stock of a railroad for its construction. Legislative authorization required that a majority of the town electors approve the subscription at a special election. An election was held and majority approval was received. Thereafter, $100,000 in town bonds were delivered to the railroad in exchange for capital stock of the railroad equal in value to the bonds.

Objection was made that a political subdivision of the state, like the town of Beloit, was prohibited by the Wisconsin constitution from contracting debts for internal improvements. The court rejected this argument. It pointed out that the constitution did not grant power to the legislature but rather limited the power of the legislature. Therefore the legislature was permitted to exercise all powers

not forbidden by the constitution. Since the constitution did not expressly or impliedly prohibit the legislature from permitting the town of Beloit to subscribe town bonds for railroad construction, such authorization by statute was proper under the constitution. The court said:

"* * * it is equally clear that though the state, in its political capacity as such, is prohibited from contracting any debt for works of internal improvement, and from becoming a party to carrying them on, yet this prohibition does not apply to the political subdivisions of the state, the towns, counties and cities, which, when properly authorized, may contract such indebtedness and become a party to such improvements. At all events, the natural and rational construction of these restrictive clauses is that they apply to the state in contradistinction to the subdivisions of the state. Otherwise, how would it be possible for our cities and villages to improve their harbors; to pave and grade their streets; to build their bridges; or to do many other things calculated to increase their trade and prosperity, and promote the comfort and welfare of the citizens? * * *" (10 Wis. at p. *223.)

The most serious potential objection to this use of public funds is that such expenditures are not for a public purpose. The origins of the public purpose doctrine are obscure in Wisconsin. It has been traced to Art. IV, sec. 4, U. S. Const. guaranteeing a republican form of government. *Heimerl v. Ozaukee County,* (1949) 256 Wis. 151, 158, 40 N.W. 2d 564; to the equal protection and due process clauses of the 14th Amendment — *W.D.A. v. Dammann,* (1938) 228 Wis. 147, 175, 280 N.W. 698; and to "extra constitutional standards" based upon "judicial distrust of legislative judgment" — Mills, *The Public Purpose Doctrine in Wisconsin,* Part 1, 1957 Wis. L. Rev. 40-45. Regardless of its source, however, the public purpose doctrine must be accepted as a firmly established principle of Wisconsin law.

The courts have found the public purpose doctrine singularly difficult to articulate. It is clear that the rule prohibits either the state legislature or municipal governments from

making gifts of property to private parties for private benefit. *Village of Suring v. Suring State Bank,* (1926) 189 Wis. 400, 7 N.W. 944, and *Heimerl v. Ozaukee County,* (1949) 256 Wis. 151, 40 N.W. 2d 564. The Wisconsin court in *State ex rel. W.D.A. v. Dammann,* (1938) 228 Wis. 147, 180, 280 N.W. 698, suggested the following general guidelines for determining whether or not the particular expenditure met the public purpose test:

"The course or usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, and the objects and purposes which have been considered necessary for the support and proper use of the government are all material considerations as well as the rule that to sustain a public purpose the advantage to the public must be direct and not merely indirect or remote. * * *"

The question with which this discussion is concerned is whether the acquisition and development of industrial sites is a proper public purpose. A discussion of this question must consider the *Suring* case, supra, in which the court stated at p. 405:

"* * * A municipality cannot by statute be authorized to raise funds for such purposes, and bonds issued by a municipality in aid of a manufacturing enterprise are void because the promotion of private manufacturing enterprises is not a public purpose. * * *"

We do not believe, however, that the *Suring* case requires that bill 802, A., or substitute amendment 1, A., to bill 802, A., be held to violate the public purpose doctrine. In the *Suring* case the village of Suring purchased property for which they paid $2,000 and conveyed it to private individuals so that the individuals could construct a "mill for the purpose of manufacturing cheese boxes" on the property. The trial court's findings of fact which were adopted in total by the supreme court included a finding that the conveyance of the property to private parties " 'was solely for a private purpose and without consideration' ".

Bill 802, A., and substitute amendment 1, A., to 802, A., both provide:

" * * * Any such sites, including buildings or structures may be sold or leased for industrial purposes, but only for a fair consideration to be determined by the governing body."

The *Suring* case is further distinguishable in that it involves no specific legislative authority nor any legislative finding with respect to the public purpose served by the conveyance of the property. The Suring village council acted solely on its own initiative to convey the property to private parties. Sec. 66.52 (1) makes the specific finding that the acquisition and development of industrial sites is a public purpose and recites in detail the reasons for this finding. A legislative determination of public purpose is entitled to great weight. In *David Jeffrey Co. v. Milwaukee,* (1964) 267 Wis. 559, 579, 66 N.W. 2d 362, the Wisconsin supreme court said:

"The determination of what constitutes a public municipal purpose is primarily a function of the legislative body, subject to a review by the courts, and such determination by the legislative body will not be overruled by the courts except in instances where that determination is manifestly arbitrary or unreasonable. * * *"

In the *Dammann* case, supra, the Wisconsin court pointed out at p. 182:

"* * * The rule that the benefits to the public must be direct and not remote and that the past course or usage of government is to be resorted to for guidance must in each case be considered in the light of the principle that the legislature has a very wide discretion to determine what constitutes a public purpose, and that courts will not interfere unless at first blush the act appears to be so obviously designed in all its principal parts to benefit private persons and so indirectly or remotely to affect the public interest that it constitutes the taking of property of the taxpayers for private use. * * *"

The exercise of legislative discretion must also be evaluated in the light of the social, economic and industrial conditions of the times. As the supreme court of the state of Maine said in upholding the right of a municipality to establish a wood, coal and fuel yard for sale to the inhabitants of the city at cost:

"Times change. The wants and necessities of the people change. The opportunity to satisfy those wants and necessities by individual efforts may vary. . . . On the one hand, what could not be deemed a public use a century ago, may, because of changed economic and industrial conditions, be such today. * * *" *Laughlin v. City of Portland,* (1914) 111 Maine 486, 491, 90 Atl. (1914), 318, 320, as quoted in *State ex rel. W.D.A. v. Dammann,* 228 Wis. 147, 182, 280 N.W. 698.

Industry today is extremely mobile. The states compete fiercely to entice industrial plants to locate within their borders. One of the common methods by which industry may be induced to locate in a particular community is for that community to purchase and develop facilities for that industry. An increasing number of states have adopted legislation similar to sec. 66.52, Wis. Stats., as amended by bill 802, A., to enable governmental units to do this. See Advisory Commission on Intergovernmental Relations, *A Commission Report, Industrial Development Bond Financing,* June 1963.

There is a definite tendency for state legislatures to respond to the economic needs of their states by enacting legislation enabling communities to purchase and develop industrial sites. The Wisconsin supreme court has specifically recognized that the public purpose concept changes to meet changing needs and conditions in society. The court has also said that the determination of what constitutes a public purpose is for the legislature. The Wisconsin legislature in sec. 66.52 (1) has made a clear and persuasive finding that the acquisition and development of industrial sites is a public purpose. I believe, therefore, that the Wisconsin supreme court would probably hold that sec. 66.52 as

amended by either bill 802, A., or substitute amendment 1 A., to Bill 802, A., is consistent with the public purpose doctrine and therefore constitutional.

II.

CONSTITUTIONAL DEBT LIMIT

The proposed amendments to sec. 66.52, Stats., also bring into question the constitutionality of sec. 66.52 (2), which provides in part:

"For financing purposes * * * development of industrial sites undertaken by any city, village or town is a public utility within the meaning of s. 66.066. In financing under that section, rentals and fees shall be considered as revenue. Any indebtedness created hereunder shall not be included in arriving at the constitutional debt limitation."

This provision of the law is intended to exclude debt created for industrial development purposes from the total debt in determining whether or not the unit of government has exceeded the constitutional debt limitation imposed by Art. XI, sec. 3, Wis. Const. This provision of the constitution, as a result of an amendment in 1932, provides that a debt created

"* * * for the purpose of purchasing, acquiring, leasing, constructing, extending, adding to, improving, conducting, controlling, operating or managing a public utility . . . and secured solely by the property or income of such public utility, and whereby no municipal liability is created * * *."

The meaning and purpose of this amendment to the constitution is explained in 28 OAG 663. This opinion points out that before and after the 1932 amendment to Art. XI, sec. 3, Wis. Const., a municipality may purchase property (whether a public utility or not) and concurrently improve it without incurring "debt" for debt limit purposes, if the obligation is payable solely out of the revenues of the property. Any debt incurred to expand or improve the property after it is acquired, however, is considered debt for debt limitation purposes. The 1932 amendment enabled municipalities to borrow money for later expansion and develop-

ment of public utilities without including the amount borrowed as constitutional debt.

The constitutional exception applies only to "public utilities" but this term has been broadly defined in *Payne v. City of Racine,* (1935) 217 Wis. 550, 259 N.W. 437. The court concluded that a sewage system was a public utility for the purposes of this constitutional provision and said at p. 555:

"The term 'public utility,' as used in the foregoing amendment, must be considered to include all plants or activities which the legislature can reasonably classify as public utilities in the ordinary meaning of the term. * * *"

A prior opinion, 28 OAG 663, 666, 667, states that the legislature could constitutionally classify an armory as a public utility for debt limitation purposes. That opinion said:

"* * * when the term 'public utility' is used in the 1932 amendment, it is used in no restricted sense but is rather used in the sense of municipal property devoted to public uses. * * *

"* * *

"* * * Such legislative classification is entitled to great weight, and it is only where the court can say that the legislature has exceeded the boundaries of reason that it can be said that the legislature has exceeded its power in so classifying. * * *"

In sec. 66.067 the legislature has classified numerous other public facilities as public utilities for debt limitation purposes. The Wisconsin supreme court applied this statute in holding that debt incurred to expand hospital facilities need not be included within the constitutional debt. *Meier v. Madison,* (1950) 257 Wis. 174, 42 N.W. 2d 914. The court has also upheld as public utilities an electrical system. *Flottum v. City of Cumberland,* (1940) 234 Wis. 654, 291 N.W. 777, and a water works, *Roberts v. City of Madison,* (1947) 250 Wis. 317, 27 N.W. 2d 233 (dictum).

The question, therefore, is whether the legislative determination that industrial sites and buildings are included

within the meaning of "public utility" as used in Art. XI, sec. 3, Wis. Const., exceeds the bounds of reason. Constitutional terms do not have a fixed meaning but are to be read in the light of experience. A legislative determination of meaning is entitled to great weight. On the other hand, as the Wisconsin court stated in the *Payne* case, supra, the term "public utility" includes those things "which the legislature can reasonably classify as public utilities in the *ordinary meaning of the term*". (Emphasis added.) A public utility for purposes of state regulation is defined in sec. 196.01 (1), to include entities operating toll bridges, telephone, heat, light, power, water and natural gas pipeline companies, and, by election, private sewerage companies. A public utility is defined in Black's Law Dictionary as:

"A business or service which is engaged in regularly supplying the public with some commodity or service which is of public consequence and need, such as electricity, gas, water, transportation, or telephone or telegraph service. * * *"

It is difficult if not impossible to say that land and buildings to be used for private commercial purposes can be called public utilities in the ordinary meaning of that term. Certainly the Wisconsin court has not had to go this far in previous cases. Electrical systems, water works and even hospitals are much closer to the ordinary meaning of the term "public utility". The Wisconsin supreme court would probably hold that the legislature cannot constitutionally define industrial development sites and buildings as public utilities to bring them within the exception to the debt limitation imposed by Art. XI, sec. 3, Wis. Const.

It is therefore my opinion that bill 802, A., and substitute amendment 1 A., to bill 802, A., would if passed be constitutional insofar as they authorize municipalities to borrow and expend funds to acquire industrial sites and construct buildings. Such legislation would not violate Art. VIII, sec. 10, Wis. Const., prohibiting the state from contracting a debt for works of internal improvement, nor would it be in violation of the public purpose doctrine.

It is also my opinion that the Wisconsin supreme court would probably hold that the legislature may not, by defining industrial development sites as public utilities, exclude from the debt limitation imposed by Art. XI, sec. 3, Wis. Const., indebtedness created to construct buildings or make improvements on the sites after acquisition.

BCL:DGM:JPA:ACC:

Suit Tax—The state does not pay any suit tax under sec. 299.08, Stats.

May 25, 1966.

L. P. VOIGT
Conservation Director

You ask whether the state must pay the suit tax provided for under sec. 299.08, Wis. Stats. I quote the statute for your convenience.

"**Clerk's fee.** At the time of issuance of every summons or other process in a proceeding not commenced by a summons, the plaintiff shall pay to the clerk of said court, a clerk's fee of $2 and a suit tax of $1 as prescribed by s. 271.21, except that a municipality need not advance these fees, but shall be exempt from payment of such fees until the defendant pays costs pursuant to s. 299.25."

The above section provides that the suit tax shall be paid as prescribed by sec. 271.21 as follows:

"**Suit tax.** In each civil action, special proceeding, except probate proceedings, and cognovit judgment in the circuit or county court, excluding all matters brought into the probate branches, a suit tax of $5 shall be paid at the time the action is commenced, except that in actions by small claim type procedure and forfeiture actions in the county court, the tax is $1. A municipality need not advance the $1 tax but shall be exempt from payment of such tax until the

defendant pays costs pursuant to s. 299.25. The tax paid in circuit court shall be paid into the state treasury after any credits are applied for transfer of cases to the county court in which case the rule governing remittance from the county court shall apply; the tax paid in county courts shall be paid one-half into the state treasury and one-half into the county treasury after any credit for transfer of cases to circuit court."

Sec. 271.21 was interpreted by this office in 27 OAG 84. At that time sec. 271.21 was in substantially the same form as it is now. The suit tax was for the purpose of providing a fund to pay the salaries of the judges. The tax in circuit court was to be paid into the state treasurer and those taxes in other courts of record were to be paid to the county treasurer. The opinion stated at p. 86:

"It should be noted that the required payment of one dollar is not a filing fee, but is a state tax. Since it is a state tax neither the state nor its instrumentalities are subject to the tax. We wish to particularly emphasize this point, because of the misunderstanding that apparently exists in the minds of some clerks. The state does not pay taxes to itself * * *."

This opinion has not been negated by any case or by statute. Moreover, when sec. 59.42 (2) was revised in 1953, ch. 662, Laws 1953, provided that the state shall pay fees but no suit tax. This codified the law as interpreted in 27 OAG 84. However, sec. 59.42 (2) does not apply to small claims courts. Small claims procedure is, therefore, governed by the general law as outlined in 27 OAG at page 86. This interpretation has survived 27 years and numerous sessions of the legislature without challenge or change. The only relevant legislative action occurred when the legislature adopted the rationale of the opinion in another statute. I conclude that the opinion is a correct exposition of the law. *State ex rel. West Allis v. Dieringer,* (1957) 275 Wis. 208, 81 N.W. 533.

It is my opinion that the state does not pay the suit tax under sec. 299.08.

BCL/RBMc

Compatibility—County Supervisor—Questions of compatibility of offices cannot be determined without examination of specific offices. Discussion of statutory and constitutional regulations.

May 25, 1966.

EDWARD A. KRENZKE
Corporation Counsel, Racine County

You have requested to be advised whether there is a conflict of interest involved in the following two situations:

"(1) Where a County Board Member is also a Member of a City Commission or Board by virtue of an appointment by the Mayor of the City;

"(2) Where a County Board Member is a City employee by virtue of his being hired as Manager of Memorial Hall, which is a public meeting place for local activities and functions."

Your first question involves the posssibility of a conflict of interest between the position of county supervisor, and certain unspecified municipal positions on city commissions or boards, which may or may not constitute municipal offices.

Supervisors are county officers. Sec. 59.03 (2) (h) as created by ch. 20, Laws 1965.

Questions as to compatibility of offices cannot be determined without examination of specific offices, the basis of their creation, purpose, rights, powers and duties appurtenant thereto. One of the best general statements on the

subject is contained in 42 Am. Jur., Public Officers, §§ 58-82, pp. 926-944.

The incompatibility may result from statutory prohibition or from the application of well-established common law rules. Incompatibility is usually concerned with the relationship between two specific *offices,* however constitutional or statutory rules may regulate other dual capacities and sometimes preclude an office holder from serving as an employe for the same or for another government, be it county, municipal, state or federal.

These matters are discussed in the text above referred to, in 37 OAG 624, 44 OAG 159, and in *State ex rel. Martin v. Smith,* (1941) 239 Wis. 314, 1 N.W. 2d 163, 140 ALR 1063.

In general, two offices are incompatible if there is a conflict of interest or duties, so that the incumbent of one cannot discharge with fidelity and propriety the duties of both.

Some offices are incompatible by reasons of express statute. Statutes often recognize the conflict which might arise if an officer with legislative powers were to hold an office in the same scheme of government and concerning which he had a duty to act in establishing the pay or the duties. On the other hand, the legislature has made certain offices, which would appear to be incompatible, compatible by express statute.

Ch. 20, Laws 1965, amended sec. 59.03 (3) to provide:

"No county officer or employe is eligible to the office of supervisor, but a supervisor may also be a member of a town board, the common council of his city or the board of trustees of his village."

This statute does not refer to members of municipal commissions appointed by the mayor. While it might provide a basis for argument that a county board member can also serve as a member of certain city commissions or boards, no general statement as to compatibility or incompatibility would be warranted.

When specific offices or positions are compared, attention must be given to the statutes or ordinances creating them, to the respective rights, powers and duties thereof and to any statute or ordinance which may preclude occupation of another office or position at the same time. Attention should also be given to specific statutes relating to counties, cities, villages and towns if they are involved.

With respect to your second question, the question of compatibility of offices is not involved since the position of manager of Memorial Hall is a city employe position. We do not have sufficient information as to the rights, powers and duties of the particular employe to give an opinion as to a possible conflict of interest. On the facts given, however, the chances for conflict appear to be minimal.

Princeton Dam—Internal Improvement—Constitutionality—Ch. 298, Laws 1965, authorizing expenditure of funds for repair of Princeton dam does not violate constitution regarding internal improvements.

May 27, 1966.

GEORGE KAISER
Commissioner, Department of Administration

You have asked for my opinion as to the constitutionality of ch. 298, Laws 1965. This act appropriates a sum sufficient, up to $60,000, for the repair of Princeton dam on the Fox river.

The Princeton dam was one of many built and owned by the federal government to improve the navigability of the Fox river. The Princeton dam and five other dams on the Upper Fox were transferred by the federal government under authority of Public Law 85-500, 72 Stat. 297 and accepted by the state of Wisconsin in accordance with ch. 56, Laws 1959. The terms of the transfer were as follows: The

United States agreed to convey the property and to expend up to $300,000 (including $79,000 on the Princeton dam) to put "the project facilities in a condition suitable for public purposes". In consideration the state of Wisconsin agreed to accept the conveyance "assuming responsibility for said property" so "the United States shall thereafter have no further obligation with respect to the property so conveyed". The United States has fully performed its part of the agreement.

The report of Edward S. Bragg on February 15, 1898 to Honorable R. A. Alger, secretary of war, on the Fox and Wisconsin rivers incorporated in Mr. Alger's report of March 18, 1898 to the house of representatives traces the history of the Fox river improvements including the Princeton dam, from a grant of the congress of the United States to the state of Wisconsin, upon its admission into the Union (not accomplished until two years after the Act); through the contract between the state and the Fox and Wisconsin Improvement Company, through the successor in title, the Green Bay and Mississippi Canal Company and finally to the United States government in 1872 under a deed dated July 7, 1870.

An exhibit (House Document No. 146, 67th Congress, 2nd Session) attached to a report of the secretary of war, John W. Weeks, to the house of representatives on January 3, 1922 discloses that the Princeton locks were completed in 1878 and the Princeton dam was completed in 1898. These facilities therefore were, at all times, prior to state acquisition owned by the United States.

The dam holds a head of water of approximately three and one-half feet and Lake Puckaway, created in part by that dam, has an area of 5,433 acres and a maximum depth of 5 feet. Loss or removal of the dam would result in the loss of a portion of Lake Puckaway.

The constitutional issue raised by ch. 298, Laws 1965 is whether or not the expenditures authorized by this act violate Art. VIII, sec. 10, Wis. Const. dealing with works of internal improvement. That section reads as follows:

"**Internal improvements.** SECTION 10. The state shall never contract any debt for works of internal improvement, or be a party in carrying on such works; but whenever grants of land or other property shall have been made to the state, especially dedicated by the grant to particular works of internal improvement, the state may carry on such particular works and shall devote thereto the avails of such grants, and may pledge or appropriate the revenues derived from such works in aid of their completion. Provided, that the state may appropriate money in the treasury or to be thereafter raised by taxation for the construction or improvement of public highways or the development, improvement and construction of airports or other aeronautical projects or the acquisition, improvement or construction of veterans' housing or the improvement of port facilities. Provided, that the state may appropriate moneys for the purpose of acquiring, preserving and developing the forests of the state; but there shall not be appropriated under the authority of this section in any one year an amount to exceed two-tenths of one mill of the taxable property of the state as determined by the last preceding state assessment."

I

THE PROVISO IN ART. VIII, SEC. 10.

Art. VIII, sec. 10, as amended, contains several exceptions to the general prohibition against works of internal improvement. One of these exceptions is the following:

"* * * whenever grants of land or other property shall have been made to the state, especially dedicated by the grant to particular works of internal improvement, the state may carry on such particular works and shall devote thereto the avails of such grants, and may pledge or appropriate the revenues derived from such works in aid of their completion. * * *"

This proviso has heretofore received little consideration in the cases or the literature. It is apparent, however, that it permits the state to do several things which would otherwise be prohibited by the ban on internal improvements.

1) The state, under this proviso, may accept grants of property which it could not otherwise accept because to do so would make it a party to a work of internal improvement. For example, the original grant of the Princeton dam from the federal government to the state seems to fall squarely within this exception.

2) The state may "carry on such * * * works".

3) The avails of the property granted *shall* be devoted to the property.

4) The revenues from the works *may* be pledged to complete the works.

The key provision for purposes of this discussion is the authorization to the state to *"carry on"* the work of internal improvement which it receives as a grant. Does the authorization to carry on the Princeton dam if it is a work of internal improvement include the authorization to repair the dam?

The only Wisconsin case which appears to be relevant to this question is *Sloan, Stevens & Morris v. The State,* (1881) 51 Wis. 623, 8 N.W. 393. This was a *quantum meruit* action by a firm of lawyers hired by the governor to represent the state in an action involving title to timber cut from land "granted to the state by Congress to aid in the construction of railroads". The lawyers successfully defended against the claim that the lands had reverted to the United States, but could not collect their fees. The court held that although the proviso to Art. VIII, sec. 10, permitted the state to accept the grant of the railroad property and to "carry on the particular work," it could not contract any state debt on account of the work. The court then held that a judgment against the state constituted a state debt and the lawyers were therefore not entitled to judgment.

The constitution therefore permits the state to carry on works of internal improvement provided the property has been obtained by grant, and provided that no state debt is incurred in carrying on the improvement. The relevant question for this opinion, then, is whether or not the expenditure of funds authorized by ch. 298, Laws 1965, would result

in a state indebtedness. The general rule is that neither the state nor its municipalities incur debt for constitutional purposes when they incur liabilities for current operations which are within budgeted revenues. *State ex rel. Thomson v. Giessel,* (1953) 267 Wis. 331, 352, 65 N.W. 2d 529; *School Dist. v. Marine Nat. Exchange Bank,* (1959) 9 Wis. 2d 400, 101 N.W. 2d 112; *Earles v. Wells and Others,* (1896) 94 Wis. 285, 68 N.W. 964. The funds that would be used to repair the Princeton dam would come from a current appropriation by the legislature. It is therefore apparent that the state is not, by ch. 298, Laws 1965, contracting debt for works of internal improvement.

It has not been suggested that the state could not, consistent with Art. VIII, sec. 10, accept from the federal government the grant of the Princeton dam. In view of the express language of the constitutional provision it is clear that such a contention could not be upheld. Once the state becomes the owner of works of internal improvement it must then carry on such work. Its ability to carry on the work is limited only by the prohibition against contracting debt for this purpose. Since the appropriation for the repair of the Princeton dam is not a debt, it does not violate Art. VIII, sec. 10.

This interpretation of the constitutional language makes good sense in view of the manifest purpose of the exception to the ban on internal improvements. It does not make much sense to say that the state can accept title to a work of internal improvement such as the Princeton dam and then stand helplessly by as it deteriorates. The constitutional authority given to the state to carry on works of internal improvement given to it by grant must include the authority to make the repairs necessary to maintain and carry on such works.

II.
WORK OF INTERNAL IMPROVEMENT

The repair of the Princeton dam authorized by ch. 298, Laws 1965, may not be a work of internal improvement within the meaning of Art. VIII, sec. 10. No Wisconsin case has considered whether dam repairs under these cir-

cumstances are constitutionally proscribed. Several opinions of the attorney general -e.g. 44 OAG 148, 47 OAG 7, 47 OAG 224, 52 OAG 97, have concluded that under the circumstances described in those opinions the state could not repair and maintain dams. The general tenor of the opinions is that the state can only maintain dams, consistent with Art. VIII, sec. 10, as an incident to a park development. In none of these opinions, however, did the facts indicate that the state had, by a constitutionally permitted grant, become the owner of the dam.

The meaning and scope of the constitutional term "works of internal improvement" is unclear. In *State ex rel Jones v. Froehlich,* (1902) 115 Wis. 32, 91 N.W. 115, the court defined the terms at p. 38 as follows:

"We think it clear that such conception [internal improvements] included those things which ordinarily might, in human experience, be expected to be undertaken for profit or benefit to the property interests of private promotors, as distinguished from those other things which primarily and preponderantly merely facilitate the essential functions of government." In *State ex rel. Thomson v. Giessel,* (1953) 267 Wis. 331, 343, 65 N.W. 2d 529 and *State ex rel. Owen v. Donald,* (1915) 160 Wis. 21, 79, 151 N.W. 331, the court quoted with approval the following test from *Rippe v. Becker,* 56 Minn. 100, 117, 57 N.W. 331.

" 'Works of internal improvement,' as used in the constitution, means, not merely the construction or improvement of channels of trade and commerce, but any kind of public works, *except those used by and for the state in performance of its governmental functions,* such as a state capitol, state university, penitentiaries, reformatories, asylums, quarantine buildings, and the like, for the purposes of education, the prevention of crime, charity, the preservation of public health, furnishing accommodations for the transaction of public business by state officers, and other like recognized functions of state government.' " (Emphasis supplied).

"By adopting the foregoing definition of 'internal improvement' by the Minnesota court we are committed there-

by to hold that *any structure which is used by the state in the performance of its governmental functions is excluded from being a work of internal improvement. * * *.*"

Under this test, which is obscure at best, any expenditure for construction of works other than those used for performance of the traditional functions of government is prohibited by the works of internal improvement ban. The difficulty is in delimiting the scope of governmental functions — a concept which has fallen into disrepute as an analytical tool in other contexts. See e.g. *Holytz v. Milwaukee,* (1962) 17 Wis. 2d 26, 115 N.W. 2d 618.

A third approach to the problem is that espoused by Justice Crownhart in his concurring opinion in *State ex rel. Hammann v. Levitan,* (1929) 200 Wis. 271, 228 N.W. 140. If the act is a legitimate exercise of legislative power — in the *Hammann* case the power to protect, as trustee, the rights of the people in the wild animals of the state — it is not a work of internal improvement.

The historical background of the constitutional ban on internal improvements seems to establish that the provision was designed to keep the state government out of activities considered better left to private industry. Thus even the most restrictive view permitted governmental participation in those activities which only the government can do effectively. Consequently, the universal agreement that schools, penitentiaries, structure for the preservation of public health, etc., were not within the scope of the term "works of internal improvement". The question is whether the repair of the Princeton dam is a predominantly governmental function or one which is better left to private individuals.

The state of Wisconsin holds the navigable waters of the state in trust for the use and benefit of the general public. *Muench v. Public Service Comm.,* (1952) 261 Wis. 492, 53 N.W. 2d 514. This trust is an active trust, to be administered and managed by the legislature. In *Milwaukee v. State,* (1927) 193 Wis. 423, 449, 214 N.W. 820, the court said:

"*The trust* reposed in the State is not a passive trust; it *is governmental,* active, and administrative. Representing the State in its legislative capacity, the legislature is fully vested with the power of control and regulation. The equitable title to these submerged lands [the bed of Milwaukee Harbor] vests in the public at large, while the legal title vests in the State, restricted only by the trust, and *the trust,* being both active and administrative, *requires the lawmaking body to act in all cases where action is* necessary, not only to *preserve the trust* but to promote it. * * *" (Emphasis supplied).

Maintaining the trust therefore is a governmental function and as trustee the state has a duty to preserve and promote the trust. Moreover the trust is for public purposes. *State v. Public Service Comm.,* (1957) 275 Wis. 112, 118, 81 N.W. 2d 71, citing *Illinois Steel Co. v. Bilot,* 109 Wis. 418, 426, 84 N.W. 855, 85 N.W. 402.

Puckaway lake is in part a body of water artificially produced as a consequence of the construction of the Princeton dam. While there is no question as to the state's right and duty to preserve natural waters, *Priewe v. Wisconsin State Land & Improvement Co.,* (1896) 93 Wis. 534, 67 N.W. 918; *Milwaukee v. State,* (1927) 193 Wis. 423, 214 N.W. 820, the question here presented is whether or not that same duty and responsibility extend to a body of navigable water artificially produced. In my opinion such duty does extend to those waters.

Our court in *Lathrop v. Racine,* (1903) 119 Wis. 461, 97 N.W. 192, in considering the question of riparian rights on an artificial channel designed to straighten the Root river stated at page 466:

"The new channel, cut several years ago, through block 67 — straightening Root river — although an artificial channel, yet was navigable *and must be regarded,* for the purposes of this case, *as giving* to the abutting owners and *the public the same rights and remedies that they would have had in case such channel had been a natural watercourse.* * * *" (Emphasis supplied)

Similarly, public rights in the navigable waters were said to attach to the expanded waters created by a damming of navigable waters in *Weatherby v. Meiklejohn and another,* (1882) 56 Wis. 73, 13 N.W. 697, and *Mendota Club v. Anderson and another,* (1899) 101 Wis. 479, 78 N.W. 185.

Repairing the Princeton dam pursuant to ch. 298, Laws 1965, is therefore a governmental function. It would also benefit private individuals. Private riparian owners located on the Fox river adjacent to the waters maintained by the Princeton dam would in all probability be injured by a loss or destruction of the dam. To the extent the repair of the dam would prevent this loss, there is a private benefit.

A public project, however, is not a work of internal improvement just because it creates a private benefit. *State ex rel. Jones v. Froehlich, supra.* The question is whether it is a function which is predominantly governmental in character or one which is better performed by private parties.

In a case where a dam is privately owned the state government can and does act to preserve the trust by requiring the owners of the dam to keep it in repair. See Ch. 31, Stats. For the government to repair or maintain a privately owned dam or to construct a new dam which will benefit private parties might well be within the constitutional prohibition because the work is not predominantly a governmental function, but is better done by private parties. This argument loses a great deal of its force, however, where, as in the case of the Princeton dam, the facility is already lawfully owned by the state. Its maintenance and repair may then become a predominantly governmental function as the state performs its duty as trustee of the impounded waters. Moreover, the state of Wisconsin by agreement with the United States has bound itself to "assume responsibility" for the dam. Only the state is bound to perform this contract. This contractual obligation makes its function in repairing the Princeton dam even more predominantly governmental.

III

THE DAM AS AN INCIDENT TO A PARK

There are just three Wisconsin cases holding state projects unconstitutional as works of internal improvement. None of these cases involve construction, repair or maintenance of a dam. *State ex rel. Jones v. Froehlich, supra,* held in 1902, that the state could not construct levees on the Wisconsin river to prevent flooding; *State ex rel. Owens v. Donald, supra,* held in 1915, that the state could not create a forest preserve making permanent improvements for producing forest products, developing water power and developing a business operation for profit; *State ex rel. Martin v. Giessel,* (1948) 252 Wis. 363, 31 N.W. 2d 626, held that the state could not construct low cost veterans' housing.

The closest case, on its facts, to the issue presented by your question is *State ex rel. Hammann v. Levitan,* (1929) 200 Wis. 271, 228 N.W. 140. In that case two companion acts were challenged as violating the constitution and particularly Art. VIII, sec. 10. The first act directed establishment of a wild life refuge, game preserve and fur farm; authorized establishment of a fish hatchery; permitted condemnation of Horicon marsh land by the conservation commission "or as much thereof as it deems necessary"; authorized the construction of such buildings and acquisition of such equipment as the conservation commission deemed necessary to carry out the purposes of the act; *authorized construction of a dam;* and appropriated $25,000 per year for 10 years to acquire land, purchase equipment and construct the necessary buildings. The second act appropriated the sum of $10,000 to construct the dam.

The court approved those acts as being a part of and necessary to the establishment of a species of state park, excepted from the prohibition of Art. VIII, sec. 10, by the authority of Art. XI, sec. 3a.

The state was not the sole riparian owner of the flowage area created by the dam which was the subject of litigation in the *Levitan* case. This clearly appears in *State v. Adelmeyer,* (1936) 221 Wis. 246, 265 N.W. 838, an action by the state against two hundred and thirty-six defendants

whose lands were flowed in whole or in part by construction of the dam.

In the case of the Princeton dam, the federal authority (Public Law 85-500) for the transfer of the dam, other facilities, appurtances and real property on the Upper Fox river from the United States to the state of Wisconsin appropriated $300,000 to place the property being transferred in a "condition suitable for public purposes". Subsequent to the transfer the real property has been managed as a series of public parks located on the Fox river. Public toilet facilities have been installed and the public has used the lands transferred for public access to the river to fish and picnic in the same manner as other state parks are used.

There is little to distinguish the Princeton dam from the dam authorized in the *Levitan* case except that the legislature in ch. 298, Laws 1965, has made it clear that the purpose of the authorized repairs to the Princeton dam is to preserve the present water levels established by that dam. The legislative purpose of the Horicon dam was to control the flood waters of the Rock river and to restore the waters above the dam to their natural levels. The authority to construct a dam must include the authority to repair such a structure.

CONCLUSION

You have asked whether, in my opinion, ch. 298, Laws 1965, is constitutional. It is my opinion that the law is constitutional. This opinion represents my judgment regarding the conclusion that the supreme court would reach if the question were presented. There are no previous Wisconsin cases precisely in point. Previous attorney general's opinions, although not directly contrary to this conclusion, do not directly support it. For the reasons stated herein, however, it is my opinion that ch. 298, Laws 1965, is constitutional.

BCL/ACC/RBMc

Statutes—Sec. 70.17 (2) is still in effect, and may be printed in statutes without further legislation. Clerical omission or error does not nullify statute.

June 17, 1966.

JAMES J. BURKE
Revisor of Statutes

You have requested my opinion as to whether sec. 70.17 (2), created by ch. 349, Laws 1933, is still in effect or whether sec. 70.17, ch. 444, Laws 1933, impliedly repealed it.

Ch. 349, which was effective upon passage and publication, renumbered sec. 70.17 to 70.17 (1) and 70.17 (2).

Twenty-six days later ch. 444 was published which amended sec. 70.17 without references to either subsecs. (1) or (2). Subsec. (2) has never been printed in the statutes.

It is my opinion that sec. 70.17 (2) was not repealed by ch. 444, Laws 1933.

Our court has in numerous decisions, from *Milwaukee County v. Halsey,* (1912) 149 Wis. 82, 136 N.W. 139, to *Fleming v. Barry,* (1963) 21 Wis. 2d 259, 124 N.W. 2d 93, held that the law does not favor repeal of statutes by implication unless they are irreconcilable or repugnant.

The earlier act in this instance is sec. 70.17 (2), ch. 349, Laws 1933, and provides:

"All lands which have been or may be contracted for sale by any county shall be assessed and taxed to the parties contracting therefor."

The later act is sec. 70.17, ch. 444, Laws 1933, and provides:

"Real property shall be entered in the name of the owner, if known to the assessor, otherwise to the occupant thereof if ascertainable, and otherwise without any name. The person holding the contract or certificate of sale of any real property contracted to be sold by the state, but not

conveyed, shall be deemed the owner for such purpose. The undivided real estate of any deceased person may be entered to the heirs of such person without designating them by name. The real estate of an incorporated company shall be entered in the same manner as that of an individual. *Improvements on leased lands may be assessed either as real property or personal property.*"

The changes made by ch. 444 were to delete a portion of 70.17, or more correctly 70.17 (1), and to add the underlined sentence. These changes do not affect the provisions of 70.17 (2).

Sec. 70.17 (1) and (2) are not in conflict, are not repugnant, and therefore there is no repeal by implication of the earlier act which created subsec. (2).

Moreover, there is no indication that the legislature intended to repeal sec. 70.17 (2) by the enactment of ch. 444. It is apparent that there was a clerical oversight in failing to cite correctly sec. 70.17 as 70.17 (1) in ch. 444.

This office in 50 OAG 146 cited substantial authority in expressing the opinion that mere clerical errors are to be disregarded in circumstances like these.

Your second question is: If sec. 70.17 (2) is still in effect may it now be printed in the statutes for the first time without further legislation?

The answer to this question is "yes".

The general rule as stated in *Berlowitz v. Roach,* (1947) 252 Wis. 61, 30 N.W. 2d 256, is that a law becomes effective upon passage and publication by the secretary of state.

Consequently, sec. 70.17 (2) is the law of this state although it has never appeared in the state statutes and it should be printed in the statutes at this time.

BCL:ACC:CAB:

Bong Air Base—The conservation commission may purchase a portion of Bong air base by quitclaim deed under sec. 24.085 (1).

June 17, 1966.

L. P. VOIGT, *Director*
Conservation Department

You request my opinion concerning certain questions involving the former Bong Air Base located in Kenosha and Racine counties.

Your first question is whether state funds appropriated under sec. 20.280 (82), 1963 Statutes, can be spent for the title to be acquired. The conveyance by the United States will be by quitclaim deed and the United States will not furnish evidence of title as a part of this transaction. You state that at the time the United States acquired the land, title insurance was purchased and the title insurance policies are available for examination.

It is my opinion that state funds appropriated under sec. 20.280 (82) may be used to acquire lands from the United States by quitclaim deed. At the time of the acquisition it will be necessary to determine whether the state is acquiring merchantable title. This may be done in several ways.

The state may purchase title insurance, as did the United States government. Examination of the title policy purchased by the United States government would not establish record title. There may be defects which the insurance company considered minor, and if the question arose they would defend the title. The policy is only evidence that the insurance company has agreed to defend the title of the United States as against all other persons. The title policy may note certain exceptions, and to that extent may be helpful. We could not, however, use the title policy as evidence of title.

Another method would be to order an abstract from an abstract company. We would then examine the abstract and give an opinion of title. If the title proved to be mer-

chantable the state could then accept the title by quitclaim deed.

The third possibility is to examine the records of the register of deeds for Kenosha and Racine counties and through such an examination determine the title.

The quitclaim deed makes it necessary to go beyond record title and make a determination that there are no other rights of parties who may be in possession of any portion of this land, or some other right that may not be of record. This could be determined by careful examination of the property and inquiries in the area.

You also request my opinion "as to the authority of the Conservation Commission under existing statutes to purchase a portion of the Bong Air Base to be held for the purposes contemplated. That is, to be presently and temporarily used for conservation purposes, but with full knowledge that it is to be transferred to the Wisconsin Federal Surplus Property Commission or their designee pursuant to sec. 24.085 (1), Wis. Stats., as amended by ch. 467, Laws of 1963, for nonconservation purposes at an undetermined future date".

I do not agree with your premise that the conservation commission has full knowledge that this property is to be transferred to the Wisconsin federal surplus property commission or their designee for nonconservation purposes. This transfer may never occur. The only determination that the conservation commission must make is that this property is useful for conservation purposes. It is not necessary to determine what may happen some time in the future. The commission can and has purchased property which will be sold for other purposes at some future date. See 51 OAG 118.

The legislature recognized that conditions change and lands that were once useful for conservation purposes may no longer be of such use, or may be more useful for other purposes. If conservation property is no longer necessary for conservation purposes, pursuant to sec. 24.085 (1), it may be sold at public or private sale. In general the re-

sponsibility for making this determination has been delegated to the conservation commission. Under the 1963 amendment to sec. 24.085 (1), however, the legislature has given the Wisconsin federal surplus property commission the authority to request the conservation commission to sell the lands within the Bong air base to the surplus property commission. With respect to this property the power to determine that it is more useful for purposes other than conservation has been taken from one governmental agency (the conservation commission) and given to another (the Wisconsin federal surplus property development commission).

The commission has the power to purchase this land if it is useful for conservation purposes. This determination was made by the commission's resolution of August 17, 1962, authorizing purchase of the property.

You also raise the question whether the purchase of lands by the state "for future sale to private developers" through the Wisconsin federal surplus property commission is not, in fact, in violation of Art. VIII, sec. 10, Wis. Const.

Again I cannot accept your premise that this property *will* be sold to private developers. The statute provides that it will be sold to the surplus property commission or its designee. The surplus property commission is not a private developer and there is no way of knowing who its designee will be. The property may be sold for another public use.

Even if the property is ultimately sold to a private developer, this would not necessarily make the transaction a work of internal improvement. State property, including land owned by the conservation department, is constantly being sold to private interests when it is no longer necessary for public purposes. To construe the internal improvements prohibition to forbid such sales would make land acquisition by the state virtually impossible. It would mean that any land acquired by the state would have to be acquired with the knowledge that it must remain state property in perpetuity. The facts presented by your request do not show that the contemplated transaction will violate Art. VIII, sec. 10, Wis. Const.

In my opinion the conservation commission may purchase the property described in your letter by quitclaim deed from the United States if, as has been found by the commission, the land is useful for conservation purposes. The transaction as described in your letter does not violate Art. VIII, sec. 10, Wis. Const.

BCL:ACC:AJF:

Industrial Commission—Permits—Industrial commission may not issue a permit allowing construction of footing and foundation prior to approval of general plans.

June 17, 1966.

STEPHEN J. REILLY, *Executive Secretary*
Industrial Commission

You ask whether the industrial commission may issue a footing and foundation permit to a building owner and his architect or engineer upon submission of general plans, but before commission inspection and approval thereof. You state that the permit would allow the contractor to put in the footing and foundation while the commission was reviewing the plans, which necessarily takes some time. In my opinion this cannot be done under existing commission rules.

Authority of state agencies is circumscribed by the rule summarized in *Nekoosa-Edwards Paper Co. v. Public Service Commission,* (1959) 8 Wis. 2d 582, 593, 99 N.W. 2d 821:

"* * * Administrative boards and commissions have no common-law power. Their powers are limited by the statute conferring such powers expressly or by fair implication. 42 Am. Jur., Public Administrative Law, p. 316, sec. 26."

The industrial commission has only such powers as are expressly granted to it or necessarily implied, and any power sought to be exercised must be found within the four

corners of the statute under which the commission proceeds. *American Brass Co. v. State Board of Health,* (1944) 245 Wis. 440, 448, 15 N.W. 2d 27; 46 OAG 98; 52 OAG 273.

Pursuant to its statutory authority under ch. 101, the industrial commission promulgated the state building code, cited as Ch. Ind. 50 through Ind. 57, Wisconsin Administrative Code.

Ind. 50.10, Wis. Adm. Code, provides in part:

"Ind. 50.10 Approval of plans and specifications. (1) Complete plans and specifications for all buildings and structures in the following classifications shall be submitted to the industrial commission for approval before letting contracts or commencing work.

" * * *

"(3) All plans shall be submitted in triplicate and *work shall not be started until plans are approved.* * * *" (Emphasis added.)

As the building code has the force and effect of statute, it would be a violation of the code for any person to commence work, where general plans are required, prior to approval of such plans. *Park Bldg. Corp. v. Industrial Comm.,* (1960) 9 Wis. 2d 78, 91, 100 N.W. 2d 571; *Thomson v. Racine* (1943) 242 Wis. 591, 596, 9 N.W. 2d 91; Sec. 227.01 (3), Stats.; 2 Am. Jur. 2d, Administrative Laws, §292.

Neither the commission nor its employes has statutory power to waive a violation, or to suspend enforcement of commission rules. *Connor Lumber and Land Co. v. Industrial Comm.,* (1959) 6 Wis. 2d 171, 176, 94 N.W. 2d 145. Although adoption of the quoted rule was discretionary, when the rule became effective the adopting agency did not have discretion to disregard it. See *Burris v. Karns,* (1961) 14 Wis. 2d 431, 437, 111 N.W. 2d 509.

The commission, of course, has power to amend its rules under the procedure provided by secs. 101.10 (5) and (7), 101.15, and 227.027, in appropriate circumstances.

BCL:ACC:GS:RGM:

Insurance Commission—Licenses—Discussion of ch. 502, Laws 1963, and its affect on capital stock requirements to cover various classes of insurance and the issuing of licenses.

June 22, 1966.

ROBERT D. HAASE, *Commissioner*
Department of Insurance

Ch. 502, Laws 1963, made certain changes in the statutes setting capital requirements of insurance companies, and you request an opinion covering several questions stemming from these changes. The questions will be discussed *seriatim*, and for the purposes of this opinion it is assumed that there is no question as to the meaning of capital, capital stock or surplus.

I.

Your first question is whether the creation of sec. 201.11 (2) (b) by ch. 502, Laws 1963, puts automobile insurance in a position analogous to surety—or fidelity—insurance insofar as determination of capital requirements is concerned. You point out that this office concluded in 30 OAG 65 (1941) that a stock insurance company writing fidelity and other kinds of insurance was required to have capital stock of $250,000 in addition to the capital stock required for the other kinds of insurance written. That conclusion was predicated upon sec. 201.11 (2), Stats. 1939, which provided that a company writing fidelity insurance should have capital of at least $250,000 "in addition to the capital stock and surplus requirements for other classes of insurance being transacted by such corporation".

Ch. 502, Laws 1963, renumbered sec. 201.11 (2) to become 201.11 (2) (a) and created paragraph (b), which provides that a company transacting the business specified in 201.04 (15) (automobile insurance) must have "capital of at least $300,000 in addition to the capital stock and surplus requirements for other classes of insurance being transacted by such corporation, provided that no such company shall

be subject to higher capital requirements than those in effect when it began to transact the business of insurance in this state".

The answer to your first question is in the affirmative. A company now seeking its first authority to transact insurance business in Wisconsin and writing automobile insurance must have capital of at least $300,000 "in addition to the capital stock and surplus requirements for other classes of insurance being transacted by such corporation".

A company now seeking its first authority to transact insurance business in Wisconsin and writing fire, burglary and automobile insurance is required to have capital of $600,000. Sec. 201.11 (1) provides that no stock company shall transact insurance business unless it has capital of at least $200,000 for the insurance specified in any one subsection of sec. 201.04, with an additional $100,000 for the insurance mentioned in any other subsection under which the company is to transact business, with certain exceptions not relevant to the present question. For the transaction of fire and burglary insurance this requires $300,000 of capital. The company is required to have an additional $300,000 of capital for the transaction of automobile insurance.

II.

Your second question is whether a company now organizing to transact fire and automobile insurance would have to have capital of $500,000. From what has already been said, it is obvious that the answer is "yes".

III.

Your third question is whether a company now organizing to transact plate glass and automobile insurance would have to have capital of $500,000 or only $300,000.

Sec. 201.11 (1) sets a minimum capital requirement of $200,000 for the insurance specified in any one subsection of sec. 201.04 with an additional $100,000 for the insurance mentioned in any other subsection of 201.04. The statute then provides: "No additional capital shall be required for the insurance specified in section 201.04 * * * (11) [plate

glass] * * *". A company now organizing to transact only plate glass insurance would be required to have capital of $200,000. It is only when plate glass insurance is an *additional* line that no particular capital requirement for such insurance is imposed. This much is clear from the language of 201.11 (1). The problem arises in applying the capital requirements to a company writing plate glass insurance and automobile insurance, because of the specific requirement imposed for the latter.

The new sec. 201.11 (2) (b) provides that a company writing automobile insurance "shall have a capital of at least $300,000 in addition to the capital stock and surplus requirements for other classes of insurance being transacted by such corporation * * *". It would be possible to construe this provision, together with subsec. (1), to require $300,000 capital for the automobile insurance as the first class or line being written and to consider plate glass as a second line requiring no additional capital. Such a construction, however, is not in accord with the most reasonable meaning of the statutory language or with prior interpretation.

The $300,000 requirement for automobile insurance is "in addition" to the requirements for other lines being transacted by the company. By the normal meaning of the words used, this would require computing separately the capital requirements for the lines of insurance, other than automobile, being written and then adding $300,000 for automobile insurance. If the automobile requirement of $300,000 were considered to meet the $200,000 requirement for the first line, under sec. 201.11 (1), and plate glass were considered an additional "exempt" line, under the same subsection, it could not be said that the company was required to have capital of $300,000 "in addition to" the capital requirements for other lines being written.

The question you raise here is essentially identical to that discussed with regard to fidelity insurance in 30 OAG 65 (1941). Since 1933 the specific statute applicable to capital requirements for fidelity insurance has contained the same clause used in the new statute applicable to auto-

mobile insurance—"in addition to the capital stock and surplus requirements for other classes of insurance being transacted by such corporation". The 1941 opinion concluded that your department was correct in computing the requirements for the lines of insurance, other than fidelity, being written by a company and then adding the $250,000 requirement for fidelity insurance. That opinion has been strengthened by 25 years of legislative acquiescence. *Union F. H. School Dist. v. Union F. H. School Dist.*, (1934) 216 Wis. 102, 106, 256 N.W. 788, and *Borello v. Ind. Comm.*, (1965) 26 Wis. 2d 62, at 70, 131 N.W. 2d 847.

It is my conclusion that a company now organizing to transact plate glass and automobile insurance must have $500,000 of capital.

IV.

Your last question asks whether under ch. 502, Laws 1963, a stock company which transacted only fire insurance business prior to that law and has only $200,000 of capital may now also transact automobile insurance with only $100,000 of additional capital. Sec. 201.11 (1) requires that a company have capital of $200,000 for any one kind of insurance written and an additional $100,000 for each additional kind of insurance written, with certain exceptions not relevant here. Thus under subsec. (1) the company would need total capital of only $300,000 to commence the automobile insurance business. However, the new sec. 201.11 (2) (b) provides that a company transacting automobile insurance business shall have a capital of $300,000 in addition to the capital requirements for other kinds of insurance transacted "by such corporation, provided that no such company shall be subject to higher capital requirements than those in effect when it began to transact the business of insurance in this state". The question is whether the words "such company" include a company which began transacting an insurance business in Wisconsin prior to the new law but has not transacted automobile insurance.

Sec. 201.11 (1) contains an exemption or proviso identical to that in the new sec. 201.11 (2) (b). The exemption

set forth in subsec. (1) was applied by the court in *State ex rel. Associated Indemnity Corp. v. Mortensen,* (1937) 224 Wis. 398, 272 N.W. 457. The relator there was a California stock insurance company which had been licensed in Wisconsin from 1931 until May 1, 1935, when it voluntarily withdrew from the state. In 1933 the minimum capital requirements of 201.11 had been increased, and the company did not meet the new requirements. In 1936 the company again applied for a Wisconsin license. The court rejected the contention of the commissioner that the exemption applied only to companies licensed at the time the increased requirements were enacted and which continued to be licensed. Specifically, the opinion held that the words "such company" meant merely a stock insurance company, and that the words "when it began to transact the business of insurance in this state" were unambiguous. If the reasoning of that opinion is followed, a company licensed in Wisconsin before ch. 502, Laws 1963, was enacted and then transacting only fire insurance business is exempted from the new, specific capital requirement for the transaction of automobile insurance.

There was a dissent by two justices in the *Associated Indemnity Corporation* case. The dissenters looked to the purpose of the statute and believed that the exemption should be construed to apply only to companies licensed at the time the increased requirements were enacted and thereafter continuing to do business within Wisconsin. Even if the reasoning of the dissent were followed, however, it would not necessarily mean that a company authorized to transact fire insurance business in Wisconsin in 1962 would now have to meet the new capital requirements in order to add automobile insurance.

The language of the exemption set forth in the new sec. 201.11 (2) (b) makes no distinction between a company which began transacting *any* insurance business in Wisconsin prior to the amendment and one which began the transaction of automobile insurance in Wisconsin prior to the amendment. To require $500,000 minimum capital for a company previously authorized to transact fire insurance

business in the state and now desiring to add automobile insurance might be construed, even by the reasoning of the dissent in *Associated Indemnity,* to subject that company to higher capital requirements than those in effect "when it began to transact the *business of insurance* in this state".

In the *Associated Indemnity* case the company was seeking merely to re-enter Wisconsin, doing the same lines of insurance business for which it previously was licensed. In the problem you raise a licensed company seeks authority to write automobile insurance for which it has not previously been licensed. I do not believe this distinction avoids the scope of the reasoning used in the *Associated Indemnity* case. However, a court faced with the question you raise might be persuaded to restrict that decision to the facts there involved and to give greater weight to what, I consider, is the basic purpose of the grandfather clause of the statute—merely to permit a licensed automobile insurer to continue such business without having to meet the new, stricter capital requirements. That construction of the statute would be more likely to prevail, were it a matter of first impression.

As it is, the legislature in 1963 has used the identical grandfather clause interpreted by the court in the 1937 *Associated Indemnity* case. Furthermore, administrative interpretation since that case has followed the reasoning of the court, and such interpretation is entitled to great weight. *Mèdnis v. Industrial Comm.,* (1965) 27 Wis. 2d 439, 444, 134 N.W. 2d 416.

For many years your predecessors in office have construed the grandfather clause in 201.11 (1) to mean that only the capital requirements applicable when a company began its Wisconsin business were to be applied to that company in the future. Prior to 1933 the minimum capital requirement for the first line was $100,000 with an additional $50,000 for each additional line, subject to certain exceptions irrelevant here. In 1933 the general requirements were increased to $200,000 for the first line plus $100,000 for each additional line, and the grandfather clause was in-

serted in 201.11 (1). Thereafter your predecessors took the position that a company licensed in 1930 for only fire insurancce needed total capital of only $150,000 in order to add burglary insurance in 1938, although a company then entering Wisconsin would have been required to have capital of $300,000 to write those two lines. This interpretation is, of course, consistent with the literal construction of the grandfather clause adopted in the *Associated Indemnity* case.

In view of the 1937 case and the long period of administrative interpretation of the grandfather clause in 201.11 (1), acquiesced in by the legislature, it seems unlikely that the courts today would reject the literal construction of the same clause in the new sec. 201.11 (2) (b). In my opinion, therefore, the capital requirements imposed by 201.11 (2) (b) would probably be construed not to apply to insurance companies previously licensed in Wisconsin for the transactcion of insurance other than automobile insurance.

BCL:EWW:

County Officers—Attorney's Fees—A county board may in its discretion reimburse a county officer for expenses incurred in defense of a suspension order.

June 23, 1966.

ROBERT P. RUSSELL
Corporation Counsel, Milwaukee County

You have asked whether the county is authorized to pay the claim of a Milwaukee county probation officer, under sec. 331.35 (1), Stats., for substantial attorney's fees incurred in the defense of a three-day suspension order issued April 7, 1961. The suspension was upheld by the county civil service commission without a hearing and certiorari was denied by the circuit court. The state supreme court in *State ex rel. Irany v. Milw. County C. S. Comm.*, (1962) 18 Wis. 2d 132, 118 N.W. 2d 137, reversed the cir-

cuit court holding that such individual was entitled to a hearing, and without a hearing the probation officer was ordered reinstated with pay by the civil service commission.

You state that the incident took place in a corridor of the safety building in which the probation officer worked, at about 4:00 o'clock in the afternoon. It was alleged that he attempted to seize the camera of a news photographer who was attempting to take a picture of a person undergoing a trial, the accused's attorney, the sheriff, and said probation officer. You further state that the probation officer had no agency concern with the criminal matter in trial, but was on the scene as a spectator as he was employed in the building.

Sec. 331.35 provides:

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

The statute specifies the conditions under which a municipality or county may reimburse a municipal officer for expenses incurred in a legal action.

Sec. 331.35 authorizes the county board, in its discretion, to pay all or any part of the legal expenses incurred by a

county officer under the following circumstances; 1) if charges of any kind are filed against him 2) in his official capacity and 3) the charges are discontinued and the officer is reinstated.

It is clear under the facts recited in your letter that charges were filed and were discontinued and the probation officer reinstated. If the probation officer is an officer, within the meaning of that term as used in sec. 331.35 and the charges were brought against him in his official capacity the county board may, in its discretion, authorize payment of his legal expenses.

Sec. 331.35 speaks of charges being filed against the officer *in* his official capacity not in the course of or arising out of his official duties or capacity. I do not believe that the legislature intended to limit the coverage of this statute to situations where the officer is sued for actions performed as he carried out his official duties. The statute is also intended to provide for discretionary compensation of expenses incurred by an officer in protecting his right to his position regardless of the basis of the attack on that right. In *Page v. Milwaukee,* (1939) 230 Wis. 331, 283 N.W. 833, the court held that an action to oust a judge from office on grounds that he had engaged in an illegal conspiracy and had unlawfully accepted certain salary payments was one against the judge "in his official capacity." In so holding the court said at p. 335:

"In view of the evident purpose of the legislature to provide for reimbursement when charges of any kind have been made against an officer, subjecting him to expense, it must be held that the words 'in his official capacity' are to be given a liberal construction which includes actions calling upon the officer to *defend his title to the position.* The legislature evidently used the expression 'in his official capacity' in order to exclude lawsuits not related to the official position of the defendant." (Emphasis added)

The remaining question is whether a county probation officer is a public officer within the meaning of that term as used in sec. 331.35. That a position may be classified a

public office for one purpose does not mean that it is so for all purposes.

"Some words and phrases are subject to more than one meaning, depending upon the context in which used. The term *'public officer'* falls within this category." *Matczak v. Matthews,* (1953) 265 Wis. 1, 5, 60 N.W. 2d 352.

In the *Matczak* case the Wisconsin court held that a city police patrolman was a public officer for purposes of sec. 270.58 which requires that municipalities pay a judgment entered against a public officer acting in good faith in his official capacity. At p. 5 *Heffernan v. Janesville,* (1946) 248 Wis. 299, 21 N.W. 2d 651, which held that a patrolman was not an officer, was distinguished as follows:

"* * * A city police patrolman is not a public officer in the sense of having a salary attached to his position which would be due to him if he were wrongfully suspended or ousted from such position irrespective of whether he had sustained any actual damage thereby. On the other hand, a police patrolman is commonly referred to as a police officer and in this sense is a public officer. We are satisfied that it was the intention of the legislature to include police officers within the term *'public officers'* appearing in sec. 270.58, Stats."

It is often very difficult to tell whether or not a particular position is a public office. In *Thompson v. Whitefish Bay,* (1950) 257 Wis. 151, 158, 42 N.W. 2d 462, the court said:

"* * * As stated in *In re Appointment of Revisor,* 141 Wis. 592, 608, 124 N.W. 670, —

" 'There have been many attempts to accurately define an office and differentiate it from a mere employment, but it is manifest that the line is not easy to draw. In *Hall v. State,* 39 Wis. 79, Justice LYON said:

" ' "When public functions are conferred by law upon certain persons elected by the people or appointed by the legislature, if those functions concern the general interests of the state, and are not of a nature merely local or temp-

orary, such persons are public officers, especially if they are paid a salary for their services out of the public treasury."

" 'The doctrine is well-nigh universal that the duties must be continuous and permanent, and not merely transient, occasional, or incidental. [Cases cited omitted].' "

In *Martin v. Smith,* (1941) 239 Wis. 314, 332, 1 N.W. 2d 163, the court, in holding that the president of the University of Wisconsin was not a public officer within the constitutional ban on dual office holding in Art. XIII, sec. 3, Wis. Const. said:

" 'to constitute a position of public employment a public office of a civil nature, it must be created by the constitution or through legislative act; must possess a delegation of a portion of the sovereign power of government to be exercised for the benefit of the public; must have some permanency and continuity, and not be only temporary or occasional; and its powers and duties must be derived from legislative authority and be performed independently and without the control of a superior power, other than the law, except in case of inferior officers specifically placed under the control of a superior officer or body, and be entered upon by taking an oath and giving an official bond, and be held by virtue of a commission or other written authority.'

"* * *

"It may seem anomalous to some that the president of a great university should not be a public officer while a justice of the peace or a notary public is a public officer. However, the character of the employment is not determined by the salary paid to the employee or by the importance of the duties which he performs or by the manner in which he is chosen, but rather by the nature of the duties he performs. In the case of the president of the university, the nature of these duties much more nearly conforms to the nature of the duties of a superintendent of schools than it does to the nature of the duties performed by a public officer. He is an employee, not a public officer; he holds a position not an office of trust, profit, or honor under the state. . . ."

The meaning of "public officer" is largely a question of legislative intent. *Matczak v. Matthews, supra.* Sec. 331.35 is to be liberally construed. *Page v. Milwaukee, supra.* If sec. 331.35, liberally construed, evinces a legislative intention that the position in question is a public office, the county board may authorize the payment of the legal expenses in question.

In 43 OAG 230, the attorney general stated that a county traffic patrolman is an officer of the county within the meaning of sec. 331.35, and that the county board was authorized to pay reasonable expenses incurred by him in the successful defense of a criminal action brought against him by reason of acts done in the performance of his official duties.

In the present instance, the probation officer held a position on a salary basis for which he was paid out of the county treasury. His duties were to make presentence and preprobation reports and included supervision of persons on probation. He also had specific statutory arrest powers. Sec. 57.025, 1959, refers to such a position as "probation officer" and subsections (4) and (5), provided:

"(4) PROBATION OFFICERS; APPOINTMENT; POWERS; COMPENSATION. The judge of the municipal court shall appoint a chief probation officer for said courts. The chief and additional probation officers shall receive such salaries and necessary expenses as determined by the county board. They shall be officers of both courts but subject to the control of the municipal court, except as to matters pertaining exclusively to the probationers of the district court, as to which the district court shall have control. The chief shall have power to arrest and shall execute the orders of such courts affecting their probationers.

"(5) ADDITIONAL PROBATION OFFICERS. Additional probation officers may be appointed by the judge of the municipal court. They shall be subordinate to the chief and shall have power to arrest. The judge may appoint one of them as deputy chief probation officer to perform the duties of the chief during his absence or inability to perform them."

The statute specifically provides that such probation officers are officers of the courts, and we are of the opinion that they are also county officers within the meaning of sec. 331.35 (1). Also see secs. 59.15 (2), 59.07 (20), 63.03 (1) and (2), Art. XIII, sec. 9, Wis. Const. The functions of the position concern the general interests of the state and are not merely local or temporary. While he may not have had to take an oath or file a bond, the nature of the duties, and statutory as well as ordinance designation of the position, require a determination that he is an officer. Oath and bond requirements are mere incidents of office and neither is an absolute criterion to distinguish an office from some other position. 42 Am. Jur. 884, 885.

The county board may in its discretion reimburse the probation officer for his reasonable and necessary expenses incurred in defense of the suspension order. While the county board may not retry the disciplinary matter to determine whether the individual should or should not have been suspended, it can, in the exercise of its discretionary determination of whether or not the individual should be reimbursed, consider all of the circumstances involved. These would include the facts surrounding the incident itself, the bringing of the charges, the discontinuance or dismissal thereof, the reinstatement, and the necessity and reasonableness of the expenses claimed. In short, the question of reimbursement is one of policy for the county board.

BCL:ACC:RJV:

Words and Phrases—Classified—Unclassified—Discussion of the authority of director of bureau of personnel and state personnel board with respect to classified and unclassified divisions of civil service.

June 27, 1966.

C. K. WETTENGEL, *Director*
Bureau of Personnel

JOHN H. SHIELS, *Chairman*
State Personnel Board

You have requested my opinion with respect to five very general questions, which relate to the duties, powers and authority of the director of the bureau of personnel and the state personnel board. Such hypothetical questions, unrelated to any specific fact situation, do not permit very definite or authoritative answers. Moreover, many of the provisions of the statutes involved in your questions are imprecise and need legislative clarification.

Your questions are prompted in part by a generalization contained in an opinion by my predecessor, 52 OAG 79, 81-82, which states:

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

FIRST QUESTION

"(1) What administrative responsibility, authority, and jurisdiction does the Bureau of Personnel and/or the Personnel Board have in regard to the promulgation of rules and regulations regarding unclassified civil service employes identified in section 16.08 (2) Wis. Stats.?"

This question is too broad to answer unless I assume that you have in mind the Stevens Point situation mentioned

on page 1 of your request. I, therefore, make that assumption.

When the board has before it a petition asking it to investigate and adopt rules relating to a situation wherein a classified position is apparently being transferred into the unclassified category by some state agency, the board should assume jurisdiction and should adopt such rules and regulations as may be necessary to effectuate the purposes of the statutes and in accordance with sec. 16.05.

I do not think that the board has anything in the nature of a mandate or even a "blank check" to adopt rules and regulations relating to the unclassified service.

Sec. 16.01 refers specifically to "the policy of the state * * * in the classified service".

Sec. 16.02 relates entirely to definition and is not a grant of authority.

Sec. 16.05 relates to the duties of the personnel board. While the language is ambiguous, it seems most unlikely that it was intended to cover the unclassified service.

Sec. 16.27 is loosely worded but there is a definite clue in it that it was intended to apply only to the classified service by reason of the language at the end of the section reading: "*and* that the salary or compensation is within the salary ranges fixed pursuant to s. 16.105". See ch. 218, Laws 1965, retaining such language in sec. 16.27.

The entire subject matter of sec. 16.27 is the matter of salaries and it must relate to salaries in the classified service by reason of the reference to sec. 16.105. Sec. 16.105 relates to the "classification and compensation plan." It has nothing to do with salaries or classification in the unclassified service.

The statutes in question are loosely drawn, and I cannot speculate as to the powers of the board or bureau. Administrative agencies have only such powers as are expressly granted to them or are necessarily implied, and any power sought to be exercised by such an agency must be found within the four corners of the statute under which the

agency proceeds. *Amer. Brass Co. v. State Board of Health,* (1944) 245 Wis. 440, 15 N.W. 2d 27.

The directors of the bureau of personnel and the state personnel board are primarily concerned with the administration of the provisions of secs. 16.01 through 16.32, only insofar as they may be related, directly or indirectly, to the regulation or welfare of those persons properly within the classified division, those who have established rights therein, or applicants to the classified division.

The power of the board to investigate under sec. 16.05 (3) is broad and goes to all matters touching the *enforcement and effect* of the provisions of 16.01-16.32. One purpose of such investigation is to uncover and correct inefficiencies or abuses in the administration of the sections. Another is legislative in nature, to discover areas in which additional rules are needed to implement statutes or to form the basis of a report to the commissioner of administration and governor, suggesting areas of new or remedial legislation. See sec. 16.004 (4). The number and type of inquiries in your letter indicate a need for possible legislative revision of secs. 16.01-16.32, especially in view of the growth of the unclassified division of civil service, the members of which are also subject to the provisions of various other statutes such as Chs. 13, 14, 36, 37, sec. 20.901, and others creating special boards and commissions. Certain of these other special statutes affect both classified and unclassified personnel within the respective department; in some cases are auxiliary to the provisions of secs. 16.01-16.32 and in other cases supersede certain of such sections as to the specified personnel.

Recently the board had a petition from the Wisconsin state employes' association for an investigation under sec. 16.05 (3) of the action of one of the state universities relative to the reassignment of duties of a named classified employe to another individual whose position has been designated unclassified by the appointing authority.

I have reviewed the petition of the Wisconsin state employes' association for an investigation of a situation at Stevens Point, and am of the opinion that the board has

power to undertake such an investigation with an end to determine whether the newly created position is properly within the unclassified service. The board would not have to investigate by means of formal hearings, but could designate a board member, members or an employee to make such investigation and report to the board.

I am advised that the petition in question has been withdrawn, but I have discussed the matter of the board's authority with respect thereto for the future guidance of the board in like situations.

SECOND QUESTION

"(2) Other than unclassified positions authorized, established, and identified by specific statutory provisions, who has the authority and responsibility to establish and determine what other positions in state service are to be included in the unclassified service?"

I think the issue is brought into sharper focus if the question is rephrased to ask who has the authority to determine what positions are to be included in the classified service, since that is the area over which the board and bureau have jurisdiction.

Sec. 16.105 (1) states that the director, with the advice and approval of the personnel board, shall ascertain and record the duties and responsibilities of, and establish grades and classes for, all positions to which the chapter applies.

Under this section the classification of positions within the service is the function of the director of the bureau of personnel and of the personnel board rather than that of the appointing officer. *Odau v. Personnel Board,* (1947) 250 Wis. 600, 27 N.W. 2d 726.

Thus, the director and the board may proceed in the first instance to set up a job classification.

If the agency disagrees it must assume the burden of attacking the job classification in the manner provided by law. Otherwise, the appointing officer may be subjected to

personal liability under 16.27 (3) if he treats the job as being one in the unclassified service.

Sec. 16.29 is also applicable to positions properly within the classified service and provides:

"(1) All officers of this state shall conform to, comply with and aid in all proper ways in carrying into effect the provisions of ss. 16.01 to 16.30, and the rules prescribed thereunder.

"(2) No appointing officer shall select or appoint any person for appointment, employment, promotion or reinstatement, except in accordance with the provisions of ss. 16.01 to 16.30, and the rules prescribed thereunder.

"(3) Any person employed or appointed contrary to the provisions of ss. 16.01 to 16.30, or of the rules established thereunder, shall be paid by the officer or officers so employing or appointing, or attempting to employ or appoint him, the compensation agreed upon for any service performed under such appointment or employment, or attempted appointment or employment, or in case no compensation is agreed upon, the actual value of such services and any expenses incurred in connection therewith, and shall have a cause of action against such officer or officers or any of them, for such sum and for the costs of the action. No public officer shall be reimbursed by the state for any sums so paid or recovered in any such action."

The only room for discretion in the application of 16.08 (2) involves par. (c), (d) and (e).

Sec. 16.105 requires the director to establish grades and classes for "all positions to which this chapter applies," and to allocate each position "in the classified service" to an appropriate class after consultation with the appointing authority. In the absence of a statute to the contrary, the director is the proper authority to make a determination whether any position, which is not within the unclassified service by express statute, should be included in the unclassified service.

While 16.105 requires the director to establish grades and classes for "all positions to which this chapter applies" the

language immediately following makes it clear that such classification procedures are applicable only to positions in the classified service. The director can in some instances determine whether a position should be in the classified service, and hence must view positions which may be within the unclassified service to make his determination. However, it is manifest that if a position is properly within the unclassified service there can be no sub-classification of the position by the director. The language "all positions to which this chapter applies" is a carry-over from the era when the provisions of 16.01-16.30 dealt almost exclusively with members of the classified service.

The intent of the legislature is that all positions be and are included in the classified service unless expressly excluded. The action of the director must be based on reasonable grounds. The director could not act arbitrarily to enlarge the unclassified division. In *State ex rel. Buell v. Frear,* (1911) 146 Wis. 291, 304, 131 N.W. 832, the court stated that the civil service commission could not act arbitrarily to extend the exempt division but must enforce the tests prescribed by law.

Proper procedure requires any appointing authority to bring an appointment to the attention of the director whenever there is any question as to whether a position should be classified or unclassified. The director should have the benefit of the reasons and statutory authority which the appointing authority contends require that the position be unclassified. Where a statute provides that a certain position or certain class of positions are in the unclassified division, and there is no question but that such positions are unclassified, the appointing authority may fill such positions without resort to the director of the bureau of personnel if there is money properly appropriated and available.

Sec. 16.25 requires appointing officers to report appointments to the classified service forthwith in writing to the director, and to include the name, title, and character of his office or employment, date of commencement of service and salary.

Sec. 16.26 requires the director to maintain an official roster of all permanent employes in the classified service.

Sec. 14.69 provides:

"Record of positions, appointments. (1) On or before July 1, 1959, and annually thereafter on or before July 1, each legislative, administrative and judicial agency of the state government shall submit to the secretary of state a list of all positions within that agency outside the classified service and excluding the faculties under the jurisdiction of the board of regents of the university of Wisconsin and state colleges and the department of public instruction, and above the clerical level which are filled by appointment, the term if there is one, together with the name of the incumbent, and the date of his appointment.

"(2) The secretary of state shall keep a record of all such positions, the names of the incumbents and the dates when the terms of incumbents expire.

"(3) The secretary of state shall diligently scrutinize all new legislation as it is enacted to discover positions abolished or created and shall notify each agency of such positions created or abolished.

"(4) Sixty days prior to the expiration of the term of any person covered by this section, the secretary of state shall notify the agency of the impending expiration of the term unless the position expires with the end of such term.

"(5) The appointment officer shall promptly notify the secretary of state of any vacancy occurring in any such position because of resignation, disability or death as well as any appointments made to fill such vacancies.

"(6) Any officer or agency of the state authorized to select any officer of the state or member of a board, commission or committee outside the classified service, whether judicial, military or civil, shall report such selection to the secretary of state who shall record and file such selection for information of the public. The department of administration shall not approve any pay roll or expense voucher for such postition until the notice of appointment has been filed with the secretary of state."

There appears to be no statute which requires departments and state agencies to promptly report to any state agency appointments to unclassified positions at or below the clerical level, or in the case of the university of Wisconsin, the state universities and the department of public instruction, appointments to the faculties thereof.

Sec. 16.42 (4) requires all departments, other than the legislature and the courts, to furnish the director of the bureau of finance a list of all employe positions and their salaries, but makes no reference to names of employes. Other sections would permit the bureau of finance to secure such information and it would necessarily be useful in performance of the duty of the bureau of finance to audit payrolls pursuant to 16.53 (1). Also see sec. 16.53 (7).

Consideration should be given as to whether there is a need for legislation to provide for a central roster of all state officers and employes, including pertinent personnel data, whether they be in the classified or unclassified division of civil service.

THIRD QUESTION

"(3) Other than salaries established by statute for unclassified positions, who has the authority and responsibility to establish salaries of other unclassified positions; and, is the Bureau of Personnel responsible for the audit of unclassified employe payrolls in accordance with section 16.27, Wis. Stats.?"

This question consists of two parts:

(a) Other than salaries established by statute for unclassified positions, who has the authority and responsibility to establish salaries of unclassified positions?

(b) Is the bureau of personnel responsible for the audit of unclassified employe payrolls under sec. 16.27?

In answer to part (a) of this question, the authority of the director, with the approval of the personnel board and acting in some instances with the joint committee on finance or board of government operations under the provi-

sions of sec. 16.105 with respect to salary schedules, ranges, etc., is limited to positions in the classified division of civil service.

This does not mean that the director cannot cooperate with appointing authorities in establishing job specifications and salary schedules for positions in the unclassified service. The benefits of such cooperation to personnel in both divisions and to the state in general are easily recognized. Sec. 20.904 encourages such cooperation.

Many positions in the unclassified division have salaries which are set by statute, either at a specified sum or with a top limit. Where no salary is set and in cases where there is a top limit, the provisions of 20.901 quoted below would allow the appointing power to set the salary. Also see 20.930 (2) and the special statute for each board, commission or department which may be concerned.

Sec. 20.901 provides:

"Appointment of subordinates. *Unless otherwise provided by statute,* each department is authorized to appoint such deputies, assistants, experts, clerks, stenographers or other employes as are necessary for the execution of its functions, and to designate the titles, prescribe the duties, and fix the compensation of such subordinates, *but these powers shall be exercised subject to the state civil service law, unless the position filled by any such subordinate has been expressly exempted from the operation of ch. 16* and subject, also, to the approval of such other officer or body as may be prescribed by law. If a department contains a board or commission which is authorized to appoint an executive officer by whatever name called, the appointing power resides in the executive officer and the board or commission has no further appointing power except as it is specifically given such power."

I construe the language underlined to refer to positions which have been exempted from the provisions of ch. 16 by express language, such as the director of the department of agriculture (see sec. 93.02 (5)), and all the positions in the unclassified division of civil service specified in 16.08

(2). Here again the language in 20.901 is a carry-over from the era when most of the provisions of secs. 16.01 to 16.30 were concerned with the classified division of civil service and when the list of unclassified positions in 16.08 (2) was very limited.

Sec. 20.901 is the general statute which governs appointments to the unclassified service and contains authority to fix their compensation, but it must be construed with relation to 16.08 (2), 20.930 (1), (2) and any specific statute relating to each board, commission or department which may be concerned.

It can be noted that Ch. 36, regulating the university of Wisconsin grants the board of regents the express power to *fix the salaries* and the term of office of its president "professors, instructors, officers *and employes*". This language expressly includes all employes, whether classified or unclassified. Sec. 36.06 (1). No comparable language appears in the powers of the regents of state universities. However, sec. 37.11 (2) and (3) provide:

"(2) To appoint a president and assistants and such other teachers and officers and to employ such persons as may be required for each of said colleges; and to prescribe their several duties.

"(3) To remove at pleasure any president, assistant or other officer or person from any office or employment in connection with any such college, but discharges of teachers shall be governed by s. 37.31."

Predecessor statutes, out of which sec. 20.901 grew, listed specific officers, boards, commissions, and departments. See sec. 14.71, Stats. 1935, and 25 OAG 17. The university of Wisconsin, however, was never included. While there can be no question but that the university of Wisconsin is a department of the state (see sec. 20.900), there is some question as to whether the legislature intended the provisions of 20.901 to apply to such agency. Assuming however that it does apply, the statute begins "Unless otherwise provided by statute", and as to the matter of compensation, 36.06 (1) is an express statute which takes pre-

cedence over the general, at least where unclassified personnel are concerned. Also see sec. 36.07 as to salaries of janitors.

By reason of the provisions of secs. 16.105 (2), 16.27 (1), 20.901, and 20.931, the power of an appointing authority to fix the salary of a *classified* employe is a limited one. Sec. 16.27 (1) is applicable to all fiscal officers. The appointing authority is in most instances limited to fixing the salary or compensation to an amount which is within the salary ranges fixed pursuant to 16.105. In some instances the legislature has expressly provided a given salary or maximum amount certain classified employes may be paid, and the director of the bureau of personnel must consider these amounts in establishing the salary plan under sec. 16.105.

With respect to part (b) of this question concerning the audit responsibility, sec. 16.27 is pertinent and provides (subsec. (1) as amended by ch. 218, Laws 1965):

"**Pay rolls certified by director; mandamus; liability of appointing officer; taxpayers' suits.** (1) Neither the director *of finance* nor other fiscal officer of this state shall draw, sign or issue, or authorize the drawing, signing or issuing of any warrant on the treasurer or other disbursing officer of the state to pay any salary or compensation to any person in the service of the state unless an estimate, payroll or account for such salary or compensation, containing the names of every person to be paid, ~~shall bear~~ *bears* the certificate of the director *of personnel* that the persons named in such estimate, payroll, or account have been appointed, employed, reinstated or promoted as required by law and the rules established thereunder and that the salary or compensation is within the salary ranges fixed pursuant to s. 16.105.

"(2) Any officer, clerk, employe, or other person entitled to be certified by said director to the secretary of state or other fiscal or disbursing officer of the state, as having been appointed or employed in pursuance of law and of the rules made in pursuance of law, and refused such certificate, may maintain an action of mandamus to compel such director to issue such certificate.

"(3) Any sums paid contrary to the provisions of this section may be recovered from any officer or officers making such appointments in contravention of the provisions of law or of the rules made in pursuance of law, or from any officer signing or countersigning or authorizing the signing or countersigning of any warrant for the payment of the same, or from the sureties on the official bond of any of said officers, in an action in the circuit court of any county within the state, maintained by the director or the personnel board or by any member thereof, or by a citizen resident therein, who is assessed for, and liable to pay, or within one year before the commencement of the action has paid, a state, city or county tax within this state. All moneys recovered in any action brought under this section when collected, shall be paid into the state treasury except that if a citizen taxpayer is plaintiff in any such action he shall be entitled to receive for his own use the taxable cost of such action and 5 per cent of the amount recovered as attorney's fees."

Prior to 1959, the words "director of budgets and accounts" appeared in subsec. (1) after the first two words "Neither the". These words were deleted by ch. 228, Laws 1959. Ch. 218, Laws 1965, made it clear that the director of finance is a designated officer. The language requiring the certificate of the director of the bureau of personnel has been in the statute for many years.

As pointed out above sec. 16.27 is loosely worded, but the language at the end of the sentence indicates that it was intended to apply only to the classified service, and it has been the long standing administrative practice not to submit payrolls for unclassified personnel to the director for certification. Such administrative practice is entitled to great weight. I conclude that the bureau of personnel is not responsible for audit of unclassified employe payrolls.

The bureau of finance, also in the department of administration, is charged with the duty of pre-audit of payrolls.

Sec. 16.53 (1) (b) provides:

"(b) *Payrolls.* Payrolls, to be entitled to audit, shall be *certified by the proper officers* who shall set forth the na-

ture of the services rendered by each person named therein."

Both the director of the bureau of personnel and the director of the bureau of finance are entitled to rely on the certificates of proper officers.

Sec. 16.53 (7) provides:

"(7) CERTIFICATION OF BOARDS, EVIDENCE OF CORRECTNESS OF ACCOUNT. The certificate of the proper officers of the board of regents of state colleges, the regents of the university of Wisconsin, the state department of public welfare, or the proper officers of any other board or commission organized or established by the state, shall in all cases be evidence of the correctness of any account which may be certified by them."

See, also, secs. 36.06 (1) and (2), 36.10 (2), and 37.11, Stats.

The director of the bureau of personnel is the guardian of the classified division and as such must take proper measures of inspection and investigation to insure that appointing authorities do not appoint and authorize payment to persons who occupy positions which are properly within the classified service and who have been improperly appointed. The legislature has provided the safeguards and has placed the duty on the director acting with the advice of the state personnel board.

FOURTH QUESTION

"(4) Are all positions in the unclassified service, including those positions specified in 16.08 (2) (d), ('and other teachers, as defined in s. 42.20, in the university, state colleges and the Wisconsin school for the deaf') subject to the provisions of sec. 16.274, Stats.?"

The answer to your question is in the affirmative.

Sec. 16.274 provides:

"Leave of absence and salary while serving in unclassified position. A permanent employe in the classified service appointed to a position in the unclassified service shall be

granted a leave of absence without pay from his former position in the classified service for the period of his service in such unclassified position and for one year thereafter, during which time he shall be entitled to return to such *former position* or to one with equivalent responsibility and pay in the classified service without loss of seniority or civil service status. Any permanent employe receiving a greater salary in the classified service than that provided for a position in the unclassified service to which he is appointed shall be entitled to the same salary while serving in such position as he was receiving in the classified service at the time of such appointment. This section shall supersede any provision of law in conflict therewith."

Where the provisions of a statute are clear and unambiguous, there is no room for applying rules of statutory construction. *State ex rel. Neelen v. Lucas,* (1964) 24 Wis. 2d 262, 128 N.W. 2d 425.

This statute means what it says and includes all unclassified positions specified in sec. 16.08 (2), or permitted thereunder. It is a somewhat unusual statute in that there is no time limit set during which the classified employe can be away from his position while actually serving in an unclassified position. It also might lead to a situation where a high salaried classified employe might take leave to serve in a very low paying unclassified position, and still be entitled to the greater salary. The employing department would be liable for the payment of the higher salary.

If the statute were ambiguous, resort could be made to the legislative history to determine the legislative intent. *State ex rel. Tilkens v. Bd. of Trustees,* (1948) 253 Wis. 371, 34 N.W. 2d 248.

If construction is appropriate the act must be construed by its own language, uninfluenced by what the persons introducing or preparing the bill actually intended to accomplish by it. *In re Estate of Ries,* (1951) 259 Wis. 453, 49 N.W. 2d 483.

Sec. 16.274, Stats., was enacted by ch. 377, Laws 1949. The legislative reference library has been unable to find

the drafting record file. However the bill, 533 S., 1949, indicates that it was introduced at the request of the governor. It can be surmised that the sponsors intended to protect a limited number of classified personnel whom the governor desired to appoint to positions in the executive office or to high level appointive positions in the unclassified service.

The resulting statute is much broader than the sponsors may have desired. However, any change is a matter of legislative concern.

The right to return to the classified service is limited to the former position or to one with equivalent responsibility and pay in the classified service.

Sec. 16.19 (3), Stats., provides:

"No promotion shall be made to a position in the classified service from a position in the unclassified service, nor shall any promotion be made except as provided in s. 16.105 (1)."

FIFTH QUESTION

"Does the definition of 'teaching' and 'teacher' as found in section 42.20 (13) (14), and incorporated by reference into sec. 16.08 (2) (d), include any and all jobs and positions at the state owned institutions of higher learning?"

The answer to your question is in the negative. If the legislature had intended that all jobs and positions be included it would not have used the selective language found in sec. 16.08 (2) (d). It is extremely difficult, however, to determine just what positions are excluded from the classified service.

Sec. 16.08 (2) defines positions in the unclassified service and subsec. (d) provides:

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

Sec. 42.20 (13) and (14) provide:

"(13) 'Teacher' means any person legally or officially employed or engaged in teaching as a principal occupation.

"(14) 'Teaching' includes the exercise of any educational function for compensation, in any of the public schools, the state colleges, or the university, or in any school, college, department or institution, within or without this state, in instructing or controlling pupils or students, or in administering, directing, organizing or supervising any educational activity."

The sections must be construed together. The person must be legally or officially employed or engaged in teaching as a *principal* occupation. He must exercise *educational* functions for compensation. He must be engaged in an *educational* activity.

The statute is broad, but that does not mean that it should be broadly construed. Since sec. 16.08 (1) divides the civil service into the unclassified service and the classified service, and 16.08 (3) provides that all positions not included in the unclassified service shall be within the classified, it is incumbent upon those claiming that a position is within the unclassified service to prove that it falls within one of the several categories established under 16.08 (2).

These provisions were discussed in 11 OAG 678, and 11 OAG 811, copies of which have been furnished. The statute has not changed in any material aspect in the interim, and both opinions indicate the various criteria which must be considered when the statute is applied to any specific position.

A distinction was made in those opinions between positions which were basically concerned with business management, mechanical, clerical, or housekeeping functions, and positions which were directly concerned with instruction, the formulation of curricula, and the controlling of students. The latter classes were considered educational. The opinions were related to questions involving retirement benefits.

Both the university of Wisconsin and state universities have followed these guidelines in the past. Nevertheless, there is a need for legislative clarification in view of present day concepts of the scope of educational functions. Sec. 42.20 (13) and (14) were originally intended to serve as definitions for "teacher" and "teaching" for purposes of the retirement act alone. Some more appropriate language might well have been chosen to specify positions in the unclassified service.

In 1941, sec. 16.08 (2) (d) included in the unclassified service:

"(d) All presidents, deans, principals, professors, instructors, research assistants and other teachers in the university, state teachers colleges, Stout institute and the state school of mines."

Ch. 276, Laws 1943, added the words "librarians" after research assistants, and "as defined in section 42.20," after teachers.

This law was an outgrowth of Bill 86, S., 1943, which was requested by a librarian in a state college. After the bill drafter consulted with representatives from the free library commission, university officials, the director of the bureau of personnel, the director of investments of the state annuity and investment board and the secretary of the state board of normal school regents, language was added to relate the definition of teachers to sec. 42.20. A letter in the file from the secretary of the legislative reference library to the senator who introduced the bill states:

"The amendment suggested * * * makes the reference definite in including librarians among the teaching group in these institutions. I am informed that this is the only definition of 'teacher' in the statutes and it is so broad that it includes those concerned in educational activities whether or not they actually meet classes."

The law may well have had the effect of adding many positions, in addition to librarians, to the unclassified division of civil service.

Provisions of Ch. 36 and 37, Stats., might be read to exclude virtually all employes of Wisconsin institutions of higher learning from the classified service because of "restrictions placed upon them by statute". See sec. 16.08 (2) (e). Sec. 36.06 (1) permits the university to set salaries and term of office of its employes; sec. 36.07 provides that the regents should fix the salaries of janitors and that the salary schedule shall conform to the civil service commission; sec. 37.11 (2) provides that the state board of college regents may employ and prescribe the duties of its employes; and sec. 37.11 (3) grants authority to remove any person or officer, except teachers, from office or employment at pleasure.

The question raised is whether secs. 36.06 (1) and 37.11 (3), which authorizes the two board of regents to regulate employment are controlling, or whether 16.08 (2) (d) and 42.20 incorporated therein by reference should control. There is an obvious conflict. The university follows the provisions in Ch. 16 with reference to the employment of most of its employes. According to figures furnished to me by the university they have 3,019 full time employes in the unclassified service such as deans, directors, professors, instructors, lecturers, counsellors, physicians, residents, interns, editors, supervisors, project associates, athletic coaches, etc., and some 4,977 in the classified service. There are also a number of part time employes in both categories. There are in addition some 2,500 students employed on a part time basis as well as research assistants who are candidates for PhD. degrees, many being paid out of gift and grant funds totalling some $28,000,000 annually and covering over 3,200 separate studies.

If it is assumed, however, that only "teachers" are excluded, all of the surrounding circumstances must be considered to determine the nature of a specified position. There must be a determination as to what the principal occupation of the individual actually is. The tasks performed must be examined to determine whether they are directly or indirectly related to educational functions. Activities which might not have been considered educational functions in the past may possibly be viewed as such at the present

time. There appears to be no hard and fast rule which can be applied.

In *State ex rel. Thomson v. Giessel,* (1955) 271 Wis. 15, 45-49, 72 N.W. 2d 577, for example, the court held that the furnishing of dormitories to students was justified as a part of the university's educational system.

Under subsec. (14) "teaching" includes the exercise of any educational function in instructing or controlling pupils or students "or in administering, directing, organizing, or supervising any educational activity".

Since the university and the state colleges are engaged in an "educational function" and "educational activity" almost anyone employed by such an institution in any capacity could be considered a teacher. However, something more restrictive must have been intended.

I cannot draw any precise lines between classified and unclassified positions in university service. The statutes are contradictory and the statutory language imprecise.

While it is apparent from the legislative history and administrative practice that university service is intended to include both classified and unclassified positions, the distinction must be made on a case by case basis.

BCL:RJV:

State Patrol—Traffic Violation—A verified uniform traffic citation filed with any court in this state is sufficient to give court jurisdiction over subject matter of action. Discussion of when complaint or warrant is required.

June 28, 1966.

JAMES L. KARNS, *Commissioner*
Motor Vehicle Department

You ask for a formal opinion as to whether it is necessary that representatives of the state patrol go before a magis-

trate to swear out a complaint in all cases of violation of the traffic laws of the state.

You state that since the supreme court decision in *State ex rel. White v. Simpson,* (1965) 28 Wis. 2d 590, and the circuit court of Dane county decision in *City of Madison v. George C. Vogel,* you are encountering difficulties in processing traffic violation cases throughtout the state. The *Simpson* case in substance held that warrants of arrest may not be issued except upon a finding of probable cause by an independent and detached magistrate, while the *Vogel* case held that a court cannot acquire jurisdiction of the subject matter of a traffic offense unless there is a prior finding by a magistrate of probable cause.

Under the definition found in sec. 939.12, "a crime is conduct which is prohibited by state law and punishable by fine or imprisonment or both", the violation of the state traffic laws is a crime.

When your enforcement officers stop a violator on the highway, they give him a "traffic summons" which directs the violator to appear in court on a certain date or post bond which may be forfeited by the violator in accordance with sec. 345.13. In some cases the violator is arrested and taken to the local sheriff's department or police department where he may be held until court appearance if he is unable to post bond.

Where the violator is given a "traffic summons" by the state patrolman and the violator either appears in court voluntarily on the date set on the summons or posts a bond and does not appear on the date set and the bond is forfeited, the *Simpson* case does not apply. The *Simpson* case dealt with the legality of an arrest warrant; not with the question of jurisdiction over the subject matter of the action. Jurisdiction over subject matter is determined by statute and the facts of the complaint which bring the action within the specific authority of the court set out by statute. 14 Am. Jur., Criminal Law, §214. County courts have subject matter jurisdiction over the violation of the traffic laws of this state. Sec. 253.12.

Voluntary appearance in court by an accused charged with violating one of the state's traffic laws either by appearing in person or by his bond, together with a verified uniform traffic citation, is sufficient to give the court jurisdiction over the person of the accused, and no independent finding of probable cause by a magistrate is necessary to give such court jurisdiction. Accordingly, it is my opinion that it is not necessary for personnel of the patrol to present their cases to a magistrate before proceeding with court actions to forfeit bond for appearance or for the court to determine cases where the accused makes a voluntary appearance before the court in response to the "traffic summons". Sec. 345.13 specifically states that jurisdiction is in the court hearing the traffic case to adjudicate ex parte the guilt or innocence of the accused if a deposit has been filed with the sheriff, chief of police, or clerk of court having jurisdiction of the violation.

There is no prerequisite that a proper affidavit be filed in connection with the acquiring of jurisdiction of the subject matter by the court. As you were advised in 49 OAG 171, the uniform citation sworn to by the court officer is an adequate complaint. In *South Milwaukee v. Schantzen,* (1950) 258 Wis. 41, which is the case relied upon by the court in the *Vogel* case, the statute involved imposed strict jurisdictional requirements by way of affidavit. The affidavit was required to be made in behalf of the municipality involved in order to give a justice court jurisdiction to hear an action brought by that municipality for violation of its ordinances. The *Schantzen* case is inapplicable to state traffic cases and is not authority on the issue of jurisdiction of the county court. Different specifications for acquiring jurisdiction over the subject matter apply in justice court. "Whether an inferior court has jurisdiction of a particular offense must be determined by the allegations of the complaint and not by facts proved at the trial." 14 Am. Jur., Criminal Law, §215.

Where the accused motorist does not appear voluntarily or post bond which can be forfeited in accordance with sec. 345.13, the question arises as to how the court may properly acquire jurisdiction over the *person* of the accused.

This is where the *Simpson* case is controlling. If a warrant is desired to secure jurisdiction over the person, such a warrant may issue only upon establishing probable cause that the accused committed the offense complained of. This determination of probable cause must be made by an independent and detached magistrate and not by the district attorney. That is the limit of the holding in the *Simpson* case as applied to your cases.

You further inform me that in some jurisdictions you are required to take in excess of 100 cases at a time before a judge and have your court officer swear that all of the facts stated in those 100 cases are true to his knowledge and belief before the court will permit these cases to be prosecuted, even though the defendant makes a voluntary appearance or has posted bond in accordance with sec. 345.13. Such procedure is irregular and does not lend authenticity to any of the complaints which have been sworn to in that manner. Certainly it does not establish any degree of probable cause as to those complaints which may subsequently require the issuance of a warrant to require the appearance of the defendant in court.

A desirable procedure if the accused fails to appear in response to a traffic citation issued under a state statute is for the district attorney of the county to issue a summons for the accused to appear on a date certain. Upon failure of the accused to appear in response to the summons the court officer could appear before a magistrate and establish from records and files in his possession probable cause that the accused is guilty of the offense charged. Then a warrant could be issued for the arrest of the accused. Until that point is reached, however, there is no need to swear out a complaint establishing probable cause before a magistrate to prosecute violations of the traffic laws of this state.

BCL:LLD:

Joint Committee on Finance—Pay Plan—The joint committee on finance had authority to modify the 1965-67 civil service pay plan under sec. 16.105 (4) because of changing employment and economic conditions.

June 28, 1966.

GEORGE C. KAISER, *Commissioner*
Department of Administration

You have requested my formal opinion as to whether the joint committee on finance had authority to modify the 1965-1967 civil service pay plan, effective July 1, 1966, by adopting a new schedule of minimum and maximum salary ranges, and by providing a mandatory $15.00 per month increase for all employes whose salaries would not be increased by at least $15.00 as a result of the modification of the existing plan.

The 1965-1967 plan as proposed by the director of the bureau of personnel was approved by the joint committee on finance pursuant to sec. 16.105 (3) in 1965 after the beginning of the biennium. The salary ranges and schedules had been established by the director after public hearing and with the advice and approval of the personnel board pursuant to sec. 16.105 (2).

During the past year the director of the bureau of personnel decided that limited modification of the pay plan was desirable and in the best interests of the state. Because of changing employment and economic conditions, the state was unable to compete with other employers in certain areas of employment. Many state positions were vacant and others were in danger of becoming vacant because the state's salary ranges were not reasonably competitive.

On May 18, 1966, while the legislature was in session, the joint committee on finance at the request of the director, amended the standard salary ranges pursuant to sec. 16.105 (4). The amendment did not have prior approval of the personnel board nor had there been a public hearing before the director or state personnel board.

The purpose of sec. 16.105 is the delegation of authority to establish grades, classes and salary schedules for all positions in the state civil service so as to avoid the necessity of the same being done by the legislature. Subsec. (1) delegates to the director of personnel and the personnel board the authority to establish grades and classes of state civil service employment. Subsecs. (2), (3) and (4) delegate to the director of personnel, the board of personnel and the joint committee on finance of each legislature the authority to establish and maintain current salary schedules and ranges for all positions in the civil service. That authority is exercised in the following manner:

Subsec. (2) provides that after a public hearing and with the advice and approval of the personnel board, the director of personnel shall establish and maintain salary schedules and ranges for all positions and employments in the state civil service. Subsec. (3) provides that immediately after the organization of the joint committee on finance in each regular session of the legislature, the director shall report to that committee the standard salary ranges for the various grades and classes in the classified civil service. He is to make recommendations based upon experience in recruiting, data collected and studies made as to the need for changes in the compensation schedule and any other matters pertinent to a compensation plan for the classified service that takes into account the prevailing employment market and the state's financial condition.

Sec. 16.105 (4) reads as follows:

"(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; provided, that the personnel board, with the approval of the director and board on government operations, while the legislature is not in session, may change the compensation schedule for any grade and class when such action is made desirable by changing employment and economic conditions."

Subsec. (4) specifically provides that the standard salary ranges established by the director and submitted to the joint committee on finance pursuant to subsec. (3) shall constitute the state compensation plan for the classified service subject to modification by the joint committee on finance. Thus while the legislature is in session the final determination as to what shall be contained in the standard salary ranges so as to be an adequate compensation plan for the classified service is delegated to the joint committee on finance. This is made clear by the proviso in subsec. (4) which says that changes in the compensation schedule because of changing employment or economic conditions may be made while the legislature is *not* in session by the personnel board with the approval of the director and the board on government operations.

The fixing of salaries, even in advance, is not exclusively a legislative power and may be delegated to a proper administrative agency or legislative committee. *In re Appointment of Revisor,* (1910) 141 Wis. 592, 124 N.W. 670.

The pattern of the provisions in subsecs. (2), (3) and (4) is that the director of personnel with the approval of the Personnel Board is to make a preliminary investigation of facts relating to the state classified civil service pay plan, and then make preliminary determinations on any modifications and report the same to the joint committee on finance for its use in establishing the pay plan for the coming two fiscal years. In order to assure that full information is obtained and that all interested parties may have an opportunity to present any pertinent information or data, the statue requires that as a part of this preliminary survey the director is to hold a public hearing. To bring to the preliminary determination the experience and judgments necessary, it is also provided that the determination shall not be just that of the director of personnel but shall also have the approval of the personnel board. When this is done, such change as is made in the compensation plan is relayed to the joint committee on finance for it to approve or modify as it, in its best judgment determines. The joint committee on finance may approve the plan without modification or amendment, or may modify it or amend it as in their judg-

ment they deem best. If it is approved without amendment or modification, the preliminary determination submitted by the director then becomes the state civil service pay plan for the coming fiscal years unless it is subsequently modified.

The ultimate authority in respect to fixing the terms of the state civil service pay plan rests in the joint committee on finance so long as the legislature is in session. Its duty and authority in this respect is a continuing one. The statute says that the pay plan as submitted by the director of personnel may be modified by the joint committee on finance. There is nothing in the statutory language that says that the committee on finance may act once and only once in exercising its delegated authority to determine what shall be the currently used salary schedule.

When the joint committee on finance acts with respect to a pay plan, it is exercising delegated power which is partially administrative. It is generally held that, except as restricted by statute, such an agency retains continuing jurisdiction to modify its determination because of changed conditions. 2 Am. Jur. 2d, Administrative Law, §§ 337, 338, 525.

The words "for the ensuing biennium" do not limit the power of the joint committee on finance to modify the existing pay plan. They are an indication of the period the standard pay plan is to remain effective unless modified and indicate that the director of the bureau of personnel must at least biennially review the standard pay plan pursuant to sec. 16.105 (2), and must report his recommendations to the joint committee on finance as provided by 16.105 (3). As pointed out above, the full 1965-1967 compensation plan was approved by the joint committee on finance after the start of the 1965-1967 biennium. The legislature by the use of the words "for the ensuing biennium" could not have intended that such committee was without power to approve a proposed pay plan after the biennium had commenced. In the same vein, the power to modify is a continuing one and the committee has power to act if changing circumstances warrant it.

The power of the committee to modify the pay plan is not required by sec. 16.105 (4) to be based upon any particularized ground. There is nothing therein that requires that the director of personnel must first have held a public hearing on any modification or amendment made by the joint committee on finance, or that prior thereto the same must be approved by the personnel board. The only requirement that there be such a public hearing and approval is that of subsec. (2) (a) which is in respect to the preliminary establishment by the director of personnel of salary schedules and ranges before submission pursuant to the provisions of subsec. (3). Thus, public hearing and consent of the personnel board are not prerequisite to action by the joint committee on finance to modify the compensation plan because of changing employment or economic conditions during the period for which the pay plan has been established.

In June 1956, during the second year of the 1955-1957 biennium, a $10 across the board increase was granted to all classified service employes by the emergency board, predecessor to board of government operations, pursuant to the provisions of 16.105 (4). The action was recommended by the personnel board with the approval of the director. There had been considerable discussion before the personnel board concerning the bureau's proposal and several department heads had participated. However, there had not been a formal public hearing on notice before either the director or the personnel board.

The modified pay plan cannot become effective unless the legislature has appropriated the funds necessary to carry it into effect. Such funds are available by reason of sec. 20.550 (30), Stats., as amended by ch. 262, Laws 1965, which provides in part:

"(30) (a) There is appropriated to the various state agencies from the respective funds from which state employes' and officers' salaries are paid, annually beginning July 1, 1965, a sum sufficient to supplement the respective appropriations of said state agencies in the amount necessary to pay the cost of salary adjustments approved by

the 1965 legislature, for employes of the classified service and comparable adjustments for those employes in the unclassified service * * *."

In effect the modifications by the joint committee on finance on May 18, 1966 were salary adjustments approved for the 1965 legislature. The legislature had the power to legislate thereon while it was in session notwithstanding that it had designated the committee as its agent while the session continued so as to avoid the necessity of bringing the matter before the full legislative body.

It is therefore my opinion that the action taken by the director of the bureau of personnel and the joint committee on finance to modify the compensation plan for the 1965-1967 biennium was valid.

BCL:ACC:HHP:RJV:

Industrial Commission—Tips—The industrial commission is not authorized under any chapter of the statutes to require an employer to post a notice of the disposition of tips.

July 5, 1966.

JOSEPH C. FAGAN, *Chairman*
Industrial Commission of Wisconsin

You ask whether the industrial commission may require an employer to post a notice in his establishment informing patrons of the disposition of tips. Apparently it is the policy of some employers either to require that their employes relinquish to the employer all tips or gratuities or to deduct all or part of the tips from the wages payable to an employe. Although fairness to the patrons might require that such notice be posted, the commission is not authorized to impose such a requirement.

There is no specific authority which would authorize such action under Ch. 104 (minimum wage law) or any other chapter relating to the duties and powers of the commission. Sec. 227.014 (2) (a) provides:

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

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

Sec. 104.04 provides in part:

"* * * It shall be the duty of the industrial commission and it shall have the power, jurisdiction and authority to investigate, ascertain, determine and fix such reasonable classifications, and to impose general or special orders, determining the living-wage, and *to carry out the purposes of sections 104.01 to 104.12.* * * *"

Thus, the commission's authority includes those powers which arise by necessary implication in order to carry out the purpose of the statute.

The purpose of the minimum wage law is to establish and enforce a living wage for women and minor employes. The statute does not show a purpose to protect an employe's wages above the minimum wage level or to inform the consuming public as to the practices of an employer in respect to the manner of payment of wages to employes.

Within the scope of the minimum wage law, the commission may enforce its rule requiring employers to post a sign informing employes, the public, and the commission that the minimum wage is being paid. A rule requiring a posted notice concerning disposition of tips, however, is quite a different matter. Such a requirement has no relation to the minimum wage law.

Other states deal with this problem by enacting statutes under topics other than minimum wage. For example, California requires such posting under the Cal. Labor Code:

Sec. 351 "No employer or agent shall collect, take, or receive any gratuity, or a part thereof, paid, given to, or left for an employee by a patron, or deduct any amount from wages due an employee on account of such gratuity, or require an employee to credit the amount, or any part thereof, of such gratuity against and as a part of the wages due the employee from the employer, unless he posts in a conspicuous place at the location where his business is carried on, in a place where it can easily be seen by patrons thereof, a notice, in lettering or printing of not less than 48-point blackface type, to the following effect:

"(a) If not shared by the employees, that any gratuities paid, given to, or left for employees by patrons go to and belong to the business or employer and are not shared by the employees thereof.

"(b) If shared by the employees, the extent to which gratuities are shared between employer and employees."

Sec. 352 "The notice required by Section 351 shall also state the extent to which the employees are required by the

employer to accept gratuities in lieu of wages or the extent to which the employee is required to accept and credit gratuities against wages."

Violations are punishable as misdemeanors under sec. 354, and the statute is enforced by the department of industrial relations under sec. 355.

The purpose of this law is expressly stated in sec. 356:

"The Legislature expressly declares that the purpose of this article is to prevent fraud upon the public in connection with the practice of tipping and declares that this article is passed for a public reason and cannot be contravened by a private agreement. As a part of the social public policy of this State, this article is binding upon all departments of the State."

These provisions have existed in California in substantially the same form since 1929 and have withstood attacks on their validity. See *California Drive-In Restaurant Ass'n v. Clark,* (1943) 22 Cal. 2d 287, 140 P. 2d 657.

The Wisconsin legislature might find it necessary or desirable to enact similar legislation in view of the anticipated trend toward more employer-employe agreements regarding disposition of tips. The commission, however, owes no duty in this area to the consuming public under the minimum wage law, nor under any other statutory scheme. Benefit to employes from a rule establishing such a posting requirement would be too remote from the basic purposes of any statute which delegates rule-making powers to the commission to justify adoption of such rule.

BCL:DJ:

Industrial Commission—Inspection Fees—Contractors are responsible for the payment of industrial commission inspection fees regardless of the fact that the building ownership will ultimately be in the state.

July 19, 1966.

JOSEPH C. FAGAN, *Chairman*
Industrial Commission of Wisconsin

You ask my opinion concerning fees charged for elevator, escalator and dumbwaiter inspections by the industrial commission pursuant to sec. 101.10 (12) and Ind 69.20 and 69.25 of the Wis. Admin. Code. More specifically, you ask whether such fees apply to industrial commission inspections of new installations in state buildings in light of sec. 101.10 (12) (f), where the state has not yet "accepted" the new elevator, escalator or dumbwaiter.

Sec. 101.10 (12) provides that the industrial commission "fix and collect fees for the required inspection of * * * elevators, escalators and power dumbwaiters". The fee schedule is set forth in Ind. 69.20, and 69.25, WAC Sec. 101.10 (12) (f) states that "Fees fixed under this subsection shall not apply to buildings of state and local governments".

"Acceptance" by the state of the new elevator, escalator or dumbwaiter from the contractor is understood to mean final payment by the state for the contractor's product and services. Final payment is not made by the state until such contract item is completely installed and operates properly. Proper operation naturally includes inspection for safety of operation. A safety inspection by the industrial commission of the new elevator, escalator or dumbwaiter provides the necessary proof of proper operation.

It is my opinion that the cost of safety inspection for a newly installed elevator, escalator or dumbwaiter falls upon the contractor. The contractor has not completed his work until he demonstrates to the state that the contract item is properly installed and operates safely. The inspection cost should be reflected in the contractor's bid for the job. In any event, the state can assume that the cost of safety inspection is included in the contractor's bid figure.

Further, the contractor cannot rely upon the fact that the state ultimately will own the elevator, escalator or dumbwaiter to avoid payment of inspection fees. Sec. 101.10 (12) (f) exempts the state from payment of inspection fees to

the industrial commission for state owned elevators, escalators and dumbwaiters. In the instant situation, the contractor rather than the state owns the elevator, escalator or dumbwaiter. Ownership by the state does not occur until the state "accepts" the contract item by making final payment for its cost. Thereafter, sec. 101.10 (12) (f) applies.

Therefore, it is my opinion that contractors who install new elevators, escalators and dumbwaiters in state buildings are not exempt by reason of sec. 101.10 (12) (f) from paying the inspection fees set forth in Ind 69.20 and 69.25 WAC, merely because ownership ultimately will be in the state.

BCL:JPA:

Federal School Aids—Teachers' Salaries—Federal school aid funds paid into the general fund may not be used for salaries of teachers who are sent into parochial schools to teach.

July 19, 1966.

WILLIAM C. KAHL, *Superintendent*
State Department of Public Instruction

You have asked my opinion regarding the state's participation in the federal aid to education program established by the Federal Elementary and Secondary Education Act of 1965. More specifically you ask whether payments to a school district by the state department of public instruction from funds in the state treasury, received from the federal government under Title I of the Federal Elementary and Secondary Education Act of 1965, violate Art. I, sec. 18, Wis. Const., if the money is used in part to pay the salary of a public school teacher who is sent into a parochial school to teach.

Art. I, sec. 18, Wis. Const., provides in part:

"* * * nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries."

No state has a more comprehensive constitutional ban against aid to religious institutions. In *State ex rel. Reynolds v. Nusbaum,* (1962) 17 Wis. 2d 148, 165, the Wisconsin supreme court said:

"* * * In *State ex rel. Weiss, supra,* this court stated (p. 207):

" 'Wisconsin, as one of the later states admitted into the Union, having before it the experience of others, and probably in view of its heterogeneous population, . . . has, in her organic law, probably furnished a more-complete bar to any preference for, or discrimination against, any religious sect, organization, or society than any other state in the Union.'

"Thus, we deem that the First amendment provision, which prohibits laws 'respecting an establishment of religion,' lends itself to more flexibility of interpretation than the provision contained in the last clause of sec. 18, art. I of the Wisconsin constitution. * * *"

Religious societies and theological seminaries include parochial elementary and secondary schools. *State ex rel. Weiss v. District Board,* (1890) 76 Wis. 177, 215. The next question is whether paying the salary of a public school teacher who is sent into a parochial school to teach is a "benefit" to the parochial school within the meaning of that term as used in Art. I, sec. 18. The meaning of "benefit" in this context was discussed at length in *State ex rel. Reynolds v. Nusbaum, supra.* The statute involved in that case was framed, as is this one, to evince a legislative intention to benefit the parochial school pupils rather than the parochial school. In discussing this issue the court said at pages 160-161:

"The legislature, in enacting ch. 648, entitled it, 'An Act to amend 40.53 (1) and 40.56 (3) of the statutes, relating to the safety and welfare of all school pupils in the state.' The attorney general argues that this act is sustainable on the basis that the transportation of parochial school pupils

would promote their health and welfare. It could also be argued with equal plausibility that a direct grant in aid of public funds to parochial schools promotes the general welfare of the pupils of such schools because it aids in their education. In passing on the constitutionality of legislation as to whether it violates the particular prohibition of sec. 18, art. I, Wisconsin constitution, courts are not foreclosed by a legislative declaration that the act is in furtherance of some facet of the promotion of the public welfare valid in itself, if the effect of the questioned act would in fact violate such prohibition had there been no legislative declaration of its purpose included in the title or body of the act. * * *"

Paying the salary of a teacher who teaches in a parochial school is a benefit to that school. That it also benefits the children attending the school does not mean that the payment escapes the constitutional prohibition. The benefit conferred by paying a teacher's salary to teach in a parochial school is not one of that class of benefits, such as police and fire protection, which is permissible under the Wisconsin Constitution. It is a benefit indistinguishable in principle from furnishing bus transportation, which was held unconstitutional in *State ex rel. Reynolds v. Nusbaum, supra.*

The payment described in your letter is "for the benefit of religious societies, or religious or theological seminaries." The remaining question under Art. I, sec. 18, Wis. Const., is whether the payment is also "money drawn from the treasury". If so it is unconstitutional.

Attorneys General in New York, Kentucky and Nevada have concluded that funds received by the state under Title I of the Federal Elementary and Secondary Education Act of 1965 can retain their character as federal funds and not become subject to state constitutional restrictions.

In each case the opinion was predicated upon the assumption that the federal funds could be kept entirely separate from state funds and at no time commingled with moneys of the state or of a local subdivision.

The constitutional and statutory provisions upon which these conclusions were based, however, were different from

those in Wisconsin. Our conclusion must be based upon Wisconsin law.

Wisconsin has specific statutory provisions regarding the way in which federal funds are received and handled by the state. See secs. 16.54, 20.550 (68), 20.650 and 20.951 (1) which are controlling here, the pertinent portions of which read as follows:

"**20.650 Public instruction department.** There is appropriated to the state department of public instruction for the following programs:

"(1) EDUCATIONAL AND AUXILIARY SERVICES TO LOCAL SCHOOLS. (a) *General program operations.* The amounts in the schedule for educational and auxiliary services to local schools, including the matching of federal funds available under the national defense education act.

"* * *

"(m) *Federal aids.* All federal moneys received as authorized by the governor under s. 16.54 to carry out the purposes of the program."

* * * *

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

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

gress making an appropriation of such funds, or by the department of the United States government making such funds available to this state."

* * * *

"20.550 (68) FEDERAL FUNDS. Any and all funds which may be paid to this state under the authority of s. 16.54, *shall,* upon receipt, *be paid into the state treasury,* and the same shall be and are appropriated to the state board, commission or department designated by the governor to administer the same. *Expenditures of such funds shall be made in the same manner and subject to the laws, rules and regulations governing payments made by the state treasury,* and further such expenditures shall be made in accord with federal rules and regulations. *If funds* made available *be retained by the government of the United States,* then the officers and employes of this state designated to administer same *shall be governed by the act of congress and the rules and regulations of the federal government."*

* * * *

"**20.951 Receipts and deposits of money; procedure; penalties.** (1) Unless otherwise provided by law, all moneys collected or received by each and every officer, board, commission, society, or association for or in behalf of the state, or which is required by law to be turned into the state treasury, shall be deposited in or transmitted to the state treasury at least once a week and also whenever required by the governor, and shall be accompanied by a statement in such form as the treasurer may prescribe showing the amount of such collection, and from whom and for what purpose or on what account the same was received. *All moneys paid into the treasury shall be credited to the general fund unless otherwise specifically provided by law."*

Under this statutory scheme, federal money received under Title I of the Federal Elementary and Secondary Education Act of 1965 is accepted by the governor under the authorization of sec. 16.54, and must be paid into the state treasury upon receipt pursuant to sec. 20.550 (68). Under sec. 20.951 (1), "* * * All moneys paid into the treasury shall

be credited to the general fund unless otherwise specifically provided by law". The Title I funds must, therefore, be paid into the general fund.

Once federal funds are paid into the general fund they become state funds and are subject to all of the restrictions imposed upon the use of state funds. *Democrat Printing Co. v. Zimmerman,* (1944) 245 Wis. 406, 414. Such funds are therefore subject to the limitations imposed by Art. I, sec. 18, Wis. Const. and may not be expended for the benefit of parochial schools. Since the payment of funds for the salary of a teacher who teaches in a parochial school is a benefit to that school within the meaning of Art. I, sec. 18, I must conclude that such payment would violate the Wisconsin constitution.

This conclusion is also required by the language of sec. 20.550 (68) prescribing the method of handling federal funds received under sec. 16.54. This section provides that expenditures of federal funds in the state treasury "shall be made in the same manner and subject to the laws, rules and regulations governing payments made by the state treasury, and further such expenditures shall be made in accord with federal rules and regulations". The statute then provides that "If funds made available be *retained* by the government of the United States, then the officers and employes of this state designated to administer same shall be governed by the act of congress and the rules and regulations of the federal government". The intent of the legislature is plain. If the federal funds are put into the treasury they are to be treated like state funds. If the state rules are to be avoided the money must be kept out of the treasury.

The legislature has clearly stated that "unless otherwise specifically provided by law" all federal funds received by the state are to be expended subject to limitations imposed by state law. If this policy is to be changed and federal funds are to be used in Wisconsin for purposes which would violate the Wisconsin constitution the legislature must make that decision.

This opinion does not mean that the state of Wisconsin is unable to participate in the federal aid to education pro-

gram established by Title I of the Federal Elementary and Secondary Education Act of 1965. Quite the contrary. The state of Wisconsin can participate fully, and I understand your department is now implementing the program. This opinion concludes only that teachers paid from funds from the state treasury may not teach in parochial schools. Such use of teachers is not required for participation in the federal program. The pertinent provisions of the Federal Elementary and Secondary Education Act of 1965 provide as follows (Public Law 89-10, Title II, Section 205):

"(a) A local educational agency may receive a basic grant or a special incentive grant under this title for any fiscal year only upon application therefor approved by the appropriate State educational agency, upon its determination (consistent with such basic criteria as the Commissioner may establish) —

"(1) that payments under this title will be used for programs and projects (including the acquisition of equipment and where necessary the construction of school facilities) (A) which are designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families and (B) which are of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting those needs, * * *

"(2) that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate;"

The regulations issued by the secretary of health, education and welfare include the following:

"§ 116.19 Participation by children enrolled in private schools.

"(a) To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, the local educational agency *must* make provision for including special educational services and arrangements (such as *dual enrollment, educational radio and television, and mobile educational services and equipment*) in which such children can participate. * * *

"(b) The application for each project must show the degree and manner of expected participation by educationally deprived children enrolled in private schools in the program of the local educational agency under Title II of the Act. Opportunity for participation on the basis of geographical area, must be substantially comparable to that with respect to children enrolled in public schools and the provision for such participation shall be designed to be applied, insofar as is practicable, to children enrolled in private schools who reside in the areas affected by the program. * * *

"(c) Any project to be carried out in public facilities and involving *joint participation by children enrolled in private schools and children enrolled in public schools* shall include such provisions as are necessary to avoid classes which are separated by school enrollment or religious affiliation of the children.

"(d) Public school personnel *may* be made available to other than public school facilities only to provide specialized services which the local educational agency determines are designed to meet the special educational needs of educationally deprived children and only where such specialized services are not normally provided by the non-public school. * * *" (Underscoring added.)

These provisions require that a proposal for federal funds include plans for assistance to pupils in private schools substantially comparable to that given public school pupils. They do not, however, require that the assistance be given by sending public school teachers to teach in private schools. The requirements in this respect may be fulfilled in other ways, such as providing dual enrollment or shared-time

classes in the public schools. While the Wisconsin supreme court has not decided the precise question whether such classes in the public schools are constitutionally permissible, there is a strong suggestion in *State ex rel. Reynolds v. Nusbaum, supra,* pp. 159-160, that such programs are constitutional:

"We have also given consideration to whether the benefits, conferred by ch. 648 upon parochial schools, differ in kind from the situation where parochial school pupils are permitted to attend certain specialized courses in the public schools. For example, it has been brought to our attention that pupils of certain parochial schools attend manual-training and domestic-science classes in the public schools. These parochial schools benefit in that they are saved the expense of providing the specialized equipment required for such courses, and of securing teachers trained to teach the same. However, let us assume but not decide that permitting children, who satisfy the age and residence requirements, to secure part of their education in the public schools, even though at the same time they may be in attendance at parochial schools, does not violate sec. 18, art. I, Wisconsin constitution. On this hypothesis it might be argued that permitting parochial school children to take advantage of transportation by public school bus, is a use of public school facilities equivalent to attendance at manual-training and domestic-science classes in the public schools. However, the essential difference, from a constitutional standpoint, is that riding school buses is not an educational objective of the state in itself, but merely an instrumentality to bring the pupils to the public schools where they will secure a public education. *Under ch. 648, parochial school children are not to be transported to the public schools for the purpose of receiving any public instruction; rather, such transportation is merely a convenience to assist them in attending a parochial school.*" (Underscoring added.)

Shared time differs from the plan to send public teachers into parochial schools in the constitutionally significant respect described in the last sentence of the above quotation. Shared time, properly conducted, is a means of providing public instruction to parochial pupils and not a "convenience

to assist them in attending a parochial school". In my opinion, shared-time arrangements which would meet the requirements of the Federal Elementary and Secondary Education Act of 1965 can be carried out without violating the Wisconsin constitution. Other permissible programs involving such things as educational radio and television, and mobile educational services and equipment, can probably also be devised. In expressing this opinion I am aware of 53 OAG 187 in which the shared-time issue was discussed with the conclusion that the question must be resolved by the Wisconsin supreme court. I believe, however, that under these circumstances, where participation in this vital federal program is dependent upon the state's ability to plan educational programs in the nature of shared time, you are entitled to my best judgment on the constitutional issue. I believe that such programs can be conducted within constitutional limitations and I am prepared to assist you in working out such programs.

I conclude that under the present statutes federal funds received under Title I of the Federal Elementary and Secondary Education Act of 1965 must be paid into the general fund. In the general fund these funds are subject to limitations imposed by Art. I, sec. 18, Wis. Const., and cannot be used to pay the salary of a teacher who teaches in a parochial school. Your department can, however, continue to participate in the federal program by providing for participation by private school pupils as described above.

BCL:ACC:

Political Advertising—Election Day—Distribution of advertising material on election day discussed.

July 22, 1966.

HUGH O'CONNELL, *District Attorney*
Milwaukee County

You ask whether sec. 12.13 forbids the publication of political advertising on election day. Sec. 12.13 provides:

"No person nor personal campaign or party committee shall *pay or incur any obligation,* express or implied, to pay, any sum of money or thing of value whatever, *for services to be performed on the day of any primary or election,* in behalf of any candidate, party or measure, to be voted upon at said primary or election; or for any political service performed on such day, or for any loss of time or damage suffered by attendance at the polls at the primary or election, or in registering for voting, or for the expense of transportation of any voter to or from the polls on such day."

The general rule is that if a paid service which has a direct bearing on any political candidacy or measure is performed on the day of any primary or election, the payer violates this section. If the service is performed on election day, the time of actual payment or the date upon which the obligation is incurred is irrelevant.

The United States supreme court's decision in *Mills v. Alabama,* (1966) — — U. S. — —, however raises serious doubt concerning the constitutionality of sec. 12.13 if that provision is applied to political advertising. In *Mills* a newspaper editor was charged with publishing an editorial on election day urging the people to adopt a mayor-council form of government. The Alabama Corrupt Practices Act made it a crime "to do any electioneering or to solicit any votes * * * in support of or in opposition to any proposition that is being voted on on the day on which the election affecting such candidates or propositions is being held". Ala. Code, 1940, Tit. 17, sec. 285. The United States supreme court held that this statute abridged freedom of the press.

There is an obvious practical difference between publishing a newspaper editorial and publishing or distributing political advertising. It is apparent from the court's reasoning in *Mills,* however, that no valid distinction can be made when First Amendment freedoms are involved. Speaking through Justice Black, the court said:

"Whatever differences may exist about interpretations of the First Amendment, there is practically universal agree-

ment that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, see *Lovell v. Griffin,* 303 U. S. 444, to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free. The Alabama Corrupt Practices Act by providing criminal penalties for publishing editorials such as the one here silences the press at a time when it can be most effective. It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press."

It is clear from this quoted passage that the First Amendment authorizes free and open discussion of the candidates and issues whether in an editorial or in a paid advertisement. The court also rejected the argument that the Alabama statute protected the public from "confusive last-minute charges and countercharges" which could not be effectively answered. The court observed that the same problem exists irrespective of the time designated for banning further appeals to the electorate.

It should be noted that the court recognized the "State's power to regulate conduct in and around the polls in order to maintain peace, order and decorum there". The court's express recognition of this power may have been meant as a limitation on the state's power to otherwise suppress free expression concerning the candidates and issues.

The *Mills* decision does not affect the validity of sec. 12.64 (1), which states in part that no person shall "solicit votes for any candidate or party or engage in any electioneering whatever on the day of any such election within 100 feet of any entrance to any building containing any polling place * * *". Nor does *Mills* affect the illegality of other paid services performed on the day of any primary or election.

It is my opinion, however, that sec. 12.13 cannot be constitutionally applied to ban publication or distribution of campaign advertising on election day.

BCL:DPJ:

Promotional Schemes—Refunds—Promotional scheme requiring certificate and proof of purchase for refund would violate sec. 100.15 (1), Stats.

July 25, 1966.

DANIEL M. BYRNES, *District Attorney*
Burnett County

You have requested my opinion as to the legality of a promotional scheme which has been proposed for use in Burnett county and other northern Wisconsin counties. The promotion would involve the placing of certain so-called certificates in various grocery stores by a food manufacturer, which certificates would read substantially as follows:

TAKE ONE

Save up to $3.00 on Your Total Grocery Purchase*

USE THIS VALUABLE CERTIFICATE TO GET YOUR 10% CASH REFUND

Send this certificate, accompanied by the following proofs-of-purchase:

(Product) ..... 1 label from 3 lb. can

(Product) ..... 1 label from any size jar

(Product) ..... 1 label from regular size (1 pt. 8 oz.) or larger size

(Products) ..... 3 symbols from 3 package fronts

Together with one food store cash register tape to:

(Company)

You will receive a check from (Company) for 10% of the total amount of your food store purchase as shown on your register tape (minimum refund: 25¢ — maximum refund: $3.00).

If you prefer, two labels from (Product) or three labels from (Product) may be sent in place of one label from each.

Name _____

Address _____

City _____ State _____ Zip Code_____

Total amount of food store purchase as shown on cash register tape .....$_____

Less amount paid for Fair Trade Items and alcoholic beverages* .....$_____

Amount on which refund is due $_____

*Refunds on Fair Trade Items and alcoholic beverages are illegal and may not be claimed.

NO REFUND CAN BE GIVEN WITHOUT THIS CERTIFICATE

Limit one register tape per refund, one refund per family. The register tape must have imprinted on it the name of the store and the date and amount of your purchase. If your stores does not use register tapes, send the name and address of the store with the date and amount of your purchase signed by your grocer.

(Company) reserves the right to require additional proof that the register tape submitted represents an actual purchase.
Hurry—Offer expires _____, 1966
— Offer Good in Northern Wisconsin Only —
Cash value of this certificate—10% of "amount on which refund is due," if accompanied by proofs-of-purchase and cash register tape.

The certificates would be available to everyone entering the stores without requiring any purchase. However, in order to be eligible to receive a refund check, an individual would have to send the certificate to the company together with various proofs of purchase and the cash register tape.

You first ask whether this promotion in any way violates sec. 100.15 subsec. (1), which is material to this question, reads as follows:

"100.15 **Regulation of trading stamps.** (1) No person, firm, corporation, or association within this state shall use, give, offer, issue, transfer, furnish, deliver, or cause or authorize to be furnished or delivered to any other person, firm, corporation, or association within this state, in connection with the sale of any goods, wares or merchandise, any trading stamp, token, ticket, bond, or other similar device, which shall entitle the purchaser receiving the same to procure any goods, wares, merchandise privilege, or thing of value in exchange for any such trading stamp, token, ticket, bond, or other similar device, except that any manufacturer, packer, or dealer may issue any slip, ticket, or check with the sale of any goods, wares or merchandise, which slip, ticket or check shall bear upon its face a stated cash value and shall be redeemable only in cash for the the amount stated thereon, upon presentation in amounts aggregating twenty-five cents or over of redemption value, and only by the person, firm or corporation issuing the same; provided, that the publication by or distribution through newspapers, or other publications, of coupons in advertisements other than their own, shall not be consider-

ed a violation of this section; and provided further, that this section shall not apply to any coupon, certificate or similar device, which is within, attached to, or a part of any package or container as packed by the original manufacturer and is directly redeemed by such manufacturer."

An initial question is whether the broad regulation of trading stamps and other similar devices found in sec. 100.15 (1) covers the type of promotional scheme here involved. Certainly the certificates, taken alone, are not within the ambit of the statute since they are freely available without regard to purchases. In 8 OAG 820 and 13 OAG 355 it was said that trading stamps which are distributed free to prospective customers are outside the scope of the trading stamp statute since they are not issued "in connection with the sale of any goods, wares or merchandise". However, unlike the situations there presented, the certificates here involved have no redemption value by themselves but become of value only after certain purchases have been made as evidenced by the cash register tape and various labels.

In fact, a closer examination of the promotion reveals that the certificates would operate not so much as trading stamps than as customer lures, while the cash register tape and the labels would be the devices for which a cash redemption would be paid. In past opinions by this office it was concluded that both cash register slips and labels from cans could be "devices" within the meaning of the trading stamp statute if used to obtain a later cash refund. 17 OAG 25 (cash register slips); 13 OAG 234 (labels). Under the scheme here involved, both the cash register tape and the labels are absolutely essential in order for the individual to qualify for a cash redemption. They provide the only method by which the manufacturer can ascertain whether the required purchases, or indeed any purchases whatsoever, have been made by the person claiming a refund. Viewed thusly, it is clear that the cash register tape and the appropriate labels are at the very heart of the refund scheme.

Since the labels are attached to the product and are directly redeemable by the manufacturer, they are expressly outside the scope of the statute. I conclude, however, that

the cash register tape required by the proposed scheme is a device within the meaning of sec. 100.15 (1) as it is used by the manufacturer to entitle the purchaser receiving the same to a cash refund.

The next question is whether the scheme falls within the exception to the general prohibition of trading stamps found in sec. 100.15 (1). This exception provides that "any manufacturer, packer, or dealer may issue any slip, ticket, or check with the sale of any goods, wares or merchandise, which slip, ticket or check shall bear upon its face a stated cash value and shall be redeemable only in cash for the amount stated thereon. * * *"

It is quite clear from an examination of the proposed plan that none of the slips in question bear upon its face a stated cash value as required by sec. 100.15 (1). This, of course, is obviously true in the case of the labels and the cash register tape. The cash register slips which were found to be trading stamps in 17 OAG 25 were determined to be in violation of the trading stamp statute for the very reason that they stated no cash value. The proposed certificate is also defective in this respect. Although the certificate states that the purchaser is entitled to a 10% cash refund on the amount purchased, no cash value is stated since the amount of the purchase is unknown. In fact, the cash value of the certificate cannot be ascertained unless and until the individual holding the certificate makes the necessary purchases and calculates the refund himself. This plainly is not a slip bearing a stated cash value upon its face as contemplated by the statute.

The dicta in the case of *State ex rel. Downey-Farrell Co. v. Weigle,* (1918) 168 Wis. 19, 29, 168 N.W. 385, merely reinforces this conclusion. The court there suggested that a coupon which designated the amount of the sale together with a recital that the allowance was to be a certain named percentage thereof would be permissible under the statute. The situation obviously envisioned in that case was where the cashier, before handing or issuing the customer the coupon or trading stamp, would imprint thereon the amount of the sale so that the customer could readily

determine the stated cash value of the coupon upon receiving it. Under the present scheme, however, the prospective customer would acquire the certificate before knowing the amount of his purchase and would thereafter have to fill in the amount of the purchase himself in order to be able to compute the cash value of the certificate. This is obviously straining the concept of "stated cash value" as used in the statute beyond all reasonable limits of construction.

It is therefore my opinion that the proposed scheme would violate sec. 100.15 (1), for the reason that no cash value would be stated on any of the slips to be used to obtain a cash refund.

You next ask whether our Unfair Sales Act, sec. 100.30, would apply to the promotional scheme in question. As pointed out in 38 OAG 72, a rebate plan sponsored by a retailer can most certainly violate sec. 100.30 depending upon the "cost" factors involved. You state, however, that under the proposed plan the manufacturer would bear the entire cost of the refund. If that would in fact be the case, sec. 100.30 would by its terms be inapplicable.

Finally, you ask whether the proposed plan violates any other Wisconsin laws. I have not found any other Wisconsin laws which would invalidate the plan. However, since it is my opinion that the plan violates sec. 100.15 (1), it is unnecessary to discuss the applicability of any other Wisconsin laws.

BCL:JDJ:

Recording Fees—Land Contracts—Under sec. 59.57 (1) (a) the proper recording fee for a land contract is $2.50 in spite of alterations on the form.

July 27, 1966.

S. DEAN PIES, *District Attorney*
Kewaunee County

You have inquired what the correct recording fee should be for a Wisconsin form land contract, No. 36, which is a standard form under sec. 59.57 (1) (a), but where some of the printed language has been stricken as follows:

In Paragraph 2 — "Including all screen and storm doors and windows, attached mirrors, fixtures, shades, attached floor covering, hot water heater, furnace, oil tank and light fixtures."

All of Paragraph 6 which covers the following words: "The purchaser hereby states that he is satisfied with the title as shown by the abstract-title insurance commitment submitted to him for examination; the Vendor agrees to deliver the abstract-title insurance policy to the Purchaser when the full purchase price hereunder shall have been paid. The Purchaser agrees to pay the cost of later continuations of abstract-title insurance."

In Paragraph 7 the following words: "either (1) a title insurance commitment for an owner's policy of title insurance in the sum of the purchase price, the Purchaser to be named as the assured, to be written by a title insurance company, and guaranteeing the Vendor's title in the condition called for by this agreement, or"

Apparently there is a difference in administrative construction of the applicable statutes by various registers of deeds. Some contend that the charge should be $3.75 and on the other hand others contend that the charge should be $2.50, which is your interpretation.

The $3.75 fee is reached by applying the rate provided by sec. 235.16 (3), which reads:

"(3) Whenever after July 1, 1953, there is offered for record any standard instrument on an approved form to which has been attached a separate sheet or rider, the register of deeds shall charge 50 per cent above the recording fees prescribed by s. 59.57 (1) (a) or, if it will result in a greater fee, the charge prescribed by s. 59.57 (1) (b)."

Sec. 59.57 (1) (a) provides in part:

"59.57 **Register of deeds; fees.** Except as otherwise provided by law every register of deeds shall receive the following fees, to wit:

"(1) (a) For entering and recording the following forms of standard instruments as approved pursuant to s. 235.16 and filed in the approved form in the office of the secretary of state:

"FEES FOR RECORDING WISCONSIN LEGAL FORMS

Forms	Nature of Instrument	Fees
"* * *		
"33 to 36	Land contract	2.50

"* * *." (See ch. 249, sec. 34, Laws of 1965.)

Sec. 59.57 (1) (b) provides:

"(b) For entering and recording standard instruments not drawn on an approved form and other instruments for which there is no approved form 20 cents per folio, and 5 cents for every necessary entry in a tract index in excess of 3 entries in counties where a tract index is kept; with a minimum fee for recording standard instruments not drawn on an approved form as specifically set forth in s. 59.57 (1) (a) of $2 for any deed, $3 for any mortgage, and $1.50 for any other instrument."

Sec. 235.16 (3) is not applicable for the reason that there has not been attached "a separate sheet or rider" so as to bring the fee within the purview of that subsection.

Sec. 59.57 (1) (b) is not applicable here since to come within the scope of that statute the instrument must be one "not drawn on an approved form." Here an approved form was used.

In 40 OAG 241, to which you call our attention, it was concluded that where a standard form is used there is to be no extra charge merely because some notation as to prorating taxes and the like is typed in the instrument. The emphasis there was on the question of whether or not a standard form was used, and the result is the same whether words are added to the standard form or are stricken. As

was pointed out in the above opinion, the variance for which the extra recording fee is chargeable relates to the *form* of the instrument and not to the specific *language* inserted to effectuate the intention of the parties. The only exception would be where to effectuate such intention it becomes necessary to attach separate sheets or riders, which of course brings the fee squarely within the provisions of sec. 235.16 (3).

Accordingly, we concur in your conclusion that the proper fee under the circumstances is $2.50 as provided in sec. 59.57 (1) (a), Stats.

BCL:WHR:

Statutes of Limitations—Claims—The provisions of sec. 49.11 (5) (b) apply prospectively only. Reimbursement claim for relief granted prior to 1960 is governed by sec. 49.11 (5) (d).

July 28, 1966.

R. R. ROGGENSACK, *Corporation Counsel*
Grant County

You point out that ch. 104, Laws 1959, effective January 1, 1960 changed the procedure whereby one municipality makes claims against another municipality for reimbursement for relief furnished to dependent persons. The periods of time specified by the statute of limitation applicable to these claims were also changed. You have asked my opinion whether the old or the new statute of limitation applies where the relief was granted prior to the amendment of the law.

Your specific question is whether the limitation of time for bringing an action provided in sec. 49.11 (5) (d), Stats. 1957, or the limitation of time for bringing an action provided in sec. 49.11 (5) (b), Stats. 1959, effective January 1, 1960 is applicable to the following fact situation.

In 1959, county A granted relief to a dependent person whose legal settlement was in county B. In February, 1960 county A filed with county B a verified claim for reimbursement. County B did not serve written notice of disallowance of such claim upon county A. You do not state what further action was taken, but we assume that county A then filed a complaint with the state department of public welfare to recover the amount of its claim from county B. County B has apparently defended on the ground that the action is barred by the statute of limitation.

I

PRIOR LAW

Under the old law, the limitation of time for commencing such action was provided by sec. 49.11 (5) (d), Stats. 1957, which read:

"(d) *Notice of disallowance.* When a claim for relief is disallowed (either by action or lapse of time) the clerk shall within 30 days file notice of disallowance with the clerk of the claimant who shall promptly notify his relief official or agency, and action on the claim must be commenced within 6 months after such filing and within 6 years after the relief was granted."

The precise meaning of this statute is not clear, but apparently a claim for reimbursement could be disallowed either by specific action disallowing the claim or by taking no action. Under the practice which was followed, taking no action was treated as a disallowance by lapse of time. Where specific action was taken to disallow the claim, the statute required that within 30 days a notice of disallowance shall be filed with the county making the claim. Where this notice was given, the county making the claim had 6 months thereafter to start a proceeding by filing a complaint with the state department of public welfare. Where no notice of disallowance was filed, the county making the claim had 6 years from the date of granting the relief to file its complaint with such department.

II

PRESENT LAW

This statute was repealed and recreated by ch. 104, Laws 1959, effective January 1, 1960. In the new law, the provisions relating to the effect of disallowance or disallowance by failure to act were separated from the provisions relating to the limitation of time to bring the action. Sec. 49.11 (4) (e) 4., Stats. 1959, provided:

"4. Disallowance or allowance of claims by the municipality or county of claimed settlement shall be transmitted within 60 days of receipt of the claim for reimbursement, and failure to allow or disallow within such period shall be deemed a disallowance."

This statute specifically provides that failure to take action to allow or disallow for 60 days constitutes a disallowance. Under the old law, the effect of taking no action or disallowance by lapse of time was not clearly spelled out. The new law makes it clear that no action for 60 days constitutes a disallowance.

Also in the new law the limitation of time for bringing the action is changed. Sec. 49.11 (5), Stats. 1959, provides:

"(5) GENERAL LIMITATIONS. In addition to the other limitations and penalties hereinbefore stated, recovery of relief granted shall be barred unless a proceeding is commenced before the department:

"(a) Within 6 months after receiving written notice of a disallowance of a claim.

"(b) Within one year after disallowance by failure to allow a claim.

"(c) Under any other circumstances within 2 years of the date relief is first furnished under the nonresident notice which is the basis for the claim, including claims against the state."

Under subsec. (b) of this section, it is clear that a proceeding must be started within one year of the disallowance by failure to allow a claim.

It is important to recognize that there are two principal provisions in these statutes. The first relates to the method of disallowance and the second relates to the limitation of time in which action can be brought after disallowance. In the old law, these two provisions were combined in one section. Sec. 49.11 (5)(d), Stats. 1957. In the new law they are separated into two sections: 49.11 (4)(e) 4., and 49.11 (5), Stats. 1959. I believe much of the confusion has arisen because of the combining of these two provisions in the old law.

You have stated that in your opinion these statutory provisions establish conditions precedent to commencement of suit, and that these provisions, being procedural in nature, may be changed and such changes may have retroactive application. You also state that this is especially true in relation to a municipality, which is but an arm or agency of the state, and which is engaged in the performance of a governmental function. I agree as to the provisions of these statutes which relate to the method of disallowance of claims. Such provisions are clearly procedural in nature. The legislature is free to change these procedures and the new procedures will apply retroactively. While statutes are ordinarily construed to operate prospectively only, the general rule is that remedial or procedural statutes are construed to operate retroactively, unless the legislature has expressly declared otherwise. A party has no vested right in existing procedure and the fact that a procedural statute applies retroactively does not render it unconstitutional. *State ex rel. Sowle v. Brittich,* (1959) 7 Wis. 2d 353, 96 N.W. 2d 337; *Steffen v. Little,* (1957) 2 Wis. 2d 350, 86 N.W. 2d 622; *Schultz v. Vick,* (1960) 10 Wis. 2d 171, 102 N.W. 2d 272.

Statutes of limitation, however, even though they may in some respects be regarded as procedural or remedial in nature, do not fall within this rule. Statutes changing the period of limitation are presumed to apply prospectively only, unless the legislature expressly provides otherwise. *Estate of Tinker,* (1938) 227 Wis. 519, 279 N.W. 83; *Thom v. Sensenbrenner,* (1933) 211 Wis. 208, 247 N.W. 870.

Sec. 990.06 reads:

"**Repeal or change of law limiting time for bringing actions.** In any case when a limitation or period of time prescribed in any act which shall be repealed for the acquiring of any right, or barring of any remedy, or for any other purpose shall have begun to run before such repeal and the repealing act shall provide any limitation or period of time for such purpose, such latter limitation or period shall apply only to such rights or remedies as shall accrue subsequently to the time when the repealing act shall take effect, and the act repealed shall be held to continue in force and be operative to determine all such limitations and periods of time which shall have previously begun to run unless such repealing act shall otherwise expressly provide."

This statute provides that when a statute of limitation has begun to run and the statute is repealed by an act which provides a different limitation, the latter limitation of time applies to rights or remedies which accrue after the effective date of the act. The prior law continues to determine such time periods as have previously begun to run, unless the repealing act expressly provides otherwise. The act here involved does not expressly provide that it shall apply retroactively.

Under the law as it existed prior to January 1, 1960, where there was a disallowance of a claim by lapse of time (failure to disallow), the time within which a proceeding could be started was the 6 years following the granting of relief. Under the new statute where there is a disallowance by failure to act within the 60-day period, the time within which a proceeding can be started is one year from the end of the 60-day period. In the fact situation here involved, the relief was granted in 1959, and under the old law the 6-year period of limitation started to run from such date. The statute was repealed and the new statute created effective January 1, 1960. The new statute provided a different limitation of time for starting the action. It is my opinion that in this situation the limitation of time for starting the proceeding, as provided by the old statute, is controlling.

I conclude, therefore, that as to relief granted prior to January 1, 1960 where no notice of disallowance is filed, the time within which the county granting such relief may bring action on its claim is limited to 6 years from the date of granting the relief, under sec. 49.11 (5) (d), Stats. 1957. The provisions of sec. 49.11 (5) (b), Stats. 1959, operate prospectively only.

BCL:AH:

Reimbursement—Utility Services—Discussion of rate of reimbursement to Milwaukee Gas and Light Company for cut off service to individual buildings being demolished for expressway project.

July 29, 1966.

ROBERT P. RUSSELL, *Corporation Counsel*
Milwaukee County

You have asked my opinion concerning reimbursement to Milwaukee Gas Light Company of various costs, charges, and losses incurred as a result of expressway construction in Milwaukee county. You state that you are particularly concerned with the costs incurred as a result of special cut offs at individual buildings which are proposed for demolition in order to accommodate the expressway project.

The Milwaukee Gas Light Company has its facilities lawfully within an existing street. Certain buildings along the street have been acquired and it is necessary that they be demolished in order to accommodate the expressway project. The portion of the gas main within the street will be eventually abandoned. However, the gas company continues service until such time as all buildings are demolished. For various reasons the demolitions are made on a random basis. This requires individual cuts to sever the service lateral from the main in order to comply with the statutory provisions and common law safety standards. The gas company

finds it necessary to continue its service to various users through the existing street mains while being subjected to the expense of making physical cuts to accommodate the individual property.

The gas company contends that the county is acting in a proprietary capacity and is required to compensate the gas company for all of its out-of-pocket expenses pursuant to sec. 66.047 (2), and Wis. Adm. Code PSC 135.07. I can find no authority for this proposition. Moreover, sec. 66.047 (1) specifically excepts the state and any county, city, village or town.

In the alternative, the gas company contends that it is entitled to reimbursement of two-thirds of its expenses pursuant to sec. 59.965.

Sec. 59.965 (5) (h) 1. provides as follows:

"(h) *Private occupancy of streets; relocation.* 1. All persons other than those mentioned in par. (g) lawfully having buildings, structures, works, conduits, mains, pipes, wires, poles, tracks or any other physical facilities in, over or under the public lands, streets, highways, alleys, parks or parkways of the county, or of any town, village or city therein, which in the opinion of the commission in any manner interfere with the construction of any expressway project or the relocation or maintenance thereof, shall upon order by the commission promptly so accommodate, relocate or remove the same as may be ordered by the commission so as to remove such interference."

Sec. 59.965 (5) (h) 3. provides for the two-thirds reimbursement as follows:

"3. When the utility pursuant to the commission's order proceeds with the work in a manner satisfactory to the commission, the county by the commission shall pay the utility from expressways funds upon monthly estimates of work performed and submitted for payment by the utility, two-thirds of the net cost incurred by the utility in performing such work, after deducting reasonable and fair credits for items salvaged, for any betterments made at the option of

the company and for the value as carried on the utility's books, of the used life of a facility retired from use if the service life of the new facility will extend beyond the expectancy of the one removed. The county shall not be liable to pay any value whatever for utility facilities where use of the same has been abandoned for reasons other than the construction or proposed construction of an expressway project even though the installation is intact."

Prior to the passage of Sec. 59.965 no utility relocation costs incurred to accommodate a highway use could be recovered. The highway use was the dominant easement and it was necessary for the utility to make the needed adjustments to accommodate any highway use. The present statute for the reimbursement of utilities is limited to expressways in counties with a population of over 500,000. See 46 OAG 58, 52 OAG 319, and 49 OAG 119, in which this law is discussed.

It is my opinion that sec. 59.965 (5) (h) was intended to make all utility costs necessary to accommodate such expressway construction reimburseable to the extent provided in the statute. In the fact situation given, the utility is lawfully within a public street and these cuts are necessary to accommodate the construction of the expressway.

I am aware that a private owner may request that his service be discontinued and the Milwaukee Gas Light Company would be required to remove its facilities to accomodate the individual property owner. In the previous opinion, 49 OAG 119, at pages 121-122, my predecessor stated:

". . . There is certainly no indication of any intent to pay for abandoned lines in the statute as so far discussed, although necessary work performed to abandon the line such as disconnection and capping would be a proper subject for payment. * * *"

Sec. 66.047 (1) protects the utilities against interference when highway work shall be accomplished. It provides that the public service corporation shall have notice of the work and shall have the duty to temporarily protect or change its structures to allow the work to be performed. As pointed

out above, it exempts the state and its counties and municipalities from any obligation to pay the costs of relocating or protecting public utility lines in the street.

This section was originally enacted by ch. 439, Laws 1915. This statute is still applicable to all highways with the exception of certain expressways under sec. 59.965. It is my opinion that sec. 59.965 (5) (h) changed the law as it applies to expressway construction in counties with over 500,000 population.

The constitutionality of the reimbursement provision of sec. 59.965 was discussed in 52 OAG 319. That opinion upheld the constitutionality of this section.

It is therefore my opinion that the Milwaukee Gas Light Company should be reimbursed to the extent provided in sec. 59.965 (5) (h) for expenses necessarily incurred to accommodate the construction of the expressway.

BCL:ACC:AJF:

Real Estate Broker—Securities Brokers—Licenses—Real estate broker must be licensed as a securities broker in order to negotiate for sale of corporate business by means of stock transfer except where exempt securities are involved.

August 1, 1966

ROY E. HAYS, *Secretary-Counsel*
Wisconsin Real Estate Commission

You have requested my opinion with respect to the following:

"Is a licensed real estate broker required to be licensed as a securities dealer in order to negotiate for the sale of or sell real estate and a business or for the sale of or sell a business by means of a stock transaction where the business is composed of inventory, good will, etc., or the business and real estate is composed of real estate, inventory, good will, etc.?"

By this very general inquiry you have asked me to review an opinion of a former attorney general which dealt with the same question. That opinion, 49 OAG 4, discussed the respective rights of real estate brokers and licensed securities brokers in connection with the sale, by means of stock transactions, of corporate businesses consisting of real estate, inventory and good will.

Since that time Ch. 136, Stats., has been amended to include the activities of a business opportunity broker within the definition of a real estate broker. Separate licensing is no longer required. This change in no way affects the conclusions reached in the opinion referred to.

I have reviewed the opinion in 49 OAG 4 in detail, and I am of the opinion that the conclusion there reached at page 9 is sound but should be modified as indicated by the underlined language below:

"It is my opinion, however, * * * that a real estate broker, generally, must be licensed as a securities dealer in order to negotiate for the sale of a corporate business by means of a stock transaction where the business is conducted by a corporation and is composed of real estate, inventory, good will, etc." *except where the stock transfer involved is an exempt securities transaction by reason of a specific provision of sec. 189.07 or other statute. See sec. 189.12, Stats.*

While the supreme court in *State ex rel. Reynolds v. Dinger,* (1961) 14 Wis. 2d 193, 109 N.W. 2d 685, did authorize real estate brokers to engage in a very limited practice of law, real estate brokers are generally limited to the business of a real estate broker and cannot by reason of their license engage in activities which require separate licensing or registration.

A real estate broker is not generally authorized to engage in the business of the purchase or sale of shares of corporate stock for others.

As stated in 18 Am. Jur. 2d, Corporations, §209, pp. 737, 738, Nature of shares of stock:

"A share of stock is a unit of interest in a corporation. While ownership thereof confers no immediate title to any

of the property of the corporation, it entitles the shareholder to an aliquot part of the property, or its proceeds, to the extent indicated, when distributed according to law and equity. Each share represents a distinct and undivided share or interest in the common property of the corporation.

"Shares of stock constitute property distinct from the capital or tangible property of the corporation and belong to different owners. The capital is the property of the artificial person, the corporation, the shares of stock are the property of the several shareholders. Incorporeal in their nature, the shares are personal property * * *."

The stock of a corporation is personal property even though the assets of the corporation consist mostly of real estate. Prior to the enactment of the business opportunities licensing law in 1947, a person employed to sell a business by transfer of stock was not required to be licensed as a real estate broker to recover his commission. *Ireland v. Tomahawk Light, Telephone & Improvement Co.,* (1924) 185 Wis. 148, 200 N.W. 642; *Dubin v. Mohr,* (1945) 247 Wis. 520, 19 N.W. 2d 880, 167 ALR 778.

In *Silvertooth v. Kelley,* (1939) 162 Or. 381, 91 P. 2d 1112, 122 ALR 1329, plaintiff had been engaged by the stockholders of a mining corporation to sell or procure a purchaser for all of the stock of such corporation. He procured a purchaser and sued for compensation. He was not a licensed real estate broker, nor was he a licensed securities broker. The principal asset of the mine was real estate. The court held that he was entitled to a commission based on reasonable value of his services. The court held that the shares of a corporation were personalty even where the property of the corporation consists wholly of real estate and that under Oregon law he was not required to have a real estate license to perform, and that even though he was not licensed to sell stock his act amounted to an isolated sale which was exempt from the Oregon securities brokers' statute.

In *George Nangen & Co. v. Kenosha Auto Transport Corp.,* (1965) 238 F. Supp. 157, it was held that an Illinois plaintiff, not licensed as a real estate broker in Wisconsin,

could not recover a commission for "finding" a buyer for a Wisconsin business which had assets, including real estate, having a fair market value in excess of $4,000,000. It was agreed that the sale could be of the assets or of the capital stock. Plaintiff did not offer proof that its activities were those of a securities broker or that it qualified as such under Wisconsin statutes and it was held that plaintiff's acts brought it within the real estate brokers' licensing act.

A real estate broker could contract with the shareholders of the corporation to effect a sale of the shares themselves without being licensed as a securities dealer if the transaction were exempt under sec. 189.07. In such case the corporation would continue with the same name and management until the new shareholders acted under the statutes and bylaws to otherwise provide.

It is possible that sec. 189.07 (5) would provide the necessary exception for certain of such transactions depending upon the facts, and provides:

"The sale of securities when made by or on behalf of a seller not the issuer thereof who, being a bona fide owner of such securities, disposes of his own property for his own account, provided such seller was not at the time of acquisition of such securities and is not at the time of such sale a dealer, and such sale is not made, directly or indirectly, for the benefit of the issuer or a dealer or directly or indirectly for the purpose of evading any provision of this chapter. As used in this subsection, the term 'issuer' shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, and any person under direct or indirect common control with the issuer."

In *Dubin v. Mohr,* (1945) 247 Wis. 520, 19 N.W. 2d 880, 167 ALR 778, the court approached, but did not decide one facet of the question we are concerned with. The mojority owner of the stock of the Medford Brewing Company entered into an exclusive agency agreement with Dubin, publisher of "The Modern Brewing Age", to procure a purchaser for the sale of the stock he owned and for the sale of the other stock of the corporation. Dubin

first claimed to be licensed as a securities broker, but was not and amended his complaint to that effect, claiming that the proposed transaction was exempt under sec. 189.07 (5). Dubin claimed to have procured a purchaser, but Mohr sold to a purchaser he had found, and Dubin sued for his commission. The court upheld denial of plaintiff's motion for summary judgment and remanded the matter for trial. The court stated that a contract for the sale of real estate was not involved. The court also stated that the exclusive agency agreement was not a contract for the sale of stock, that sec. 121.04 was inapplicable, and that the contract was valid. Dubin in his brief argued that if the Blue Sky Law, Ch. 189, were applicable, the transaction was exempt under sec. 189.07 (5). The defendant did not press the application of Ch. 189 at the trial court or supreme court levels. Vol. 2329, Appendices and Briefs.

If Dubin had effected a sale, the supreme court might have had to consider the applicability of Ch. 189. In such case the court might well have reached the same conclusion that the Oregon supreme court did: That a securities transaction was involved but that insofar as the sale of stock for the owner, not an issuer, was concerned, the transaction was exempt under sec. 189.07 (5).

I have reviewed the correspondence furnished between the director of the department of securities and a Milwaukee law firm, and question whether sec. 189.07 (14) would provide the necessary exception for the transaction there cited which contemplated that the transferrers receive "equity securities, notes, and/or cash".

A shareholder parting with his stock would in most cases expect to receive some immediate cash in connection with a transaction, and sec. 189.07 (14) would not permit it. It is probable that some method could be worked out so that cash would be almost immediately forthcoming. However, cash is not a security within the meaning of 189.07 (14). See definition in 189.02 (1).

A real estate broker not licensed as a securities broker should be extremely hesitant in entering into any contract involving the direct or indirect sale or offering of sale of

securities, and should in every such instance discuss the necessity of license requirements with the department of securities. See 189.07 (14) (b), 189.11, and 189.12.

It would serve no useful purpose to speculate as to the thousands of forms a transaction for the sale of a business might take or to attempt to spell out ways which a real estate broker could set up an exempt transaction under Ch. 189, or by which a securities broker could avoid licensing requirements under Ch. 136. The duty to comply is on the individual involved.

BCL:RJV:

Aid to Dependent Children—Aid to dependent children may be granted under sec. 49.19 (4) (d) to a remarried mother unable by law to compel former husband to support children, and present husband who has not legally adopted children is unable or unwilling to support them.

August 9, 1966.

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

You ask whether aid to dependent children may be granted to a mother who has remarried when she is unable through use of the provisions of law to compel her former husband to support the children, and when her present husband who has not adopted the children is unable or unwilling to support them. In 38 OAG 257, one of my predecessors concluded that aid to dependent children could not be granted unless the mother was "without a husband". When that opinion was written in 1949, sec. 49.19 (4) (d) provided in part:

"* * * Aid may not be granted to the mother or stepmother of a dependent child unless such mother or stepmother is without a husband, or the wife of a husband who is incapacitated for gainful work by mental or physical

disability, likely to continue for at least 3 months in the opinion of a competent physician, or the wife of a husband who has been sentenced to a penal institution for a period of at least 3 months, or the wife of a husband who has continuously abandoned her for at least 3 months, if the husband has been legally charged with abandonment under section 351.30, or if the mother or stepmother has been divorced from her husband for a period of at least 3 months, dating from the interlocutory order, and unable through use of the provisions of law to compel her former husband to support the child for whom aid is sought."

This office stated that this language imposed " a general restriction against granting aid to a woman with a husband, and the legislature apparently intended all descriptive material after the first 'or' to be regarded in the light of exceptions to the first proscription". The opinion concludes with a recommendation that the legislature amend the statute if such interpretation leads to an inequitable result.

Sec. 7, ch. 590, Laws 1965, repealed and recreated sec. 49.19 (4) (d) to read as follows:

"Aid may be granted to the mother or stepmother of a dependent child only if she:

"1. Is without a husband; or

"* * *

"6. Has been divorced or legally separated from her husband and is unable through use of the provisions of law to compel her former husband to adequately support the child for whom aid is sought; or"

It is wholly conceivable that the conditions numbered 1 through 9 were enumerated separately in order to remove any ambiguity which may have existed when they were contained within a single paragraph. Regardless of the specific legislative intent in making this and other changes not relevant to this question, it is clear now that the words "is without a husband" do not impose a general restriction but simply constitute one basis of eligibility.

Under condition 6, the words "her husband" must refer to the father of the children for whom benefits are sought. When the mother procured a divorce or legal separation this man was her husband. The later reference to "her former husband" alludes to the same man. He would be her former husband when the mother attempted to compel him to provide adequate support through the use of the provisions of law.

If the words "her husband" are interpreted to mean her *present* husband, an absurd result would follow. In order to qualify for aid to dependent children a mother would have to show that: (1) she is unable to compel her original husband to adequately support the children of that marriage; and (2) she has been divorced or legally separated from any subsequent husband or husbands. This situation would bring her, however, within the scope of condition 1—"is without a husband". Such an interpretation would fail to give any effect to condition 6 as a separate basis for qualification under the aid to dependent children program.

If a woman is divorced or legally separated and is unable to legally compel her former husband to provide adequate support for the children of that marriage, she is eligible for aid to dependent children under condition 6. If her second husband has not legally adopted these children or if he is unable or unwilling to provide for their care, the refusal to grant aid under sec. 49.19 penalizes the children of the first marriage for conditions over which they have no control. To say that the second husband *should* support such children raises a moral issue and completely ignores both the legal question and the fundamental purpose of the aid to dependent children program.

BCL:DPJ:

Legislators—Constitutionality—Salaries—General discussion of partial veto of bill 583, S., regarding salaries and terms of officers and legislators. Legislative action needed to establish pay plan.

August 11, 1966.

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

You have requested my opinion on a series of questions concerning ch. 592, Laws 1965, which became effective July 1, 1966. The act initiated numerous changes in the law relating to the compensation of state agency department administrators and members of the legislature. The act was an outgrowth of bill No. 583, S., which was partially vetoed by the governor in pertinent part as follows:

"4m. 20.530 Members of the legislature. The basic salary of the members of the legislature shall be the minimum of the range. ~~It is the intent of the legislature to recognize the additional time, effort, and responsibility required of its leaders, and to compensate them accordingly. Any member who serves as the speaker and speaker pro tempere of the assembly, the president pro tempere of the senate, the senate and assembly co-chairmen of the joint committee on finance, the senate and assembly majority and minority leaders, the senate and assembly assistant majority and minority leaders and the senate and assembly majority and minority caucus chairmen shall be paid, during their term of office, a salary equivalent to the midpoint of the range.~~

"* * *

"SECTION 13. 1966-67 RANGES. For the 1966-67 fiscal year, the salary ranges for the positions enumerated in SECTION 5 shall be as follows:

"Group I $19,000 to $22,500

Group II $17,000 to $20,500

Group III $15,500 to $18,000

Group IV $14,000 to $16,500

Group V $ ~~9,600~~ to $14,500"

VETOED

QUESTION ONE

Were the partial veto actions taken by the governor within the authority granted him by the Wisconsin constitution?

The answer to this question is "yes".

Art. V, sec. 10, Wis. Const., provides in part:

"* * * Appropriation bills may be approved in whole or in part by the governor, and the part approved shall become law, and the part objected to shall be returned in the same manner as provided for other bills. If, after such reconsideration, two-thirds of the members present shall agree to pass the bill, or the part of the bill objected to, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of the members present it shall become a law. * * *"

The provisions of sec. 11 clearly made bill 583, S., an appropriation bill. The fact that the governor's partial disapproval effectuated a change in policy did not invalidate those parts of the bill approved by him. The parts of the bill approved, taken as a whole, provide a complete workable law.

State ex rel. Martin v. Zimmerman, (1940) 233 Wis 442, 289 N.W. 662;

State ex rel. Wisc. Tel. Co. v. Henry, (1935) 218 Wis. 302, 260 N.W. 486.

QUESTION TWO

Since the chapter provides that the basic salary of members of the legislature shall be the minimum of the range and the governor vetoed the minimum set for group V range, what salary are current legislators entitled to?

It has been speculated that current legislators would be entitled to no salary whatever since line 1m repeals the former statutory level for legislators.

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

"**Extra compensation; salary change.** SECTION 26. [*As amended Apr. 3, 1956*] The legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into; nor shall the compensation of any public officer be increased or diminished during his term of office. * * *"

Ch. 592, Laws 1965, was ineffective to repeal the former statutory salary level for current legislators during the term for which they were elected. Members of the legislature are public officers, and the legislature is without power to increase or decrease salaries of legislators during their terms of office. *State v. Dammann,* (1939) 201 Wis 84, 228 N.W. 593; *Sullivan v. Boos,* (1964) 23 Wis. 2d 98, 126 N.W. 2d 579.

Legislators now serving are entitled, for the remainder of their respective terms, to receive the same compensation they were receiving prior to the enactment of ch. 592, Laws 1965.

QUESTION THREE

What is the status of the salaries of legislators next to be elected?

Ch. 592, Laws 1965, was effective to repeal the former statutory salaries insofar as they apply to legislators to be next elected for terms beginning in January, 1967.

Ch. 592 originally provided that members of the legislature were to receive the minimum of the applicable salary range. Since the governor vetoed the minimum for the range applicable to legislators, legislators to be next elected would be entitled to no salary unless the legislature establishes a new compensation plan acceptable to the governor, or unless the minimum for group V is established prior to the beginning of such terms pursuant to 16.105 (2), (3) and (4), as amended by ch. 592, Laws 1965.

Construction of sec. 13, ch. 592 to place $14,500 as the minimum for group V would lead to an absurd result and was not intended by either the legislature or the governor.

The provisions of 16.105 (2), (3) and (4) were formerly concerned with establishing salary schedules and ranges for positions in the classified service only. Sec. 20.930 (1m) as created by ch. 592, Laws 1965, now makes the procedures there described applicable to salaries for certain department head positions, and since members of the legislature are locked in at the minimum established for group V, the proper authorities under 16.105 (2), (3) and (4) may also review and establish a minimum for legislative salaries.

In an opinion of this office to the commissioner of administration dated June 28, 1966 I advised that the joint committee on finance had continuing power to modify an existing pay plan while the legislature was in session, and the personnel board with the approval of the director and board on government operations could change the schedule for any grade and class when the legislature was not in session, if the change was desirable by reason of changing employment and economic conditions.

Sec. 16.105 (4) was amended by ch. 592, Laws 1965, to provide:

"The standard salary ranges submitted by the director *pursuant to subs. (2) and (3),* 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; provided, that the personnel board, with the approval of the director and board on government operations, while the legislature is not in session, may change the compensation schedule for any grade and class when such action is made desirable by changing employment and economic conditions. *The authority of the joint committee on finance and the board on government operations shall be limited to the revising of the standard salary ranges and the reassignment of classes to salary ranges and approving features required to implement and administer such revisions and reassignments. Except as otherwise provided by law, the joint committee on finance and the board on government operations shall not be empowered under this section to establish longevity pay*

plans or to grant general salary adjustments to all employes. Any modification of the plan under this subsection may be disapproved by the governor within 10 calendar days. A vote of 9 members of the joint committee on finance, or 5 members of the board on government operations is required to set aside any such disapproval of the governor."

It is my opinion that the changes made do not limit the authority of the joint committee on finance (or state personnel board, director of bureau of personnel, and board on government operations, under certain circumstances) to change the salary ranges. The power of the personnel board acting with the approval of the director and board on government operations is a limited one when the legislature is not in session and must be tied to changing employment and economic conditions. It would not appear that there has been any marked change in such conditions which would require a change in the limits of the range for group V, which is now from zero to $14,500.

While sec. 13, ch. 592, Laws 1965, provides that the figures there given shall be the ranges for the positions enumerated for the 1966-67 fiscal year, the act of the governor in vetoing the minimum for group V reduced the minimum for that group to zero, and I am of the opinion that proper authorities can act under the provisions of 16.105 (2), (3) and (4) to provide a reasonable minimum. It is presumed that the legislature and governor have not acted in vain.

QUESTION FOUR

What is the status of the salaries of legislative leaders in the next legislature?

Sec. 5, ch. 592, created 20.930 (1m) to provide in part:

"* * * To this end, the following groups of department head position are established, and the dollar value for the salary range minimum and maximum for each group shall be reviewed and established in the same manner as that provided for positions in the classified service under s. 16.105 (2) (a), (3) and (4). The salary rate for depart-

ment heads upon appointment and subsequent thereto, shall be set at the discretion of the appointing authority within the range for the group to which the position is assigned, subject to the provisions of article IV, section 26 of the constitution of this state."

Authority is granted to establish a minimum for group V. By reason of ch. 592, however, legislative salaries are limited to the minimum. Since the governor vetoed the provisions which would permit legislative leaders to be paid above the minimum, and since 16.105 (2), (3) and (4) apply only to the classified service and to department head positions by reason of 20.930 (1m) as created by ch. 592, there is no authority to place legislative leaders at a higher point in the salary range than is applicable to members of the legislature. Legislators are elected rather than appointed. It could be argued that legislative leaders are appointed by the respective bodies and that such bodies are appointing authorities and could therefore establish the salary to be paid such legislative leaders prior to the commencement of their terms as legislative leaders. However, such legislative leaders are not department heads and such legislative bodies are not appointing authorities, within the meaning of 20.930 (1m) as created by ch. 592, Laws 1965. It is my opinion that the salaries to be paid legislative leaders must be established before they commence their terms as legislative leaders, and may have to be established before they commence their terms as legislators, to be effective during such term.

The legislature may have intended to establish procedures to set salaries for legislative leaders. The provisions of ch. 592, Laws 1965, however, do not provide such procedures and most legislative leaders will receive no extra compensation, unless the legislature reconvenes and enacts a bill acceptable to the governor prior to the commencement of their terms.

Neither do the provisions of assembly joint resolution 163 establish the necessary procedures. Par. (8) thereof provides:

"(8) The joint committee on finance and the joint committee on legislative organization may meet during the interim between recess date and reconvening date for the purpose of reviewing proposals relating to and taking any appropriate action regarding the establishment of legislatives salaries pursuant to chapter , laws of 1965 (Senate Bill 583)."

It should be pointed out that ch. 592, Laws 1965, did not repeal 20.530 (1) (c) and 20.530 (2) as amended by ch. 163, Laws 1965, and which provide a salary for the speaker of the assembly and expense money for certain legislative leaders.

The governor's veto message appears to recognize the fact that ch. 592 does not contain machinery to establish extra pay for legislative leaders, and states:

"* * * I believe this subject should be studied thoroughly and acted upon in a more deliberate manner at a later date."

QUESTION FIVE

May the joint committee on finance act to establish a minimum for group V?

The answer to this question is "yes".

By joint resolution 163 passed June 10, 1966, the legislature *recessed* until Wednesday, January 11, 1967 at 11 a.m., which would be one hour before the opening of the regular session of the succeeding legislature. The resolution provides machinery for reconvening the 1965 regular session prior to the set reconvening date, and provides that the joint committee on finance and joint committee on legislative organization may meet during the interim to review proposals to, and take appropriate action regarding, the establishment of legislative salaries pursuant to ch. 592, Laws 1965.

There is only one regular session of the legislature.

Art. IV, sec. 11, Wis. Const., provides:

"**Meeting of legislature.** SECTION 11. [*As amended Nov. 1881.*] The legislature shall meet at the seat of government

at such time as shall be provided by law, once in two years, and no oftener, unless convened by the governor, in special session, and when so convened no business shall be transacted except as shall be necessary to accomplish the special purposes for which it was convened. [*1880 J.R. 9S, 1881 J.R. 7A, 1881 c. 262, vote Nov. 1881.*]"

Sec. 13.02, Stats., provides:

"**Regular sessions.** The regular session of the legislature shall commence at 12 M. on the 2nd Wednesday of January in each odd-numbered year."

In *State ex rel. Thompson v. Gibson,* (1964) 22 Wis. 2d 275, 290, 125 N.W. 2d 636, it was stated:

"* * * The ordinary form of termination of a session is by *sine die* adjournment, although we do not here decide that there could be no other form of adjournment which would terminate the session. We hold that one single session may be interrupted by recesses, and validly continue after a recess as long as such recesses can reasonably be said to be taken for a proper legislative purpose. The recess in the instant action fulfilled this requirement."

The court stated that the legislature is not in session where there has been termination or dissolution of a session, usually by adjournment *sine die,* but that the legislature has power to recess, which is a temporary adjournment during the biennial session, and that the legislature is then technically in session.

It is presumed that the recess of the legislature was for a legitimate legislative purpose, and I am of the opinion that the legislature is in session within the meaning of sec. 16.105 (4), as amended by ch. 592, Laws 1965, and that the joint committee on finance has authority to establish a minimum salary range for the positions covered in group V. The issue is not entirely free from doubt, however, since the Wisconsin court in *Thompson v. Gibson, supra,* indicated that *sine die* adjournment is not the only means by which a session can be terminated. If the legislature is not "in session" the joint committee on finance

cannot act, nor can the legislature reconvene itself as contemplated in joint resolution 163.

As can be seen from the foregoing discussion, troublesome questions have been raised as to the authority of the joint committee on finance and there is reasonable grounds for argument as to whether the legislature is in session although in recess. I therefore recommend that you consult with the governor as to the advisability of calling a special session of the legislature to review the preliminary work done on legislative pay plans, and to take appropriate action at the full legislative level after full public hearings are held.

QUESTION SIX

When must the action on a legislative pay plan be completed to enable the newly elected legislators to receive a higher salary?

The governor has 10 days in which to disapprove of actions taken by the joint committee on finance, and that committee can thereafter act to override the governor's disapproval. It is therefore important that procedures in the bureau of personnel, state personnel board, and joint committee on finance be expedited so that there will be adequate time for the distribution of information to the public on proposed plans, full public hearings, and ample time for thorough consideration by the joint committee on finance.

The minimum salary range to be adopted will only affect legislators to be next elected, and to benefit therefrom such plan must be in full force before the beginning of the terms of such legislators. In my opinion those terms begin the first Monday in January, 1967.

Neither the constitution nor the statutes are specific as to when the terms of assemblymen, who are elected for two year terms, or senators, who are elected for four year terms, commence.

See Art. IV, secs. 4, 5, 6, 7, 11 and 28, Wis. Const., as to terms of assemblymen, senators, qualifications, organization, meetings, and oath before assuming duties.

"The general rule is that, where no time is fixed by the constitution or statute, the term begins, in the case of elective offices, on the day of election * * *." 67 C.J.S., Officers, §45, 199.

I am of the opinion that such general rule does not apply in Wisconsin because the Wisconsin constitution implies that such terms commence on the first Monday in January of the year following election.

Sec. 14.02 provides that the full terms of governor, lieutenant governor, secretary of state, treasurer, and attorney general shall commence on the first Monday of January following their election. This is in accordance with the provisions of Art. XIII, sec. 1, Wis. Const., which establishes the political year as commencing on the first Monday of each year. The section, for transitional purposes, provided in part that:

"* * * All state, county or other officers elected at the general election in the year 1881, and *whose term of office would otherwise expire* on the first Monday of January in the year 1884, shall hold and continue in such offices respectively until the first Monday in January in the year 1885."

I am of the opinion that the section applies to assemblymen and senators, and that their terms commence on the first Monday of January following their election. *State ex rel. Husting v. State Board of Canvassers,* (1915) 159 Wis. 216, 150 N.W. 542; 1904 OAG 114.

At the time Art. XIII, sec. 1, Wis. Const., was amended in 1882 to include the language "would otherwise expire", Art. XIV, sec. 14, provided as it did when the original constitution was adopted:

"The senators first elected in the even-numbered senate districts, the governor, lieutenant governor and other state officers first elected under this constitution, shall enter upon the duties of their respective offices on the first Monday of June next, and shall continue in office for one year from the first Monday of January next; the senators first elected in the odd-numbered senate districts,

and the members of the assembly first elected, shall enter upon their duties respectively on the first Monday of June next, and shall continue in office until the first Monday in January next."

This section is still part of the Wisconsin constitution.

Art. IV, sec. 11, provides that the legislature shall meet "at such time as shall be provided by law, once in two years".

At an early date the legislature, by law, provided:

"13.02 **Regular sessions.** The regular session of the legislature shall commence at 12 M. on the 2nd Wednesday of January in each odd-numbered year."

This section has nothing to do with the term of office of such legislators. It could have provided for a meeting date later in the year. Legislators may have been under the impression that their terms began on this date, and found it a convenient date to take their oaths of office. However, it is clear that they could take and file their oaths at an earlier date. See Art. IV, sec. 28, Wis. Const., and sec. 13.03, Stats.

For a number of years the secretary of state in the notice for primary and general elections has in the case of state constitutional officers such as governor, etc., referred:

"A Governor, for the term of two years, to succeed ....., whose term of office will expire on the first Monday of January, ..."

In the case of assemblymen and senators he has used the following:

"* * * for a term of two years [or four years] to succeed the present incumbents, whose terms of office will expire on the second Wednesday of January, ..., to-wit:"

However, where the constitution establishes the date on which the term of certain offices commence or expire,

neither the legislature nor an administrative official can alter the term. *State v. Hastings,* (1860) 10 Wis. 525.

One elected to the legislature is not a member nor is he entitled to vote, but is an assemblyman-elect or senator-elect until he qualifies and takes his oath. Art. IV, sec. 28, Wis. Const.; *State Bank of Drummond v. Nuesse,* (1961) 13 Wis. 2d 74, 108 N.W. 2d 283.

This does not mean that the term for which he was elected does not begin prior to the time he takes his oath and qualifies. 43 Am. Jur., Public Officers, §155, Commencement of Term, 15.

QUESTION SEVEN

Is the appointment of a fixed term public officer made to the salary range existing at the time of his appointment?

Under sec. 20.930 (1m), department heads are appointed at a salary "rate" within a salary "range". They are not appointed to a salary range.

Where the department head is a public officer serving for a fixed term, the restriction of Art. IV, sec. 26, Wis. Const., applies:

"* * * nor shall the compensation of any public officer be increased or diminished during his term of office. * * *"

I make no determination herein as to which department heads are public officers within the meaning of the constitutional provision.

Some of the earmarks of a public officer are a fixed term, requirements to take oath, give bond, and designation as "officer". However, whether a person occupying a position of public employment is a public officer is not determined by the salary paid to him, by the importance of his duties, or by the manner he is chosen, but rather by the nature of the duties he performs. A person employed cannot be a public officer, however chosen, unless there is devolved upon him by law the exercise of some portion of the sovereign power of the state in the exercise of which the public has a concern. *State ex rel. Martin v. Smith,* (1942) 239

Wis. 314, 1 N. W. 2d 163; *State ex rel. Sachtjen v. Festge,* (1964) 25 Wis. 2d 128, 130 N. W. 2d 457.

Most of the department heads listed are charged with administrative and enforcement powers and would be classed as public officers. The restriction applies to state public officers paid out of the state treasury, serving for a fixed term.

The constitutional provision cannot be circumvented by an attempted appointment to a salary range. A public officer cannot be advanced within the range applicable to his position so as to benefit during his term, and an adjustment of the salary range up or down would not affect the salary of such public officer during his term. If his salary is currently below the minimum for the range it cannot be changed at the discretion of his appointing authority, and where he is appointed for a fixed term he cannot resign and, assuming he is reappointed, collect a higher salary during his term. 44 OAG 242; *State ex rel. Sachtjen v. Festge, supra.*

In the *Sachtjen* case it was stated at pp. 137-138:

"* * * the section prohibits diminution as well as increase of compensation. It was doubtless intended to protect public officers from reprisals as well as to prevent improper rewards. * * * It is true that the rising price level has usually made sec. 26 a burden to public officers, and more so to justices and judges, but we think the construction must be made in the light of the intended purpose. So viewed, the longer terms of the judges provide no basis for concluding that the constitution makers did not intend sec. 26 to apply to them."

The compensation to be paid a public officer must be fixed at or prior to the beginning of his term of office, and cannot be increased or diminished during that term. Ch. 592, Laws 1965, does not provide for a set escalating plan whereby the salary to be paid in the first, second, third or fourth years of a term would be predetermined so as to increase or decrease over the term. It could be argued that if such a plan were established prior to the beginning of

the term that the salary rate would consist of the entire plan, and that there would be no increase or decrease of that rate during the term. In view of the wording of 20.930 (1m) as created by ch. 592, Laws 1965, it is questionable whether an appointing authority would have power to establish such an escalating compensation plan at the time of appointment, or at least prior to the beginning of the term of the individual public officer. In view of the strict provisions of Art. IV, sec. 26, Wis. Const., and interpretations thereof by the courts, a disbursing officer should not authorize payment of public monies out of the state treasury at any increased rate under such a plan unless and until the issue has been determined in a proper case by a court of competent jurisdiction.

While the caution used by the supreme court in *State ex rel. Thomson v. Giessel,* (1952) 262 Wis. 51, 64, 53 N.W. 2d 726, was directed at that part of Art. IV, sec. 26, which deals with extra compensation for past services, it is equally applicable here:

"* * * If exceptions are to be made, they should not come from the legislature or the court but from those whose proper function it is to amend the constitution. * * *"

We are not concerned here with a situation where the legislature has by law provided that the terms of designated officers shall expire on a certain date and with the creation of new terms of office and with respect to rights of persons appointed thereto at increased compensation. *State ex rel. Reuss v. Giessel,* (1952) 260 Wis. 524, 51 N.W. 547.

BCL:ACC:RJV:

Industrial Commission—Safety Devices—Under sec. 101.10 (4) and Ch. Ind. 1 WAC the industrial commission can require employers to observe the "safe place" statute, but cannot enforce it to protect pupils in school shop courses. Pupils may be indirectly protected since schools would have to employ safety devices for teachers.

August 15, 1966.

JOSEPH C. FAGAN, *Chairman*
Industrial Commission

You ask whether the industrial commission can enforce its safety orders set forth in Ch. Ind 1 of the Wisconsin administrative code to protect pupils in school shop courses. Ch. Ind 1, WAC, relates to required use of safety devices such as guards on machines and eye protection. Such orders have been promulgated by the commission pursuant to authority granted in sec. 101.10 (4). These orders concern the "safety devices", "safeguards" and "methods and processes" of safety as required by sec. 101.06 (the safe-place statute) in places of employment, and provides:

"Every employer shall furnish employment which shall be safe for the employes therein and shall furnish a place of employment which shall be safe for employes therein and for frequenters thereof and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employes and frequenters. Every employer and every owner of a place of employment or a public building now or hereafter constructed shall so construct, repair or maintain such place of employment or public building as to render the same safe."

See also, sec. 101.07 (1).

The last sentence of sec. 101.06 relates to another phase of safety, that of structural defects in buildings. Both places of employment and public buildings are included within its scope. Ch. Ind 35, WAC, prescribes the main building structure safety standards promulgated by the industrial commission pursuant to authority granted in sec. 101.10 (5).

The employer is required to furnish and use "safety devices", "safeguards", and "methods and processes" of safety adequate to render premises safe to "employes" and "frequenters" only in "places of employment". The owner

or employer is required to conform to structural safety standards in both "places of employment" and "public buildings".

A school is not a "place of employment" as to frequenters. *Mlynarski v. St. Rita's Congregation,* (1966) 31 Wis. 2d 54, 57, 142 N.W. 2d 207; *Niedfelt v. Joint School District,* (1964) 23 Wis. 2d 641, 647-648, 127 N.W. 2d 800; *Kirchoff v. Janesville,* (1949) 255 Wis. 202, 206-207, 38 N.W. 2d 698.

However, a school is a "place of employment" as to teachers therein because teachers are considered "employes" (*Sullivan v. School District,* (1923) 179 Wis. 502, 504-505, 191 N.W. 1020) and school districts are "employers" under sec. 101.01 (3).

I am of the opinion that the distinction made that schools are "places of employment" as to teachers but not as to pupils or frequenters probably will not be maintained in the future, especially in light of *Mlynarski v. St. Rita's Congregation,* (1966) 31 Wis. 2d 54, 142 N.W. 2d 207 (see discussion, *infra*). For purposes of this opinion, however, it is unnecessary to determine that schools are "places of employment" as to pupils or frequenters in order to require "safety devices", "safeguards" or "methods and processes" of safety in school shops.

Since schools are "places of employment" as to teachers, schools must adopt "safety devices", "safeguards" or methods and processes" of safety for the protection of teachers. Thus in practice, the commission can require school shops to be equipped with "safety devices", "safeguards" or "methods and processes" of safety.

A school is a public building requiring the owner to build and maintain it free from structural defects as to frequenters. Sec. 101.06; *Mlynarski v. St. Rita's Congregation,* (1966) 31 Wis. 2d 54, 57, 142 N.W. 2d 207; *Niedfelt v. Joint School District,* (1964) 23 Wis. 2d 641, 647, 127 N.W. 2d 800; *Heiden v. Milwaukee,* (1937) 226 Wis. 92, 101, 275 N.W. 922.

A pupil attending school has been held not to be a frequenter in the school building within the meaning of 101.06.

Niedfelt v. Joint School District, (1964) 23 Wis. 2d 641, 645, 127 N.W. 2d 800; *Sullivan v. School District,* (1923) 179 Wis. 502, 504-506, 191 N.W. 1020.

Considerable doubt as to the validity of this rule today has resulted from *Mlynarski v. St. Rita's Congregation,* (1966) 31 Wis. 2d 54, 58-59, 142 N.W. 2d 207.

In the *Mlynarski* case, a 10-year-old girl pupil was injured when she fell against a school building window from a 4-foot wall on which she was walking. The incident occurred outside the school building itself. The court found that the pupil was not a "frequenter", not because previous judicial definition excluded her from the class considered as frequenters, but because the statutory definition of the term "frequenter", sec. 101.01 (5), required injury going into or inside rather than outside the public school building. Sec. 101.01 (5) defines the term "frequenter" as follows:

"(5) The term 'frequenter' shall mean and include every person, other than an employe, who may go in or be in a place of employment or public building under circumstances which render him other than a trespasser."

While not specifically overruling the frequenter rule as applied to pupils established in *Sullivan v. School District,* (1923) 179 Wis. 502, 191 N.W. 1020, the court pointed out that the *Sullivan* decision was based on the doctrine of governmental tort immunity which was abrogated recently in *Holytz v. Milwaukee,* (1962) 17 Wis. 2d 26, 115 N.W. 2d 618, and therefore the *Sullivan* rule should be changed. The court stated at 31 Wis. 2d 59:

"Now that the doctrine of governmental immunity from tort liability has been abrogated, the foundation underlying *Sullivan* has been taken away and the *Sullivan* rule should be changed. If parents and others who are temporarily on the premises under circumstances which do not make them trespassers are frequenters entitled to the protection afforded by the safe-place statute it defies logic and common sense why students attending classes in that building should not be entitled to that same protection. * * *"

Therefore it is my opinion that the law presently does not allow the commission to enforce safety orders of Ch. Ind 1, WAC, specifically to protect pupils in school shop courses. Nevertheless, the commission can require school shops to be equipped with "safety devices", "safeguards" or "methods and processes" of safety, because it has the authority to enforce safety orders for the protection of the teachers.

It is my further opinion that in light of *Mlynarski v. St. Rita's Congregation,* (1966) 31 Wis. 2d 54, 142 N.W. 2d 207 and *Holytz v. Milwaukee,* (1962) 17 Wis. 2d 26, 115 N.W. 2d 618, pupils attending school probably are "frequenters" within the meaning of 101.01 (5) while inside school buildings, thereby requiring schools to comply with the safety orders as to structural defects.

BCL:JPA:

Fences—Right-of-Way—Sec. 90.035 relating to partition fences does not apply to highway rights of way.

August 16, 1966.

V. L. FIEDLER, *Secretary*
State Highway Commission

You ask my opinion regarding the following question:

(1) Does Section 90.035 apply to the partition between privately owned agricultural or grazing lands and highway lands owned in fee or occupied by easement, dedication, or user by the state or municipal subdivisions of the state, such as a town, county, village, or city?

My answer to the question is "no".

Sec. 90.035 created by ch. 200, Laws 1963, provides:

"**90.035 Public fences.** Where the 2 parties, one of whom is the state or a subdivision thereof, agree that a fence is

reasonably necessary, the duty to erect and maintain partition fences shall apply equally to the state, as provided in s. 90.03, and its subdivisions as occupants of lands whenever such lands are bounded by privately owned agricultural or grazing lands."

It is a statute in *para materia* with sec. 90.03:

"**90.03 Partition fences; when required.** The respective occupants of adjoining lands, used and occupied for farming or grazing purposes, and the respective owners of adjoining lands when the lands of one of such owners is used and occupied for farming or grazing purposes, shall keep and maintain partition fences between their own and next adjoining premises in equal shares so long as either party continues to so occupy the same, and such fences shall be kept in good repair throughout the year unless the occupants of the lands on both sides otherwise mutually agree."

Ch. 90 was created by Ch. 14, 1849 Rev. Stats. In essence it provides for erection and maintenance of partition fences between lands in cases where all the lands are used and occupied for farming or grazing purposes, or where the lands of one of the owners are so used and occupied for a sharing of the cost thereof; and for the submission of disputes arising under Ch. 90 to fence viewers designated in sec. 90.01. Then fence viewers constitute the exclusive tribunal for the determination of matters so submitted to them. Their jurisdiction from which no appeal is provided is confined solely to the instances specified in Ch. 90, and must be strictly construed as in derogation of the common law. *Butler v. Barlow,* (1853) 2 Wis. *10.

Sec. 90.035 is on its face neither mandatory nor self-executing. Before the state highway commission could have any "duty" imposed upon it by that statute, it would first have to agree voluntarily that such fences were reasonably necessary. Even if it did so agree, however, I am of the opinion that 90.035 was not intended to apply to highway rights of way.

Sec. 90.035 imposes an additional condition—namely, that the state be an "occupant" of the land to be affected. In my view the state does not "occupy" land within the mean-

ing of 90.035, because of the mere presence of a public highway thereon, whether the right of way is owned by the state in fee or consists of an easement only. Ch. 90 was, and is, designed to give adjoining landowners mutual causes of actions for trespasses of agricultural livestock owned by them. See *Taylor v. Young,* (1884) 61 Wis. 314, 21 N.W. 488; *Schumdlach v. Danner,* (1921) 173 Wis. 513, 181 N.W. 727. Since the state may not be sued for any trespass it may commit, I am of the opinion that sec. 90.035 cannot apply, because it is not the type of "occupant" envisioned by Ch. 90—namely, one suable in trespass. In addition, a failure to perform a duty to erect and maintain partition fences under Ch. 90 can be dealt with only by recourse to sec. 90.11, which provides for the imposition of the cost of erection and maintenance as a special charge upon the lands of the noncomplying owner. State lands may not be taxed or assessed. *State ex rel. Wisconsin Univ. Bldg. Corp. v. Bareis,* (1950) 257 Wis. 497, 44 N.W. 2d 259. Again this consideration impels me to conclude that, since the state cannot be compelled to pay any part of the fencing costs under Ch. 90, it is not within the class of owners or occupants contemplated by that chapter as being amenable to enforced payment through special charges under sec. 90.11. In these connections, it must be noted that the term "occupants" is not confined solely to 90.035. It appears in other sections of Ch. 90, notably secs. 90.03 and 90.11.

The answer to question (1) makes it unnecessary to consider other questions you have asked which are contingent upon an affirmative answer to the first question.

BCL:REB:

Handicapped Children—Counties—County may not contract with private association to construct and operate a greenhouse for handicapped children. County may accept gift of foregoing, employ handicapped adults, authorize transportation for them, and sell products.

August 17, 1966.

WILLIAM L. SEYMOUR
Corporation Counsel, Walworth County

Walworth county operates a special school for handicapped children under Ch. 41, Wis. Stats. A private unincorporated association seeks county permission to construct and operate a greenhouse on the county's special school grounds as a part of a "sheltered workshop" to be operated in conjunction with the special school. This greenhouse would also be used by physically handicapped adults and both adults and children would be furnished transportation, the cost of which presumably would be borne by the county. The cost of the operation of this proposed greenhouse would also be borne by the county, except insofar as defrayed by income derived from a proposed sale of greenhouse plans and flowers to the public.

You ask:

(1) May the county contract with a private association to construct and operate such a greenhouse for the use of handicapped children and physically handicapped adults?

(2) May the county accept a gift from a private association and the county itself operate such an installation through the county's handicapped children's education board?

(3) May the county use public funds to furnish transportation for handicapped adults to such an installation?

(4) May the county authorize the sale of plants and flowers at such an installation to defray the cost of operation?

County boards have only such legislative powers as are conferred upon them by statute, expressly or by clear implication. *Maier v. Racine County,* (1957) 1 Wis. 2d 384, 385, 84 N. W. 2d 76; *Spaulding v. Wood County,* (1935) 218 Wis. 224, 228, 260 N. W. 473; *Dodge County v. Kaiser,* (1943) 243 Wis. 551, 557, 11 N. W. 2d 348.

The committee of the county board responsible for schools or services for handicapped children is the handicapped children's education board (hereafter called HCE board). Its duties include the power "to do all things necessary to accomplish such objectives including but not restricted because of enumeration the authority to erect buildings subject to county board approval and employ teachers and other personnel". Sec. 41.01 (1m) (c). Although the statutes are not express as to what specifically is referred to by "such objectives" it is a reasonable inference that the legislature intended a rather broad grant of power to the committee in connection with its duties of establishing, organizing, operating, maintaining and supervising the county's school and other services for handicapped children. Sec. 41.01 (1r) (c), dealing with the scope of the program, states that it may provide for "classes or special treatment and instruction centers of one or more types of handicapped children".

The legislature has vested in the HCE board the power to erect buildings subject to county board approval. This is not a transferable power, except that under 41.01 (1m) (f) the county board may assign the functions of the county HCE board to one of the cooperative educational service agencies operating in the county. The HCE board is specifically authorized by the same statutes to contract with the cooperative educational service agency or a local board of education for professional and administrative services. The HCE board may employ teachers and other personnel in the furtherance of its statutory responsibilities, but it may not by contract assign its functions. Thus the HCE board may not by contract or otherwise transfer to another agency, public or private, its power to erect buildings or to maintain or operate a county school or other services for handicapped children.

The county board, of course, could accept a donation or gift from a private association for any public governmental purpose under the provisions of sec. 59.07 (17). A donation for the purpose of constructing or maintaining a workshop or greenhouse for the use of handicapped children would be a proper public governmental purpose. Such a donation

could not be accepted, however, if it were conditioned upon the use of the facility by handicapped adults or conditioned upon its being operated or maintained by any unauthorized agency.

The statutes speak only of classes, special treatment, services, etc., for handicapped children. You have found no statutory authority for extending such a program to include adults. We find no authority for adults participating in such a program on the same basis as the children. This is not to say, however, that the county is prohibited, for example, from employing physically handicapped adults to instruct or supervise the children or to do other work at the school within their capabilities.

In this context it would be a proper matter for the HCE board to exercise discretion as to which county employes, whether handicapped or not, may be authorized transportation to or from the center at county expense.

Finally, you ask whether the county may sell greenhouse plants and flowers in connection with the operation of such a facility. Our supreme court has said that a county may not go into the abstract business for profit without legislative authority. *Rock County v. Weirick,* (1910) 143 Wis. 500, 506, 128 N. W. 94. Previous opinions from this office have concluded that a county may not act in a proprietary capacity, such as bidding on highway contracts, 22 OAG 634 (1933), or maintaining a farm as a separate enterprise, 41 OAG 162 (1952). The latter opinion indicated that a county might, in the performance of its authorized governmental functions, engage in incidental operations which might be beyond its authority if carried on as independent functions. Also, see *Vaudreuil Lumber Co. v. Eau Claire County,* (1942) 239 Wis. 538, 2 N. W. 2d 356.

It was demonstrated in *Heimerl v. Ozaukee County,* (1949) 256 Wis. 151, 40 N. W. 2d 564, that a statute would be constitutionally defective if it authorized a county to carry on an independent competitive business unless such business involved a public function or public utility. See Art. IV, secs. 4 and 22, Wis. Const. In *Heimerl* it was held that the doing of private road work by a county was without

any direct advantage accruing to the public and was engaging in private business. But here the marketing of greenhouse products does involve an undisputed public function, i.e., the county's normal operation of its handicapped children's school or center, and such incidental marketing is clearly distinguishable from an independent county undertaking such as the building of private roads or the engaging in farming operations not associated with other legitimate county functions. It is my opinion that the county may engage in the incidental marketing of the products of a greenhouse operated in connection with a handicapped children's school or center.

BCL:JEA:

Real Estate Brokers Commission—Licenses—Corporation operating a "sell your own home" service would probably be required to be licensed as a real estate broker under Ch. 136, but the facts of each case must be evaluated.

August 18, 1966.

ROY E. HAYS
Secretary-Counsel
Real Estate Brokers' Commission

You inquire whether a corporation which conducts a "for sale by owner" business must be licensed as a real estate broker. A number of such businesses are being operated in Wisconsin. The facts in each case may affect any legal opinion, and this opinion is restricted to the following hypothetical fact situation based upon information furnished me by your office.

I.

ASSUMED FACTS

A corporation, "For Sale By Home Owner Corporation", solicits clients by newspaper, radio, television and direct mail advertising. One source of contacts is from classified

advertisements by which owners attempt to sell their own homes.

The home owner wishing to sell his home registers the home with the corporation, giving detailed physical information, assessed value, taxes, extras included, address, location of nearby schools, hospitals, etc., and the asking price. The owner enters into a contract with the corporation whereby the latter agrees to perform the following "advertising" services:

1. Preparation and delivery of 100 sales brochures with photographs.

2. Furnishing of reflectorized sign "For Sale By Owner".

3. Delivery of homeowner's manual and phonograph record containing sales advice.

4. Maintaining of supply of brochures at the corporation's "Clearing House" to be furnished to all persons who in the opinion of the company appear in good faith to request the information as possible buyers of the property directly from the owner.

5. Mailing of brochures to personnel managers of companies in the area, who may forward the information to possible buyers.

The contract provides that the services by the corporation shall terminate in 180 days, or upon notification that the services are no longer needed. On termination all materials furnished are to be returned to the corporation.

The contract fee is $125, payable in advance and irrespective of whether a sale is effected. No additional fee is payable in the event of a sale and the homeowner is not liable to the corporation for any further fee, unless the advertising materials are not returned or unless the owner participates in advertising in selected newspapers in an arrangement whereby his advertisement listing his own telephone number is included with other owner-clients of the corporation in a column in the classified section contracted for by the corporation, with pro rata cost billed by the corporation to participating owner-clients. Such advertisements

also carry the name and phone number of the corporation, solicit other owners to sell their own homes via the service, and invite buyers to call the corporation for information on other homes for sale by owner-clients.

The contract further provides:

1. That the corporation does not guarantee that the owner will be able to sell his home himself, with or without the service or with the services of a real estate broker.

2. That the corporation has not indicated an opinion as to value, appropriate asking price, likelihood of sale, proper terms of sale or whether a real estate broker should be employed.

3. That the corporation "has not and will not offer or attempt to offer to negotiate a sale, exchange, purchase, rental or financing of this or any other property" owned by the owner-client.

4. That the corporation "has not and will not in any way participate or attempt to participate in my efforts to sell or rent the above property except as stated in the engaged services * * * and the right and obligation to negotiate or attempt to negotiate with prospects being reserved exclusively to me".

5. That the corporation will not render legal advice in connection with the sale or with regard to any liability to any real estate broker, engaged or to any other person and that the corporation has encourgaged the owner to seek the advice of an attorney in all phases of the transaction.

The corporation does not contract to, but customarily makes, offer to purchase and acceptance forms available to the client. It also conducts a consulting service for answering problems which may arise.

The corporation is listed in the yellow pages of the telephone directory under the heading "Real Estate" and has a display advertisement in said section, which provides in part: "Buy Direct and Save. Display Room of Homes for Sale by Owners. You Too can Sell Your Own Home and Save." The only name and address listed is that of the corporation.

II.
DISCUSSION

If the corporation conducts an operation which brings it within any one of the definitions of "real estate broker" contained in sec. 136.01 (2), and is not excepted by reason of sec. 136.01 (6), a license is required.

The attempted disclaimer by the corporation that it is not acting as a broker in any manner and does not participate in the acts of negotiation of a sale, and is not acting as a sales agent, will not exempt the corporation from the necessity of licensing if the acts performed or held out to be performed by the corporation bring it within the definition of real estate broker in sec. 136.01 (2).

The two subsections of sec. 136.01 (2), which may be applicable are (a) and (b), which provide:

"(2) 'Real estate broker' means any person not excluded by sub. (6), who:

"(a) For another, and for commission, money or other thing of value, sells, exchanges, buys or rents, or *offers* or attempts to *negotiate a sale,* exchange, purchase or rental of an interest or estate in real estate;

"(b) Is engaged wholly or in part in the *business of selling real estate* to the extent that a pattern of real estate sales is established, whether or not such real estate is owned by such person; * * *"

The promoters of the plan evidently claim to sell only advertising services of a do-it-yourself type, or have attempted to create an operation in the nature of a middleman, which in some states may not require licensing.

Some jurisdictions recognize the difference between a broker and a middleman. A middleman is employed merely to bring parties together who desire to exchange, or buy or sell property; and in such transaction his services are not rendered as the agent of either party, but he merely puts the parties in a position where they may make their own contracts, and he may later receive a commission from both. 12 C.J.S. 8.

In *Ames v. Ideal Cement Company,* (1962) 235 N.Y.S. 2d 622, 625, a case involving a merger of two corporations, the court pointed out the legal distinction which is made in New York between finders and brokers. The court held that the statute of frauds did not apply to a finder and hence plaintiff could recover in absence of evidence of acts of negotiation.

"The same distinction between a finder (who finds, interests, introduces and brings the parties together for the deal which they themselves negotiate and consumate) and a broker (whose duty is to bring the parties to an agreement on his employer's terms) has been noted in all the decisions dealing with the subject * * *. A more precise designation for a finder would appear to be an 'intermediary' or a 'middleman.'

"The services performed by finders may vary from case to case. But their distinction from the status of a broker, if the circumstances of the particular case require such a distinction to be drawn, lies in their bringing the parties together with no involvement on their part in negotiating the price or any of the other terms of the transaction. Of course, with respect to real estate, commissions are payable only to a licensee and only when he produces a buyer who agrees to seller's terms, unless otherwise expressly agreed."

It is clear that the Wisconsin statutes, however, require licenses of individuals who are not brokers in the historical sense of the word. Persons who are not in fact agents are required to be licensed under certain circumstances.

In the instant case there is a contract, the corporation agrees to perform services for another, and there is consideration. The fact that a commission is not involved is not material. The critical issues under 136.01 (2) (a) are whether the corporation is offering for sale or selling an interest in real estate, or is offering or attempting to negotiate a sale of real estate. Under 136.01 (2) (b) the question is whether the corporation is engaged in the business of selling real estate.

In *Howard v. Heinig,* (1926) 191 Wis. 166, 170, 210 N.W. 414, our supreme court considered sec. 136.01 (2) (a) (sub-

sec. (b) had not been adopted at that time), and held that an individual hired on a commission basis to put on an advertising campaign to sell cemetery lots, whose duty it was to arrange for advertising and to hire salesmen to sell lots at prices fixed by the employer, was not required to be licensed as a real estate broker. The court did not determine whether the actual salesmen were required to be licensed. At p. 170 the court stated:

"* * * As sales manager and director of the sales force the plaintiff was not offering for sale or negotiating the sale of defendants' property and was therefore not required to be a licensed real-estate broker. * * *"

The court has not construed the word "negotiate" as used in 136.01 (2) (a) in the phrase "or offers or attempts to negotiate a sale".

Black's Law Dictionary, 3rd ed. page 1235, terms "negotiation":

"The deliberation, discussion, or conference upon the terms of a proposed agreement; the act of selling or arranging the terms and conditions of a bargain, sale or other business transaction."

People v. Augustine, 232 Mich. 29 204 N.W. 747, 748 approves an instruction insofar as it defines "negotiate" as:

"It is that which passes between parties or their agents in the course of *or incident to the making of a contract;* and is also defined as conversation in the arranging of terms of the contract."

65 C.J.S., p. 1273, defines "negotiate", to wit:

"The word may be used in two senses, as meaning to discuss or arrange for a sale or bargain, *or the preliminaries of a business transaction,* and also to sell or discount negotiable paper, or assign or transfer it by endorsement or delivery." Citing, *State v. Gordon,* 231 Mo. 547, 133 S.W. 44.

In *Mason v. Mazel,* 82 Cal. App. 2d 769, 187 P. 2d 98, 100, a real estate case, "negotiate" is defined:

"To conduct communications or conferences as a basis of agreement."

Watson v. Holland, 155 Fla. 342, 20 So. 2d 388, 393, defines "negotiate", to wit: "To discuss or arrange a business transaction."

It is my opinion that the court would place a more liberal definition on the term in 136.01 (2) (a), in view of the use of the present tense and words "or offers or attempts to negotiate" than it has on the past tense of the word when used in a broker's listing contract in commission disputes.

"* * * In *Munson v. Furrer* (1952), 261 Wis. 634, 53 N.W. (2d) 697, we construed the word *'negotiated,'* when so used in a real-estate broker's listing contract, to mean that the efforts of the broker to interest a prospective purchaser must have proceeded to the point where the prospect would be considered a likely purchaser." *Dunn & Stringer Investment Co. v. Krauss,* (1953) 264 Wis. 615, 618, 60 N.W. 2d 346.

In 12 Am. Jur. 2d §12, at pp. 781-782, it is stated:

"Many statutes regulating the practice or business of brokers, including real-estate brokers, salesmen, and agents, in terms define the persons who are deemed to be within the meaning thereof. Generally, in the absence of any express definition to the contrary, any person, firm, or corporation which bargains and contracts as a middleman between other persons for a compensation or commission is deemed a broker within the meaning of such statutes. A broker 'negotiates' within the meaning of licensing statutes just as much when he brings the parties together in such frame of mind that they can by themselves evolve a plan of procedure as when he himself carries on the discussion and personally induces an agreement to accept a specific provision. Furthermore, to be engaged in the brokerage business within the meaning of a license law, it is not necessary that one should complete a sale or purchase, since it is immaterial whether or not a person actually does business if he holds himself out as being engaged in it. A prospect of some sort of compensation, however, is generally

deemed indispensable to the status of a broker within the purview of the regulatory laws."

The corporation in question, however, does much more than sell advertising services. It actively solicits prospects and brings buyer and seller together. It acts as a clearing house for buying prospects, furnishes display space at which brochures and information on homes for sale by owners are available and screens prospects and directs buyers to owner-clients. It furnishes a free home buyer's service and advertises that it conducts a home shopping center. We are not advised as to the nature of the consulting service which is available. However, while the corporation's contract disclaims any part in advising as to price, terms, or financing, it would be difficult for the operator of the consulting service to refrain from advising on such material matters as are connected with a home sale and without reference to the specific property or any proposed transaction. Whether the corporation is negotiating or offering to negotiate the sale of real estate depends, of course, upon the actual conduct of the participants in the transaction. Development of the facts in an investigation or prosecution might well establish negotiation or an offer or attempt to negotiate.

It is not necessary, however, to establish that the corporation is engaged in negotiations to require a license. A license is also required if the corporation "is engaged wholly or in part in the business of selling real estate".

The nature of the advertising material furnished, and the content of the advertisements under "Real Estate" in the yellow pages of the telephone directory and in the classified sections of newspapers indicate that the corporation is, at least in part, probably engaged in the business of selling real estate, or is participating in the offering of real estate for sale to the extent that a license is required.

Since there are penal provisions for violation of the licensing statute it is subject to strict construction in favor of the accused. In enforcing the statute, therefore, you should carefully evaluate the facts and circumstances of each case in the light of the above discussion. It is also

suggested that you consider seeking legislative clarification of the precise application of the licensing statute in these and similar situations.

BCL:RJV:

Divorce—Judgments—Where divorce judgment is subject to modification under sec. 247.32, by family court, during life of parties, no court has power to enter final judgment for arrearage in favor of wife, child or assignee. Final judgment can be entered under a certain conditions.

August 19, 1966.

Chairman
Advisory Council for Home and Family
HONORABLE ALLEN J. BUSBY

You have requested my opinion on the following:

"Whether a party to a divorce action entitled to alimony or support money or any assignee such as a welfare department under s. 247.29 (2) of the statutes can get a money judgment for arrearage in alimony or support at any time such arrearage develops, even though the obligation for alimony and/or support has not been terminated and the divorce court retains continuing jurisdiction of the same?"

This opinion is limited to judgments of divorce entered in Wisconsin and to payments which are subject to modification under sec. 247.32, Stats.

The answer to this question is a qualified "no".

Neither the family court nor any other state court has the power to enter a final judgment for arrearages for alimony or support money where the family court retains jurisdiction to modify the divorce judgment prospectively and retrospectively. Final judgment can be entered on the death of one of the parties, on the death of the child, or when the child reaches majority.

"Past-due sums or instalments of alimony are generally recognized as assignable even though non-accrued instalments may not be assigned. * * *" 24 Am. Jur. 2d, Divorce and Separation, §531, Assignment or Anticipation, 655; *Kempster v. Evans,* (1892) 81 Wis. 247, 51 N.W. 327; *Lally v. Lally,* (1913) 152 Wis. 56, 60, 138 N.W. 651.

Sec. 247.29 (2) provides:

"If any party entitled to alimony or support money, or both, is receiving public assistance under ch. 49, such party may assign his right thereto to the county department of public welfare or municipal relief agency granting such assistance. Such assignment shall be approved by order of the court granting such alimony or support money, and may be terminated in like manner; except that it shall not be terminated in cases where there is any delinquency in the amount of alimony and support money previously ordered or adjudged to be paid to such assignee without the written consent of the assignee or upon notice to the assignee and hearing. *When an assignment of alimony or support money, or both, has been approved by such order, the assignee shall be deemed a real party in interest within s. 260.13 but solely for the purpose of securing payment of unpaid alimony or support money adjudged or ordered to be paid, by participating in proceedings to secure the payment thereof.*"

This provision permits the assignment of past due as well as unaccrued instalments of alimony or support money to the county or municipal welfare agency. However, such assignee has no greater rights to enforcement of the collection of arrearages than the assignor possesses.

Under 247.32 the family court has continuing jurisdiction over alimony or other allowance for the wife and children.

Sec. 247.32 provides:

"**Revision of judgment.** After a judgment providing for alimony or other allowance for the wife and children, or either of them, or for the appointment of trustees as aforesaid the court may, from time to time, on the petition of either of the parties and upon notice to the family court commissioner, revise and alter such judgment respecting

the amount of such alimony or allowance and the payment thereof, and also respecting the appropriation and payment of the principal and income of the property so held in trust, and may make any judgment respecting any of the said matters which such court might have made in the original action. But when a final division of the property shall have been made under s. 247.26 no other provisions shall be thereafter made for the wife."

In 24 Am. Jur. 2d, Divorce and Separation, §713, Action at Law, p. 819, it is stated:

"Although payment of alimony may usually be enforced by a more expeditious remedy, in some jurisdictions an action at law may be maintained on a domestic decree, provided the decree is final. Thus, an independent action for arrears is appropriate where the husband has moved from the county in which the divorce action was brought. But where arrears of alimony or support are subject to modification the wife cannot maintain an action at law upon the judgment nor resort to remedies at law which are designed for use in the enforcement of a final judgment for money."

A judgment for alimony or support money is under the control of and subject to revision by the court during the life of the parties and does not create a debtor-creditor relationship of the usual sort, and the statute of limitations does not apply. Since it is not a final judgment, it will not support a garnishment action under a statute which requires that there be a final judgment before garnishment. Under 247.30 it may be imposed as a charge upon specific real estate and may be enforced by execution. The most effective manner of enforcement is by contempt proceedings and an action of law cannot be maintained thereon. The court which retains jurisdiction may cancel or adjust arrearages retrospectively or make provision for their payment over a period of time. *Ashby v. Ashby,* (1921) 174 Wis. 549, 554, 183 N.W. 965; *Larson v. Larson,* (1946) 248 Wis. 352, 21 N.W. 2d 725; *Courtney v. Courtney,* (1947) 251 Wis. 443, 29 N.W. 2d 759; *Miner v. Miner,* (1959) 10 Wis. 2d 438, 103 N.W. 2d 4; *Gissing v. Gissing,* (1961) 13 Wis. 2d 556, 559.

In the *Larson* case the court which retained continuing jurisdiction did amend its judgment to include a judgment for alimony and support money arrearage and did provide for enforcement of collection by contempt proceedings. However this judgment continued to be subject to control of the court and continued to be subject to modification. The court noted that the judgment did not require the payment of the gross sum at once. It really served to establish the amount of the arrearage and set up a schedule for payment.

Applications for enforcement of alimony or support money judgments should be made to the court which granted the original judgment or to its successor. *Barber v. Barber,* 2 Pin. 297, 1 Chand. 280; *Luedtke v. Luedtke,* (1966) 29 Wis. 2d 567, 139 N.W. 2d 553.

Upon the death of the party obligated to support, the judgment can no longer be modified and a claim may be filed in probate court against the deceased's estate to collect arrearage. *Will of Burghardt,* (1917) 165 Wis. 312, 162 N.W. 317.

Where the children have reached majority, the family court does not have jurisdiction to revise or alter a support order. At that time the wife, if entitled to the support money, could bring an independent action of debt in a court of general jurisdiction. *Halmu v. Halmu,* (1944) 247 Wis. 124, 19 N.W. 2d 317.

In *Braun v. Brown,* (1957) 1 Wis. 2d 481, 85 N.W. 2d 392, 86 N.W. 2d 427, it was held that where the child dies in its minority, the family court's jurisdiction is terminated and that an independent action for arrearage could be brought in a court of general jurisdiction against the person obligated to support.

Your second question is whether the legal obstacle would be overcome by the enactment of the following statute:

"247.32 (2) Any party in interest may petition the court for a final judgment for alimony or support arrearage at any time."

The proposed statute would permit arrearages to be reduced to sums certain at any reasonable time. However, the

wording of the proposed statute is unclear. It is impossible to determine the limits of "any party in interest". It apparently is directed at permitting an assignee welfare department to reduce its claim to a sum certain and to take it to judgment and could aid in early collection. The wording of the statute, however, would probably apply to other assignees. Attempts by assignees to enforce collection of such judgments might not be in the best interests of the wife and minor children.

The word "petition" is not properly used in any event. An assignee is not a party to the original divorce action, and it would appear that if it had basis for action, the action would be based on the assignment involved and that suit should be brought as an independent action.

The wife can presently move the court to take some action on arrearages, including the ascertainment of amounts and schedules for payment. It is difficult to see what added benefit would be forthcoming by reducing the same to a final judgment as far as the wife and children are concerned. Any outstanding judgments would complicate the family court's duty of enforcing current payments and arrearages. Your committee should carefully examine the advantages and disadvantages to the public before recommending any change.

I cannot at this time suggest particular changes in language, since the purpose of the statute is not entirely clear. I would be pleased to work with your committee on specific language changes when you have more clearly formulated your objectives.

In your third question you inquire whether any final judgment for arrearages obtained under proposed 247.32 (2) would be dischargeable in bankruptcy.

In 9 Am. Jur. 2d, Bankruptcy §793, p. 596, it is stated:

"The Bankruptcy Act excepts from the discharge of provable debts in bankruptcy, liabilities for alimony due or to become due or for maintenance or support of a wife or child." Paragraph 17 (a) (2) of the Bankruptcy Act, 11 U.S.C.A. §35 (a) (2).

This rule prevents discharge even where the amount has been reduced to judgment. *Fernandes v. Pitta,* (1941) 47 Cal. App. 2d 248, 117 P. 2d 728; *Hylek v. Hylek,* (C.C.A. Ind. 1945) 148 F. 2d 300; 57 Am. Bankr. Rep. N.S. 683; *Aarons v. Brasch,* (1964) 40 Cal. Rptr. 153, 229 CA 2d 197.

In *Hilliard v. De Ciuceis,* (1952) 115 NYS 2d 5, 202 Misc. 197, it was held that a judgment obtained by the commissioner of welfare for relief payments made to a judgment debtor's family was not a liability for alimony or support money of a wife or child which would be exempt from discharge even though the judgment was in favor of a state. The judgment, however, was not obtained on the basis of an assignment of alimony or support money. The court said that the welfare funds were not provided in lieu of the bankrupt's obligation to support his wife and family but would have been provided even if he were dead or under no obligation to support.

I am of the opinion that if a judgment for arrearage were in favor of the wife or child entitled to support that the same would not be subject to discharge in bankruptcy, and that if it were in favor of a county or municipal welfare agency and based on an assignment of alimony or support money where such agencies had furnished support to such wife or child, that such judgment probably would not be dischargeable in bankruptcy.

BCL:RJV:

State Aids—Vocational and Adult Education—Sec. 41.21 (1) (b), as amended by ch. 163, Laws 1965, did not authorize board of vocational and adult education to approve state aids to local boards. Erroneously enrolled and signed bill has no legal effect.

August 24, 1966.

C. L. GREIBER, *Director*
State Board of Vocational,
Technical and Adult Education

Sec. 41.21 (1) (a), Stats., provides that on July 1 in each year the secretary of the local board of vocational and adult education shall report to the state board of vocational and adult education (hereafter state board) the cost of maintaining such a school, the character of the work done, the number, names, and qualifications of the teachers employed and such other information as may be required by the state board. Thereafter the state board, if it ascertains that such school has been maintained pursuant to law in a manner satisfactory to the state board, certifies to the department of administration the amount of state aid to be paid in accordance with a statutory formula. The reports from the local boards received by the state board on or shortly after July 1, 1965 were, of course, based upon the school year just ended, i.e., the 1964-1965 school year. On October 8, 1965 the state board, after duly reviewing and considering the reports submitted and applying the statutory formula, certified to the department of administration the various amounts of state aid which should be paid to the respective local boards, and in accordance with such certification the payments were made.

The formula which the state board used in computing the state aids was that set forth in sec. 41.21 (1) (b) 1, 2, and 3, including the amendment thereof effected by section 64, ch. 163, Laws 1965, effective August 1, 1965. The 1965 legislature further amended the statutory formula for state aids by section 10m, ch. 292, Laws 1965. However, the state board did not take into account the amendment effected by ch. 292 because it believed that ch. 292 was not in effect at the time the state board was acting. Ch. 292 was first enrolled in erroneous form (assembly bill 501) and in that form submitted to the governor who signed it. It was published in that form on September 29, 1965, with a presumed effective date of September 30, 1965. Subsequently, a corrected copy of assembly bill 501 was re-enrolled, signed by the governor, and published on November 2, 1965, with a presumed effective date of November 3, 1965.

You ask whether the state board's action of October 8, 1965, in certifying the state aids without regard to the

statutory formula changes effected by ch. 292 was proper. In my opinion the state board's action was proper.

"When the bill approved by the governor and properly authenticated is materially different from the bill passed by the two houses, the enrolled bill will not control in those states which permit the enrolled bill to be attacked either by the journals or other extrinsic evidence." Sutherland, Statutory Construction, 3d Ed., Vol. I, §1419.

In Wisconsin it is established that the courts will look to the legislative history of a bill to determine whether it has been validly enacted. *Integration of Bar Case,* (1943) 244 Wis. 8, 11 N.W. 2d 604. In that case the court observed that in some jurisdictions the enrolled bill is conclusive as to the method of enactment but in Wisconsin the journals may be resorted to for the purpose of showing that the enrolled bill is erroneous or invalid. Journal of the Assembly (October 18, 1965), at page 2485, shows the committee on enrolled bills reporting assembly bill 501 (corrected copy) as correctly enrolled.

Art. V, sec. 10, Wis. Const., provides that every bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor. But in this case the erroneously enrolled assembly bill 501 was not a bill which passed the legislature, and its signing by the governor and publication could not result in any valid enactment. It was the corrected copy of assembly bill 501 which was correctly enrolled October 18, 1965, signed by the governor, and published on November 2, 1965 which brought into effect ch. 292, Laws 1965, effective November 3, 1965. See 8 OAG 725 (1919).

"* * * The requirement which is absolutely essential is that the governor shall approve *the same law which the legislature passed.* This is the fact *which makes a law,* and want of it makes mere waste paper. * * *" *The State v. Wendler,* (1896) 94 Wis. 369, 379, 68 N.W. 759.

Therefore the state board acted properly on October 8, 1965, in approving state aids without regard to ch. 292 because it was not in effect at the time of the board's action.

Ch. 292, Laws 1965, introduced a new element into the state aid formula—that of reimbursing local districts at the rate of 80% for the 1965-1966 school year, 100% for the 1966-1967 school year, and thereafter of the cost of instructional salaries incurred in state-wide full-time collegiate transfer programs designated and approved by the state board. Sec. 41.21 (1) (b) 3. Before ch. 292, the statutes made no specific reference to aids for schools operating collegiate transfer programs. I understand, however, that the state board has in the past approved aids for such programs under the provisions of sec. 41.21 (1) (b) 1. You ask whether under the law as it stood before changed by ch. 292 the state board should have approved reimbursement by state aid to local districts operating collegiate transfer programs at the rate of 80% of instructional salaries as within the phrase "state-wide full-time programs designated and approved by the state board" of sec. 41.21 (1) (b) 3, instead of at the rate of 15¢ for each student period of 50 minutes or more of attendance under sec. 41.21 (1) (b) 1.

The "state-wide full-time p r o g r a m s" language was brought into the statutes by ch. 163, Laws 1965, effective August 1, 1965. Before that the aid formula merely permitted aid: (1) On a per student attendance basis for courses having "vocational objectives"; (2) on a per student attendance basis for "terminal technical courses"; and (3) on a limited basis for administrative, supervisory and coordinating salaries. Ch. 163 did not change the first category, repealed the 2d category, repealed and recreated the 3d category with a proviso not relevant here, and created the new provision for state-wide full-time programs.

The fact that the same 1965 legislature deemed it necessary by ch. 292 to amend again this section, 41.21 (1) (b) 3, by adding the language "and 80%, but beginning with instructional salaries for the 1966-1967 school year and thereafter the full cost * * *" gives rise to the inference that up to that time the legislature believed the "state-wide full-time collegiate transfer programs" specifically dealt with by ch. 292 were not previously included in the "80% of instructional salaries incurred in state-wide full-time programs"

provision created by ch. 163. The insertion of the word "technical" before "programs" as effected by ch. 292 does not alter the result. If the legislature had thought the collegiate transfer program already covered under the "80% of instructional salaries incurred in state-wide full-time programs" provision, it would not have found it necessary to spell out the 80% entitlement and would have merely provided instead for the full cost of the instructional salaries for the collegiate transfer program commencing with the 1966-1967 school year.

It is my conclusion, therefore, that the state board, at the time it made its determinations with respect to state aids to local boards on October 8, 1965, was without statutory authority to approve reimbursement to school districts operating collegiate transfer programs at the rate of 80% of instructional salaries.

BCL:JEA:

Justice of the Peace—Civil Warrants—Territorial jurisdiction of municipal justices of the peace under certain conditions is controlled by sec. 66.12 which makes exception to general limitations of sec. 300.01.

August 30, 1966.

ROGER P. MURPHY
District Attorney, Waukesha County

You ask if a municipal justice of the peace for Hales Corners, Milwaukee county, Wisconsin, may issue a civil warrant to be served by the sheriff of Waukesha county in Waukesha county for the arrest of a resident of Waukesha county, for violation of a municipal ordinance of Hales Corners.

Sec. 62.24 (2) (a) sets forth the jurisdiction of municipal justice of the peace as follows:

"(2) JURISDICTION. (a) The municipal justice of the peace shall have the jurisdiction, both as to subject matter and as to territory, of any other justice of the peace and in addition shall have:

"1. The exclusive jurisdiction of offenses against ordinances of the city;"

Sec. 300.01 sets forth the territorial jurisdiction of justices of the peace as follows:

"Territorial jurisdiction of justices. The territorial jurisdiction of a justice is coextensive with the county in which he is elected, except when otherwise provided."

Sec. 62.24 (2) (a) provides that municipal justices of the peace shall have the same territorial jurisdiction as any other justice of the peace, and 300.01 provides that the territorial jurisdiction of a justice shall be coextensive with the county in which he is elected. The general territorial jurisdiction of municipal justices of the peace is thereby limited to the county in which the justice is elected.

Sec. 300.01, however, qualifies this territorial jurisdiction limitation with the language "* * * except when otherwise provided". The supreme court of Wisconsin dealt with this qualification to 300.01 in *State ex rel. Fontaine v. Sullivan*, (1946) 248 Wis. 441, 22 N. W. 2d 535. In that case, garnishment proceedings in a Brown county justice court against a resident of another county were upheld on the theory that specific statutory provisions relating to garnishment constituted an exception to 300.01, and provided for broader territorial jurisdiction.

"Relator claims that under the provisions of sec. 300.01, Stats., the jurisdiction of the justice of the peace of Brown county does not extend beyond the limits of the county and that consequently there was no jurisdiction of defendant in the principal action. This overlooks the specific exception in sec. 300.01 'when otherwise specially provided by law.' Sec. 304.24 does 'otherwise' specifically provide that in garnishment actions where jurisdiction has been had of the garnishee defendant and the principal defendant cannot be found in the county service may be had in the

principal action by publication. * * *" 248 Wis. at 444, 22 N. W. 2d at 537.

Sec. 66.12 (1) (a) constitutes a similar exception to the general territorial jurisdiction limitation of 300.01.

"66.12 Actions for violation of city or village regulations. (1) COLLECTION OF FORFEITURES AND PENALTIES. (a) An action for violation of a city or village ordinance, resolution or bylaw is a civil action. All forfeitures and penalties imposed by any ordinance, resolution or bylaw of the city or village may be collected in an action in the name of the city or village before the municipal justice of the peace, or a court of record, to be commenced by warrant or summons as provided in s. 954.02 * * *."

Sec. 954.02 (6) (a) provides:

"The warrant or summons may be served anywhere in the state. * * *"

Sec. 66.12 (1) (a), which provides that the procedures set forth in 954.02 may be used to commence an action before a municipal justice of the peace to collect forfeitures or penalties for violations of a city or village ordinance, extends the territorial jurisdiction of municipal justices of the peace for a service of process in such actions. It is therefore my opinion that a civil warrant for the arrest of a Waukesha county resident, issued by the municipal justice of the peace of Hales Corners for violation of an ordinance of that village may be validly served in Waukesha county by the sheriff of Waukesha county.

You also ask the extent of the territorial jurisdiction of municipal justices of the peace under 62.24 (2) (a) 1 and 5. An opinion of this office in 51 OAG 111 (1962) speaks directly to this question as follows:

"V.

"A question is raised as to the territorial jurisdiction of a municipal justice of the peace under 62.24 (2) (a) 4, which reads:

" 'Jurisdiction of actions for a penalty or forfeiture, not exceeding $200, given by statutes;'

"This presumably relates to forfeitures under state law and not under local ordinances.

"Ch. 288 of the statutes on "forfeitures" has for the most part remained intact under court reorganization. In fact there are no changes except an amendment of sec. 288.19 by adding the words 'or county court' at the end of the sentence and by creation of 288.195 on clerk's fees. These changes were effected by secs. 143 and 144 of ch. 495, Laws 1961, and by sec. 10 of ch. 643, Laws 1961. However, such changes have no relevance in answering the present question.

"The answer would appear to be that to the extent an ordinary justice of the peace has countywide jurisdiction of forfeiture actions brought under state statutes pursuant to Ch. 288, the same jurisdiction is enjoyed by a municipal justice of the peace, since under 62.24 (2) (a), 1961 Stats., the municipal justice of the peace has the jurisdiction both as to subject matter and as to territory of any other justice of the peace.

"With respect to county ordinance violations, the municipal justice of the peace has not been given the exclusive jurisdiction which has been vested in him in the case of town, village and city ordinances by secs. 60.595, 61.305, and 62.24 (2) (a) 1, respectively."

"VI.

"The next question relates to criminal jurisdiction of the municipal justice of the peace where the penalty does not exceed $200 or 6 months' imprisonment or both, in battery and disorderly conduct cases and state traffic cases.

"This is answered by 62.24 (2) (a) 5 which gives the municipal justice of the peace jurisdiction of crimes *arising within the county,* the penalty for which is not more than $200 or 6 months or both. The penalties for ordinary state traffic cases come within that category. (We are not here discussing offenses such as negligent homicide involving use of a motor vehicle.) The same comment applies to ordinary battery and disorderly conduct cases."

BCL:TAL:

Licenses—Board of Medical Examiners—Physicians and surgeons assigned to veterans' facilities in Wisconsin must comply with licensure requirements of Ch. 147 if they desire to participate in programs of public or privately owned hospitals in this state.

August 31, 1966.

DR. THOMAS W. TORMEY, JR.
Secretary
State Board of Medical Examiners

You have requested my opinion as to the necessity for an individual employed by the United States government in the capacity of a physician and surgeon in a veterans facility located within this state to obtain a license to practice medicine from the state of Wisconsin, where such individual participates in a rotating training program which includes service as a resident in a private hospital, or a public hospital, such as the Milwaukee county hospital. You advise me that this program has been developed in cooperation with such institutions under the direction of the Wood veterans hospital.

The department of medicine and surgery was established in the veterans' administration in 1946. (P. L. 293, 79th Congress, January 3, 1946, Chapter 658, 59 Stats. 675). The establishment of the department was necessitated by the demands for services of highly skilled medical and hospital personnel which resulted from World War II. The rotating training program referred to above is designed to provide a system of teaching hospitals, in order that the staff of the veterans hospitals can acquire the requisite training. The history of legislation pertaining to the veterans benefits contained in 38 USCA states at page 30 in part:

"When the War ended demands for the services of highly skilled medical and hospital personnel remained high, both in and out of Government. At the same time, the Veterans' Administration was faced with the great in-

crease in the number of veterans needing care for service-connected conditions.

"One approach to the problem was the development of legislation to permit the appointment of Veterans' Administration physicians, dentists, and nurses outside of the classified civil service system. This was found to be necessary to attract the highest qualified persons in sufficient numbers. The authority was included in Public Law 293, 79th Congress, January 3, 1946 (ch. 658, 59 Stat. 675), which established a Department of Medicine and Surgery in the Veterans' Administration.

"To insure the best possible medical program, a system of teaching hospitals was set up near the country's leading medical schools. Although all hospitals could not be placed in this residency training program, an overall education program was developed to include the non-teaching hospitals. A related and important development was the institution of a major research program."

You have heretofore been informally advised that physicians and surgeons employed by the federal government to practice in federally owned and operated institutions are not required to be licensed under Wisconsin statutes. You also have been advised that the physical therapists practicing in such institutions are likewise exempt from the licensing requirements of Wisconsin. 43 OAG 152 (1954). These opinions are based upon the doctrine of *In Re Neagle,* (1890) 135 U.S. 1, 10 S. Ct. 658, 34 L. ed. 55, to the effect that one acting in the discharge of his duty as an officer of the United States cannot be held to answer in state courts for an act prohibited by state law. See also, *State of Ohio v. Thomas,* 173 U.S. 276 (holding that a state cannot enforce its laws with respect to the use of oleomargarine in a federal institution located within the state); and *Auerbacher et al. v. Wood,* 53 A. 2d 800 (holding that an agency of the United States government, acting under authority granted by congress, may regulate the qualifications of persons appearing before it, and that a state is without power to interfere with the determination of the qualifications of such persons to practice before such agency).

The doctrine of the foregoing cases imposes a limitation upon the authority of the state to regulate a federal officer acting in the discharge of his official duty. In most instances such duties are discharged within the confines of the federal institution and do not affect activities outside of such institutions. Even where such authorized duties specifically require the federal officer to act outside of the confines of a federal institution, it seems that the states cannot regulate the activities of such officer while he is doing acts specifically authorized by congress. See, *In Re Neagle,* (1890) 135 U. S. 1, 10 S. Ct. 658, 34 L. ed. 55.

As pointed out above, residency training programs are a matter of cooperation between the federal installation and other public or private hospitals within the state. While the purpose of such programs is a highly laudable one, neither the board of medical examiners nor any of such other hospitals located within this state can waive the requirements for licensure established by the legislature. A physician and surgeon employed by the veterans' administration and participating in a residency program outside of the veterans' administration hospital is not discharging duties specifically required by act of congress.

Sec. 147.151 (1) authorizes the board to issue a temporary educational certificate to a person who can satisfy the board that he has sufficient training in medicine and surgery to qualify for such a certificate. Undoubtedly many of the resident physicians in question could qualify under that provision of the statutes. I recognize that the number of educational certificates which may be issued is limited, and this may not be a practical solution to the problem. The alternative is for the physicians in question to apply for and obtain a license from the board of medical examiners. In this connection it is observed that 38 USC, §4105, which specifies the qualification for appointment in the department of medicine and surgery of the veterans' administration requires that such appointee hold a degree of Doctor of Medicine or of Doctor of Osteopathy from a college or university approved by the administrator and have served an internship satisfactory to the administrator, and that such person be licensed to practice medicine, sur-

gery or osteopathy in a state. It would seem that most, if not all, of the physicians in question could qualify for licensure by reciprocity under our law. Accordingly the requirements for licensure should not prove to be any serious obstacle to the training programs.

You are therefore advised that physicians and surgeons of the veterans' hospital at Wood, Wisconsin, desiring to participate in residency programs in other public or privately owned hospitals in the state of Wisconsin, must comply with the licensure requirements of Ch. 147, Stats.
BCL:EWW:

Vocational Districts—Fringe Benefits—Discussion of application of retirement fund and insurance funds regulations to the newly created vocational districts.

September 7, 1966.

C. M. SULLIVAN
Executive Director
Wisconsin Retirement Fund

Your predecessor in office requested my opinion as to the status—for the purposes of the Wisconsin retirement fund, the public employes social security fund and the group insurance board—of vocational, technical and adult education districts established pursuant to sec. 41.155 as repealed and recreated by ch. 292, Laws 1965. Basically, your problem is to determine how the statutes governing the two funds and the group insurance program are to be applied to the officers and employes of these new districts, hereinafter called vocational districts.

The new section, 41.155 (2), provides for the establishment of vocational districts containing one or any contiguous combination of the following governmental units: counties, municipalities and school districts operating high schools. Under subsec. (1), when such a district is created,

any existing *local* vocational and adult education board in the territory included in the new district shall cease; and subsec. (4) provides that upon creation of a vocational district the assets and liabilities "relating and pertaining to the vocational and adult education schools operated in the territory of the district" shall be transferred to such new district, with one exception here irrelevant.

The new subsecs. 41.155 (6) to (12) provide that the board of a vocational district may levy taxes, incur indebtedness, sue or be sued in the name of the district, purchase land and equipment for its schools and employ a director, teachers and others.

Beyond question these new vocational districts are governmental subdivisions having at least the status of quasi-municipal corporations. The districts created under this statute cannot be considered mere arms of some other municipalities.

If the entire territory of a new vocational district did not include a pre-existing vocational school, the new district could not be considered the successor to any prior vocational school. In most cases, however, a new vocational district will continue the operation therein of a vocational school previously operated by a city, village or regular school district, in which case the new district takes over the assets and liabilities pertaining to the existing vocational school and thus becomes a successor municipality in a limited sense.

The statutes governing administration of the Wisconsin retirement fund are set forth in secs. 66.90 to 66.918. Sec. 66.901 (2) defines municipality, as used in the retirement law, to include, among others, a common school district, high school district, unified school district, "or any other unit of government, or any agency or instrumentality of 2 or more units of government now existing or hereafter created within the state". The definition is amply broad to include a vocational district created pursuant to sec. 41.155, Stats. 1965.

Sec. 66.902 (1c) provides:

"Whenever any school district shall be created, the territory of which includes more than one-half of the last assessed valuation of either a school district which was a participating municipality at the time of such creation or a city which at the time of such creation was a participating municipality in which the schools operated under the city school plan, then in either case the school district so created shall automatically be a participating municipality from its inception, but no prior service credits shall be provided for any personnel thereof."

The above quoted provision was enacted by ch. 271, Laws 1959. At the time of that enactment there already was in the statutes a sec. 41.155 which provided for what was called a vocational and adult education area school district which, by sec. 41.16 (2p), was authorized to levy taxes and certainly was a municipality within the definition set forth in sec. 66.901 (2). I am aware of the fact that from 1957 until the passage of ch. 292, Laws 1965, there were inconsistencies in the statutes pertaining to these vocational and adult education area school districts. For example, although the boards of such districts were given power to levy taxes, the boards could sue and be sued only "in the name of the municipality or school district * * *". Secs. 41.15 (17) (a) and 41.155 (6) (g), Stats. 1963. This resulted from applying to the area districts established pursuant to sec. 41.155, Stats. 1957-1963, several of the statutes pertaining to a local board of vocational and adult education, which board was merely an arm of a city, village or "regular" school district.

In enacting sec. 66.902 (1c) in 1959, the legislature may have been concerned chiefly with the regular primary and secondary school districts, many of which were being reorganized and consolidated, and with protecting retirement benefits of the non-teaching personnel of those districts. The legislature cannot, however, be presumed to have ignored sec. 41.155, Stats. 1957-1959, which provided for another kind of school district—the vocational and adult education area school district. Such a district, as well as the new vocational districts established pursuant to sec. 41.155

as recreated in 1965, is a "school district" within the ordinary meaning of those words.

The words, "school district," are used three times in sec. 66.902 (1c), however, and an anomalous result would be reached were the term given the same construction in each instance. For example, a new vocational district might be created entirely from territory which previously had no vocational school and might include all of the territory of a common school district which was a participating municipality in the Wisconsin retirement fund. In such case, a literal construction of sec. 66.902 (1c) would make the new vocational district a participating municipality in the retirement fund, even though the new district would in no sense be a successor to any vocational school.

In interpreting a statute, the legislative intent must be sought, even though the language seems clear, if the literal application would work an absurd result. *State ex rel. Neelen v. Lucas,* (1964) 24 Wis. 2d 262, 268, 128 N. W. 2d 425; *Worachek v. Stephenson, Town School Dist.* (1955) 270 Wis. 116, 124, 70 N. W. 2d 657; and *Carchidi v. State,* (1925) 187 Wis. 438, 443, 204 N. W. 473. Also, it is a cardinal principle that a statute should be construed to give effect to its leading idea and the whole brought into harmony therewith, if such a construction is reasonably practicable. *Pella Ins. Co. v. Hartland Ins. Co.,* (1965) 26 Wis. 2d 29, 41, 132 N. W. 2d 225.

What, then, is the general purpose or leading idea of sec. 66.902 (1c) ? Clearly, it is to preserve to school district employes who are members of the Wisconsin retirement fund the benefits of continued membership, when the employing school district is absorbed by, or consolidated in, a successor school district. The statute also protects individuals employed in the schools of a city operating under the city school plan and participating in the Wisconsin retirement fund, when the operation of the city schools is taken over by a newly created school district. In each case the protection is given only if the territory of the new district includes more than one-half of the assessed valuation of a former school district which was a participating

municipality or of a city which was a participating municipality and was under the city school plan. In no case involving ordinary, as distinguished from vocational, school districts is a new district automatically a participating municipality in the Wisconsin retirement fund unless the new district is the successor or partial successor of a unit of government which was a participating municipality.

In my opinion sec. 66.902 (1c) reasonably can be construed to apply to the new vocational districts established pursuant to sec. 41.155, as recreated by ch. 292, Laws 1965, and to protect the retirement benefits of employes of such new districts without compelling a new district to participate in the Wisconsin retirement fund when the new district is in no sense a successor to any participating municipality. This can be done by construing "school district" where the term is used in sec. 66.902 (1c) to refer to a newly created district, to include a new vocational school district established under the provisions of sec. 41.155 and, when so construed, by construing "school district" and "city" where either term is used to refer to a predecessor unit of government, to mean a school district or city which in either case operated a vocational school.

The construction here suggested would give effect to the leading idea of sec. 66.902 (1c)—to protect the retirement benefits of a non-teaching school employe when the employing unit of government is succeeded by another unit of government. This result would be reached, under this construction, without compelling a vocational school district which is in no sense a successor municipality to become a participating municipality.

It is my conclusion that a vocational school district created pursuant to sec. 41.155, as repealed and recreated by ch. 292, Laws 1965, is a "school district" as that term is used in sec. 66.902 (1c) to refer to a newly created district. In order for sec. 66.902 (1c) to be applicable to such a vocational district, the territory of that district must include more than one-half of the last assessed valuation of (1) a school district which was a participating municipality at the time the new district was created and which at such time was operating a vocational school, or (2) a city which

at the time the new district was created was a participating municipality, was operating its schools under the city school plan and was operating a vocational school.

The status of a new vocational district under the statute governing the public employes social security fund, sec. 66.99, presents no problem once the status of such district for Wisconsin retirement fund purposes has been ascertained as set forth previously.

The statute pertaining to the state group insurance program contains a provision, sec. 66.919 (15) (cc), which, for present purposes, is identical to sec. 66.902 (1c). The reasoning previously applied in construing sec. 66.902 (1c) is equally applicable to the proper construction of sec. 66.919 (15) (cc).

BCL:EWW:

Veteran Points—Civil Service—Discussion of secs. 16.18 (1) and 45.35 (5a) as they apply to honorably discharged veterans.

September 12, 1966.

C. K. WETTENGEL, *Director*
Bureau of Personnel

You have requested my opinion on the following question:

Are preference points authorized to candidates for positions in the classified division of civil service who are veterans as defined in the introductory paragraph of sec. 45.35 (5a) as amended by ch. 648, Laws 1965, in addition to those veterans of wars of the United States in accordance with the dates specified in sec. 45.35 (5a) (a) through sec. 45.35 (5a) (g)?

Sec. 16.18 (1) was not amended by the 1965 legislature insofar as veterans' preference points are concerned. This statute provides in material part:

"* * * Whenever eligibles are certified, they must be those candidates who have been graded highest in an examination * * * except that there shall be no restriction as to age in the case of veterans and except that other conditions being equal, a preference shall be given in favor of *veterans of any of the wars of the United States in* accordance with the dates specified in s. 45.35 (5a). The employing officer shall not reject because of age any eligible veteran, 55 years of age or less, whose name has been certified to him. Preference is hereby defined to mean that whenever an honorably discharged veteran competes in any examination conducted by the bureau he shall be accorded 5 points, and if such veteran has a disability which is directly or indirectly traceable to war service, he shall be accorded another 5 points, in addition to earned ratings therein. * * *"

The preference does not apply to all veterans, but rather to honorably discharged veterans who have served for required periods of time *in any of the wars* of the United States within the dates specified in sec. 45.35 (5a).

Wisconsin's first civil service law gave a preference in favor of veterans of the late civil war. Ch. 363, sec. 16, Laws 1905.

In 1917 the preference was extended to veterans of any of the *past* wars. Ch. 90, Laws 1917.

The law was renumbered to sec. 16.18 (1) by ch. 306, Laws 1917, and ch. 18, Laws 1919, extended the preference to veterans of any of the wars of the United States.

In 1929 the preference was made mandatory and preference was redefined to include another five points for disability traceable to war service. Ch. 72, Laws 1929.

Problems were encountered in the administration of the preference law. While World War I and World War II were wars in which there were formal declarations of war and while each ended by formal declarations of an end of hostilities, there were differences of opinion as to the total time period to be included in each war for veterans' preference purposes. The Korean conflict brought additional problems as there was no declaration of war by congress.

In 45 OAG 81, it was stated that the conflict was a war for purposes of sec. 16.18 (1), and the opinion attempted to establish dates for its commencement and termination.

Ch. 437, Laws 1961, amended sec. 16.18 (1) to add the following language:

"* * * veterans of any of the wars of the United States in accordance with the dates specified in s. 45.35 (5a). * * *"

Sec. 45.35 (5a) has contained beginning and ending dates for certain wars since it was repealed and recreated by ch. 365, Laws 1957, as a law defining veteran for the purposes of eligibility of veterans to membership in the Grand Army Home.

The 1965 legislature did not alter the provisions of subsections (a) through (g) of sec. 45.35 (5a), which set forth the names of wars and periods covered beginning with the "Indian War: Between 1860 and 1898" and ending with the "Korean conflict: Between June 27, 1950 and January 31, 1955".

The introduction to sec. 45.35 (5a) was amended by ch. 648, Laws 1965, (Senate Bill 614) to provide:

"45.35 (5a) (intro. par.) 'Veteran' as used in this chapter, except in s. 45.37 and unless otherwise modified, means any person who served *on active duty* under honorable conditions in the ~~active military or naval service of the United States~~ *U.S. armed forces which service entitled him to receive either the armed forces expeditionary medal, established by executive order 10977 on December 4, 1961, or The Viet Nam service medal established by executive order 11231 on July 8, 1965, or* for 90 days or more during a war period~~,~~ as enumerated below~~,~~ *or under section 1 of executive order 10957, dated August 10, 1961,* or if having served less than 90 days was honorably discharged for a service-connected disability or for a disability subsequently adjudicated to have been service-connected, who has been a resident of this state for at least 10 years next preceding his application or was a resident of this state at the time of his enlistment or induction into service and is a resident of and living in this state at the time of making applica-

tion. If the service was in more than one wartime period, service in one entire period must have been under honorable conditions or have been terminated by an honorable discharge. The benefits available to veterans shall also be made available to the unremarried widows, widowers and children of persons who were residents of the state at the time of their enlistment or induction into service, who served *on active duty* under honorable conditions in the ~~active military or naval service of the United States~~ *U.S. armed forces* and who were officially reported missing in action, killed in action or who died in service during a wartime period."

Executive Order 10957 by President Kennedy authorized the calling up of certain military persons and units to serve in the Ready Reserve. This order was connected with the Berlin crisis but contains no specific reference thereto nor does it establish a period as to the beginning and ending of any conflict or crisis. 3 CFR 1959-1963 Comp. p. 482. Executive Order 10977, by President Kennedy, establishes an armed forces expeditionary medal for service after July 1, 1958 and sec. 1 (a) and (b) provide:

"(a) Participate, or have participated, as members of United States military units in a United States military operation in which personnel of any military department participate, in the opinion of the Joint Chiefs of Staff, in significant numbers; and

"(b) Encounter, incident to such participation, foreign armed opposition, or are otherwise placed, or have been placed, in such position that, in the opinion of the Joint Chiefs of Staff, hostile action by foreign armed forces was imminent even though it did not materialize." 3 CFR 1959-1963 Comp. p. 498.

Executive Order 11231, by President Johnson, establishes a Vietnam service medal for services in Vietnam or contiguous waters or air space after July 3, 1965 and before a terminal date to be prescribed by the secretary of defense and the order also refers to persons who qualified for the armed forces expeditionary medal under Executive

Order No. 10977, by reason of service in Vietnam between July 1, 1958 and July 4, 1965. 3 CFR 1965 Supp. p. 151.

The drafting record to 614, S., 1965 which became Ch. 648, Laws 1965, makes no reference to veterans preference under sec. 16.18 (1). The fiscal note, made by the department of veterans' affairs refers to benefits provided by the Wisconsin department of veterans' affairs including "emergency grants, economic assistance loans, educational grants and housing loans".

Two attempts were made to specify the Vietnam conflict as a war and to allocate dates thereto.

Amendment 2, A., to Bill 614, S., would have created:

"45.35 (5a) (h) Viet Nam Conflict: Between July 1, 1958, and the termination thereof, as declared by the Congress of the United States."

Amendment 4, A. would create 45.35 (5a) (h) to provide:

"Cold War—Viet Nam Conflict: Between February 1, 1955, and a termination date to be established by the legislature after the effective date of this paragraph (1966)."

Both amendments were defeated.

It could be argued that since the amendments failed, the legislature did not intend that veterans' preference with respect to civil service should apply since ch. 648, Laws 1965, does not specifically label the Vietnam conflict as a war and since the legislature did not expressly specify dates.

The persons covered by the three executive orders do however qualify as veterans for the purposes of sec. 45.35 (5a), and for those purposes the legislature may have determined that specific references to conflicts and inclusive dates were unnecessary as there was incorporation by reference of any dates included in the executive orders.

For the purposes of this opinion it is assumed that the incorporation of materials in the executive orders was proper. Duly enacted laws are presumed valid.

I am of the opinion that the Vietnam conflict qualifies as a war under the reasoning set forth in 45 OAG 81. The

legislature intended to grant a preference to veterans *of any of the wars* of the United States in accordance with the dates specified in s. 45.35 (5a). I am of the opinion that s. 45.35 (5a), by inclusion of the executive orders, sufficiently identifies the Vietnam conflict with respect to name and period, so that honorably discharged veterans with service in Vietnam or in contiguous waters or air space can qualify for veterans' preferred points.

I am of the opinion that service in the armed forces during the Berlin crisis would not qualify as wartime service, and that veterans' points should not be accorded for service in connection with the Cuban or Dominican incidents on the basis of legislation in force. Nor should points be accorded to veterans who served in the armed forces during the Vietnam conflict, but who do not qualify for Vietnam Service Medal because they did not serve in Vietnam or in contiguous waters or air space.

These statutory provisions result in apparent inconsistencies and thus should be brought to the attention of the legislature. Moreover, incorporation by reference of federal executive orders and federal legislation should be avoided in most cases.

BCL:RJV:

Licenses—Employment Agency—A described temporary help agency is an employment agent subject to the provisions of Ch. 105.

September 12, 1966.

JOSEPH C. FAGAN, *Chairman*
Industrial Commission

You ask whether a described temporary help agency is an employment agent subject to the provisions of Ch. 105 so as to require licensing under sec. 105.05. It is my opinion that the answer to this question is in the affirmative.

Sec. 105.01 defines the term "employment agent" as follows:

"The term 'employment agent' shall mean and include all persons, firms, corporations or associations which furnish to persons seeking employment, information enabling or tending to enable such persons to secure the same, or which furnish employers seeking laborers or other help of any kind, information enabling or tending to enable such employers to secure such help, or which keep a register of persons seeking employment or help as aforesaid, whether such agents conduct their operations at a fixed place of business, on the streets or as transients, and also whether such operations constitute the principal business of such agents or only a side line or an incident to another business; but this term shall not include any employer who procures help for himself only or an employe of such an employer who procures help for him and does not act in a similar capacity for any other employer."

The temporary help agency you describe maintains business offices, open to the public, where it accepts applications of persons seeking temporary employment. It maintains a register of these persons classified according to skills and the hours they are available for work.

Employers seeking temporary help notify the agency of their needs. The agency then selects from its files the persons considered qualified to fill the request and sends these persons to such employers where they work under the direction of the latter. The agency bills the employers at an hourly rate and pays a portion to the employe as wages. The agency keeps employment records, withholds social security and tax payments, maintains workmen's and unemployment compensation and the like. The difference between the amount paid to the agency and the amount paid by it to the employes, or taxes for their benefit, is retained by the agency to compensate it for its services. The employes do not work under the direct supervision and control of the agency. The agency does not pay the described employes for periods between assignments to other employers.

It is apparent that the described temporary help agency operates as an "employment agent" as defined by sec. 105.01, the laws of other jurisdictions notwithstanding. The agency (1) furnishes "to persons seeking employment, information enabling * * * such persons to secure the same"; (2) furnishes "employers seeking laborers or other help of any kind, information enabling * * * such employers to secure such help"; (3) keeps "a register of persons seeking employment or help as aforesaid". Further, it should be emphasized here that the described agency is an "employment agent" if its operation comes within only one of the aforementioned categories listed by sec. 105.01, and whether "such operations constitute the principal business of such agents or only a side line or an incident to another business".

Sec. 105.01 further provides that the term "employment agent" "shall not include any employer who procures help for himself only or an employe of such an employer who procures help for him and does not act in a similar capacity for any other employer".

The first exclusion refers to employers hiring employes to work directly for them. Only the agency's office staff falls within this category. The second exclusion refers to an employe who is the employer's recruitment officer. This employe's function is to secure other employes to run the employer's business. For example, the agency may have such an employe to recruit typists, clerks and other employes to run its offices. If this employe secures employes for employers other than his immediate employer, both he or his immediate employer become employment agents as contemplated by the provisions of sec. 105.01. Thus, it is also apparent that the described agency's business operations do not fall within the exclusions of sec. 105.01.

In enacting Ch. 105, Stats., the legislature clearly intended the following:

(1) Persons standing between the employer-employe relationship, helping employers secure employes and helping employes secure employment, are employment agents. Sec. 105.01.

(2) No distinction exists between employment agents finding and providing temporary employment and those finding and providing permanent employment. Sec. 105.01.

(3) The licensing and regulating of employment agents is to protect employes and employers from the frauds, misrepresentations, false statements (secs. 105.03, 105.08, and 105.14), excessive fees (sec. 105.11), and fee splittings (sec. 105.04) of unscrupulous employment agents. The fact that one individual may need no regulation to compel proper operations does not exempt him from regulation which is necessary to protect the public from those adopting less exemplary standards.

(4) Licensing and regulating employment agents is not limited to protection of the employes and the employers dealing with employment agents. Sec. 105.15 makes applicable to employment agents the provisions of secs. 101.01 to 101.28. The industrial commission is obligated to keep informed as to employment conditions. Secs. 101.10 (9), 101.41, 101.43. In order to carry out these functions it must collect statistical data and publish reports. Sec. 101.10 (10). These obligations, as well as many others, are carried out in part by statutory authority granted to obtain information from employment agents. Sec. 105.14. Certainly information which could be obtained from the records of a temporary help agency are as essential to a complete picture of the state's employment situation as information from records of other employment agents.

(5) It has been submitted that employes assigned by the described agency to employers are actually employes of the agency because the agency keeps the employes' employment records, withholds their social security payments and taxes, maintains workmen's compensation and the like. In my opinion this arrangement does not create an employer-employe relationship between the agency and the employes. Rather, such arrangement is an inducement to the employer seeking employes to obtain help from the agency by relieving the employer of bookkeeping and other employe expense. In addition, the agency's further business arrangement with the employers assures payment of its employ-

ment fees. The employers pay the employes' salaries or wages directly to the agency. The agency makes the aforementioned bookkeeping deductions including deductions for its employment fees before turning the balance over to the employes.

Further, even if the persons supplied to employers by the described temporary help agency are considered employes of that agency, the agency still is an employment agent within the purview of sec. 105.01, since it furnishes information concerning "help" to other employers. The legislature intended a distinction between the terms "employe" and "help" by using both terms in sec. 105.01. Thus, if a temporary help agency supplies information concerning "help of any kind" to other employers "tending to enable such employers to secure such help", the agency is an "employment agent" within the definition of sec. 105.01.

Therefore, it is my opinion that the described temporary help agency is an employment agent subject to the provisions of Ch. 105, Stats., so as to require licensing under sec. 105.05.

BCL:JPA:

Medicare—Aid Recipients—Public Welfare—Department of public welfare may pay medicare premiums for only recipients of aid as listed in sec. 49.46.

September 13, 1966.

WILBUR J. SCHMIDT
Director
Department of Public Welfare

Section 1837 of Public Law 89-97, 89th Congress, which is commonly known as the "Social Security Amendments of 1965" or "Medicare" approved July 30, 1965, limited to March 31, 1966, the period for the enrollment of persons 65 years of age or over to secure benefits provided under

said amendments. Public Law 89-384, 89th Congress, which was approved April 8, 1966 extended the aforesaid period of enrollment from March 31, 1966 to May 31, 1966.

Your department recommended that all persons 65 years of age or over who are confined in state or county mental hospitals be enrolled and I have been informed that this has been done.

The monthly premium for each of said persons who was enrolled is $3.00. The first payment fell due on July 1, 1966 but I have also been advised that the effectiveness of the enrollment has continued pending a determination of the question which you have submitted. Many of the aforesaid patients who have been enrolled are indigent and you have inquired whether the premium of $3.00 per month can be paid for indigent patients from the operating funds appropriated to the respective state and county mental hospitals.

Sec. 51.001 (2), (3), (4), and (5) provide:

"(2) 'County hospital' means a hospital for mental disturbances established pursuant to s. 51.25 and the county mental health center, south division, established under s. 51.24 (1).

"(3) 'State hospital' means any of the institutions operated by the state department of public welfare for the purpose of providing diagnosis, care or treatment, for mental or emotional disturbance or mental deficiency.

"(4) 'State-wide average per capita cost' means the cost of maintenance, care and treatment averaged over all patients in all county hospitals established under s. 51.25 and the county mental health center, south division, established under s. 51.24 (1), except as provided in s. 51.26 (1) (c), during the fiscal year from annual individual hospital reports filed with the state department of public welfare under the mandatory uniform cost record-keeping requirement of s. 46.18 (8), (9) and (10).

"(5) 'Individual average per capita cost' means the cost of maintenance, care and treatment averaged over all pa-

tients in each individual county hospital and each division of the county mental health center, except as provided in s. 51.26 (1) (c), during the fiscal year from the annual individual hospital report filed with the state department of public welfare under the mandatory uniform cost record-keeping requirement of s. 46.18 (8), (9) and (10)."

Sec. 51.08 (1), (2), (3) and (4) provide:

"(1) The expense of maintenance, care and treatment of a patient in any state hospital shall first be charged to the state and the state shall then charge back to the county of such patient's legal settlement an amount equal to $5 per week.

"(2) The state shall contribute toward the expense of maintenance, care and treatment of each patient hospitalized in a county hospital in the county of his legal settlement an amount equal to 60 per cent of such hospital's individual average per capita cost.

"(3) The expense of maintenance, care and treatment of a patient in a county hospital operated by a county other than the county of such patient's legal settlement shall first be charged to the state at the rate of (a) the state-wide average per capita costs, or (b) at such hospital's individual average per capita costs, whichever is higher, and the state shall then charge back to the county of such patient's legal settlement 50% of such charge.

"(4) The expense of maintenance, care and treatment in a county hospital of a patient having no legal settlement in any county shall be charged to the state at the rate prescribed by sub. (3)."

Sec. 46.18 (1) as amended by ch. 39, Laws 1965, provides in part:

"Every county home, infirmary, hospital, tuberculosis hospital or sanatorium, or similar institution, or house of correction * * * shall * * * be managed by 3 trustees, * * *."

Sec. 46.18 (11) provides:

"COUNTY APPROPRIATION. The county board shall annually appropriate for operation and maintenance of each

such institution not less than the amount of state aid estimated by the trustees to accrue to said institution; or such lesser sum as may be estimated by the trustees to be necessary for operation and maintenance."

Sec. 46.106 (2) provides that on July 1 of each year the department of public welfare shall prepare a statement of the amounts due from the several counties to the state "for the maintenance, care and treatment of inmates at public charge in state and county * * * curative * * * institutions for the preceding fiscal year and shall give * * * the amount due to state from the county, itemized as to board, clothing, dental, burial, surgical and transfer". The statute then provides for charging, collecting and distributing these amounts.

Sec. 46.106 (3) provides that on July 1 in each year the county shall also prepare a statement of the amount due from the state for the "maintenance, care and treatment" of inmates of such institutions also itemized as to "board, clothing, dental, burial, surgical and transfer". The statute then provides for adjustment or offsetting of the amounts of the respective statements and for payment to the state of any net sum due to it from the county.

The "maintenance, care and treatment" of the indigent inmates of state and county mental hospitals for which the state departments and counties are authorized to expend funds are not defined. In my opinion, however, these words would not include the payment of the $3.00 premium required by "Social Security Amendments of 1965" as a condition precedent to the receipt of certain kinds of medical care.

This conclusion is strengthened by the fact that the breakdown of the itemization of changes is limited to "board, clothing, dental, burial, surgical and transfer". This itemization cannot be read to include the aforesaid $3.00 premium any more than it could be read to include the payment of private health insurance premiums. Sec. 49.46 as amended by ch. 590, Laws 1965, provides in part:

"(1) (a) All persons included in the grant of old-age assistance, aid to dependent children, aid to the blind or

aid to totally and permanently disabled shall be furnished medical assistance pursuant to this section.

"(2) The department shall audit and pay charges * * * for medical assistance to recipients for inpatient hospital services other than services in an institution for tuberculosis or mental diseases (except as hereinafter provided); * * * the following services when prescribed by a physician: skilled nursing home services excluding services in an institution for tuberculosis or mental diseases (except as hereinafter provided), * * * and other medical services, and inpatient hospital and skilled nursing home services for individuals 65 years of age and over when a patient in an institution for mental diseases. * * * Medical assistance shall also include payment of * * * the monthly premiums payable under section 1839 of the social security act."

In my opinion this statute means that the $3.00 premium could be paid as medical assistance, which is available only to persons included in a grant of old-age assistance, aid to dependent children, aid to the blind or aid to totally and permanently disabled. Sec. 49.46 (2), however, cannot be read to authorize the payment of the $3.00 premium for other indigent persons confined in state or county mental hospitals.

BCL:JRW:

Students—Schools—Discussion of compulsory school attendance law in the light of ch. 292, Laws 1965, creating the vocational, technical, and adult education schools.

September 26, 1966.

HUGH R. O'CONNELL
District Attorney, Milwaukee County

You have asked whether under the compulsory school attendance law, sec. 40.77 as amended by ch. 292, Laws 1965, a child within the age limits of required high school

attendance in paragraph (am) of subsec. (1), who has completed 8th grade, has the option of attending a vocational, technical and adult education school full time in lieu of such high school attendance. The question arises out of an apparent conflict in the statutes. Although ch. 292, Laws 1965, repealed former subsec. (2) and replaced it with a newly created paragraph (am) in subsec. (1) imposing compulsory high school attendance requirements, the last sentence of paragraph (b) of subsec. (1) was not changed.

The new sec. 40.77 (1) (am), so created, reads as follows:

"*Vocational, Technical and Adult Education Schools.* Any such child who resides in a school district which also contains within its boundaries a vocational school which offers day class programs, shall attend a high school until the end of the school term, quarter or semester in which he becomes 18 years of age. But any such child, 16 years of age or over, with the approval of his parent or legal custodian and the school board of his school district, may attend the vocational, technical and adult education school in the district in lieu of high school. Transportation for such students attending vocational, technical and adult education school shall be provided on the same basis as is transportation for those students attending high school. If no vocational and adult education day class program is offered in a school building located in the public school district resident students of such public school district shall be required to attend high school only until age 16 as provided in this subsection."

The provisions of sec. 40.77 (1) (b), which were not changed but are retained in the statutes, read as follows:

"This subsection does not apply to any child who is not in proper physical or mental condition to attend school (the certificate of a reputable physician in general practice shall be sufficient proof that a child is unable to attend school) nor to any child exempted for good cause by the school district board or board of education of the school district in which the child resides, nor to any child who has completed the full 4-year high school course. Any child who

has completed the first 8 grades of school work or the equivalent thereof may at his option attend a vocational and adult education school full time in lieu of attendance at any other school."

The overall objective in the enactment of ch. 492 was to prescribe general education beyond the elementary level as the prime educational requirement of the state. This was effected by making high school attendance compulsory until 18 with an exception permitted by the substitution of vocational school attendance for 16 year olds and over when educationally appropriate. The provisions in new sec. 40.77 (1) (am) and in old sec. 40.77 (1) (b) therefore must be given an effect which is consistent with the purpose embodied in the enactment of ch. 292.

It is well established as a principle of statutory construction that where two statutory provisions appear to conflict they are to be construed, if possible, to give operation to both without doing violence to either. Repeals by implication are not favored and are to be avoided by construing statutes together if possible. *Brunette v. Bierke,* (1955) 271 Wis. 190, 72 N.W. 2d; *Pruitt v. State,* (1962) 16 Wis. 2d 169, 114 N.W. 2d 148. However in this case it is not possible to reconcile the conflict between the two provisions.

The provision in the first sentence in this new paragraph (am) very clearly says that any child residing in a school district that contains within its boundaries a vocational school offering day classes must attend high school until he becomes 18 years of age. Then, the next sentence specifically excepts a child who is 16 years of age or over and attending a vocational, technical and adult education school with the approval of both his parent or legal guardian and the school board of his school district. The last sentence in sec. 40.77 (1) (b), however, says that a child who has completed 8th grade has an absolute option to attend vocational school full time in lieu of attendance at any other school.

This requirement of high school attendance until 18 years of age contained in paragraph (am) is stated positively and

is unequivocal, with only an exception thereto based upon age with specified approval. The option in the last sentence of paragraph (b) of subsec. (1) to attend vocational school in lieu of other required school attendance is based upon grade or educational level completed. This is a basis entirely different from and inconsistent with the exception to compulsory attendance if the student is 16 years of age and a specified approval therefor is obtained. An option to attend vocational school whether or not the specified approval is obtained would render the first two sentences in paragraph (am) meaningless.

There is no way the two provisions can both be given effect as the operation of either destroys the effect of and negates the other. However, these new requirements in paragraph (am) were specifically inserted into the bill and are clear in their language. Therefore the legislature must have intended that these new provisions in paragraph (am) should be given the meaning and effect the unequivocal language therein requires. Any other provisions in conflict therewith are no longer controlling but are superseded.

The last sentence of paragraph (am) also provides that if no vocational and adult education program is offered in a school building located in the school district in which a child resides, then he is required to attend high school only until age 16. This is a clear requirement that a child who does not come within the prior provisions requiring high school attendance until 18 because there is no vocational school conducted in his school district, must attend high school until reaching 16 years of age. It is equally as positive and unequivocal as the prior provisions in the paragraph. However, this last provision contains no stated exception and therefore absolutely requires such a child to attend high school until 16. The option in the last sentence of paragraph (b) of subsec. (1) would clearly conflict with the clear and unambiguous language of this positive requirement of high school attendance until 16 without any stated exception.

The option provision in the last sentence of paragraph (b) did make sense and had operative effect under the

statutes as they previously existed. It was previously provided that vocational and adult education schools were to be operated for persons "14 years of age and over". But, as a part of the overall program embodied in said ch. 292, the age provisions were raised to "16 years and over". As a result the statutes now provide that vocational, technical and adult education schools operate only for persons 16 years of age and over. There is no authorization anywhere in the statutes to conduct such schools for other than those 16 and over.

It was clearly the intent in changing the age specifications in secs. 41.13 (8) and 41.18 (1) that such provisions, as in the past, define the extent of vocational, technical and adult school operation and limit the authority and power of the boards to conduct such schools. In this respect vocational school operation is statutory in origin and existence and is in the same status as other creatures of the statutes. The authority therefor must be found in the statutes. It is well established that a school district has only such powers as are given to it by statute and such implied powers as are necessary to execute the powers expressly given to it. *State ex rel. Van Straten v. Milquet,* (1923) 180 Wis. 109, 192 N.W. 392; *Iverson v. U.F.H. School Dist.,* (1925) 186 Wis. 342, 202 N.W. 788. Therefore, as the result of the amendment of the statutes by ch. 292, vocational, technical and adult education schools are now authorized to operate only for persons 16 years of age and over.

Obviously the option in the last sentence of paragraph (b) of subsec. (1) can be no longer of any effect for a child under 16, because, if a vocational, technical and adult education school is conducted in his school district of residence, then he falls in the first category and is subject to the provisions applicable thereto. If no such school is conducted in his district, there is no vocational school for him to attend. Thus, this option provision cannot be operative as to one under 16.

It is thus not possible to reconcile these two statutory provisions and give effect to both of them. Where two stat-

utes are repugnant and irreconcilable, the last enacted presumably expresses the will of the legislature and therefore the later enacted provision prevails and supersedes the earlier statute insofar as necessary to avoid a conflict. *Abdella v. Abdella,* (1954) 268 Wis. 127, 66 N.W. 2d 689; *State ex rel. Mitchell v. Superior Court of Dane County,* (1961) 14 Wis. 2d 77, 109 N.W. 2d 522. Therefore, under the above rule of construction of statutes, it must be construed that the legislature in enacting sec. 40.77 (1) (am), in terms which clearly conflict with those in paragraph (b), intended that the newly created statutes are those which are operative.

Therefore it is my opinion that the provisions in sec. 40.77 (1) (am) prevail and impliedly repeal the last sentence in sec. 40.77 (1) (b). Accordingly, a person who has completed 8th grade but not reached 18 years of age does not have the option which the last sentence in sec. 40.77 (1) (b), would provide, but must abide by the requirements in sec. 40.77 (1) (am).

The conclusions reached in this opinion differ in some respects from those reached in a letter from this office to Mr. C. L. Greiber, Director of the State Board of Vocational and Adult Education on January 4, 1966. We have concluded, however, that the inconsistent provisions of sec. 40.77 (1) (b) cannot be reconciled with those of 40.77 (1) (am) created by ch. 292, Laws 1965, and the former must therefore be considered repealed in those respects by the latter.

BCL:HHP:

Discrimination—Home Rule—Cities, villages and towns possess the power to promulgate regulations to remove discrimination in housing. Sec. 101.60 governs state-wide and does not pre-empt home rule.

October 3, 1966.

JOSEPH C. FAGAN, *Chairman*
Industrial Commission

You have asked by opinion on the following question: Has the creation of sec. 101.60, Stats., pre-empted the field of regulation of nondiscrimination in housing so as to render municipalities powerless to enact and enforce local regulations to prevent and remove all discrimination in housing?

For the purpose of this opinion the term municipality shall mean city, village or town.

Your question presupposes that the legislative body of a municipality has the power to enact such legislation in the absence of sec. 101.60. This of course is true. Enforcement of laws, preservation of order, protection of persons and property, and the suppression of crime are within the police power. The power municipalities possess to deal with these matters need not be derived from Art. XI, sec. 3, Wis. Const., but has been delegated by legislative enactment. See *Van Gilder v. Madison,* (1936) 222 Wis. 58, 76, 268 N.W. 108. Art. XI, sec. 3, is a limitation on the power of the state rather than on the power of cities and villages. See *Van Gilder v. Madison, supra.*

The home rule provision of the Wisconsin constitution is not the source of a municipality's power to deal with subjects of state-wide concern nor does the constitution limit that power if granted by statute. Where a municipality may exercise the police power pursuant to statutory delegation it is immaterial whether the subject to be regulated is of primary state-wide concern.

Cities and villages have power, pursuant to secs. 62.11 (5) and 61.34 (1) to legislate for the government and good order of the city or village and for the health, safety and

welfare of the public. Under 60.18 (3) towns may make orders or bylaws for the management of the town conducive to peace, welfare and good order.

Milwaukee, unlike other Wisconsin cities, is not governed by the general charter law, *i.e.*, Ch. 62, Stats. Milwaukee may, however, adopt as part of its charter any provision of Ch. 62, and when so adopted the provision applies to Milwaukee. Milwaukee has adopted sec. 62.11 (5), as Milwaukee City Charter, sec. 6.06.

Municipalities prior to the passage of 101.60 possessed ample power to pass local regulations to prevent and remove all discrimination in housing. See *Johnston v. Sheboygan,* (1966) 30 Wis. 2d 179, 185-186, 140 N.W. 2d 247; *Milwaukee v. Piscuine,* (1963) 18 Wis. 2d 599, 602-603, 119 N.W. 2d 442; *Beardsley v. Darlington,* (1961) 14 Wis. 2d 369, 373, 111 N.W. 2d 184; *Hack v. Mineral Point,* (1930) 203 Wis. 215, 219, 233 N.W. 82.

A municipality acting under a statutory delegation of power may exercise that power to its outer-most limits as long as the local regulation is not directly in conflict with a state statute on the same subject and is not unreasonable or arbitrary. The local regulation is not in direct conflict with a state statute merely because it goes further in its regulation. See *Milwaukee v. Piscuine, supra; Fox v. Racine,* (1937) 225 Wis. 542, 545-546, 275 N.W. 513; *Hack v. Mineral Point, supra,* at 219, 220-221.

The legislature may pre-empt regulation of a subject when that subject is of primary state-wide concern. Preemption limits the delegated powers of municipalities to legislate on the same subject. The power delegated to cities and villages by secs. 61.34 (1) and 62.11 (5) can be limited only by express language. See *Fox v. Racine, supra,* at 545.

There is no specific language in 101.60 which limits the power of cities and villages to regulate nondiscrimination in housing. There is, in fact, specific language to show a legislative intent that municipalities are to use their delegated powers to complement state law. Sec. 101.60 (7) provides:

"* * * it is the duty of the local units of government to assist in the orderly prevention or removal of all discrimination in housing through the powers granted under s. 66.433. * * *"

It is my opinion that cities, villages and towns possess the power, irrespective of sec. 101.60, to promulgate local regulations to prevent and remove all discrimination in housing, even though regulation of nondiscrimination in housing is a matter of state-wide concern.

BCL:EGY:

Licenses—Cosmetology—Citizenship requirements for cosmetology operator's and manager's licenses discussed.

October 7, 1966.

E. H. JORRIS
State Health Officer

You ask my opinion on three questions relative to the cosmetology law of Wisconsin. For purposes of clarity I have taken the liberty of dividing your first question (with appropriate rewording), and eliminating your second question. Nevertheless, as you will note, such second question is answered in this opinion. Your third question remains unchanged in form.

A.

I. *May a cosmetologist registered or licensed under the laws of a foreign province or country be required, in order to establish eligibility for licensure under sec. 159.08 (6) (a) or (b), Wis. Stats., to provide evidence satisfactory to the state board of health that in obtaining such foreign license she met a requirement of the province or country issuing it that she be a citizen of such country, or a citizen (in case of a provincial license) of the country of which the license-issuing province was a part?*

Ch. 159, Stats., our cosmetology law, contains the following definitions in sec. 159.01:

"(2) 'Cosmetologist' is any person who, for compensation, either directly or indirectly or in the expectation thereof practices cosmetology. * * *

"* * *

"(4) 'Manager' or 'managing cosmetologist', as used in this chapter, is defined as any person who has direct supervision over operators or apprentices in a beauty salon.

"(5) 'Operator' is any person who is not a manager, itinerant or apprentice cosmetologist, who practices cosmetology under the direction and supervision of a managing cosmetologist."

Sec. 159.08 (2) provides:

"A *manager's* license shall be issued only to one:

"(a) Who is at least 21 years of age.

"(b) Who has practiced cosmetology at least 2 years under an operator's license in this state.

"(c) Who has satisfactorily passed an examination conducted by the board to determine his fitness to practice as a managing cosmetologist.

"(d) *Who is a citizen of the United States.*"

Sec. 159.08 (4) provides:

"(4) An *operator's* license shall be issued to one:

"(a) Who has completed 2 years as a registered apprentice under the supervision of a managing cosmetologist, or who has completed the course prescribed by section 159.02 in a registered school of cosmetology.

"(b) Who has satisfactorily passed an examination conducted by the board to determine his fitness to practice cosmetology."

Sec. 159.08 (6) in pertinent part provides:

"Any cosmetologist registered or licensed under the laws of another state or territory of the United States or of a

foreign country or province, who can provide *evidence satisfactory to the board* that he has met *requirements substantially comparable to the requirements of this state* may be licensed as follows:

"(a) As an *operator* upon [etc.] * * *.

"(b) As a *manager* upon [etc.] * * *."

Against this statutory backdrop, let me say at the outset that there is substantial doubt in my mind that the state board of health in determining eligibility for licensure as an operator under sec. 159.08 (6) (a) need, or even should, demand of one seeking such licensure evidence satisfactory to the board that she, in the foreign province or country wherein she obtained her cosmetologist's license, met a citizenship requirement in connection with its issuance comparable to the requirement of United States citizenship for issuance of a manager's license, laid down by 159.08 (2) (d). In expressing this doubt I am not ignoring your advice contained in the letter requesting this opinion, that "Since August, 1951, the words in Section 159.08 (6) 'requirements substantially comparable' have been interpreted to mean comparable to the requirements needed for Wisconsin licensed applicants to qualify for the examination for a managing cosmetologist license". With all due respect for such long-standing administrative construction, I am compelled to observe that there is surely no clear cut authority for such construction in our cosmetology law and that such construction, very questionable with regard to one seeking an operator's license under 159.08 (6) (a), is not even entirely free of doubt with regard to one seeking a manager's license under sec. 159.08 (6) (b). I say this because a "cosmetologist" in Wisconsin, as shown by the above quoted statutes, may clearly be (and in most cases no doubt is) an "operator" *subject to no citizenship requirement for her licensing,* and 159.08 (6) reads in part:

"*Any cosmetologist* registered or licensed under the laws of another state or territory of the United States or of a foreign country or province, who can provide evidence satisfactory to the board that he has met requirements substantially comparable to the requirements of this state [for

registering or licensing a *cosmetologist*] may be licensed as follows: * * *"

In view of this statutory language, I find no justification for imposing on one seeking an operator's license under 159.08 (6) (a) a citizenship requirement not imposed by Ch. 159 for licensing as an operator under 159.08 (4). Such requirement would not, of course, be "substantially comparable" to anything required of a person licensed under 159.08 (4) as an operator. Nor is it entirely clear in the light of such statutory language, that a citizenship requirement should be imposed on one seeking licensure as a manager under 159.08 (6) (b) even though eligibility for a manager's license under 159.08 (2) is dependent in part on meeting a United States citizenship requirement. It is my opinion that the existence of such citizenship requirement is sufficient to justify the board's practice of demanding that one seeking a manager's license under 159.08 (6) (b) produce satisfactory evidence that in obtaining her license as a cosmetologist outside of Wisconsin she met a citizenship requirement substantially comparable to the citizenship requirement imposed on managers licensed in Wisconsin under sec. 159.08 (2), but it is my further opinion that no citizenship requirement should or can be lawfully imposed on one seeking licensure as an operator under 159.08 (6) (a), despite the long standing administrative construction above mentioned.

Arriving at a specific answer to your question as above stated, it is my opinion that a cosmetologist registered or licensed under the laws of a foreign province or country may lawfully be required, in order to establish eligibility for a manager's license under 159.08 (6) (b), to provide evidence satisfactory to the state board of health that in obtaining such foreign license she met a requirement of the country issuing such license that she be a citizen of such country, or a citizen (in case of a provincial license) of the country of which the license issuing province was a part. The board in my judgment would be warranted in demanding satisfactory evidence that the applicant had met a requirement of citizenship in the country issuing the license, and in rejecting as unsatisfactory mere proof of citizenship in some

other country unless the law of the licensing country recognized citizenship in such other country as meeting a citizenship requirement of the licensing country. Moreover (and as above indicated), I believe that the board in dealing with a person seeking licensure as a manager under 159.08 (6) (b) and having a foreign, *provincial* license, may lawfully require evidence that the licensee in obtaining such license met a provincial requirement for citizenship in the nation of which the license issuing province was a part, rather than a requirement for provincial citizenship, were there such a thing. A provincial requirement of national citizenship would be "substantially comparable" to the United States citizenship requirement laid down by 159.08 (2) (d); not so a mere requirement for provincial citizenship, if such a thing existed.

B.

II. *May a cosmetologist, registered or licensed under the laws of another state or territory of the United States, be required, in order to establish eligibility for licensure under sec. 159.08 (6) (b) Wis. Stats., to provide evidence satisfactory to the state board of health that in obtaining her license from such other state or from a territory of the United States she met a requirement of such other state or territory that she be a United States citizen?*

It is my opinion that this question must be answered affirmatively. A citizenship requirement substantially comparable to that imposed by sec. 159.08 (2) (a) must first of all be one of national citizenship, and in the case of any other state of the United States or territory thereof, the citizenship requirement for licensure in the field of cosmetology which it would have to impose, to be substantially comparable to our Wisconsin requirement of United States citizenship, would of necessity be one of United States citizenship, too, i.e., it would not only be comparable, but would be identical, since under the circumstances involving a comparison of the requirements one state of the United States as to licensing cosmetologists with those of another such state or of a United States territory as to such licensing, the only citizenship requirement truly compar-

able to one of United States citizenship would be the identical requirement. Put in another manner Minnesota, for example, would in my judgment not have a citizenship requirement substantially comparable to our own in the cosmetology field unless it was a requirement not only of citizenship in a nation, but of United States citizenship.

For reasons shown in my answer to your first question, a person seeking licensure as an operator under 159.08 (6) (a) possessing a cosmetologist's license from another state of the United States or territory thereof cannot lawfully be required to submit satisfactory evidence to the board that she has met a citizenship requirement of the state or territory issuing her license.

C.

III. *If a person who is not a citizen of the United States receives her training as a cosmetologist in Wisconsin and is licensed as an operator in Wisconsin, must such a cosmetologist become a United States citizen in order to qualify for the examination for a managing cosmetologist license under the provisions of sec. 159.08 (2), Wis. Stats.?*

It is conceivable that the person described in your above stated question could have received the training and operator's license referred to therein, and yet also be a person, not a citizen of the United States, who is registered or licensed as a cosmetologist under the laws of a foreign country or province. Such a person, as indicated above, could receive a manager's license under 159.08 (6) (b), without becoming a United States citizen, if her cosmetologist license was a foreign one and if in receiving it she had met a requirement of citizenship in the license issuing nation substantially comparable to the citizenship requirement of 159.08 (2) (d). Assuming that the person described in your third question has no foreign cosmetologist's license, it then follows that such person is not eligible for licensure as a manager under 159.08 (6) (b), and would therefore be compelled to seek her manager's license under 159.08 (2). This would mean, of course, that she would have to become a citizen of the United States as required by 159.08 (2) (d), in order to write the examination referred

to in 159.08 (2) (c). In order to write such examination she would also have to be at least 21 years of age and must have practiced cosmetology at least 2 years under an operator's license in this state, and only after satisfactorily passing such examination could she be issued her manager's license under sec. 159.08 (2).

BCL:JHM:

Licenses—Notary Fees—County clerk may charge only $4.00 for issuance of marriage license, but may charge a fifty cent notarial fee in addition. If part of application is completed by another county clerk he is entitled to the notary fee also.

October 31, 1966.

JOSEPH A. MCDONALD, *District Attorney*
Douglas County

You request my opinion as to the amounts county clerks may collect for license fees and notarial fees for the issuance of marriage licenses.

Sec. 245.15, as amended by ch. 163, sec. 82, Laws 1965, provides:

"Each county clerk shall receive as a fee for each license granted, the sum of $4, of which $3 shall become a part of the funds of the county, and $1 shall be paid into the state treasury and credited to *as reimbursement toward* the appropriation made by s. 20.435 to be used to carry out the functions of the state advisory council for home and family. The clerk shall also receive a *standard* **notary fee** *of 50 cents for each license granted* which may be retained by him if operating on a fee or part fee basis, but which otherwise shall become part of the funds of the county."

Sec. 137.01 (9) (e) was amended by ch. 44, Laws 1965, to limit the notarial fee applicable to a single document as follows:

"For taking the acknowledgement of deeds, and for other services authorized by law, the same fees as are allowed to other officers for similar services, *but the fee per document shall not exceed 50 cents.*"

You inquire whether the above sections limit the maximum notarial fee on the one document to 50 cents in all instances, even where separate acknowledgments are taken before two county clerks, and whether the total maximum license fee for the issuance of the marriage license is therefore $4.50.

The answer to both questions is in the negative.

The maximum marriage license fee the county clerk of the issuing county can charge for the issuance of a marriage license is $4.

The issuing county clerk may also collect a standard notary fee of 50 cents for the notarial services performed in his county.

Where both parties appear before the county clerk in the county of issuance, only one notary fee of 50 cents may be charged by reason of the limitation in sec. 245.15. However, the limitation contained therein and the limitation contained in 137.01 (9) (e) are personal to the officer performing the service, and where a similar service is required of another officer he is also entitled to collect a fee. In each case each officer is entitled to only one notarial fee on a single document.

If part of the application is completed in another county as permitted by 245.05, the county clerk of such other county is entitled to collect a standard notary fee of 50 cents.

BCL:RJV:

Divorce—Nonresident—Divorced nonresident must abide by Wisconsin regulations governing the issuance of marriage licenses.

November 8, 1966.

ALLEN J. BUSBY, *Chairman*
Advisory Council for Home and Family

You inquire whether a person whose permanent residence and domicile is in a foreign state and who has been granted a decree of absolute divorce in such state, there being no statutory waiting period before remarriage in such state, or the foreign court having granted permission to remarry without regard to any waiting period provided by the law of such state, can lawfully be issued a Wisconsin license for marriage to and marry a Wisconsin resident before one year has passed after the granting of his divorce.

The answer to your question is "no".

For the purposes of this opinion it is immaterial whether either of the parties are Wisconsin residents, except that if one is a Wisconsin resident the license must be obtained from the county clerk of the county in which such person has resided for at least 30 days immediately prior to making application. Sec. 245.05.

Sec. 245.03 (1) and (2) provides in part:

"(1) No marriage shall be contracted while either of the parties has a husband or wife living * * *.

"(2) It is unlawful for any person, who is or has been a party to an action for divorce in any court in this state, or elsewhere, to marry again until one year after judgment of divorce is granted, and the marriage of any such person solemnized before the expiration of one year from the date of the granting of judgment of divorce shall be void."

You also request my opinion as to the constitutionality of sec. 245.03 (2) as applied to the above set of facts.

It is my opinion that the statute is constitutional.

Subsec. (1) is not involved in your question but is quoted because it has been in part at least the basis for Wisconsin decisions holding remarriages void where persons who were divorced in Wisconsin and remarried within the one

year period in Wisconsin or elsewhere. A Wisconsin divorce does not affect the marital status of the parties until the expiration of one year from the granting of the judgment, except that it shall immediately bar the parties from cohabitation together. Sec. 247.37 (1) (a). The parties remain husband and wife during the said year.

In the case you refer to, it is assumed that the marriage relationship was immediately severed. We are concerned with the provisions of 245.03 (2).

We are not concerned with any extraterritorial effect of sec. 245.03 (2), since the application to marry is made and marriage is contemplated in Wisconsin.

The statute does not violate the provisions of the full faith and credit clause of the federal constitution. Wisconsin extends full faith and credit to the foreign divorce decree within the required constitutional limits. See sec. 247.21.

Wisconsin courts must accord the divorce decree of a sister state such faith and credit as it has by law or usage in such sister state. *Hartenstein v. Hartenstein,* (1963) 18 Wis. 2d 505, 118 N.W. 2d 881.

Even under the assumed set of facts, all the foreign court could do would be to grant the divorce and authorize remarriage of the divorced person without regard to the interlocutory waiting period provided by the law of such state if the laws of such state permitted such waiver. Such court could not by its divorce decree absolve the parties to the divorce from compliance with various requirements of the marriage laws of such state, nor could it absolve the parties from meeting the marriage requirements of any sister state in which either of the parties sought to remarry.

As a related example, a female nonresident who is 15 is not qualified to receive a license to marry in Wisconsin where the minimum age even with consent is 16 just because the laws of her state of residence permit marriage at 15.

We are concerned with laws granting persons the right to enter into a marriage relationship in this state, and only

indirectly with divorce laws, and neither a Wisconsin court nor the court of a sister state has authority to waive the provisions of a duly enacted Wisconsin statute such as sec. 245.03 (2).

A nonresident seeking to marry in Wisconsin must comply with the reasonable requirements of the Wisconsin marriage law. Such nonresident is entitled to equal protection of the laws by reason of section 1 of the XIV Amendment to the United States constitution. However, such nonresident is not entitled to preferential treatment.

Under Art. IV, secs 1 and 2, U. S. Const., a state must accord full faith and credit to the public acts and judicial decrees of other states, and the citizens of each state are entitled to all privileges and immunities of the citizens of the several states. This in no way means that one state can impose its legislation or practices on a sister state with respect to matters which are properly within the jurisdiction of the sister state.

The law of the state where a marriage is consummated generally determines the question of validity of a marriage, as stated in 35 Am. Jur., *Marriage,* 284, 285:

"* * * Therefore, a marriage valid where contracted or celebrated will generally be regarded as valid everywhere, unless it is contrary to the statutes or public policy of the forum. * * * The converse is equally true — a marriage void where it is celebrated is void everywhere. * * *"

Wisconsin has the right to control and regulate by reasonable laws the marriage relationship of its citizens, and persons seeking to enter into the relationship in this state must comply with its laws.

Kitzman v. Werner, (1918) 167 Wis. 308, 166 N.W. 789;

State v. Duket, (1895) 90 Wis. 272, 276, 63 N.W. 83;

Hall v. Industrial Commission, (1917) 165 Wis. 364, 162 N.W. 312.

At 35 Am. Jur., *Marriage,* 186, 187, it is stated:

"Marriage, being of vital public interest, is subject to the state and to legislative power and control, with respect to

its inception, duration and status, conditions, and termination, except as restricted by constitutional provision. * * * Since the state is an interested party, its consent is essential to every marriage. * * *

"* * *

"* * * The *power of regulation* of *marriages within a state belongs to that state and not to Congress or another state* * * *." (Emphasis added.)

At 35 Am. Jur., *Marriage*, 282, it is stated:

"A state is fully sovereign with respect to the control and regulation of marriages for the purpose of promoting public morality and the moral and physical development of the parties, and every state has the power to determine not only who shall assume but who shall occupy the matrimonial relationship within its borders. Such effect as may be given by a state to the marriage laws of another state is merely because of comity, or because justice and policy demand the recognition of such laws, and no state is bound by comity to give effect in its courts to laws which are repugnant to its own laws and policy. * * *"

At 35 Am. Jur., *Marriage*, 277, it is stated:

"Statutes commonly prohibit and make void or voidable and a punishable crime the remarriage after divorce within a certain time after divorce * * *. Such statutes are founded on public policy, are within the power of the legislature, and are constitutional. * * *"

The public policy reasons for the provision prohibiting divorced persons from remarrying prior to one year after judgment of divorce is entered are discussed in *Lanham v. Lanham*, (1908) 136 Wis. 360, 117 N.W. 787. On the basis of the reasoning therein and in later cases, it is immaterial whether the marriage relationship is severed immediately on entry of the divorce judgment or one year thereafter, as is the case in Wisconsin. Also See *Hall v. Industrial Comm.*, supra, p. 369.

Our court has consistently held that the prohibition contained in sec. 245.03 (2) is applicable to Wisconsin residents

and has given extraterritorial effect to the provision where remarriage is attempted outside the state within the one year period.

Estate of Ferguson, (1964) 25 Wis. 2d 75, 80, 130 N.W. 2d 300;

Lanham v. Lanham, (1908) 136 Wis. 360, 117 N.W. 787;

Bliffert v. Bliffert, (1961) 14 Wis. 2d 316, 111 N.W. 2d 188;

Ginkowski v. Ginkowski, (1965) 28 Wis. 2d 530, 137 N.W. 2d 403.

In *Roddis v. Roddis,* (1962) 18 Wis. 2d 118, 118 N.W. 2d 109, the court was dealing with present sec. 245.03 (2). The court held that a remarriage in New Mexico within one year was void and sufficient cause to vacate a judgment for divorce granted for adultery. At pp. 123 and 124 the court states:

"* * * We find nothing in the Family Code, enacted in the 1959 session of the legislature, which supersedes or makes obsolete the decisions of the *White* and the *Kilmer Cases* in any respect material to the present questions. The legislature has not indicated that there has been a change in public policy looking with more favor upon a more-rapid acquisition of successive spouses. The old deterents, as expressed in those cases, have not been modified, and when they are, the modification should be by the legislature, not by the courts."

Prior to its creation into present form by ch. 690, Laws 1959, sec. 245.03 (2) applied only to persons who were a party to an action for divorce *in this state,* and to *Wisconsin residents* who were parties to a divorce *elsewhere.* See 1959 Stats.

The legislature by enactment of ch. 690, Laws 1959, clearly intended that the mandatory waiting period apply to any person, including a nonresident, before a license could lawfully be issued in this state irrespective of whether his divorce decree became final at judgment or one year thereafter.

Sec. 245.12 (1) authorizes the county clerk to issue a license only if there is no prohibition against the marriage, and under 245.12 (2) the license authorizes a marriage to be performed by an authorized person who must refuse to perform the ceremony if he knows of any legal impediment to such marriage. Sec. 245.30 (2) (b) provides a criminal penalty for a county clerk who issues a marriage license in violation of statute, and 245.30 (3) (a) provides a criminal penalty for any officiating person who solemnizes a marriage knowing of any legal impediment.

As stated above I am of the opinion that the provisions of sec. 245.03 (2) are constitutional as applied to nonresidents seeking to enter into a marital relationship in this state.

Duly enacted statutes are entitled to a strong presumption of constitutionality unless it appears clearly beyond a reasonable doubt that a statute is unconstitutional. An inferior court should assume that the statute is constitutional until the contrary is decided by a court of appellate jurisdiction, especially where the statute has been in effect for a number of years and has been enforced in numerous cases.

Milwaukee v. Hoffman, (1965) 29 Wis. 2d 193, 198, 138 N.W. 2d 223.

BCL:RJV:

Resources Development—Contracts—State agency cannot enter into contractual agreement with private agencies to furnish services normally performed by civil service employes.

November 28, 1966.

WALTER K. JOHNSON
State Planning Director

You have requested my opinion whether the board on government operations can allocate $30,000 to your department to finance the cost of employing consultants to pre-

pare maps and plans for an area within one mile of the proposed parkside campus in Kenosha county.

The answer to this question is "no".

It is proposed that your department contract with a planning consultant who is now working on a Kenosha area plan for the southeast regional planning commission for $12,500 and that a separate contract be let for the aerial survey work at $17,500.

It is clear that the department of resource development has authority to undertake this *type* of state planning through the use of its own personnel or in cooperation with other state agencies. See secs. 109.04, 109.05, 109.08 and 20.904.

The duty to accomplish tasks of state planning rests with the department, and there is no specific language within the chapter which would permit the department to accomplish its planning duties by contracting with private professional planning firms.

Sec. 109.10 does authorize the department to enter into contracts with private agencies for promotional activities under the chapter. If the legislature had contemplated that private contracts could be entered into for the purposes of accomplishing state planning and development activities, it would have so provided. The language of sec. 109.05 (1) (i) "to contract with reference thereto" does not in my opinion authorize the department to delegate its planning duties to private consultants.

The general rule is that a state agency cannot enter into contractual agreements with individuals, partnerships or corporations, for the furnishing of services *normally performed* by employes under the civil service laws. In some instances a state agency can contract for the furnishing of services not normally performed by regular state employes.

Stockburger v. Riley, (1937) 21 Cal. App. 2d 165, 68 P. 2d 741;

State Compensation Ins. Fund v. Riley, (1937) 9 Cal. 2d 126, 69 P. 2d 985;

Rehse v. Industrial Commission, (1957) 1 Wis. 2d 621, 85 N.W. 2d 378;

State v. Industrial Comm., (1946) 250 Wis. 140, 26 N.W. 2d 273;

111 A. L. R. 1510;

10 OAG 1019.

Resort to independent contractors cannot be made to circumvent the civil service laws.

In 15 Am. Jur. 2d Civil Service, § 13, p. 474, it is stated:

"The purpose of a civil service act to have public servants selected for merit and fitness, and not on the basis of personal and political considerations, may not be destroyed by the mere device of entering into an agreement with an 'independent contractor,' although bona fide contracts with independent contractors may be made in proper cases. The true test is not whether a person is an 'independent contractor' or an 'employee,' but whether the services contracted for, whether temporary or permanent, are of such a nature that they could be performed by one selected under the provisions of civil service; if the services could be so performed, compliance with the civil service laws is mandatory and the contract is invalid, but such a contract may be valid if the services are of such a nature that they could not be performed by one selected under the civil service provisions."

It would appear that the aerial survey work is not work which could normally be performed by persons within the civil service and that such work could be contracted for if funds were available.

The department of resource development has authority to hire personnel under the civil service laws who should be competent to carry out the planning duties of the department. As pointed out above assistance from other state departments, including the University of Wisconsin, is available under the cooperation statutes, secs. 20.904 and 109.08. Some planning services may include engineering services. Sec. 16.85 (2) requires the department of administra-

tion to furnish engineering and architectural services to the various state agencies. Also see sec. 16.87.

Can the board on government operations allocate $30,000 to the department of resource development for planning an area around the new campus if the department were to accomplish the work itself?

I am of the opinion that it cannot accomplish this by supplement, but might authorize transfer of certain funds from the state building commission.

You state that the legislature authorized your department $204,402 for local and regional planning and $49,023 for state planning for the 11 months beginning August 1, 1966, and ending June 30, 1967. Evidently no part of those funds was earmarked for this project.

The board on government operations refers to the request as:

"a supplement * * * for instituting this new program of planning and zoning an area around the new campus * * *"

The state unquestionably has an interest in this type of planning. The southeastern regional planning commission could undertake the task and Kenosha county and other municipal units of government could zone in the area.

While the planning is of lands adjacent to the campus proper, the campus itself would be a prime beneficiary.

The board on government operations is governed by secs. 14.72 and 20.385.

Sec. 14.72 (2) provides that the board may supplement appropriations of a department if it finds:

"(a) That an emergency exists;

"(b) That no funds are available for such purposes;

"(c) That the purposes for which a supplemental appropriation or transfer is requested have been authorized or directed by the legislature; or"

Sec. 14.72 (2a) relates to transfers and provides in part:

"(2a) The board on government operations is authorized to transfer between appropriations and programs if the board finds that unnecessary duplication of functions can be eliminated, more efficient and effective methods for performing programs will result or legislative intent will be more effectively carried out because of such transfer and if legislative intent will not be changed as the result of such transfer. * * *"

The 1965 legislature created 20.551 (4b) and 39.024 (4) by enactment of ch. 259, Laws 1965. These sections relate to the creation of a new public collegiate institution in the Kenosha-Racine area, and make certain appropriations in that regard.

Sec. 39.024 (4) (g) provided:

"The state building commission shall allocate from funds made available to it by s. 20.551 (4b) moneys *adequate for all purposes in its judgment appropriate to the planning of the new collegiate institutions* authorized by this subsection. Such allocation shall be made following completion of all actions contemplated by pars. (c), (d), (e) and (f)."

Sec. 20.551 (4b) appropriated $400,000 for "preliminary planning, surveys and architectural design", but was repealed by ch. 433, Laws 1965 and 39.024 (4) (g) was amended by the same chapter of the laws to refer to 20.240 (2) (c) for funds.

There appears to be a legislative intent to place all responsibility for financing planning for this campus with the state building commission. The need for planning does not stop at the borders of the campus.

The board on government operations cannot supplement the budget of the department of resource development for planning services at the southeastern campus, as the legislature intended that the state building commission should allocate the funds available for that purpose. Certain of such funds could be transferred to the department of resource development if the board determines that the latter agency can carry out the tasks in a more efficient manner.

Sec. 14.72 (3) provides that the governor shall submit his recommendation on the request for supplement or transfer of funds.

BCL:RJV:

Teachers Retirement—Benefits—Benefits provided by sec. 42.49 (4), (6) and (7) are not available to a member of the combined group of the teachers retirement fund who elected to become a member of the formula group.

November 29, 1966.

HARRY H. JOYCE, *Executive Secretary*
State Teachers Retirement Board

You have requested my opinion "* * * as to what rights and benefits are * * * waived or forfeited by members of the combined group who elect the formula group and whether they include the benefits of sec. 42.49 (4), (6) and (7)".

Sec. 42.244, Stats., enacted by ch. 250, Laws 1965, created the "formula group" of the state teachers retirement system, and provided the procedure whereby members of said system who were in either the "combined group" or the "separate group" might go into the "formula group".

Sec. 42.242 listed the benefits which were available to members of the "combined group" of the state teachers retirement system, and 42.49 listed the benefits which were available to members of the "separate group" of said system. Included in the latter were guaranteed minimum benefits under 42.49 (4), (6) and (7). These subsections provided that a member of the "separate group" who could meet the qualifications established by one of them could receive a retirement annuity described therein, calculated under a formula based upon years of service or upon a combination of average annual salary for the last 5 years and years of service. If the member's deposits and the state deposits and prior service credits of the member

would not finance, upon an actuarial basis, the guaranteed minimum annuity for which the member could qualify, the state would provide the additional reserve required to pay the difference. Those guaranteed minimum annuities sometimes were called "increased annuities" as indicated by the respective titles of sec. 42.49 (4), (6) and (7).

The only "increased annuity" which was available to a member of the "combined group" was that provided by 42.242 (3). This was restricted to those members of the combined group who had been members of the state retirement system prior to April 5, 1957 and who were not in the variable annuity division. See ss. 42.242 (3) and 42.243 (2) (c). Of this restricted group one who was eligible to receive an OASI (Social Security) benefit was guaranteed a total benefit (OASI plus retirement system) "equal to" the benefit for which "he would have been eligible under 42.49 (4) * * * (6) or (7) if he had remained a member of the separate group". Sec. 42.242 (3) (a) 1. The remainder of such restricted group—namely those who were not eligible to receive an OASI benefit—had the right to receive an annuity which would be "increased by an amount such that said annuity * * * is equal to the total annuity for which such member would have been eligible under sec. 42.49 (4) * * * (6) and (7) if he had remained a member of the separate group".

In *State ex rel. O'Neil v. Blied,* 188 Wis. 442, 206 N.W. 213, and *State ex rel. Stafford v. Annuity and Investment Board,* 219 Wis. 31, 261 N.W. 718, the court held that a contractual relationship existed between the state and the members of the state teachers retirement system whereby certain rights and benefits which accrued to a member of the system under the statutes which comprised said system could not be taken away, even by the enactment of another statute.

Hence the procedure which was provided by ch. 250, Laws 1965, for becoming a member of the newly created "formula group" involved an election by the individual member.

Sec. 42.244 (2) provides in part:

"* * * A member who elects to become a member of the formula group shall thereby become subject to the laws relating to the formula group, and such election shall constitute a modification of the employment contract of such member, * * *."

This provision applies equally to all members of the state retirement system, and means that any member of such system who elects to become a member of the formula group agrees to forego the rights and benefits which he enjoyed as a member of either the separate or combined group, except where such rights or benefits are specifically continued under some other provision of the statutes.

Ch. 250, Laws 1965, created s. 42.245 entitled "Benefits under the formula group". The introductory paragraph thereof provides that it applies only to members of the formula group. Subsec. (1) establishes a system for determining "creditable service" which is used in calculating retirement benefits. Subsec. (2) provides the retirement annuities available to members of the formula group. Par. (b) states that "The retirement annuity of a formula group member, except as provided in par. (c), (d) or (dm), shall be in the monthly amount equal to the sum of the amounts determined pursuant to subds. 1 and 2, * * *". Neither subds. 1 or 2 nor pars. (c), (d) or (dm) make any reference to s. 42.49 (4), (6) or (7), or 42.243 (3). Moreover, par. (d) states "Except as provided in par. (dm) the retirement annuity of a member who elected under s. 42.244 (1) (a) or (b) [which includes members of both the separate and combined groups] to become a formula group member shall be the amount determined pursuant to par. (b), (c) or this paragraph, as the member may elect * * *".

I am of the opinion that the modification of the employment contract which the members of the system possessed under the doctrine of the *O'Neil* case included in the case of the separate group members a waiver of the benefits of 42.49 (4), (6) and (7), and in the case of the combined group members a waiver of the benefits of 42.242 (3), and also included in each case the receipt of the benefits provided by 42.245.

Sec. 42.246 (1) relates to election of the formula group by members of the separate group, and provides in part:

"Any separate group member who is eligible to elect to participate in the formula group as provided in s. 42.244, and who so elects, shall be subject to all laws and regulations applicable to the formula group * * *. Each separate group member who elects to become a formula group member shall also be subject to the following:

"* * *

"(b) An election by a separate group member to become a member of the formula group shall constitute a complete waiver and forfeiture of any right of the member to any benefit under s. 42.49 (4), (6) and (7), and shall constitute a modification of his contract of employment."

There is no identical or similar statute which specifically states that an election by a combined group member to become a member of the formula group shall constitute a complete waiver and forfeiture of any right of such member to any benefit under 42.49 (4), (6) or (7).

While the presence of such an identical or similar statute would strengthen the conclusion of an intent to deprive the combined group members of the benefits of 42.49 (4), (6) and (7), the absence of such a provision certainly does not nullify the effect of that part of 42.244 (2) quoted above, which applies to both combined and separate group members and states that their rights are governed by the laws relating to the formula group and that their previous contract, which included the right to other benefits, was modified.

It is obvious that much of what is in 42.246 (1) is not very meaningful because it is repetitive of what is in 42.244 (2), and I do not believe that special significance should attach to the former. In one sense it could also be argued that while 42.49 (4), (6) and (7) made the benefits of those subsections available to members of the separate group who could qualify therefor, neither 42.244 (3) (a) 1 nor (d) made the benefits of 42.49 (4), (6) or (7) available to members of the combined group but referred to

them only for the purpose of indicating that the total annuity to which the combined group member was entitled should be equal to the amounts provided for members of the separate group under 42.49 (4), (6) and (7).

It is my understanding that you and the state teachers retirement board have construed the aforesaid statutes to mean that members of the combined group who elected to be members of the formula group thereby disqualified themselves for the benefits of 42.49 (4), (6) and (7), and that you have consistently so advised the members of the system. While this administrative interpretation obviously is not of long standing it is entitled to substantial weight. *Fort Howard Paper Co. v. Town of Ashwaubenon,* 9 Wis. 2d 329, 100 N.W. 2d 915, *State v. Fischer,* 17 Wis. 2d 141, 115 N.W. 2d 553.

For the reasons given above, I am of the opinion that the benefits of sec. 42.49 (4), (6) and (7), are not available to members of the combined group who elected to join the formula group.

BCL:JRW:

Resolutions—Wolf River—Resolutions of county of Menominee, Town of Menominee and Menominee Enterprises accepting offer in Ch. 623, Laws 1965, are satisfactory but supplemental agreement requires approval of governor and appears to be at variance with chapter.

November 30, 1966.

L. P. VOIGT, *Director*
Conservation Department

You request my opinion as to whether the resolutions of acceptance of Menominee Enterprises, Inc., the county of Menominee and the town of Menominee, copies of which you have submitted to me, are satisfactory and sufficiently comply with the provisions of the offer stated in ch. 623,

Laws 1965, as to constitute an acceptance of such offer. You have submitted to me for review copies of the resolutions and of the agreement and rules for protection and use of the area submitted with such resolutions.

It is my opinion that the resolutions of Menominee Enterprises, Inc., the county and the town are sufficient to constitute an acceptance of such offer.

Ch. 623, Laws 1965, relates to the preservation of the Wolf River in Menominee county as a scenic waterway, and to that end makes an offer to the county, town, company and other owners and lessees on the river of certain monetary payments for the consideration of discontinuing construction of cottages and providing for free public access to the area.

The chapter requires at sec. 30.251 (3) (g) that:

"The county board and the town board are directed to meet in special session within 30 days after the effective date of this section, or if such day is a legal holiday, then on next business day, and, together with the officials of the company, and representatives of owners and lessees of property in the areas described in par. (a), *consider and act on said offer.* * * *"

Sec. 30.251 (3) further requires that the county, town and company and any private owner or lessee execute an acceptance agreement, and specifies in part what such agreement should contain in these words:

"(c) In the acceptance of the offer it shall be specified just how the appropriation made by s. 20.280 (6) (a) shall be prorated among those initially accepting this offer.

"* * *

"(f) * * * but the agreement shall also provide that the county, town and the company shall endeavor to have such private owners and lessees join in the agreement and provide a formula for ascertaining the amount to be paid to each. * * *"

The agreement is subject to the approval of the governor by virtue of (3) (f) which reads in part:

"If any private owner or lessee, other than the company, of property in the area or waters specified in par. (a) fail to join any such agreement between the county, town and the company, the governor may approve the agreement made by the parties, and payments shall be made to the parties of the agreement as made * * *."

The governor must also approve any payment made from the appropriation under the express language of 30.251 (4):

"No payment shall be made from the appropriation made by s. 20.280 (6) unless approved by the governor."

The county, town and company met as required within the 30-day period specified in 30.251 (3) (g) and, pursuant to such meeting by individual resolution executed and forwarded to the governor, made their acceptance of the offer of the legislature. The material identical portion of the first resolutions of the county, town and company is as follows:

"NOW, THEREFORE, BE IT

"RESOLVED, that the offer set forth in Chapter 623, Wisconsin Laws of 1965, relating to the preservation of the Wolf River within 200 feet of the shoreline from the northern boundary of Menominee County through Keshena Falls, *be and hereby is accepted in accordance with the terms* thereof * * *." (Emphasis supplied.)

The resolutions, therefore, specifically and unconditionally accept the offer set forth in ch. 623, Laws 1965, "in accordance with the terms thereof".

The second and third resolutions of the county, town and company approve the agreement and proposed rules and authorize the submission of the resolutions, agreement and rules to the governor. The identical resolutions read as follows:

"FURTHER RESOLVED, that the Agreement containing the terms of said offer and acceptance, and proposed rules for protection and use of the Area, in substantially the form attached hereto and made a part hereof, be and hereby is approved.

"FURTHER RESOLVED, that copies of these resolutions of acceptance on behalf of the Town of Menominee, together with said Agreement executed on behalf of the Town of Menominee by the Town Chairman and the Town Clerk, shall be immediately sent to the Governor as notification of such acceptance."

The agreement submitted with the resolutions of acceptance contains terms in addition to and apparently at variance with the terms stated in sec. 30.251. This, however, does not affect the validity of the acceptance.

It is apparent that the legislature intended the governor to review the agreement to be executed following the acceptance, and to insure that such agreement was in conformance with the offer. Ch. 623 sets no limit on the time during which the agreement must be submitted to or approved by the governor. The only limitation is that set forth in sec. 30.251 (3) (g) requiring the county, town and company to "consider and act on said offer" within 30 days after the effective date of the section. The county, town and company have, as noted above, acted within such time and accepted the offer by resolution. The chapter contemplates additional agreements both in specific terms and in the form of rules for the protection and use of the area. Consequently, although the agreement submitted with the resolution may be unsatisfactory, the governor and the parties may negotiate the required collateral agreement to conform such agreement with the terms of ch. 623.

The collateral agreement contemplated by ch. 623 is to be reviewed and approved by the governor. Any negotiation necessary to bring the agreement into conformity with the terms of ch. 623 is to be carried on by the governor or his representatives. We will be pleased to confer with the governor or his representatives with respect to specific terms of the agreement upon request.

BCL:WMS:

State Armory Board—Leases—Under sec. 21.615 (4) the leasing of property owned by the state armory board to private individuals would not affect the tax exempt status.

December 7, 1966.

RALPH J. OLSON, *Chairman*
Wisconsin State Armory Board

You have requested my opinion as to the effect of sec. 70.11 (1), and other statutes upon a private leasing agreement which the board contemplates entering on a year-to-year basis.

The property in question was purchased by the board in 1962 to provide a runway extension to existing facilities at Volk Field, Camp Douglas, Wisconsin. The grantor of the property nevertheless continued to utilize the parcel purchased from him for agriculture purposes until April of 1964 when he was given notice to vacate the premises. In the summer of 1965 a request by the grantor for permission to harvest the hay crop on the property precipitated your opinion request.

Sec. 70.11 (1) exempts property owned by the state from general property taxation, and this exemption is not lost when such property is leased to private persons. *Aberg v. Moe,* (1929) 198 Wis. 349, 224 N.W. 132, 226 N.W. 301. However, it is not necessary to further discuss sec. 70.11 (1) since the board possesses a specific statutory exemption from property taxation which expressly resolves any taxation problems with respect to the lease. I refer to 21.615 (4), which reads in part:

"* * * So long as any property of any kind or character shall be owned by the board such property, together with the rents, issues and profits thereof, shall be exempt from taxation, both general and special, by this state or by any municipal corporation, county or other political subdivision or taxing body in the state."

It is my opinion that the language of sec. 21.615 (4) clearly precludes any possibility that effectuation of the pro-

posed lease would subject the land in question to property taxation. Moreover, except for statutes of general application relating to leases and leasehold interests, I have found no other statutes which would affect the proposed lease under the facts you have given.

BCL:JDJ:

Compatibility—Positions of county board supervisor and veterans' service officer are incompatible. Supervisor would be eligible to appointment if he resigned position before board acts.

December 21, 1966.

ROBERT ZUMBRUNNEN, *District Attorney*
Washburn County

You have inquired whether the positions of county board supervisor and county veterans' service officer are compatible.

In 34 OAG 265 it was stated that they were not compatible and that a county board supervisor could not resign and be elected veterans' service officer so as to serve in the latter position during a portion of the term for which he was elected as supervisor. In view of the amendment of sec. 66.11 (2), a reappraisal is in order.

Both positions are county offices, and because of applicable statutes are incompatible and cannot be held by one person at the same time.

A county service officer is elected by the county board for an initial two-year term, and if reelected serves a four-year term. While sec. 45.43 uses the term "elected" it means "appointed", and is one of the county offices within the provisions of Art. XIII, sec. 9, Wis. Const. As used in sec. 66.11 (2), I conclude that the term "elective office" was used to denote election by the electorate.

A county board supervisor is a county officer. Sec. 59.03 (2) (d).

Sec. 59.03 (3) provides:

"(3) COMPATIBILITY. No county officer or employe is eligible to the office of supervisor, but a supervisor may also be a member of a town board, the common council of his city or the board of trustees of his village."

Sec. 66.11 (2) provides:

"ELIGIBILITY OF OTHER OFFICERS. Except as expressly authorized by statute, no member of a town, village or county board, or city council shall, during the term for which he is elected, be eligible for any office or position which during such term has been created by, or the selection to which is vested in, such board or council, but such member shall be eligible for any elective office. The governing body may be represented on city or village boards and commissions where no additional remuneration is paid such representatives and may fix the tenure of such representatives notwithstanding any other statutory provision. This subsection shall not apply to a member of any such board or council who resigns from said board or council before being appointed to an office or position which was not created during his term in office."

The disability to serve during the term for which he is elected would be applicable if the position of veterans' service officer were created during the term for which the supervisor was elected. It was not.

If the supervisor were to resign as supervisor, he could thereafter be elected or appointed to the veterans' service officer position. Such member takes a risk in resigning, since he cannot be assured of being selected county veterans' service officer.

BCL:RJV:

Constitutionality—Religion—There are no state or federal constitutional objections to the proposed program of academic study of religion at Whitewater state university.

December 29, 1966.

EUGENE R. MCPHEE, *Director*
Wisconsin State Universities

You have requested my opinion as to the constitutionality of the program of academic study of religion proposed for use at Wisconsin State University, Whitewater.

The state and federal constitutional provisions pertinent to your inquiry are as follows:

United States Constitution, First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *."

Art. I, sec. 18, Wis. Const.:

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

Art. X, sec. 6, Wis. Const.:

"Provision shall be made by law for the establishment of a state university at or near the seat of state government, and for connecting with the same, from time to time, such colleges in different parts of the state as the interests of education may require. The proceeds of all lands that have been or may hereafter be granted by the United States to the state for the support of a university shall be and remain a perpetual fund to be called 'the university fund,' the inter-

est of which shall be appropriated to the support of the state university, *and no sectarian instruction shall be allowed in such university.*" (Emphasis supplied.)

The proposed program at Whitewater state university would involve offering specific courses such as "Religions of the World", "Basic Religious Thought in the Western World", and "Introduction to Contemporary Religious Thought". These courses would be offered as electives and would not be required for graduation in any curriculum. The incidental treatment of religious art, religious music, the reformation and other academic aspects of religion would remain in the basic studies of history, literature, music and art.

Although there is a paucity of case law on this point, it is apparent that the state and federal constitutional provisions respecting sectarian instruction and an establishment of religion were never intended to prohibit the academic study of religion. In *Abington School District v. Schempp,* (1963) 374 U.S. 203, 225, 300, 10 L. ed. 2d 844, 83 S. Ct. 1560, the landmark decision which banned devotional bible reading in public schools, the United States supreme court took careful pains to point out the difference between the teaching of religion and the teaching about religion. Justice Clark, writing for the majority, stated:

"* * * We do not agree, however, that this decision in any sense has that effect. In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment. * * *"

Justice Brennan in a concurring opinion expressed the same concept as follows:

"The holding of the Court today plainly does not foreclose teaching *about* the Holy Scriptures or about the differences

between religious sects in classes in literature or history. Indeed, whether or not the Bible is involved, it would be impossible to teach meaningfully many subjects in the social sciences or the humanities without some mention of religion. * * *"

The test enunciated in the *Schempp* case is one of governmental neutrality. That is, the purpose and primary effect of a legislative enactment or a course of instruction at a state university must neither be to advance or oppose religion. Rather the government should take a position of neutrality towards religion, which in the present context would appear to permit attempts to inculcate an understanding of but not a belief in a religious faith. This test should provide considerable flexibility to university administrators in formulating a program of academic religious instruction.

It is likely that our supreme court would adopt a comparable test in construing the prohibition against sectarian instruction in Art. X, sec. 6, Wis. Const. In *State ex rel. Weiss v. District Board,* (1890) 76 Wis. 177, 195, 44 N.W. 967, the court made the following salient observations with respect to permissible nonsectarian uses of the Bible and other religious literature in the public schools:

"It should be observed, in this connection, that the above views do not, as counsel seemed to think they may, banish from the district schools such text-books as are founded upon the fundamental teachings of the Bible, or which contain extracts therefrom. Such teachings and extracts pervade and ornament our secular literature, and are important elements in its value and usefulness. Such text-books are in the schools for secular instruction, and rightly so; and the constitutional prohibition of sectarian instruction does not include them, even though they may contain passages from which some inferences of sectarian doctrine might possibly be drawn.

"Furthermore, there is much in the Bible which cannot justly be characterized as sectarian. There can be no valid objection to the use of such matter in the secular instruction of the pupils. *Much of it has great historical and liter-*

*ary value, which may be thus utilized without violating the constitutional prohibition. * * **" (Emphasis supplied.)

Although the court in the *Weiss* case did not specifically include university programs of academic religious instruction among those secular uses of the bible and other religious writings which would be permitted under the Wisconsin constitution, it seems reasonable to infer that such a program would be considered secular in nature. Indeed, to conclude otherwise would be repugnant not only to the concept of governmental neutrality but to that of academic freedom. See Katz, Religious Studies in State Universities, 1966 Wis. L. Rev. 297.

It is therefore my opinion that there would be no state or federal constitutional objection to the program of academic religious instruction proposed for use at Whitewater state university.

BCL:JDJ:

Mental Hospitals—Supervision—Supervision of county mental hospital, mental health clinics, and day care programs rests with authorities established in secs. 51.25, 51.36, and 51.38 respectively, notwithstanding provisions of sec. 46.21.

December 30, 1966.

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

You ask, "whether an election by a county of less than 500,000 to be under sec. 46.21, Stats., operates to place its mental hospital, mental health clinic, and day care program established pursuant to secs. 51.25, 51.36, and 51.38, Stats., respectively, under the county board of public welfare established by sec. 46.21 (1) (a), Stats., and a director of institutions and departments, instead of the governing authorities mentioned in the statutes pursuant to which these institutions and services were established."

Sec. 46.22 (1) provides:

"Every county having a population of less than 500,000 may by a vote of its county board of supervisors elect to be under s. 46.21. In every county having a population of less than 500,000 that has not elected to be under s. 46.21, there is created a county department of public welfare. * * *"

The remainder of this section sets forth the composition, powers, and duties of the county department of public welfare.

Sec. 46.21 (1) provides for a county board of public welfare in counties having a population of 500,000. The duties and responsibilities of this board are set forth in sec. 46.21 (2) (a), which provides:

"Such board shall be charged with supervising the operation, maintenance and improvement in each county by the director of institutions and departments, of the county hospital, dispensary-emergency unit of said hospital, guidance clinic, infirmary, home for children, children's court center as provided in s. 48.06 (1), mental health center, north division and south division, tuberculosis hospital, department of public welfare created by s. 49.51 (2) (a), county agent's department, farm, service departments and such other institutions and departments as are placed under the jurisdiction of the board of public welfare by the county board of supervisors, and all buildings and land used in connection with any or all such institutions. * * *"

It is my opinion that the county mental hospital, mental health clinic, and day care program should be governed by the authorities established within Ch. 51 even when a county elects to be under sec. 46.21. This conclusion is compelled by the language of sec. 46.21 (2) (a) and by the provisions and goal of Ch. 51.

The enumeration contained in sec. 46.21 (2) (a) does not include any of the institutions involved in your question. From a careful reading of the statute, it is clear that the "county hospital" to which reference is made in 46.21 (2) (a) is not the county mental hospital established by 51.25. Furthermore, only counties of 500,000 or more have statu-

tory authority to establish a "mental health center, north division and south division". Sec. 51.24. The mental health clinics established pursuant to 51.36 are an entirely different entity.

Moreover, the omnibus clause in sec. 46.21 (2) (a) does not affect the conclusion stated. In addition to the institutions enumerated therein, this section also charges the board with the operation of "such other institutions and departments as are placed under the jurisdiction of the board of public welfare by the county board of supervisors". It is my opinion that this clause refers to those institutions and departments which counties are authorized to establish but does not include those which are specifically identified and established pursuant to special statutes, such as those in Ch. 51.

Secs. 51.36 and 51.38 authorize any county, city, town or village or any combination thereof or any nonprofit corporation to establish mental health clinics and day care services. Subsec. (6) of each of these sections establishes a board of directors to govern such institutions.

I find no compelling reason for interpreting 46.21 (2) (a) to include these institutions, which might be established by any municipality or by a private nonprofit corporation. On the contrary, the elaborate provisions relating to the supervision of these institutions and the unique character of mental health problems dictate the opposite result. In enacting Ch. 51 (state mental health act), the legislature recognized a need for specialized supervision as well as specialized treatment in this area.

This same reasoning applies with equal force to 51.25, under which county mental hospitals are established. Sec. 51.26 (2) provides that such hospitals "shall be governed pursuant to ss. 46.18, 46.19 and 46.20". Sec. 46.18, among other things, provides for the management of various county institutions by three trustees elected by the county board. Secs. 46.19 and 46.20 deal with officers and employes of county institutions and joint county institutions, respectively. The former provision authorizes the trustees to appoint a superintendent of each institution and to

prescribe his duties. This authority possessed by the trustees reappears in 51.25, after which it is stated that the superintendent shall appoint a visiting physician for the county mental hospital subject to the approval of the trustees.

When it provided for the election under 46.22 (1), the legislature did not express a clear intention that the omnibus clause contained in 46.21 (2) (a) encompass those institutions established under Ch. 51. In view of the elaborate scheme for both treatment of patients and supervision of programs under the mental health act, such a clear expression must be shown before these mental health institutions are removed from the supervising authorities established in secs. 51.25, 51.36 and 51.38.

BCL:DPJ:

Home Rule—Vending Machines—Regarding the merchandising of food and beverages by vending machines, the home-rule amendment is effective unless it is pre-empted by state legislation.

December 30, 1966.

E. H. JORRIS,
State Health Officer

You have requested my opinion whether municipalities may enact ordinances to regulate the vending of food and beverages to the public by machine in view of the fact that certain aspects of such activity are regulated by Chs. 97 and 160, Stats., and H. 98 of the Wis. Adm. Code.

Your question is of a general nature and does not involve any ordinance which has been adopted.

Ch. 160 was substantially amended by ch. 270, Laws 1963, to include extensive regulation of the sale of food and beverages by vending machines. In view of the increase of this type of merchandising during recent years,

both the industry and the legislature were interested in methods of regulation which would be uniform throughout the state.

I am of the opinion that the merchandising of food and beverages by vending machines involves the health and welfare of the general public and is a matter of state-wide concern.

Under Art. XI, sec. 3, Wis. Const., and sec. 66.01, Stats., cities and villages are given power to determine their local affairs and government subject to the constitution and to such enactments of the legislature of state-wide concern as shall with uniformity affect every city or every village.

In *Plymouth v. Elsner,* (1965) 28 Wis. 2d 102, 106, 107, 30 N.W. 2d 186, the court said that the home-rule amendment extends only to local affairs and does not cover matters of state-wide concern.

In *Muench v. Public Service Commission,* (1952) 261 Wis. 492, 515c-515g, 53 N.W. 2d 514, 55 N.W. 2d 40, the court discussed some of the tests of state-wide concern as opposed to local affairs. The court said that "local" includes only those matters which primarily affect the people of the locality and stands in opposition to "matters of state-wide concern" which affect all of the people of the state.

Determination of what legislative enactments are of state-wide concern is in the first instance for the legislature and utimately one for the courts with the presumption in favor of the legislative action.

14 OAG 74;

Van Gilder v. Madison, (1936) 222 Wis. 58, 267 N.W. 25, 268 N.W. 108.

The legislature has granted cities under sec. 62.11 (5), and villages under 61.34 (1) and (5), broad power to act for the good order of the municipality and its commercial benefit and for health, safety and welfare of the public. Towns and counties possess similar although less extensive police powers.

In general it may be stated that the statutory delegation of police power to cities, villages, and in some cases towns, would enable them to enact reasonable ordinances to regulate vending machines where the problem was one at least partially local in nature unless the state had pre-empted the field.

In *Johnston v. Sheboygan,* (1966), 30 Wis. 2d 179, 184, 140 N.W. 2d 247, the court held that the over-all regulation of the production of baked goods for resale was a matter of state-wide concern. It held that the city ordinance regulated a different operation of the bakery, that of sale, and that there was no conflict with the statute and the ordinance was valid. The court recognized that the sale of uninspected food was a matter of state-wide concern, but that it was also a local matter where the state statute did not pre-empt the field, and stated:

"The appellants point to secs. 97.10 and 97.12, Stats., and urge that the ordinance of the city of Sheboygan purports to regulate the same subject which has been fully covered (and thereby pre-empted) by secs. 97.10 and 97.12. In *Milwaukee v. Piscuine,* (1963) 18 Wis. (2d) 599, 602, 119 N.W. (2d) 442, this court held that an ordinance adopted by a city under its home-rule authority and police power will be upheld unless it is in direct conflict with a state statute on the same subject or is found to be unreasonable or arbitrary.

"* * * In *Milwaukee v. Childs Co.,* (1928) 195 Wis. 148, 151, 217 N.W. 703, this court stated:

" '. . . municipalities may enact ordinances in the same field and on the same subject covered by state legislation where such ordinances do not conflict with, but rather complement, the state legislation.' "

I am of the opinion that municipalities may enact ordinances in the area of the merchandising of food and beverages by vending machines, if such ordinances do not conflict with but rather complement state legislation in the same field.

BCL:RJV:

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