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
WINFIELD 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 3, 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
BRONSON C. LA FOLLETTE, Madison from Jan. 5, 1965, to
ATTORNEY GENERAL'S OFFICE

BRONSON C. LA FOLLETTE .................. Attorney General
ARLEN C. CHRISTENSON .................... Deputy Attorney General
JOHN WM. CALHOUN* .................... Director of Legal Services
JAMES R. WEIDLAKE ................... Assistant Attorney General
WILLIAM A. PLATZ .................... Assistant Attorney General
BEATRICE LAMPERT* .................. Assistant Attorney General
ROY G. TULANE ...................... Assistant Attorney General
RICHARD E. BARRINGTON .......... Assistant Attorney General
GEORGE F. SIEKER .................... Assistant Attorney General
E. WESTON WOOD ..................... Assistant Attorney General
ROBERT J. VERGERONTE .......... Assistant Attorney General
JOHN E. ARMSTRONG ................ Assistant Attorney General
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LERoy L. DALTON .................... Assistant Attorney General
ALBERT O. HARRIMAN ............... Assistant Attorney General
ROY G. MITA ....................... Assistant Attorney General
WILLIAM H. WILKER ................. Assistant Attorney General
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GORDON SAMUELSN ............ Assistant Attorney General
JAMES P. ALTMAN ................. Assistant Attorney General
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BETTY R. BROWN .................... Assistant Attorney General
CHARLES A. BLECK ............... Assistant Attorney General
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ROBERT B. McCONNELL ........ Assistant Attorney General
E. GORDON YOUNG ............... Assistant Attorney General
DONALD P. JOHNS ................ Assistant Attorney General
THOMAS A. LOCKYEAR ........ Assistant Attorney General
JOHN P. ANDERSEN ............. Assistant Attorney General
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BENJAMIN SOUTHWICK* ........ Assistant Attorney General
MARK ROSENHEIMER* ........... Assistant Attorney General
BRUCE A. CRAIG* .................. Assistant Attorney General
MILO W. OTTOW .................. Chief Investigator
EDWARD E. RYCEK ................ Investigator
RODNEY R. REEK ................ Investigator
DONALD R. SIMON .............. Chief Special Agent
WALTER A. YOUNK ............... Special Agent
HERBERT L. KRUSCHE ........... Special Agent
FRANK A. MEYERS ............... Special Agent
RUSSELL NELSON .................. Special Agent

1. Appointed December 18, 1967
2. Retired October 1, 1967
3. Appointed May 15, 1967
4. Appointed June 1, 1967
5. Appointed September 1, 1967
6. Appointed September 19, 1967
7. Appointed September 25, 1967
8. Appointed November 1, 1967
9. Appointed February 1, 1967
Constitutionality—School Districts—Sec. 40.30 (14) as amended to allow construction contracts between school districts and other municipalities is a valid enactment.

January 18, 1967.

WALTER J. SWIETLIK
District Attorney, Ozaukee County

You have requested my opinion as to whether the county is now authorized to enter into a contract to pave a parking lot for a local high school. You call my attention to the case of Heimerl et al. v. Ozaukee County, et al., (1949) 256 Wis. 151, 40 N.W. 2d 564. In that case, it was held that the county had no authority to build private driveways for individuals, and that sec. 86.106, which authorized such work, was, in part, unconstitutional.

Sec. 40.30 deals with school districts and the powers of the school district board. It is a general statute of authority and very lengthy. It would serve no purpose to set forth its provisions in full in this opinion.

In 1965, the legislature amended sec. 40.30 (14) as follows:
"(14) The board of any school district may enter into agreements, including leases for a term not exceeding 50 years, with any other school district, city, village, town, county or the state or any department or agency thereof for the purchase, operation and maintenance of land, buildings and equipment for educational purposes, including without limitation by enumeration contracting for the construction or repair of school driveways, roadways and parking areas, or for the operation of any school program authorized by law. An agreement made by a city school district must be approved by the city council."

Assuming that the local high school is governed by school district law, the chief objection raised by the court in the Heimerl case has been overcome. The work to be done is for the benefit of the school district, which is a governmental authority, so that it cannot be said that the county is engaging in private enterprise.

Further objections were raised by the court in the following language:

"2. No structure is set up for charges and disbursements so that all taxpayers may be equally protected. The Ozaukee county board has set up a regular price structure for work to be done on any contract agreements; however, this is not a requirement of the statute in question. Nothing in the statute requires such a charge structure, and we cannot read such a requirement into it.

"3. No restriction is made as to those counties, towns, cities, and villages where private road builders are equipped to operate, as in the present case. Thus it competes with private persons and takes away from them the opportunity for a livelihood or a right to work. The right to engage in work is a property right. This property right cannot be infringed upon.

"Sec. 86.106, Stats., would result in the appropriation and expenditure of public funds for a private purpose without any direct advantage accruing to the public and would unconstitutional therefore and the Ozaukee county resolu-authorize municipalities to engage in private business. It is
tion is invalid." (Heimerl v. Ozaukee County, 256 Wis. 151, 160-161)

It must be kept in mind that in the Heimerl case, the court was dealing with the validity of sec. 86.106 which, at that time, read as follows:

"Private road work by municipalities and counties. Any town, city, or village, by its governing body, may enter into contracts to build, grade, drain, surface and gravel private roads and driveways. Any county, by its governing body, may enter into agreements with a municipality to perform for it any such work."

There are numerous laws in the state which allow inter-governmental contracting without setting forth a specific charge structure, such as secs. 83.16 (bridge contracts between state and foreign counties), 83.035 (contracts for maintenance of streets between counties, villages and towns), 83.018 (sale of road building supplies by counties to municipalities), and 84.07 (maintenance of state highways by counties).

I also point out that sec. 66.30 provides, in part, as follows:

“(1) ‘Municipality’ as used herein includes the state or any department or agency thereof, or any city, village, town, county, school district or regional planning commission.

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

"* * *"

It is my opinion that the rule in the Heimerl case governs limitations on private work done by municipalities, and that sec. 40.30 (14), as amended in 1965, is a valid enactment.

BCL/REB
Board of Regents—Parking—Board of Regents of State Colleges may adopt administrative rules regulating on-campus parking and charge a fee therefor. Violations thereof would be subject to Ch. 288. Authority is vested in local municipality to regulate parking on streets or drives on university lands.

January 20, 1967.

EUGENE R. MCPHEE, Director
Wisconsin State Universities

You have requested my opinion on ten questions relative to the regulation of vehicle parking on state university grounds by the Board of Regents of State Colleges.

Question one

1. In order to have enforcement of parking on campus property is it necessary for the Board of Regents to make rules under the Wisconsin Administrative Code? If so, what are the guidelines or requirements for such rules?

Sec. 37.11 (16) (a) and (b), read:

“(a) The board of regents of state colleges may make rules regulating the parking of motor vehicles on property under its jurisdiction. Such rules shall not be subject to ch. 227.

“(b) Any person who violates any rule made under par. (a) shall be fined not more than $10.”

The violation of any rule promulgated by the board under the authority of sec. 37.11 (16) (a) will subject the violator to the fine or forfeiture imposed by subsec. (b). There is no question and it was the opinion of this office in 43 OAG 350, that administrative rules have the force and effect of law.

As was noted in the case of Whitman v. Department of Taxation, (1942) 240 Wis. 564, 4 N.W. 2d 180, these general laws or administrative rules must, under Art. VII, Sec.
the requirements of Ch. 227, in the adoption of rules under sec. 37.11, they did not and could not exempt the board from the requirement of publication as imposed by the constitution.

In the *Whtman case*, supra, the court referred to the case of *Sholes v. State*, (1850) 2 Pin. 499 as to what constitutes publication. In this early case the court held that the requirement of publication, as provided in the state constitution, implies no particular manner but vests wide discretion even to the extent of "**proclamation at the door of the courthouse in each county, **".

Notwithstanding the fact that the provisions of Ch. 227 do not have to be followed, in my opinion it would be only practical and expeditious to have such rules published in the Wisconsin Administrative Code or register and filed with the secretary of state and with the revisor of statutes as provided in Ch. 227. This procedure would, in my opinion, fulfill the constitutional requirement of publication and is possibly available in view of the language of sec. 227.025, which authorizes publication of certain exempted rules.

**Question two**

2. Can the Board of Regents charge a fee for issuing parking permits to students or employees to park for a semester or longer?

The answer to this question is yes.

The powers of the board are extremely broad.

Sec. 37.02 (1) reads in part:

"** The regents shall possess all the powers necessary or convenient to accomplish the objects and perform the duties prescribed by law. **"

Sec. 37.11 (8) (a) provides in part:

"** The board may also charge any student laboratory fees, book rents, fees for special departments or any incidental fee covering all such special costs. **"

The above quoted section further provides that resident students are not exempt from these "** incidental or other fees and tuition in state colleges"."
Sec. 37.11 provides:

"The said board shall have the government and control of all the state colleges, and shall have power therefor:

"(1) To make rules, regulations and by-laws for the good government and management of the same * * *"

Finally, sec. 37.11 (16) (a) specifically provides that the board may regulate parking on campus property. It is a well accepted fact that the charging of a fee is but one form of regulation.

In my opinion, the broad powers granted to the regents in the exercise of their prescribed duties are sufficient to include the licensing of campus parking facilities.

Question three

3. If so, can such fees be used for enforcement and parking development and maintenance?

The answer to this question is no.

There is no specific legislative direction or authority allowing the direct use of these funds for the enforcement and development of parking. Consequently, the student fees collected must be treated in the same manner as other incidental student fees of the university. In other words, such fees must be paid to the state treasury and appropriated as provided by sec. 20.760, if the money is to be used by the regents. The fees collected from employes must be credited to the general fund as provided by sec. 20.951.

Question four

4. If an individual is illegally parked (no parking permit, blocking an exit or hydrant) can State University Personnel issue a ticket?

The answer to this question is yes, assuming the violation is on campus property.

Sec. 37.11 (16) (c) provides:

"(c) The board shall have concurrent police supervision over all property under its jurisdiction. The duly appointed
agents of the board may arrest, with or without warrant, any person on such property violating a state law or a rule made under this subsection, to deliver such person to any court having jurisdiction over such violation, and to execute a complaint charging such person with such violation.”

**Question five**

5. If so, must the ticket be authorized by the local city or county or can the University develop the ticket?

The provisions of sec. 37.11 (16) (a), (b) and (c) authorize the university to develop its own ticket or traffic citation. In this regard it must be kept in mind that the parking ticket serves only as notice of a violation of a parking regulation. The violation may result in a civil action for the collection of the forfeiture if the parking ticket is ignored.

The civil action for the collection of the forfeiture must comply with the general rules of law pertaining to forfeiture actions as set forth in Ch. 288.

**Question six**

6. If the term fee instead of bail is used on the ticket for illegal parking, can the University collect the fee?

a) If so, for what purposes may this money be used?

b) Would the opinion differ in regard to issuance and collection if a student or non-student is ticketed?

Regardless of the nomenclature the local university may collect the bail.

Sec. 345.13 (1) provides in part:

“(1) Whenever a person is arrested for a violation of chs. 129, 194 and 341 to 348, administrative orders issued pursuant to law, or is arrested for violating any ordinance enacted pursuant to s. 349.06, the sheriff, chief of police or clerk of the court having jurisdiction of the violation is authorized to receive at his office, from the accused, a deposit in money not to exceed the amount of the maximum
penalty which may be imposed if the accused is found guilty. * * *"

Under sec. 37.11 (16) (c) the regents have the authority to create a local police force and in my opinion may delegate to the chief of such force or supervising officer the authority to receive bail for violations of the rules of the board.

The right or authority to receive bail does not imply the right to retain the same. The monies so collected must be subsequently deposited with the clerk of court who would have the bail forfeited and eventually pay these monies to the county treasurer pursuant to sec. 288.13.

The fact of whether the violator is a student or non-student is immaterial, for in both instances the disposition of the monies or bail must be the same.

**Question seven**

7. If the ticket uses the term fee and can be collected by the University, would the individual have a right to appeal to a Court? If so, what Court?

The mere fact that the university may accept the bail does not in any way change the character of the violation. As stated previously, the parking ticket is actually mere notice of a violation of law. If the violator choses to ignore such notice by failing to post bail or in common usage pay the ticket, the state must commence a civil court action to collect the forfeiture.

**Question eight**

8. If the Board cannot issue tickets and collect fees, what Court has jurisdiction for on-campus parking?

Notwithstanding the fact that the university may accept but not keep the bail, the municipal justice court, county court and circuit court would have concurrent jurisdiction to handle forfeiture actions.

**Question nine**

9. Is it legal for the local police to collect on campus illegal parking fines through a desk sergeant or clerk?
The answer to this question is yes. Sec. 37.11 (16) (c) provides that the board shall have concurrent police supervision over all property under its jurisdiction. The obvious meaning of this language is that the local police likewise have jurisdiction. Under Sec. 37.11 (16) (d) the local police have the authority and may enforce state law or, in other words, the administrative rules of the regents pertaining to parking.

**Question ten**

10. Is illegal parking on a city street on the side that abuts state property to be treated differently courtwise and amount of fine in comparison to illegal parking on the other side of the street abutting private property?

It is apparent from this question that when you used the term “property” in your previous questions you were including within the meaning of that term on-campus streets or highways. The word “property” does not, in my opinion, include streets, highways, roads or driveways running through or around the university campuses.

Sec. 340.01 (22) provides in part as follows:

“‘Highway’ means all public ways and thoroughfares and bridges on the same. * * * It includes those roads or driveways in the state, * * * and roads or driveways upon the grounds of institutions under the jurisdiction of the board of regents of state colleges, but does not include private roads or driveways as defined in sub. (46).”

Sec. 340.01 (46) provides:

“‘Private road or driveway’ is every way or place in private ownership and used for vehicular travel only by the owner and those having express or implied permission from the owner and every road or driveway upon the grounds of public institutions other than those under the jurisdiction of the board of regents of state colleges.”

Sec. 340.01 (26) provides:

“‘Local authorities’ means every county board, city council, town or village board or other local agency having
authority under the constitution and laws of this state to adopt traffic regulations."

Sec. 349.13 authorizes the "local authority" to adopt parking regulations.

The board of regents does not have any express authority to adopt traffic regulations and therefore cannot, in my opinion, be considered a "local authority".

The above quoted sections in providing that campus roads or driveways are public highways and in specifically providing that campus roads are not to be considered as private roads or driveways effectively removes such roads from within the meaning of the term "property" as used in s. 37.11 (16) (a), which section authorizes the regents to regulate parking on campus property.

In answer to your question, parking on any street, whether it runs through or merely abuts university lands, is under the jurisdiction of the "local authority" or municipality and the board of regents of state colleges does not have the authority to regulate street parking.

In conclusion, it is my opinion that the regents have the power to charge a fee for on-campus parking. Further, that they may adopt administrative rules regulating parking on the campus without following the procedures contained in Ch. 227, but such rules to have the force and effect of law must be published; that publication in the Wisconsin Administrative Code is sufficient publication to satisfy constitutional requirements.

The violation of the board's rules in regard to parking is a violation of state law subjecting the violator to a civil action for a forfeiture. The university may not keep the monies collected either by way of bail or prosecution, but such monies must be eventually paid to the county treasurer. Further, the fees resulting from the issuance of parking permits may not be retained by the university, but must be paid to the state treasurer. Lastly, the board cannot regulate parking on streets or driveways on or abutting university lands.

BCL/CAB
Hunting and Fishing—Indian Reservations—State has no jurisdiction to apply hunting, fishing, and trapping regulations to Indians residing on non-patented lands and hunting, fishing, or trapping thereon. Menominee reservation having assumed the status of a county is under the jurisdiction of the state.


JOSEPH PRELOZNIK
Director,
Wisconsin Judicare

PHILIP S. HABERMANN
Executive Director,
State Bar

You have requested a formal opinion on the question of whether state conservation laws may be applied to Indians residing on lands within the boundaries of any Indian reservation in the state and also in Menominee county, formerly the Menominee Indian Reservation. Wisconsin Judicare is a pilot project sponsored by the state bar and financed by the Office of Economic Opportunity for the purpose of making legal services available to low-income persons in twenty-six northern Wisconsin counties. You indicate that most of the state's Indian population lives within this area, and that the judicare board, the policy making body of Judicare, voted to extend legal assistance to the Great Lakes Inter-Tribal Council, Inc., which represents several Wisconsin Indian tribes.

On December 30, 1964, my immediate predecessor in office issued an opinion that under Public Law 280 (18 U.S.C. §1162), the state fish and game laws were applicable to all non-patented lands and to individual Indians within the boundaries of any Indian reservation within the state of Wisconsin. 53 OAG 222. I disagree with this conclusion.

Public Law 280 (18 U.S.C. §1162) was enacted by congress in 1953 and provides in part as follows:

“(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same
extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

"* * *

"Wisconsin . . . . . . . . All Indian country within the State

"(b) Nothing in this section shall * * * deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof. * * *

The phrase "Indian country" contained in the above section is defined in 18 U.S.C. §1151 as follows:

"* * * the term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. * * *"

From the above statutes, the question arises whether there is in existence any "federal treaty, agreement or statute" which renders the state conservation laws inapplicable to Indians residing on lands within the boundaries of any Indian reservation.

Almost fifty years prior to the enactment of Public Law 280, the Wisconsin court held that Indians who did not reside within the boundaries of an Indian reservation were subject to the state conservation laws. State v. Morrin, (1908) 136 Wis. 552, 117 N. W. 1006. Some years later, the court held that these laws did not apply to Indians residing on lands within a reservation which were not fully patented. State v. Johnson, (1933), 212 Wis. 301, 249 N. W. 284.
The *Johnson* case involved the question of whether a Wisconsin court had jurisdiction to enforce the state conservation laws against a member of the Bad River Band of the Chippewa tribe who had hunted out of season on lands within the Bad River Indian Reservation. The lands had been fully patented to the heirs of a deceased Indian allottee, and later had been conveyed by the heirs to a non-Indian, who had, in turn, conveyed to another non-Indian who was the owner at the time the acts giving rise to the charge were committed. The Bad River Reservation was created by the 1854 treaty between the Chippewa Indians and the United States. Under the terms of the treaty, the reservation was set apart by the United States in return for cession of tribal lands in Minnesota. The court noted that the treaty made no specific reference to hunting and fishing rights in the lands reserved for Indian use (as distinguished from the lands ceded by the Indians), and stated as follows (212 Wis. at page 311):

"Art. 11 of that treaty provides as follows:

"‘All annuity payments to the Chippewas of Lake Superior, shall hereafter be made at L’Anse, La Pointe, Grand Portage, and on the St. Louis river; and the Indians shall not be required to remove from the homes hereby set apart for them. And such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President.’ Senate document No. 452, pp. 484-487.

“All of the treaty provisions which reserve hunting and fishing rights to the Chippewa Indians obviously relate to the lands ceded rather than to the lands reserved and retained. The lands upon which the defendant hunted deer during the closed season therefore were not within any area ceded by the treaties mentioned, but were lands within the boundaries of the Bad River (La Pointe) Reservation retained by them in the treaty of 1854 to which they retired as their permanent abode. While the treaty entered into did not specifically reserve to the Indians such hunting and fishing rights as they theretofore enjoyed, we think it reasonably appears that there was no necessity for
specifically mentioning such hunting and fishing rights with respect to lands reserved by them. At the time the treaty of 1854 was entered into there was not a ‘shadow of impediment upon the hunting rights of the Indians’ on the lands retained by them. ‘The treaty was not a grant of rights to the Indians but a grant of rights from them—a reservation of those not granted.’ United States v. Winans, 198 U. S. 371, 25 Sup. Ct. 662, 664. We entertain no doubt that the rights of the Indians to hunt and fish upon their own lands continued. If the lands here involved were not fully patented we should have no difficulty in concluding that as to such lands the fish and game laws of this state are without force and effect.”

The court went on to hold that since the lands in question had been fully patented by the United States, and, in fact, had been conveyed without restriction to a citizen of Wisconsin, they had become subject to the jurisdiction of the state of Wisconsin.

I have set out the rather extensive quotation from State v. Johnson because, in my opinion, the law stated therein is still the law of the state.

In State v. Sanapaw, (1963) 21 Wis. 2d 377, 124 N.W. 2d 41, the court was faced with criminal prosecutions against certain Indians for violation of the game laws. Trial was held, and the defendants were found not guilty by the court on grounds that they were enrolled members of the Menominee Indian tribe, and that the state had no jurisdiction to enforce its hunting and fishing regulations against them. The supreme court reversed, holding that the “Termination Act” (25 U.S.C. §§ 891-902) abrogated the rights of the Menominee Indians to hunt and fish their tribal lands free from the state conservation laws. The court recognized, however, that such rights were in existence prior to the termination act by virtue of certain treaties. The first treaty between the United States and the Menominee tribe was executed in 1848. Under its terms the Menominees ceded to the United States all their lands in the state of Wisconsin wherever situated, and in consideration for this cession, the United States conveyed to the In-
dians a large tract of land "for a home, to be held as Indian lands are held". 9 U.S. Stats. at L. 952. By further treaty made on May 12, 1854 (10 U.S. Stats. at L. 1064), the United States ceded to the Menominees a tract on the Wolf River consisting of 12 townships, "to be held as Indian lands are held". The bulk of these lands constituted the Menominee Indian Reservation, which continued in existence until the effective date of the Termination Act.

The court specifically directed its attention to the question of whether, prior to the time the Termination Act became effective, the Menominees had, either by reservation under the 1848 treaty, or by cession under the 1854 treaty, exclusive hunting and fishing rights which could not be reached by the state's game laws, and stated (pp. 381-383):

"This court in State v. Johnson, (1933) 212 Wis. 301, 249 N.W. 284, citing United States v. Winans, (1905) 198 U.S. 371, 25 Sup. Ct. 662, 49 L. Ed. 1089, held that where Indians cede part of their lands by treaty and retain other lands, for their own use, as to which no government patents have ever been issued, their rights to fish and hunt on their retained lands, without being subject to the state's fish and game laws, continue even though the treaty contains no express reservation to that effect. * * *"

"Therefore, if the Menominees, prior to the effective date of the Termination Act, had exclusive hunting rights over the lands embraced in their reservation free from the state's game laws, such rights must be grounded on the 1854 treaty provision whereby such lands were ceded to them 'to be held as Indian lands are held.' On the face of it this is an ambiguous provision. One permissable interpretation would be that the Menominees would enjoy the same rights with respect to the ceded lands as Indians are entitled to with respect to lands owned and occupied by them which have never been ceded by treaty. Among such rights would be that of hunting free from the restrictions of any state game laws. The rule of construction to be followed in interpreting Indian treaties is that in case of ambiguity they are to be interpreted in favor of the Indians. This was
the holding in *Winters v. United States*, (1908) 207 U.S. 564, 576, 28 Sup. Ct. 207, 52 L. Ed. 340, wherein the court declared:

"By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it."

"It would seem unlikely that the Menominees would have knowingly relinquished their special fishing and hunting rights which they enjoyed on their own lands, and have accepted in exchange other lands with respect to which such rights did not extend. They undoubtedly believed that these rights were guaranteed to them when these other lands were ceded to them ‘to be held as Indian lands are held.’ Construing this ambiguous provision of the 1854 treaty favorably to the Menominees, we determine that they enjoyed the same exclusive hunting rights free from the restrictions of the state’s game laws over the ceded lands, which comprised the Menominee Indian Reservation, as they had enjoyed over the lands ceded to the United States by the 1848 treaty.

Until 1871, the federal government dealt with Indian tribes solely through treaties. *Lone Wolf v. Hitchcock*, (1903) 187 U.S. 553, 565-566, 23 Sup. Ct. 216, 47 L. Ed. 299. Since then Indian affairs have been regulated by acts of congress, and by contracts with the Indian tribes which are similar in nature to treaties. See *Lane v. Morrison*, (1918) 246 U.S. 214, 38 Sup. Ct. 252, 62 L. Ed. 674, 42 C.J.S., Indians, sec. 24, pages 682-683.

Public Law 280 (18 U.S.C. §1152) is a regulation of Indian rights by statute. When the statute is read in its entirety it is clear that there was no intent on the part of congress to affect existing hunting, trapping or fishing rights in any way. Rather, the clear legislative intent was, in my opinion, to subject the Indians to all criminal laws of the state, but to leave the hunting, fishing and trapping rights as they were prior to the enactment of the law.
In *Organized Village of Kake v. Egan*, (1962) 369 U.S. 60, 82 Sup. Ct. 562, 7 L. Ed. 2d 578, the United States supreme court was faced with the question of the effect of Public Law 280 upon the jurisdiction of individual states over Indian fishing rights. The court stated (7 L. Ed. 2d at page 583):

"In 1958 Congress granted to several States full civil and criminal jurisdiction over Indian reservations, consenting to the assumption of such jurisdiction by any additional States making adequate provision for this in the future. 67 Stat 588, 18 USG §1162, 28 USC §1360. Alaska was added to the list of such States in 1958, 72 Stat 545. This statute disclaims the intention to permit States to interfere with federally granted fishing privileges or uses of property. * * *

Although there may be some question concerning the court's reference to federally "granted" fishing privileges or use of property, it is my opinion that this term is used in a general sense, encompassing federally "protected" rights and privileges. These rights and privileges include the inherent rights of the Indians in aboriginal lands reserved to them by treaty, as well as the rights accruing to them by virtue of grants of land for the establishment of reservations, even though the Indians may not have occupied such lands prior to that time. It would be highly unusual, if not unjust, to place the hunting and fishing rights founded upon the inherent rights of the Indians to their aboriginal lands on a different basis than those rights which were granted by statutes, treaties or agreements culminating in the establishment of Indian reservations.

One cannot escape the conclusion that, in both situations, there was a contract between the Indians and the United States under which it was agreed that the Indians should retain or accede to certain rights and interests in both the reserved and granted areas. Consideration of the Indian way of life at the time the reservations were established leads only to the equally obvious conclusion that these rights included the unrestricted right to hunt and fish their lands. See, for example, *Menominee Tribe v. United
States, (1941) 95 Ct. Cls. 232, 240-241, wherein the United States court of claims recognized the vital interests of the Menominees in securing hunting rights in reservation lands. The court described such rights as an inducement to the Indians for entering into the Treaty of 1854 (10 Stats. at L. 1064).

When lands are set aside for reservation purposes, whether by treaty or otherwise, specific mention of the right to hunt and fish is not necessary to preserve such rights in the Indians. The right to hunt and fish was part and parcel of the larger rights possessed by the Indians in the lands used and occupied by them before the territory was settled. Such rights have been characterized by the United States supreme court as being “not much less necessary to the existence of the Indians than the atmosphere they breathed.” United States vs. Winans, supra.

By tradition and habit Indians are hunters and fishermen, depending largely upon these pursuits for their livelihood and wellbeing. Their ancient and immemorial right to follow these pursuits on the lands and in the waters of their reservations is universally recognized. Their right to do so was not disputed by the state of Wisconsin prior to the enactment of Public Law 280, but rather had long been recognized and acquiesced in by the state and its agencies. Circumstances somewhat similar to these, coupled with the rule of liberal construction uniformly invoked in ascertaining the rights of Indians under their treaties and agreements, was cited by the United States supreme court in support of its conclusion that the Metlakahtla Indians had the exclusive right to fish in the waters adjacent to the Annette Islands in Alaska notwithstanding the fact that the act of congress setting aside the islands as a reservation for the Indians made no mention of the surrounding waters or the fishing rights of the Indians therein. Alaska Pacific Fisheries vs. United States, (1918) 248 U.S. 78, 89 Sup. Ct. 40, 63 L. Ed. 138. See the opinion of the Acting Solicitor, United States Department of Interior, June 30, 1936 (No. M28107).
There can be no distinction between lands occupied by Indian tribes which were later recognized by the federal government as being Indian lands, and the lands which were specifically granted to the Indians by the federal government. When the United States established Indian reservations, whether by treaty or otherwise, the rights of occupancy conveyed to the Indians included the right to hunt, fish and trap free from the state conservation laws. It follows that since these rights, as they exist today, arose through the negotiations and understandings which culminated in treaties or other agreements granting, allotting or setting aside to the Indians certain reservation lands, such rights must be recognized within the limits of the reservations. Similarly, because of the policy underlying recognition of the continuing existence of these rights, they cannot be said to apply to Indians, whether or not they are enrolled members of the tribe or band in question, who do not reside within the boundaries of the particular reservation. Under the decision in State v. Sanapaw, supra, such rights must also be restricted to non-patented lands within the reservations.

It is, therefore, my opinion that the state of Wisconsin is not free to apply its hunting, fishing and trapping laws to Indians residing on non-patented reservation lands when hunting, fishing or trapping on non-patented lands within the confines of the reservation.

It should be noted that this opinion does not cover all of the tribes or bands mentioned in your letter. The opinion is limited to hunting, fishing and trapping done on non-patented reservation lands by Indians who reside therein. Also, you specifically refer to the lands formerly constituting the Menominee Indian reservation, now Menominee county, in regard to the question of conservation law enforcement. Former Attorney General John W. Reynolds, in 51 OAG 103, stated his opinion that the federal Termination Act rendered the state fish and game laws applicable to lands in Menominee county. I share his opinion, and refer you to State vs. Sanapaw, (1963) 21 Wis. 2d 377, 124.
N.W. 2d 41, wherein it was held that the state conservation laws are in full force and effect in Menominee county.

BCL/WFE

Constitutionality—Motion Picture Review Board—Sub. Amend. 1, A., to Bill 890, A., pertaining to a motion picture review board if enacted into law would result in unconstitutional abridgement of rights granted by first and fourteenth amendments to U. S. Const., and Art. I, sec. 3, Wis. Const.

February 7, 1967.

The Honorable, The Assembly

By Assembly Resolution 45 (1965) the assembly has requested my formal opinion on the constitutionality of substitute amendment 1, A., to Bill 890, A., relating to a motion picture review board, the import of which may be gathered from the following excerpts:

"177.02 MOTION PICTURE REVIEW BOARD. (1) There is created a motion picture review board consisting of 12 members appointed by the governor, each to serve for a term of years. The board shall constitute the sole public or quasi-public agency within the state for review of motion pictures in advance of their public exhibition within the state or any subdivision thereof. * * *

"* * *

"(4) No person shall publicly exhibit any motion picture in this state for which the prescribed application has not been made for review and classification by the board. Any person pecuniarily interested in the exhibition of a motion picture in this state may apply to the board for review thereof by written application, together with the identity of the motion picture to be reviewed. The board shall, if deemed advisable, review such motion picture no less than 5 nor more than 15 days following receipt of the application.
The time and place of such review shall be determined by the board, with no less than 2 days advance notice thereof to be given to the applicant and to be published in a newspaper of general circulation in Milwaukee county. Failure or refusal of the board to classify a motion picture upon application for review shall, after the time has lapsed for review and classification by the board, terminate the operation of this chapter as to such motion picture and as to any distribution or exhibition by any person of such motion picture.

“(5) * * * The board shall, by a majority of the members present, within 2 days after reviewing each motion picture, classify it for ‘general patronage’, ‘for adults’ or ‘unacceptable.’ Such ruling shall set forth the names of members present to review the motion picture and the names of the members constituting the majority in favor of the ruling. Such ruling shall be issued in triplicate, sealed, certified as correct and subscribed by the executive secretary or acting secretary in his absence, and notice of such ruling shall forthwith be mailed to the applicant and published in a newspaper of general circulation in Milwaukee county. The classifications of ‘general patronage’ and ‘for adults’ shall be determined by the board solely on the basis of its judgment of the benefit or detriment to the welfare of minors in the state according to the standards of morality determined by the board. The sole standard to be applied by the board in determining the classification of ‘unacceptable’ shall be whether, to the average person, applying contemporary community standards, the dominant theme of the motion picture taken as a whole appeals to prurient interests and is, therefore, obscene. * * *.

“* * * “(7) Each exhibitor of a motion picture shall prominently post the classification of the board on the premises where such motion picture is presented for public exhibition and such classification shall be included in any advertisement of such motion picture. If an ‘unacceptable’ classification is set aside by court review pursuant to s. 177.03 (3), the classification to be posted and advertised by each exhibitor shall thereupon be the ‘for adults’ classification.
177.03 AUTHORIZED EXHIBITION OF CLASSIFIED MOTION PICTURES. (1) Any person having the required price of admission may attend a public exhibition of any motion picture classified by the board of 'general patronage.'

"(2) No minor shall attend or be permitted to attend a public exhibition of a motion picture classified by the board 'for adults' unless such minor is accompanied by his parent, guardian or adult spouse.

"(3) If the board classified a motion picture as 'unacceptable', and if it appears that the motion picture will otherwise be exhibited in the state, the attorney general shall, within 3 days after such classification by the board, apply to the circuit court for Milwaukee county for a judgment pursuant to s. 269.565 declaring that such motion picture is obscene. Except as otherwise required by this subsection, s. 269.565 shall operate in its entirety with respect to such application by the attorney general thereunder. The ruling of the board on such motion picture shall be filed with the complaint, and the court shall, on the basis of such ruling, thereupon issue an order to show cause as prescribed by s. 269.565 why such motion picture should not be judicially determined to be obscene. Such ruling of the board shall not, however, constitute evidence on the trial of the merits. Any award under s. 269.565 (5) to persons defending shall be paid from the general fund.

177.05 PENALTIES. (1) Any person in charge of any premises presenting a public exhibition who permits any minor to attend in violation of s. 177.03 (2) may be fined not more than $25 for the first offense and $50 for the 2nd and each subsequent offense.

"(2) Any person exhibiting any motion picture without an application for a classification by the board having first been made under s. 177.02 (4), may be fined not more than $250 or imprisoned not more than 6 months or both.

"(3) No seller, distributor or exhibitor of a motion picture classified by the board as 'general patronage' or 'for
adults' shall be subject to criminal prosecution or penalty for the distribution or exhibition of such motion picture except as provided in this chapter. Sellers, distributors or exhibitors of a motion picture which the board has failed or declined to classify shall not be so immunized from prosecution or penalty under other laws of this state.

"* * *

Let it be understood at the outset that Bill 890, A., does not deal primarily with obscenity. Rather, it concerns itself with the fundamental rights of free speech guaranteed by the United States constitution and the constitution of the state of Wisconsin. As a starting point, we must assume the general principle that freedom of expression is the rule and constraint the exception. It is a commonly accepted legal and democratic principle that only in the most urgent circumstances can a limitation upon freedom of expression be justified, and the courts have a serious obligation to strike down limitations which do not clearly meet such conditions.

The primary constitutional problem presented by this bill is commonly termed “prior restraint”. The concept of prior restraint, roughly speaking, deals with official restrictions imposed upon forms of expression in advance of actual publication or exhibition. Prior restraint is thus distinguished from subsequent punishment, which is a penalty imposed after the communication or exhibition has been made. Generally speaking, a system of prior restraint prevents the communication or exhibition from occurring at all; whereas a system of subsequent punishment allows the communication, but imposes a penalty after the event. For a variety of reasons, the impact upon freedom of expression may be quite different, depending upon whether the control is designed to block exhibition in advance or to deter further exhibition by subsequent punishment.

In constitutional terms, the doctrine of prior restraint recognizes that the first amendment to the United States constitution forbids the federal government to impose any system of restraint prior to communication, with certain limited exceptions, in any area of expression within the
boundary of that amendment. By incorporating the first amendment in the fourteenth amendment, the same limitations are applicable to the individual states.

Motion pictures constitute a form of expression protected by the first amendment from acts of prior restraint. *Burstyn vs. Wilson*, (1952) 343 U. S. 495. An official censorship system pertaining to motion pictures, which requires advance approval before a film can be shown, constitutes prior restraint in its classical form. See "The Doctrine of Prior Restraint", 20 Law and Contemporary Problems 648, 667. As a general rule, any system of prior restraint bears a heavy presumption against its constitutional validity. Such a system is tolerated only where it is operated under judicial superintendence and where there is assured an immediate determination of the validity of the restraint. See *Bantam Books, Inc. vs. Sullivan*, (1963) 372 U. S. 58. It is equally clear that the first amendment does not protect every utterance, and obscenity is not within the protected area of free speech. *Roth vs. United States*, (1957) 354 U. S. 476.

Two other propositions are pertinent to the discussion. First of all, a state may permit greater freedom of speech and press than the fourteenth amendment to the United States constitution would require, although it may not permit less. Also, the decisions of the United States supreme court are binding in Wisconsin in determining whether the state violates the fourteenth amendment in prescribing or suppressing a particular piece of material as obscene. *McCauley vs. Tropic of Cancer*, (1963) 20 Wis. 2d 134, 139.

It should be noted that while motion pictures are within the basic protection of the first and fourteenth amendments to the constitution of the United States, as well as Art. I, sec. 3, Wis. Const., legislation which requires as a prerequisite to public exhibition the submission of a motion picture to an administrative agency (i. e., a prior restraint in its simplest form) is not necessarily unconstitutional under all circumstances. *Kingsley International Pictures*
The landmark case in the area of motion picture licensing is *Freedman vs. Maryland*, (1965) 380 U. S. 51. That case involved the validity of the Maryland motion picture censorship statute which, among other things, made it unlawful to exhibit a motion picture without having first obtained a license from the Maryland State Board of Censors. The appellant, Freedman, in an express challenge to the constitutionality of the statute, exhibited a film without first submitting it to the board as required by the law. The state conceded that the picture did not violate the statutory standards and would have received a license if properly submitted. Freedman argued that the portion of the act prohibiting exhibition of any motion picture without submission to, and approval by, the board, constituted an invalid prior restraint because, in the context of the remainder of the statute, it presented a danger of unduly suppressing protected expression.

Under the statute, exhibitors were required to submit all films to the board for examination, but no time limit was imposed for completion of the board's action. If a film was disapproved, or any elimination ordered, the exhibitor would receive immediate notice of the disapproval, and, if the board's actions were appealed from, the film would be re-examined in the presence of the exhibitor by two or more members of the board. The film would be finally approved or disapproved promptly after such examination. The exhibitors were given a right of appeal from the board's decision to the Baltimore city court.

The supreme court noted that there was no statutory provision for judicial participation in the procedure which barred the film in the first instance. The substance of Freedman's argument was that, because the apparatus operated in a statutory context in which judicial review may be too little and too late, the statute lacked sufficient safeguards for confining the board's action to judicially determined constitutional limits.
In holding the Maryland act unconstitutional, the court stated (380 U. S. 57-58):

"* * * The administration of a censorship system for motion pictures presents peculiar dangers to constitutionally protected speech. Unlike a prosecution for obscenity, a censorship proceeding puts the initial burden on the exhibitor or distributor. Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression. And if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final."

The court went on to hold that a process which requires the prior submission of films to review boards avoids constitutional infirmities only if it operates under procedural safeguards designed to obviate the dangers of a censorship system. In so holding, the court stated (380 U.S. 58-59):

"* * * First, the burden of proving that the film is unprotected expression must rest on the censor. As we said in Speiser v. Randall, 357 US 513, 526, 2 L ed 2d 1460, 1473, 78 S Ct 1332, 'Where the transcendent value of speech is involved, due process certainly requires . . . that the State bear the burden of persuasion to show that the appellants engaged in criminal speech.' Second, while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression. The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. See Bantam Books, Inc. v. Sullivan, supra; A Quantity of Books v. Kansas, 378 US 205, [12 L ed 2d 809, 84 S Ct 1723]; Marcus v. Search Warrant, supra; Manual Enterprises, Inc. v. Day, 370 US 478, 518-519, [8 L
To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor’s view that the film is unprotected, may have a discouraging effect on the exhibitor. See Bantam Books, Inc. v. Sullivan, supra. Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

“Without these safeguards, it may prove too burdensome to seek review of the censor’s determination. Particularly in the case of motion pictures, it may take very little to deter exhibition in a given locality. The exhibitor’s stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation. The distributor, on the other hand, may be equally unwilling to accept the burdens and delays of litigation in a particular area when, without such difficulties, he can freely exhibit his film in most of the rest of the country; for we are told that only four States and a handful of municipalities have active censorship laws.”

A separate concurring opinion filed by Justice William O. Douglas, joined by Justice Hugo Black, noted that the majority’s opinion in Freedman would invalidate the system used in the city of Chicago, which was upheld by the narrowest of margins in Times Film Corp. vs. Chicago, (1961) 365 U. S. 48, 81 Sup. Ct. 391, 5 L. ed. 2d 403.

In State vs. Columbia Pictures Corporation, (Kan. 1966) 417 P. 2d 255, decided less than six months ago, the Kansas supreme court held that the State Motion Picture Censorship Act violated the constitutional guarantee of freedom of expression under principles enunciated in Freedman v.
Maryland, supra. In that case, the law, which was enacted in 1917, made it unlawful for any person to exhibit a film unless it first had been submitted to, and approved by, the Kansas Board of Review. Judicial review was provided for any person aggrieved by board action through the commencement of proceedings in district court. The penalty portions of the law made violation of any provision of the act a misdemeanor punishable by fine and jail sentence. In holding the law unconstitutional, the court stated (417 P. 2d at p. 258):

"It is readily apparent the Kansas procedural scheme does not satisfy the criteria of Freedman. First, once the Board disapproves a film, the exhibitor is required to assume the burden of instituting judicial proceedings and of persuading the courts that the film is protected expression. Second, once the Board has acted against a film, exhibition is prohibited pending judicial review, however protracted, and an exhibitor may be convicted if it shows a film after unsuccessfully seeking a license, even though no court ever rules on the obscenity of the film. Third, no assurance is provided for a prompt judicial determination. The only provision therefor being in 51-107, which provides that an action commenced by the party aggrieved shall not abate or suspend the action of the Board until finally determined by the court. These are the same procedural defects Freedman declared existed in the Maryland statute."

The Pennsylvania Motion Picture Control Act of 1959 was held invalid in William Goldman Theatres Incorporated v. Dana, (1961) 405 Pa. 83, 173 A. 2d 59. The pertinent features of that act were: (1) It required exhibitors to register with the board and to notify the board within 48 hours before the first showing; (2) It empowered the board to disapprove an obscene film, the statutory definition of obscenity being called from the opinion in Roth v. United States, supra; (3) It authorized the board to condemn single scenes; and (4) any violation of the act was made a criminal offense. The act also provided procedures for judicial review. The court held that the act, in its defective censorial standard and the failure of its procedural requirements to safeguard adequately the constitutionally
protected right of freedom of expression, violated both the due process clause of the Fourteenth Amendment and various provisions of the Pennsylvania Constitution. As regards the provisions of the act referred to under (1) and (4) above, the court pointed out that the act expressly restrains the initial showing of the film for 48 hours after notice to the board of its intended exhibition, and that subsequent showings would likewise be subjected to previous restraint for the reason that if the motion picture were exhibited after the censors had disapproved it, the exhibitor might be criminally punished upon proof, not of showing obscene pictures, but merely upon proof of showing a particular film, the exhibition of which had been previously restrained by administrative action.

Another case worth noting is Portland v. Welch, (1961) 229 Or. 308, 364 P. 2d 1009 (opinion modified and rehearing denied in 367 P. 2d 403). That case involved administrative approval prior to exhibition of motion pictures, and the court emphasized on rehearing that one conspicuous vice of any administrative licensing system is that, as a practical matter, it imposes upon the license applicant the very considerable burden of showing that the censor had abused his power, and that this shifting of the burden, by itself, was repugnant to the provisions of the Oregon constitution guaranteeing free expression of opinion.

Under substitute amendment 1, A., to Bill 890, A., if it appears that a motion picture classified as “unacceptable” by the board will otherwise be exhibited in the state, the attorney general is directed to apply, within three days after classification, to the circuit court for Milwaukee county for a declaratory judgment pursuant to section 269.565, Stats. The bill further provides that “the court shall”, solely on the basis of the board’s ruling “thereupon issue an order to show cause why the motion picture should not be judicially determined to be obscene”.

Sec. 269.565 (except as otherwise required by sec. 177.03, as created by Bill 890, A.), is made applicable in its entirety to the injunctive proceedings commenced by the attorney general under the bill. Sec. 269.565 provides, in
essence, that whenever there is reasonable cause to believe that any written matter, recording or film which is being sold or distributed in any county or is in the possession of any person who intends to sell or distribute the same, is obscene, the district attorney may file a complaint in circuit court directed against the allegedly obscene matter. Upon the filing of the complaint the court is directed to make a summary examination of the matter, and if the court is of the opinion that there is reasonable cause to believe that the matter is obscene, it then, and only then, issues an order to show cause why the matter should not be judicially determined to be obscene. (The requirement of 269.565 (1) that an order to show cause may only issue if the court, after examination of the matter, is of the opinion that reasonable cause exists to believe that the matter is obscene, disappears in view of the contrary language of sec. 177.03, as created by Bill 890, A, which directs the court to issue the order solely on the basis of the board's ruling.) The order to show cause is made returnable within 30 days, and is directed to be published in a Milwaukee county newspaper and mailed to interested persons. The mailing, and the commencement of publication, must be made within 72 hours (3 days) of the issuance of the order to show cause. The remainder of sec. 269.565 provides for a jury trial upon demand of any person interested in the publication or exhibition of the matter; and that if an answer is filed the case is required to be set down "for a speedy hearing", but only after adjudication of default against all persons who have not appeared and answered in the manner provided. Thus the hearing cannot be held until expiration of 30 days from the issuance of the order, for under normal circumstances no default can occur until this time period has expired. Section 269.565 also provides that, if any answering party so demands, the trial cannot be adjourned for a period of longer than 72 hours (3 days) beyond the opening of court on the day following the filing of the answer. Sec. 269.565 then contemplates a trial on the question of whether or not the matter is obscene, and provides that any judgment entered may be appealed to
the supreme court pursuant to Ch. 274 by any person adversely affected thereby.

Restraint by injunction traditionally has been thought to inhibit freedom of speech more seriously than restraint by penalties imposed after publication or exhibition. *State vs. Jackson*, (1960) 224 Or. 337, 356 P. 2d 495.

The cumulative effect of Bill 890, A, and those portions of sec. 269.565 which are incorporated therein, must be judged against the criteria enunciated in *Freedman vs. Maryland*, supra. The procedural safeguards required by that decision may be summarized as follows: (1) The burden of proving that the film is an unprotected form of expression must rest upon the board or agency; (2) The exhibitor must be assured by statute that the board will, within a specified brief period of time, either issue a permit or go to court to restrain showing of the film; (3) Any restraint imposed in advance of a final judicial determination on the merits must be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution; and (4) The procedure must assure a prompt final judicial decision.

Under sec. 177.03 (3), as created by Bill 890, A, the circuit court of Milwaukee county is directed to issue an order, based solely upon the board’s determination, requiring the exhibitor to show cause why the motion picture should not be judicially determined to be obscene. It should be remembered that we are not here discussing procedures or penalties taking effect after exhibition of the film. We are in the area of prior restraints and subject to all the constitutional restrictions pertaining thereto. It is my opinion that the language of sec. 177.03 (3) referred to above shifts the burden of proof from the board to the exhibitor. This is clearly violative of the first and fourteenth Amendments to the constitution of the United States. See *Freedman v. Maryland*, supra. As such, it must also be violative of Art. I, sec. 3, Wis. Const., since, although a state may permit greater freedom of speech and press than required by the United States constitution, it may not permit less. *McCauley v. Tropic of Cancer*, (1963) 20 Wis. 2d 134, 139.

Under Bill 890, A, the review board has 15 days following receipt of the application within which to review and classify the particular motion picture. In the case of a film classified as "unacceptable", and where it appears that the film still will be exhibited, the attorney general is given three days to apply for an injunction pursuant to sec. 269.565. Under the latter statute, no trial or hearing on the question of obscenity may be had until 30 days after the complaint of the attorney general is filed, since under 269.565 (4) an adjudication of default must be entered against all persons who have not appeared and answered before a hearing is set (and all parties have 30 days within which to answer). The trial must commence not more than three days beyond the opening of court on the day following the filing of an answer, if any person answering so demands. The trial then commences, and an appeal is provided under the provisions of Ch. 274. An appeal may, of course, be taken within three months after entry of judgment. Sec. 274.01. Thus the system set up by Assembly Bill 890 contemplates, at the minimum, over 50 days (15 plus 3 plus 30 plus 3) between receipt of the application from the exhibitor and a determination on the merits by the circuit court. The bill provides no manner in which an exhibitor may shorten this length of time. Should an appeal be taken, the normal rules pertaining to supreme court practice apply, and there is no assurance that the matter can be heard other than in the normal course of appellate affairs, which usually involves the passage of many months from the time the appeal is perfected.

It is, therefore, my opinion that Bill 890, A, does not provide sufficient procedural safeguards that a final determination will be reached in the "shortest fixed period compatible with sound judicial resolution". Similarly, the delays built into the system do not assure a prompt final judicial decision as contemplated by the *Freedman* case. It follows that the system contemplated by the bill is unconstitutional.
Another portion of the bill deserves comment. Under section 177.03 (2) no minor may attend a motion picture classified by the board as "for adults" unless accompanied by his parent, guardian or an adult spouse. A minor is defined by the bill as any person under the age of 18 years.

In Paramount Film Distributing Corp. v. City of Chicago, (D. C., N.D. Ill. E. D., 1959) 172 F. Supp. 69, 72, the ordinance in question permitted a limited exhibition license, restricted to persons over the age of 21 years, if the film, in the mind of the board, tended toward "creating a harmful impression on the minds of children, where such tendency as to the minds of adults would not exist".

In holding the law to be unconstitutional, the court stated:

"The ordinance, then, permits a limited license when a film approaches producing a harmful notion in the mind of anyone from one to twenty-one years of age. Certainly, this is an insufficient guide to either the censors or those who produce motion pictures. Section 155-5 is invalid for this reason.

"(5, 6) This section is invalid on another ground as well. Even if clearly drawn, it would be invalidated by the age limit of twenty-one years. A censorship statute is necessarily an invasion of the First Amendment right to freedom of expression. Although the City may under its police power limit that right to prevent an evil, any restrictive action must be reasonable, not capricious. Assuming without deciding that the City might correct the evil of exhibiting films unfit for 'children' the present section is unsuitable for the purpose. Under it, a twenty year old, married service man would be prevented from seeing a film that might not be suitable for a girl of twelve. As Justice Frankfurter remarked in a similar situation, 'Surely, this is to burn the house to roast the pig'. As in the case just cited, the remedy is not appropriate for the end at which it is presumably aimed, and is an invalid exercise of police power."

A court might ask the same question respecting Bill 890, A, — does it "burn the house to roast the pig"? The in-
terest of society in protecting children is a valid and necessary interest, but even a minor's freedom of speech is too precious to be subjected to the whim of the censor. *Interstate Circuit, Inc., v. City of Dallas*, (5th Cir., 1966) 366 Fed. 2d 590, 598-599.

Bill 890, A, prohibits minors from attending exhibitions of motion pictures which are classified by the board "for adults" unless accompanied by a parent, guardian or "adult spouse". Under section 177.02 (5), as created by Bill 890, A, classification of "general patronage" and "for adults" is to be determined by the board "solely on the basis of its judgment of benefit or determent to the welfare of minors in the state according to the standards of morality determined by the board".

Certainly the legislature may employ variable concepts of obscenity, including a variable standard which would proscribe dissemination to children of materials obscene as to such children, though not necessarily obscene as to the adult community. It is fundamental, however, that such a scheme can be no broader than is necessary to reach the desired end. *Butler v. Michigan*, (1957) 352 U.S. 380; *Bookcase, Inc., v. Broderick*, (1966) 18 N.Y. 2d 71, 271 N.Y.S. 2d 947, 218 N.E. 2d 668. There is, in my opinion, a serious constitutional question as to whether the 18-year cut-off point specified by Bill 890, A, is appropriate to the ends sought. See *Paramount Film Distributing Corp. v. City of Chicago*, quoted above. The court in the last-mentioned case found that a 21-year limit was sufficient, in and by itself, to render a motion picture review system unconstitutional. The reasons underlying this decision are, for the most part, applicable to 16- and 17-year olds as well, although the choice of the cut-off age is, in the first instance, a legislative decision. Suffice it to say that such a decision must be made with the knowledge that age limitations alone may be sufficient to render such laws unconstitutional.

In any event, the bill, in attempting to implement a variable standard of obscenity, provides no standard at all for the determination of which films may not be viewed by
unaccompanied minors. This determination is left to the sole judgment of the board, based upon whatever “standards of morality” the board sees fit to impose. The absence of any standard, other than the whim of the board at any given time, does violence to the principles of free speech embodied in the federal and state constitutions. Sec. 177.02 (5) as created by the bill is, therefore, much broader in its application than is necessary to effect its purpose, and, in my opinion, would violate the first and fourteenth Amendments to the United States constitution, and Art. I, sec. 3, Wis. Const.

I must also note that section 177.02 (7), in effect, provides an additional basis for determining the classification “for adults”. That section provides that if the board's determination that a certain film is “unacceptable” is set aside by the courts, the film is automatically classified “for adults only”. The practical effect of this provision is to permit classification at the “adults only” level without any standard at all, since the court may have refused to find the film obscene in any respect. In my opinion, this practice, coupled with a complete lack of provisions for speedy judicial review of a “for adults” classification, raises additional constitutional questions.

As stated at the outset, this opinion deals with the doctrine of prior restraint. The issue is not whether the government may impose a particular restriction in an area of public expression, such as forbidding obscenity in newspapers, magazines and films, but only whether it may do so by a particular method, such as advance screening of newspaper copy, or advance viewing of films. In other words, restrictions which could be validly imposed when enforced by subsequent punishment are, nevertheless, forbidden if attempted by a system of prior restraint without precise and constitutionally adequate safeguards. The major considerations underlying this doctrine are matters of administration, techniques of enforcement, methods of operation, and their effect upon the basic objectives of the first amendment. In short, restriction or suppression, whether direct or indirect, prior to exhibition, presents an entirely
different constitutional question than is involved in the general obscenity laws, which attach to a given situation only after the communication or exhibition has been made.

For the above reasons, it is my opinion that substitute amendment 1, A., to Bill 890, A, would be unconstitutional if enacted into law.

BCL/WFE

Fire Inspections—Row Houses—Dwelling units of row houses by provisions of sec. 101.10 (5b) are excepted from the inspections required by sec. 101.29 (3).

February 8, 1967.

JOSEPH C. FAGAN, Chairman

Industrial Commission of Wisconsin

You ask whether row houses are subject to regular fire inspections as required by sec. 101.29 (3), Stats. You state that for some time the commission has considered row houses to be private dwellings under sec. 101.10 (5b), and therefore not subject to regular fire inspections.

The building code, Ind. 57.25, Wis. Admin. Code, defines the term “row house” as follows:

“A row house is a place of abode not more than 2 stories in height, arranged to accommodate 3 or more attached row dwelling units in which each dwelling unit is separated from the adjoining unit by an unpierced vertical occupancy separation of not less than one-hour fire-resistive construction, extending from the basement or lowest floor to the under side of the roof boards.”

You state that basements in row houses can be entered only by first entering the living quarters of each separate dwelling unit therein. Thus, row houses, although single buildings, are divided into separate and distinct dwelling units from the basements to the roof.
Sec. 101.10 (5b) provides as follows:

"The industrial commission and its deputies shall have the right at all reasonable hours to enter into and upon all buildings, premises and public thoroughfares excepting only the interior of private dwellings, for the purpose of ascertaining and causing to be corrected any condition liable to cause fire, or any violation of any law or order relating to the fire hazard or to the prevention of fire."

It is my opinion that the dwelling units of row houses as described are private dwellings excepted from the regular fire inspections required by sec. 101.29 (3), by the provisions of sec. 101.10 (5b). Therefore, your interpretation of sec. 101.10 (5b) concerning its application to row houses is correct.

BCL:JPA

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*Industrial Commission—Rectory—A three-bedroom house normally used as a rectory is not subject to the regulations of the industrial commission.*

February 9, 1967.

JOSEPH C. FAGAN, Chairman

*Industrial Commission of Wisconsin*

You have requested my opinion as to whether a rectory should be classed as a single family dwelling under Ind. 50.03 or otherwise under Ind. 57.001, Wis. Adm. Code. You state that a rectory for a catholic church is usually designed as an ordinary three bedroom house. A rectory under normal usage is a dwelling not subject to the jurisdiction of the industrial commission.

Ind. 50.03, Wis. Adm. Code, insofar as is applicable here, provides:

"Exemption from code requirements. This code does not apply to the following buildings:"
“(1) Dwellings, and outbuildings in connection therewith, such as barns and private garages.

“(2) Apartment buildings used exclusively as the residence of not more than 2 families.”

Ind. 57.001, Wis. Adm. Code, insofar as is applicable here, provides:

“Scope. (1) The requirements of this chapter shall apply to all apartment buildings, row houses, rooming houses, hotels, dormitories, convents, monasteries, hospitals, children’s homes, homes for the aged and infirm, nursing homes, convalescent hospitals, convalescent homes, asylums, mental hospitals, jails, and other places of abode or detention, except as provided in section 57.25 (2).

“(2) By place of abode is meant a building or part of a building, such as apartment building, row house, rooming house, hotel, dormitory, convent, hospital, as follows:

“(a) Occupied as a residence of 3 or more families living independently or occupied by 2 such families and used also for business purposes, or

“(b) Occupied for sleeping or lodging purposes by 3 or more persons not members of the same family.”

The above rules were promulgated pursuant to powers vested in the industrial commission under secs. 101.09, 101.10 (4) and (5), and 101.10 (12) (d), Stats.

Sec. 101.09 provides:

“Supervisory jurisdiction and powers of commission over employments and places of employment. The industrial commission is vested with the power and jurisdiction to have such supervision of every employment, place of employment and public building in this state as may be necessary adequately to enforce and administer all laws and all lawful orders requiring such employment, place of employment or public building to be safe, and requiring the protection of the life, health, safety and welfare of every employee in such employment or place of employment and every frequenter of such place of employment, and the safety of
the public or tenants in any such public building; provided, however, that the provisions of this section shall not apply to rural school buildings."

Sec. 101.10 provides:

"Other powers, duties and jurisdiction of commission. It shall also be the duty of the industrial commission, and it shall have power, jurisdiction and authority:

"* * *

"(4) To ascertain and fix such reasonable standards and to prescribe, modify and enforce such reasonable orders for the adoption of safety devices, safeguards and other means or methods of protection to be as nearly uniform as possible, as may be necessary to carry out all laws and lawful orders relative to the protection of the life, health, safety and welfare of employees in employments and places of employment or frequenters of places of employment.

"(5) To ascertain, fix and order such reasonable standards, rules or regulations for the construction, repair and maintenance of places of employment and public buildings, as shall render them safe."

A public building is defined in sec. 101.01 (12) as follows:

"(12) The term ‘public building’ as used in ss. 101.01 to 101.29 means and includes any structure, including exterior parts of such building, such as a porch, exterior platform or steps providing means of ingress or egress, used in whole or in part as a place of resort, assemblage, lodging, trade, traffic, occupancy, or use by the public or by 3 or more tenants."

The term “public” consists of frequenters who are defined in sec. 101.01 (5) 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."

The industrial commission has further powers to investigate and enter necessary orders when appropriate.
Sec. 101.11 (3) provides:

"Whenever the commission shall learn that any employment or place of employment or public building is not safe it may of its own motion, summarily investigate the same, with or without notice, and enter such order as may be necessary relative thereto."

From reading of the above statutes, it is clear that the jurisdiction of the industrial commission is only over employment, place of employment or public buildings and not over dwellings or residencies of not more than two families. Rules and orders of the industrial commission are to define and supplement the statutes, not to diminish nor enlarge upon them. *State v. Grayson*, (1958) 5 Wis. 2d 203, 92 N.W. 2d 272.

A rectory is defined generally as the rector's or clergyman's residence or parsonage. Websters' Third New International Dictionary, unabridged, 1961 ed.

A three bedroom house used normally as a rectory by a church is the residence for its priest or minister and is not a public building. Such building is a dwelling within the meaning of Ind. 50.03 (1), Wis. Adm. Code, and not subject to the jurisdiction of the industrial commission.

**BCL/ACC/RGM**

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*Nonresident Tuition*—Dependent minor student whose parents reside in Minnesota and work full time in Wisconsin would not be entitled to exemption from nonresident tuition. Minnesota does not possess the requisite tax reciprocity statute.


**EUGENE R. MCPHEE, Director**

**Wisconsin State Universities**

You have requested my opinion whether a dependent minor student whose parents reside in the state of Minne-
sota and work full time in Wisconsin would be entitled to an exemption from nonresident tuition under the provisions of sec. 37.11 (8) (am), which reads as follows:

“(am) Any minor, or totally dependent person, who resides outside the state but whose parent upon whom he is dependent is employed full time in this state shall be entitled to the exemptions provided in par. (a), provided that if the state of residence levies an income tax on individual income, such state must have provided for reciprocity in the levying of any taxes on income imposed by such state.”

The fact that sec. 37.11 (8) (am) is phrased in terms of the residence of a minor or dependent student while your question is phrased in terms of the residence of the parent is immaterial in the present context. The well-established general rule is that the residence of a dependent minor student follows that of his parents even though such student may be attending school away from home throughout most of each year. Seibold v. Wahl, (1916) 164 Wis. 82, 159 N.W. 546; 39 OAG 44; 17 OAG 419. However, there are occasions where the residence of a minor or dependent student may differ from that of his parents as, for example, where the minor is emancipated. See 4 OAG 929.

The only other portion of this statute which requires clarification is the provision relating to income tax reciprocity by the state of residence. In enacting this provision the legislature apparently had in mind a statute similar to sec. 71.03 (2) (c) which conditions Wisconsin tax exemption of income earned by a sister state domiciliary performing personal services in Wisconsin upon the existence of a comparable exemption or credit against tax for Wisconsin domiciliaries performing personal services in such sister state. Such statutes should be carefully distinguished from other more common statutes that allow a domiciliary to claim a credit against tax to the extent that another state has taxed him for personal services performed in that state. See, for example, sec. 71.09 (8). These more common statutes are designed merely to protect one's own
domiciliaries from double taxation and do not typically require reciprocity.

Although Minnesota has enacted a tax credit statute to protect its own domiciliaries working in other states, it does not possess a reciprocal statute which would allow a tax exemption or credit for sister state domiciliaries performing personal services in Minnesota. As a result, a dependent minor student whose parents reside in the state of Minnesota and work full time in Wisconsin would not be entitled to an exemption from nonresident tuition under sec. 37.11 (8) (am). In fact, the state department of taxation has informed me that it knows of only three states, Indiana, Kentucky and Maryland, that have enacted statutes that are reciprocal with sec. 71.03 (2) (c). Thus, sec. 37.11 (8) (am) appears to be applicable only in those instances where the residence of a dependent or minor student is in one of the three above-mentioned states or in a state that does not impose an income tax and the supporting parent of such a student works full time in Wisconsin.

BCL:ACC:JDJ

Plats—Subdivisions—Discussion of the applicability of sec. 236.13 (2m) to the division, disposition, and platting of lands lying within 500 feet of a body of a navigable water.

March 10, 1967.

Freeman Holmer, Director
Department of Resource Development

You asked my formal opinion on several questions dealing with approval of preliminary or final plats under sec. 236.13 (2m), which was created by ch. 614, Laws 1965.

Ch. 236 of the statutes was redrafted in its entirety in the 1955 and 1957 sessions of the legislature (L. 1955, Ch. 570; L. 1957, Chs. 88 and 599), and its provisions have undergone further refinement since that time. Sec. 236.10
(1) requires all plats to be approved as required by Ch. 236 before they can be recorded. Sec. 236.13 provides certain conditions which must be met for approval of a preliminary or final plat, and subsection (2m), the subject of your opinion request, provides as follows:

"236.13 (2m) As a further condition of approval when lands included in the plat lie within 500 feet of the ordinary high watermark of any navigable stream, lake or other body of navigable water or if land in the proposed plat involves lake or stream shorelands referred to in s. 236.16, the department of resource development, if it deems it necessary for the prevention of pollution of navigable waters, or the state board of health, if it deems it necessary for the protection of public health and safety, may require assurance of adequate drainage areas for private sewage disposal systems and building setback restrictions, or provisions by the owner for public sewage disposal facilities for waters of the state, industrial wastes and other wastes, as defined in s. 144.01. Such public sewage disposal facilities may consist of one or more systems as the department of resource development or the state board of health determines on the basis of need for prevention of pollution of the waters of the state or protection of public health and safety."

"Plat" is defined by sec. 236.02 (5) as simply, "a map of a subdivision". Sec. 236.02 (8) defines "subdivision" in the following language:

"(8) 'Subdivision' is a division of a lot, parcel or tract of land by the owner thereof or his agent for the purpose of sale or of building development, where:

"(a) The act of division creates 5 or more parcels or building sites of 1½ acres each or less in area; or

"(b) Five or more parcels or building sites of 1½ acres each or less in area are created by successive divisions within a period of 5 years."

One of the purposes of Ch. 236 is to regulate the subdivision of land to promote public health and welfare; and the requirements of sec. 236.13 (2m) are subservient to
this general purpose. Your questions are limited to the language of sec. 236.13 (2m) dealing with lands within 500 feet of the ordinary high watermark of a body of navigable water. They do not concern that portion of the statute dealing with lake or stream shorelands as defined elsewhere in Ch. 236.

The questions you raise will be discussed seriatim.

1. Are the provisions of Sec. 236.13 (2m) applicable to an entire subdivision although only a portion of the subdivision may lie within 500 feet of the ordinary high watermark of a navigable lake or stream?

The language of sec. 236.13 (2m) is clear on this point, and the answer is “yes”. The statute is not directed toward only those portions of a subdivision which lie within 500 feet of a navigable body of water, but rather toward the entire subdivision, as long as “lands included in the plat” lie within 500 feet of the ordinary high watermark of any body of navigable water.

It is my opinion that, under the clear language of sec. 236.13 (2m) its provisions are applicable to an entire subdivision, even though only a portion of the subdivided lands lie within 500 feet of the ordinary high watermark of a navigable body of water.

2. If a subdivider chooses to divide his lands into more than one subdivision, one of which may include those lands lying within 500 feet of the ordinary high watermark of a navigable lake or stream, will the remainder of his lands also be subject to the provisions of ss. 236.13 (2m) if he subdivides them later?

The answer to this question is “no”.

Assuming that all the conditions contained in Ch. 236 and other applicable statutes and rules are met, sec. 236.13 (2m) would not be applicable as long as none of the lands within the boundaries of the second subdivision lie within 500 feet of the navigable water. This conclusion follows from the definition of “subdivision” referred to above, and from the plain language of sec. 236.13 (2m). See
Yokley, *The Law of Subdivisions*, pp. 4-5. The same reasoning would apply to the owner of a single, large tract of land who may have platted a portion of the land at a given time and wishes to plat the rest at a later date. The second division of land could be a separate subdivision, and if no part of it lies within 500 feet of the ordinary high water-mark of a navigable water, the provisions of sec. 236.13 (2m) would not apply.

3. a. If a portion of a subdivider's lands lie within 500 feet of the ordinary high water-mark of a navigable lake or stream, may he dispose of the lands so located by metes and bounds or certified survey maps assuming the requirements of ss. 236.02 (8), 236.03, 236.34 and 236.45 have been met?

The answer is in the affirmative.

By your reference to secs. 236.02 (8), and 236.03, I must assume that the question is directed toward an owner who wishes to sell lands within the 500-foot limit in a manner which does not require filing a plat under the above statutes. In other words, the disposition could be made so as to create fewer than 5 parcels of 1½ acres or less in a 5-year period. Such a division would not be a "subdivision" under sec. 236.02 (8), and sec. 236.03 (1) would not require the filing of an approved plat.

It follows that sec. 236.13 (2m), which deals solely with approval of plats, would not apply, and assuming that no "subdivision" resulted, the lands could be disposed of by metes and bounds or certified survey maps.

3. b. May he then subdivide the remainder of his lands beyond the 500 foot mark without being subject to the provisions of Sec. 236.13 (2m)?

The answer to this question must also be in the affirmative, subject, of course, to the limitation contained in sec. 236.02 (8), that if the remainder of the lands are so divided as to result in the creation of 5 parcels (including the lands mentioned in part a. of question 3. within 5 years, the entire area would be a "subdivision". If this is so, and any of the subdivided lands lie within the 500-feet
limit, sec. 236.13 (2m), would apply. If the division does not result in a "subdivision", as defined in sec. 236.02 (8), it is equally clear that sec. 236.13 (2m) has no application.

While it may seem that some portions of this opinion are inconsistent with the purpose of the platting laws in that landowners may escape the effects of sec. 236.13 (2m) by filing separate plats for lands within and without the 500-foot limit, we are governed by the plain language of the statute. We are not dealing with a question of avoidance of all platting laws, as in 52 OAG 411, but only with the application of sec. 236.13 (2m) to the specific fact situations you have presented.

BCL:WFE

County Board—County Forest—County board member may not purchase timber from the county unless all contracts involved totalled less than $1000 per year.

March 29, 1967.

ALEX J. RAINERI
District Attorney, Iron County

You state that the Iron County Forest produces timber which is sold on public bid. You inquire as to whether a member of the county board can purchase such timber from the county if he is the highest bidder, and call my attention to sec. 175.10, which relates to sales to employes.

Sec. 175.10 prohibits the procurement or possession of any goods for sale to state or county employes. However, this statute is not applicable here because, among other reasons, a member of the county board is not considered an employe but rather a public officer. See 47 OAG 302 and 51 OAG 202.

In any case, the applicable statute in this situation is sec. 946.13. This statute states as follows:
“946.13 Private interest in public contract prohibited. (1) Any public officer or public employe who does any of the following may be fined not more than $500 or imprisoned not more than one year or both:

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

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

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

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

“(5) Subsection (1) (b) shall not apply to a public officer or public employe by reason of his holding not more than 2 per cent of the outstanding capital stock of a corporate body involved in such contract.”

Pursuant both to its authority to direct sales of county property under 59.07 (1) (c), and to its power under 28.11 (3) (g) to engage in timber sales, the county board is authorized to perform functions relating to county forests and timber thereon requiring the exercise of discretion. Therefore, sec. 946.13 would be applicable. See 29 OAG 197 (1940).

If the contract with the county for the sale of timber taken together with any other contracts between the county and the board member during any one year involve receipts and disbursements exceeding $1,000.00, the contract
is prohibited by section 946.13 (2) (a). Thus, unless the sale of the timber to the board member is within this exception of section 946.13 (2) (a), the board member is precluded from purchasing the timber from the county.

BCL/GFS/JA
Insurance—Words and Phrases—Wording in accident and sickness policies which differs from statutory language may be approved by commissioner of insurance if not less favorable to insured or beneficiary.

April 6, 1967.

ROBERT D. HAASE, Commissioner of Insurance

As insurance commissioner you have power, under sec. 204.31 (3) (a), to approve different wording in accident and sickness insurance policies offered by insurers as a substitute for statutory provisions. This same statute states that you may approve only such substitute provisions which are "not less favorable in any respect to the insured or the beneficiary" than the statutory language.

You ask whether you have power to approve the following proposed substitute provisions:

"(1) All indemnities of this policy are payable to the insured, but any accrued indemnities unpaid at the insured's death will be paid to the spouse of the insured, if living, otherwise to the estate of the insured.

"(2) Benefits for loss of life shall be payable to the beneficiary designated by the insured. Any other benefits are payable to the insured. If there is no designated beneficiary surviving as to all or part of the insurance at the death of the insured, such insurance shall be payable to the insured's estate except that the company may in such case pay such insurance to a surviving spouse, mother, father, child or children, brother or sister of the insured.

"(3) Indemnity for loss of life of the insured will be payable to his wife, if living, otherwise to his estate. Any other accrued indemnities unpaid at the insured's death may be paid to his wife or to his estate. All other indemnities will be payable to the insured.

"(4) Benefits for loss of life are payable to the beneficiary designated by the insured. All other benefits are payable to the insured. If any benefit remains unpaid at the
death of the insured, the company may pay up to $1000 of such benefit to any one or more of the following relatives of the insured: wife, husband, mother, father, child or children, brother or brothers, sister or sisters.

"(5) Benefits are payable to the insured. In case of death of the insured before all amounts payable under the policy have been paid, the company may pay any such amount up to $1000 to any person or institution determined by the company to be equitably entitled thereto.

"(6) Benefits for loss of life are payable to the beneficiary designated by the insured. All other benefits are payable to the insured. If the insured is a minor or is otherwise incompetent to give a release for any payment due, the company may make payment to any person or institution appearing to have assumed the principal support of the insured. If any benefit remains unpaid at the death of the insured, the company may make payment to the surviving spouse of the insured or to any of his surviving children or to the executors or administrators of the insured.

"(7) The benefits payable under the policy will be payable to the insured or to his beneficiary on the death of the insured. If there is no valid beneficiary designation at the time of death, benefits are payable to the insured's estate. However, if the insured or the beneficiary is a minor or otherwise not competent to give a valid release or if benefits are payable to the insured's estate, the company may pay benefits up to $1000 to any one or more of the following of your or your beneficiary's surviving relatives: spouse, mother, father, child or children, brothers or sisters.

"(8) Benefits for loss of life are payable to the beneficiary designated by the insured. All other benefits are payable to the insured. If the insured is legally incapable of giving a valid receipt for any payment due him and no guardian has been appointed, the company may make such payment to the individual or individuals as have assumed the care and principal support of such person. If the insured dies before all amounts due and payable to him have been paid, the company may make such payment to the executor or ad-
ministrator of his estate or to his surviving spouse, mother, father, child or children or to any other individual or individuals who are equitably entitled thereto. If any beneficiary is legally incapable of giving a valid receipt for any payment due him and no guardian has been appointed, the company may make payment to the individual or individuals as have assumed the care and principal support of such beneficiary.

“(9) Benefits for loss of life are payable to the beneficiary designated by the insured. If there is no such designation in effect, such benefits are payable to insured's estate, or to any one or more of the following surviving relatives of the insured: spouse, child, mother, father, brother or sister. All other benefits are payable to the insured and any accrued benefits unpaid at the insured's death are payable to the insured's estate.

“(10) Benefits for loss of life are payable to the beneficiary designated by the insured. If, with respect to such insurance, there is no valid beneficiary designation in effect at time of the insured's death, such benefits are payable to the insured's estate, except that the company may in such case pay such benefits to the insured's spouse, if living, or, if not living, to the surviving children of the insured, if any, equally, or, if none, to the parents of the insured, equally if both survive, otherwise to the survivor. All other benefits are payable to the insured.

“(11) BENEFICIARIES: Any sum due under the certificate for loss of life of an insured will be paid: (a) to the spouse of such insured, if living; otherwise (b) equally to the then living lawful children of the insured, including step-children and adopted children, if any; otherwise (c) equally to the insured's parents or parent then living; otherwise, (d) to the estate of the insured. All other indemnities will be payable to the insured.

“(12) CHANGE OF BENEFICIARY: The right to change of beneficiary is reserved to the insured and the consent of the beneficiary or beneficiaries shall not be requisite to any change of beneficiary or beneficiaries. The beneficiary designation may be changed from time to time by written
notice to the issuing agent in satisfactory form, but no change of beneficiary shall take effect unless recorded for the company by the issuing agent at the office of the issuing agent. However, upon being so recorded, any such change shall take effect as of the date the notice was signed, whether or not the insured is living when the change is recorded, subject to any payment made by the company before such recording."

Except for (12), the foregoing all deal with payment of claims concerning which the applicable statutory provisions are secs. 204.31 (3) (a) 9. which states:

"9. Payment Of Claims: a. Indemnity for loss of life will be payable in accordance with the beneficiary designation and the provisions respecting such payment which may be prescribed herein and effective at the time of payment. If no such designation or provision is then effective, such indemnity shall be payable to the estate of the insured. Any other accrued indemnities unpaid at the insured's death may, at the option of the insurer, be paid either to such beneficiary or to such estate. All other indemnities will be payable to the insured.

"b. The following provisions, or either of them, may be included with the foregoing provision at the option of the insurer:

"If any indemnity of this policy shall be payable to the estate of the insured, or to an insured or beneficiary who is a minor or otherwise not competent to give a valid release, the insurer may pay such indemnity, up to an amount not exceeding $... (insert an amount which shall not exceed $1,000), to any relative by blood or connection by marriage of the insured or beneficiary who is deemed by the insurer to be equitably entitled thereto. Any payment made by the insurer in good faith pursuant to this provision shall fully discharge the insurer to the extent of such payment.

"Subject to any written direction of the insured in the application or otherwise all or a portion of any indemnities provided by this policy on account of hospital, nursing,
medical, or surgical services may, at the insurer's option and unless the insured requests otherwise in writing not later than the time of filing proofs of such loss, be paid directly to the hospital or person rendering such services; but it is not required that the service be rendered by a particular hospital or person.

"c. Notwithstanding the provisions of this section regarding payment of claims provisions, a policy otherwise written in accordance with this section which includes benefits payable on account of hospital, nursing, medical or surgical services rendered to or for an insured person may contain a provision, in lieu of the provision contained in the last paragraph of subd. 9. b., providing for the direct payment of such benefits as permitted in s. 204.33."

And, Sec. 204.33 which states:

"Direct payment. Any policy providing accident and sickness insurance which includes benefits payable on account of hospital, nursing, medical or surgical services rendered to or for an insured, including an employe or other member of any group insured by such policy, his or her spouse, child or children, or other dependents, may also provide that any such benefits be paid by the insurer directly to the hospital, physician, or other institution or person furnishing services covered by such provisions of the policy; but the policy may not require that the service be rendered by a particular hospital or person."

It is recognized that some of these alternatives proposed by the insurers apparently do not directly affect the absolute right of the insured to name or change beneficiaries at any time. These alternatives are designed to facilitate handling of claims where the beneficiary has predeceased the insured, and where there are no alternate beneficiaries or such alternate beneficiaries have also predeceased the insured. Although these proposals may have the desirable features of expediting disposition of claims by the insurer and avoiding the expense and delay of probate proceedings, the commissioner's approval may only be given if these substitutes meet the statutory requirements.
As to (1), the proposed language "but any accrued indemnities unpaid at the insured's death will be paid to the spouse of the insured, if living, otherwise to the estate of the insured" renders the paragraph unacceptable as being less favorable to the insured. This proposed provision ignores the concept of the insured's fundamental right to select and change his beneficiary. Sec. 204.31 (3) (a) 12. This statute, in my opinion, also contemplates and includes the insured's right to name successive preference beneficiaries. This proposed provision would deprive the insured of deciding who should be his beneficiary. Also, this is in conflict with 204.31 (8) (a) 9., which provides "Any other accrued indemnities unpaid at the insured's death may, at the option of the insurer, be paid either to such beneficiary or to such estate." The argument may be made that the inclusion of this proposed language has the effect of the insured's selecting his spouse as beneficiary for this limited purpose. If this reasoning were to prevail, then literally any substitute language could be justified as representative of the insured's calculated selection of a beneficiary. This, however, would compel the insured if he desired insurance at all to accept without choice or voice certain built-in beneficiaries, and thereby produce a substantial impairment in the insured's right of beneficiary selection. Ordinarily persons making contracts of insurance do not read carefully the application, and a very small per cent, in all probability, of those securing insurance ever read or understand the contents of the policy. Weiss v. Mutual Indemnity Co., (1966) 32 Wis. 2d 182, 186, 145 N. W. 2d 171.

The insured cannot fairly be expected to scrutinize each and every paragraph for special beneficiaries. He will in all probability select his beneficiary or beneficiaries in the one place designated in the policy (or the application for the policy) for such naming of the beneficiary or beneficiaries, and assume that by so selecting he has determined who will benefit under his policy. The insured, for example, might understandably and purposely omit selecting his estranged spouse as a beneficiary. The inclusion of this proposed paragraph in the policy would effectively thwart the insured's deliberate selection. This would constitute a provision less
favorable to the insured than the statutory provision, and thus could not be approved.

As to (2), the language "If there is no designated beneficiary surviving as to all or part of the insurance at the death of the insured, such insurance shall be payable to the insured's estate" is in harmony with 204.31 (3) (a) 9., but the subsequent language "except that the company may in such case pay such insurance to a surviving spouse, mother, father, child or children, brother or sister of the insured" renders this proposed paragraph unacceptable. This is because of the reasons given above plus the additional unfavorable feature of permitting the insurer to select the beneficiary. Sec. 204.31 (3) (a) 9. b., permits the insurer to select a beneficiary in certain very limited circumstances not applicable here. Therefore, this provision also would constitute a provision less favorable to the insured and could not be approved.

As to (3), this has the effect of limiting the insured's discretion in the selection of beneficiary for loss of life benefits. He may select no one but his wife, if living, or his estate. This likewise is less favorable to the insured than statutory provisions and cannot be approved for the reasons set out above.

As to (4), there is no objection to the first two sentences: "Benefits for loss of life are payable to the beneficiary designated by the insured. All other benefits are payable to the insured. . . ."

The remaining sentence:

"If any benefit remains unpaid at the death of the insured, the company may pay up to $1000 of such benefit to any one or more of the following relatives of the insured: wife, husband, mother, father, child or children, brother or brothers, sister or sisters."

however, would be acceptable only if not less favorable to the insured or the beneficiary than the following provision taken from 204.31 (3) (a) 9. b.:

"If any indemnity of this policy shall be payable to the estate of the insured, or to an insured or beneficiary who is
a minor or otherwise not competent to give a valid release, 
the insurer may pay such indemnity, up to an amount not 
exceeding $ . . . (insert an amount which shall not exceed 
$1000), to any relative by blood or connection by marriage 
of the insured or beneficiary who is deemed by the insurer 
to be equitably entitled thereto. * * *"

The statutory provision represents a departure from the 
concept of adherence to the wishes of the insured. For ex-
ample, even though the insured might have designated his 
estate or a minor as beneficiary, the statute to the extent 
of $1,000 permits a deviation from the insured's selected 
beneficiary. The legislature, undoubtedly for convenience in 
handling certain small claims, has thus permitted a limited 
exercise of discretion by the insurer in the area of "equit-
able entitlement". The surrounding of this discretion by 
various restrictive circumstances prevents any significant 
infringement on the rights of the insured. The insurer act-
ing in good faith presumably would endeavor to give weight 
to the insured's wishes, if ascertainable and no reason ap-
pearing to the contrary, in determining this "equitable en-
titlement". It would not be as favorable to the insured if the 
insurer had pre-limited the scope of his statutory discretion 
by the insertion of the proposed substitute language in the 
insuring agreement. Thus this provision may not be ap-
proved.

As to (5), the language "In case of death of the insured 
before all amounts payable under the policy have been 
paid, the company may pay any amount up to $1000 to any 
person or institution determined by the company to be equit-
ably entitled thereto" constitutes a greater restriction on 
the insured's right of beneficiary selection than that per-
mitted by statute. It purports to cover all claims where 
the insured dies before all amounts payable under the 
policy have been paid. The statute only deals with amounts 
payable to the insured's estate, a minor, or an incompetent. 
Thus it is less favorable to the insured and may not be ap-
proved.

As to (6), the last two sentences thereof are objectionable 
for substantially the same reasons as #5 above. This pro-
posed provision does not carry the $1,000 limitation imposed by statute, and for this reason alone is less favorable to the insured and may not be approved. Were the $1,000 limitation to be inserted, the language

"If the insured is a minor or is otherwise incompetent to give a release for any payment due, the company may make payment to any person or institution appearing to have assumed the principal support of the insured."

would still be objectionable if proposed as a total substitute for the language of 204.31 (3) (a) 9. b. While the statutory language "deemed by the insurer to be equitably entitled thereto" is clearly broad enough to include one "appearing to have assumed the principal support of the insured", I conclude that this entitlement could only apply to a relative by blood or marriage. Any extension of this statutory category would be less favorable to the insured in that it would enlarge the area of discretion in which the insurer could operate without necessarily regarding the rights or wishes of the insured.

The legislature has set precise limits within which the insurer in his discretion may act to the possible disadvantage or at least disregard of the insured's interests or wishes. This potential area of disadvantage should not be altered by substitute provisions unless clearly not less favorable to the insured. Therefore, this may not be approved.

As to (7), the last sentence is less favorable to the insured than 204.31 (3) (a) 9. b., because it is more restrictive than the statute as to the category of persons to whom payment may be made and further omits the statutory requirement "deemed by the insurer to be equitably entitled thereto." This may not be approved.

As to (8), I interpret the proposed language "If the insured is legally incapable of giving a valid receipt * * *" as equivalent to the statutory "If . . . this policy shall be payable to . . . an insured * * * who is a minor or otherwise not competent to give a valid release * * *." However, the addition of the words "and no guardian has been appointed" seems an unnecessary inhibition potentially adverse to the
insured's interest. For example, a guardian may have been appointed but never acted, or he may be unavailable, necessitating further guardianship proceedings. The next proposed language “the company may make such payment to the individual or individuals as have assumed the care and principal support of such person” is defective for the reasons given in (6) above, relating to enlargement of the insurer's area of discretion. The next proposed sentence reading “If the insured dies before all amounts due and payable to him have been paid, the company may make such payment to the executor or administrator of his estate or to his surviving spouse, mother, father, child or children or to any other individual or individuals who are equitably entitled thereto.” is objectionable for reasons set forth in (7) as being more restrictive than the statute as to the category of persons to whom payment may be made. The final sentence is objectionable for reasons stated in (6), again dealing with enlargement of the insurer’s area of discretion.

As to (9), the language “or to any one or more of the following surviving relatives of the insured: spouse, child, mother, father, brother or sister” is objectionable. The statute only permits such undesignated benefits to go to the insured’s estate where the insured at least has had a chance of determining its destination by his will, or the insured may simply have relied on the laws of descent, leaving no will. In either case, the insured’s wishes are potentially frustrated by the inclusion of this proposed language which is less favorable to the insured. Further, the proposed language is not clear as to whether these are successive preference beneficiaries or whether the insurer may select any one or more of those mentioned. In any event the proposed language does seem to place discretion in the insurer as to whether to pay benefits to the insured’s estate or to some one or more of the relatives mentioned. This impinges on the insured’s right to select his beneficiary. For example, if the insured had assumed these benefits would go to his estate and be disposed of by his will or the laws of descent along with all his other property, this proposed provision would potentially frustrate the insured’s selection. Thus, this is less favorable to the insured and may not be approved.
As to (10), the language "except that the company may in such case pay such benefits to the insured's spouse, if living, or, if not living, to the surviving children of the insured, if any, equally, or, if none, to the parents of the insured, equally if both survive, otherwise to the survivor." is objectionable for the reasons given in #9 above as potentially frustrative of the insured's beneficiary selection. It is less favorable to the insured than the statutory language and may not be approved.

As to (11), this bears substantial similarity to #1 and #3, and for the reasons there stated contains provisions less favorable to the insured than the statutory language, and cannot be approved.

As to (12), which deals with change of beneficiary, the first sentence "The right to change of beneficiary is reserved to the insured and the consent of the beneficiary or beneficiaries shall not be requisite to any change of beneficiary or beneficiaries" is substantially like 204.31 (3) (a) 12. The remainder of (12), however, imposes additional conditions upon the manner in which the insured may exercise his right to change beneficiary, and further requires persons other than the insured to do certain things in order for the change to become binding upon the insurer. For example, the insured must give "written notice" and he may only give it to "the issuing agent". This is not consistent with sec. 204.30 (2), which provides:

"No such policy [of insurance against loss or damage resulting from accident or injury to a person, etc.] shall be issued or delivered in this state * * * unless there shall be contained within such policy a provision that notice given by or on behalf of the insured to any authorized agent of the insurer within this state, with particulars sufficient to identify the insured, shall be deemed to be notice to the insurer * * * ."

Further, (12) has language which provides that the insured's notice of change of beneficiary is not effective unless "recorded" for the company by the issuing agent. While it is not entirely clear what is meant by "recording" it presum-
ably means that the agent must do more than merely receive the notice. Thus under this proposed language, even though the insured had given proper notice to the proper agent, if the agent failed to "record" it the notice would be ineffectual. This, likewise, is in conflict with 204.80 (2), and also constitutes a condition less favorable to the insured than the statutory language. Of similar import is the language of #12 to the effect that a change of beneficiary is not operative with respect to any payment made by the company before such "recording". For these reasons, (12) must be disapproved.

BCL:JEA

Architects and Engineers—Industrial Commission—Industrial commission's powers do not include power to impose forfeitures. Plans for places of employment and public buildings must be approved by commission prior to commencement of construction regardless of type of owner.

April 7, 1967.

JOSEPH C. FAGAN
Chairman, Industrial Commission

You ask my opinion as to whether the industrial commission may make findings and issue orders imposing forfeitures as provided in sec. 101.28, Stats., against architects, engineers, or other persons who commence construction of places of employment or public buildings prior to commission approval of the building plans.

Sec. 101.10 (12) (d) authorizes the commission to require submission and approval of building plans for places of employment and public buildings. Ind 50.10, WAC, requires approval of plans by the commission before the letting of contracts or the commencing of work. Sec. 101.10 (13) (f) allows the commission to accept building plans approved by cities of the first class which are examined in a proper manner.
Sec. 101.01 (13) provides:

"The term 'owner' shall mean and include every person, firm, corporation, state, county, town, city, village, school district, sewer district, drainage district and other public or quasi-public corporations as well as any manager, representative, officer, or other person having ownership, control or custody of any place of employment or public building, or of the construction, repair or maintenance of any place of employment or public building, or who prepares plans for the construction of any place of employment or public building. Said sections 101.01 to 101.29, inclusive, shall apply, so far as consistent, to all architects and builders."

By definition, then, the term "owner" includes every person who prepares building plans required to be approved by the commission before contracts are let or work commenced. Accordingly, architects, engineers, and others engaged by the owner to submit such building plans are deemed to be the owner when acting in his behalf and must bear equal responsibility with him for compliance with the statutes and commission orders relating to approval of building plans. Thus, it is my opinion that if construction is begun on a place of employment or public building without prior building plan approval of the commission, those persons involved in such construction and included within the statutory definition "owner" as provided by 101.01 (13) may be found jointly and severally liable for each violation.

Sec. 101.28 provides in part that owners who violate the provisions of 101.01 to 101.29, or any lawful order of the commission, shall forfeit not less than $10 nor more than $100 for each offense. Where a statute like 101.28 imposes a forfeiture, the forfeiture is recovered by commencement of a civil action brought in the name of the state of Wisconsin pursuant to ch. 288, Stats. Before action is brought, the commission may investigate or may hold hearings and take testimony to determine whether a statute or provision of the state building code has been violated. Secs. 101.10 (1) (a) and 101.11. However, the commission's statutory powers do not include the power to impose a forfeiture.
Specifically the commission has authority to determine what violations have occurred and which person or persons are responsible for such violations. As to the question herein, after investigation or hearing the commission may make findings that the construction of a place of employment or a public building was begun without prior commission approval of the building plan in violation of 101.10 (12) (d) and Ind 50.10, 3 WAC. Thereupon, the commission may direct the attorney general, the district attorney, or an authorized special prosecutor to commence an action to impose a forfeiture or forfeitures. Sec. 101.24. The attorney general, district attorney, or an authorized special prosecutor then shall commence an action to collect the forfeiture or forfeitures pursuant to ch. 288, Stats. Sec. 101.24. The amount of the forfeiture imposed, if any, is fixed by the judgment of the court. Sec. 288.06.

BCL:JPA

Insurance—Insurance company may not acquire controlling interest in a corporation engaged in a business which insurance companies are not authorized to conduct.

April 10, 1967.

ROBERT D. HAASE
Commissioner of Insurance

You have asked whether a domestic stock or mutual insurance company may invest its assets pursuant to sec. 201.25 (1) (n), Stats., in the voting stock of a business corporation operating a business foreign to insurance purposes to such an extent that the insurance company acquires a controlling interest in the business corporation. The insurance company proposes to organize a wholly-owned subsidiary corporation which would purchase all or at least a controlling interest in such a business corporation and such purchase would have the effect of placing the insurance company in the posture of owning and operating (at
least indirectly) a business other than that which insurance companies are permitted to transact.

A certain domestic insurance company, you inform us, seeks through stock acquisition to purchase a controlling interest in a corporation whose principal business is the operation of an automobile garage and new car dealership.

Sec. 201.25 (1) (n) permits an insurance company to invest not more than 10 per cent of its admitted assets in loans, securities or investments within certain limits, outside of those investments specifically authorized by other statutory provisions. This outside investment authority is restricted by 201.25 (4), which places a 10 per cent of admitted assets limit upon investments in the securities or evidences of indebtedness of any one person or corporation. Outside investments are further limited by 201.24 (2), which imposes a 20 per cent of admitted assets limit (with a different limit for town mutuals) upon real estate investment, except that necessary for the convenient transaction of its business and that acquired in good faith as security for loans or through liquidation of debts.

You point out that 201.04 places restrictions on the corporate purposes of an insurance corporation, that 201.24 (1) imposes a prohibition against an insurance company’s direct or indirect dealing in goods or commodities, and you note that 201.045 empowers the commissioner of insurance to issue to an insurance company a “certificate of authority authorizing it to transact the business of insurance.”

Over the years the department of insurance has permitted insurance companies to own and operate subsidiaries where the subsidiary business was related to and not inconsistent with the corporate purposes of the parent company. For example, the department has permitted a parent insurance company to own and operate a subsidiary premium finance corporation where the premium financing business consisted solely of financing premiums written by the parent company and was not inconsistent with the purposes of the parent company. You indicate a concern, however, as to the ability of any insurance company’s management to satisfactorily
discharge its fiduciary responsibility to policyholders and stockholders where management acquires a substantial additional interest in (and possibly loyalty to) a subsidiary corporation whose purposes are not related to the transaction of an insurance business.

Sec. 201.04 prescribes some 19 types of insurance lines or insurance purposes (such as fire, marine, life, liability, etc.) for which an insurance corporation may be formed. This provision, together with the implementing annual certificate of authority to "transact the business of insurance" granted by the commissioner under 201.045, is controlling, for example, as to any inconsistent or broader purposes or powers stated in the articles or bylaws of the corporation. Insurance corporations are significantly excepted from the provisions of Ch. 180, the Wisconsin Business Corporation Law, by 180.03. Mutual life insurance companies are excepted. Sec. 206.02 (9) (c).

Regarded purely as an investment, the type of transaction under question derives its authority from the statutes dealing with investments which a domestic insurance company (except life companies) may make. Sec. 201.25 details numerous specific types of investments (such as U. S. government bonds, municipal bonds, real estate loans, notes of state savings and loan associations, certain corporate stocks and bonds, etc.) which an insurance company may make. As an investment, the transaction in question finds validity under 201.25 (1) (n), which provides that such insurance corporation may invest its assets:

"In loans, securities or investments except stock in its own corporation in addition to those permitted in this section, whether or not such loans, securities or investments qualify or are permitted as legal investments under its charter, or under other provisions of this or other sections of the statutes. * * * The aggregate of such company's loans, securities and investments under this paragraph shall not exceed 10 per cent of such company's admitted assets."

The first sentence of 201.25 (1) (n) permits investment of admitted assets without regard to other statutory pro-
visions imposing limitations upon the kind or size of investments, but provided such investments are not otherwise prohibited by law. 53 OAG 152, 158 (1964).

If, however, the nature of this investment is such as to place the investing insurance company in the position of dealing, directly or indirectly, in goods or commodities, it would constitute a violation of 201.24 (1). The phrase "goods or commodities" has been most broadly construed. See 53 OAG 91, (1964). Generally, goods has been held to mean personal estate as distinguished from realty and to embrace every species of property which is not real estate or freehold. 38 C.J.S. 940, GOODS. An automobile business is clearly included in the purview of this statute.

Although your question does not disclose whether the two corporations involved — that is, the investing corporation and the invested-in corporation — have or will have common directors, it is relevant because of the strong probability of such a development to consider the effect of such an interrelationship.

Directors of a corporation occupy a position of trust and confidence and stand in a fiduciary relation toward the stockholders. Stoiber v. Miller Brewing Co., (1950) 257 Wis. 13, 18, 42 N. W. 2d 144.

Where an individual is a director of two corporations which are interrelated through stock ownership or which are closely dealing with one another, this director has divided allegiance. His fiduciary duties to manage each company require the most scrupulous attention to protect the interests of each company's shareholders. These interests often conflict. The courts' jealous concern for the stockholders' interests is reflected in the rule that as to a transaction between corporations having a majority of common directors, such a transaction is presumed fraudulent and the courts place the burden of proving otherwise on the one supporting the validity of the transaction. Ballantine, Corporations (1946), pp. 183-184.

In this state, a director occupying such a dual fiduciary role in related insurance corporations finds himself person-
ally in constant peril of violating 201.24 (4) (b), which provides in part:

"No director or other officer of any such company, and no member of a committee having any authority in the investment or disposition of its funds, shall receive, in addition to his fixed salary or compensation, any money or valuable thing, either directly or indirectly, or through any substantial interest in any other corporation or business unit, for negotiating, procuring, loaning or aiding in any purchase or sale of property, loan, deposit or investment, made by such company or any affiliate or subsidiary thereof; nor shall he be pecuniarily interested, either as principal, co-principal, agent or beneficiary, either directly or indirectly or through any substantial interest in any other corporation or business unit, in any such purchase or sale of property, loan, deposit or investment. * * *

While the foregoing statute deals with the conduct of individuals in their corporate relationships rather than the acts of the corporation, it is nonetheless representative of a legislative concern over inherent evils likely to appear in transactions between certain interrelated corporations or business entities. Because of the broad public interest that pervades the insurance industry, in my opinion courts will not necessarily regard a statute such as this in any narrow penal sense. In Michigan where the statute involved was strikingly similar to ours the court said:

"We do not agree . . . that under the circumstances of this case the authority of the commissioner [to order the company to dispose of securities which the commissioner found to be held in violation of the insurance code] must be found solely in said section, or that equity has no jurisdiction under the circumstances on the ground that said section is a penal statute, enforcement of which must rest solely in an arrest and conviction for a misdemeanor. . . . The remedy provided by said section—prosecution of an officer or director for a misdemeanor, does not afford an adequate remedy for the protection of the policyholders or creditors of the appellant insurance companies, or of the public. . . ." Dearborn Na-
Under what circumstances can it be said that an insurance company, through an otherwise authorized investment in shares of stock, is "indirectly dealing in goods or commodities"?

A meritorious argument can be made with respect to a parent and subsidiary corporation that in no legal sense can the business of a subsidiary corporation be said to be that of the parent. People v. American Bell Telephone Co., (1889) 117 N. Y. 241, 251, 22 N. E. 1057, 1060. This rule is not without exceptions, however. It has been held that a subsidiary corporation may engage in a business forbidden to its parent, unless the subsidiary entity is used as a cloak to cover for fraud or illegality. Berkey v. Third Ave. Ry Co., (1926) 244 N. Y. 84, 95, 155 N. E. 58, 61.

Where the corporate form or organization is adopted or a corporate entity is asserted "in an endeavor to evade a statute or modify its intent, courts will disregard the corporation or its entity and look at the substance and reality of the matter." General Motors Acceptance Corporation v. Commissioner of Banks, (1950) 258 Wis. 56, 64a, 45 N. W. 2d 83, appeal dismissed 341 U.S. 945, 95 L. ed. 1370, 71 S. Ct. 1020 (1951). Courts do not treat a corporation as a separate entity where applying the corporate fiction "would accomplish some fraudulent purpose, operate as a constructive fraud, or defeat some strong equitable claim." Jonas v. State, (1963) 19 Wis. 2d 638, 121 N. W. 2d 235. Also see Stebene Nash Co. v. Campbellsport Mutual Insurance Co., (1965) 27 Wis. 2d 112, 121, 133 N. W. 2d 724.

The general rule applicable here is rather well expressed in 44 C.J.S. §1006, Insurance, p. 634:

"Ordinarily, an insurance company has no power to purchase and hold shares of stock in another corporation. However, by some statutes, such a company is given authority to invest its funds in stocks of other corporations under prescribed limitations, in which case it may exercise the authority to the extent of acquiring a controlling interest
in another corporation, *provided the transaction is a bona fide investment of funds and not merely a scheme to pervert the funds to an unauthorized purpose.* * *” (Emphasis added.)

In the application of this rule the primary consideration must be the net effect of the transaction — that is, whether it is in fact a good faith investment or an attempt by an insurance company to do indirectly what it could not lawfully do directly. In arriving at such a determination, the amount of stock purchased, or the percentage of stock purchased as related to total shares outstanding, although relevant, would not be decisive. There is no reason to say, for example, that a purchase of 49% of the outstanding stock of a company is authorized as an investment while a purchase of 51% is prohibited. Rather, what should be more closely considered is the amount of power the proposed purchase will give to appoint directors who will manage the business of the corporation whose stock is the subject of investment. *Robotham et al. v. Prudential Insurance Co. of America,* (1903) 64 N.J. Eq. 673, 53 A. 842, 848.

Thus it is the purpose or effect of the stock purchase that is significant. If the purpose or effect of the purchase is to gain control of a company whose stock is purchased, of a company whose business an insurance company could not lawfully engage in, this is not an investment.

The language of 201.24 (1) is as broad as it is clear. It contains no exceptions. Insurance companies are prohibited from dealing in goods or commodities directly or indirectly. If the legislature had intended that certain companies were to be given a limited immunity from this prohibition through an intercorporate relationship it would have so provided. In fact, it is a reasonable inference that the legislature's choice of the words "directly or indirectly" was designed to cover this rather common indirect method of transacting business today.

Each case must be judged in light of all of the relevant facts. In my opinion where the insurance company acquires a controlling interest in the voting stock of a corporation
and assumes ownership responsibilities it is not a bona fide investment, and there is probably a violation of 201.24 (1) if the business indirectly acquired is one the insurance company is not authorized to conduct.

BCL:JEA

Counties—School Districts—Nursing Services—County may contract with school districts to provide nursing services to school districts.

April 11, 1967.

E. H. Jorris
State Health Officer

You ask whether a county can legally contract through its county health committee with school districts to provide nursing services to such school districts.

By way of background you inform me that it is customary for county and city nursing services or health departments to provide school nursing services to all schools which have not made such provisions themselves. These services are provided as a part of a generalized public health program. When a school desires more concentrated service than the county staff can provide, however, your department encourages contracts between the counties and the schools under which the counties then employ a larger staff.

Sec. 66.30 (1) and (2) provide:

“(1) ‘Municipality’ as used herein includes the state or any department or agency thereof, or any city, village, town, county, school district or regional planning commission.

“(2) Any municipality may contract with another municipality or municipalities or the state or any department or agency thereof for the receipt or furnishing of services or the joint exercise of any power or duty required or authorized by statute.”
Prior rulings under this section make it clear that the service must be one that the receiving municipality is authorized to receive and the performing municipality is entitled to render. See 51 OAG 168 (1962) and 48 OAG 231 (1959).

There is no question concerning the school district's authority to hire nurses and to provide adequate health service for the schools. See secs. 40.22 (16), 40.30 (10) and 40.30 (10c). The only remaining question, therefore, is the county's authority to contract with another municipality for providing health services.

Counties can exercise such powers as are conferred upon them by statute, or such powers as are necessarily implied therefrom. Dodge County v. Kaiser, (1943) 243 Wis. 551, 557, 11 N. W. 2d 348; Spaulding v. Wood County, (1935) 218 Wis. 224, 228, 260 N. W. 478.

The authorization for the county's establishment of a generalized public health nursing program is found in 141.06 (1), which provides:

"(1) The county health committee may employ one or more county public health nurses, when so authorized by the county board, to conduct a generalized public health nursing program pursuant to the direction and under the supervision of the county health committee in co-operation with the state board of health."

Thus a county may employ a staff of nurses to carry out a generalized public health program under 141.06 (1). Pursuant to the specific power granted under 66.30 (a), the county may contract with another municipality for the furnishing of health services to a school district.

It is my opinion, therefore, that a county through its county health committee can contract with school districts to provide nursing services to such districts.

When submitting your request for this opinion, you called my attention to an opinion issued by a corporation counsel on this same question. The corporation counsel reached a contrary conclusion, however, apparently after a considerable
amount of research and thought. In support of his conclusion he raised an additional point which I feel compelled to answer.

The point was made that 141.04 specifically authorizes towns, villages, and cities to provide jointly for health services under 66.30. The argument was made that by excluding counties from 141.04, the legislature left them without the same power that towns, villages and cities have to act under 66.30 in this field.

It is my opinion that the legislature did not intend to strip the counties of their power to contract in the field of health services under 66.30. Before 1961 sec. 141.04 provided:

"Towns, villages and cities, occupying contiguous territory, may employ a full-time health officer or commissioner jointly. His salary, including necessary traveling expenses, shall be paid jointly as agreed upon or in proportion to population. He shall engage in no conflicting occupation."

When this section was amended in October, 1961, the authority of towns, villages and cities to provide joint health services was merely expanded without affecting the counties' powers which already existed in 66.30 (2) and 141.06 (1). The express powers granted under these sections cannot be limited or abolished by any implications arising from 141.04.

BCL:DPJ

Insurance Commissioner—Bylaws—Discussion of the powers of the commissioner of insurance relative to the filing of bylaws by town mutuals and state mutuals relating to elections of directors.

April 12, 1967.

Robert D. Haase
Commissioner of Insurance
You ask whether you may accept for filing by mutual insurance companies (both town mutuals and state-wide mutuals, but not including life insurance companies) bylaws or amendments thereto which would require a member seeking election as a director of a company to have his name placed in nomination at least 60 days prior to the election.

TOWN MUTUAL INSURANCE COMPANIES

Sec. 202.01, Stats., deals with the formation of town mutual insurance companies, and subsec. (8) thereof imposes certain limitations on the adoption of bylaws but these limitations are not relevant here.

Sec. 202.01 (2) prescribes the form for Articles of Organization of town mutuals, and Article V thereof provides:

"The annual meeting of the company for the election of directors and such other business as may properly come before such meeting shall be held in ...., Wisconsin, on the .... in .... of each year at .... o'clock .... M., or at such other time and place within the company's territorial limits as may be determined by the board of directors provided they shall give ten days' notice thereof by mail to all members before the change shall become effective. * * *"

Sec. 202.09 provides that every policyholder is a member of the company. Article V of 202.01 (2) (a) says that each member shall have one vote.

Sec. 202.01 (8) provides:

"(8) FILING BYLAWS AND FORMS. Every town mutual shall adopt bylaws which shall prescribe the manner in which the same may be amended and such bylaws shall not be inconsistent with or a waiver of any of the provisions or conditions of the standard town mutual policy. Two copies of such bylaws and of any amendments thereto, accompanied by the certificate of the president and secretary stating that the same have been duly adopted and that such copy is true and complete, shall be filed with the commissioner within 30 days after such adoption. If approved by the commissioner he shall file one copy and return the duplicate showing his approval, but if disapproved by the commission-
er they shall be void. A copy of the policy, application, and of each other form of endorsement or rider used by any such company, shall be furnished to and filed by the commissioner and he shall approve or disapprove the same.”

What, if any, guidelines does this statute lay down for the commissioner with respect to his determining whether he will approve or disapprove bylaws submitted to him for filing? If there are none, or if they are inadequate, this statute is invalid as an improper delegation of legislative power. “It is not competent for the legislature, even in a circumscribed field, to grant to an administrative agency unlimited legislative power. The power granted must be exercised in accordance with standards and limitations fixed by the legislature.” Clintonville Transfer Line v. Public Service Comm., (1945) 248 Wis. 59, 69, 21 N. W. 2d 5. See also 52 OAG 418, 419.

The Wisconsin supreme court elaborated on this principle in applying it to municipal ordinances in the case of State ex rel. Humble Oil & Ref. Co. v. Wahner, (1964) 25 Wis. 2d 1, 11, 130 N. W. 2d 304, where it stated:

“Where a local zoning board of appeals is given authority to exercise discretion and judgment in the administration of a zoning ordinance, some standards must be prescribed for the guidance of the board in exercising the discretion and judgment with which it is vested. Where no such definite standards are written into the ordinance the door is opened ‘to favoritism and discrimination, a ready tool for the suppression of competition through the granting of authority to one and the withholding from another.’ ”

It is generally held that a legislative body may not simply authorize an administrative agency to consent to or permit or approve particular action or authorize particular action by an administrative agency in its discretion, or as it may deem advisable or necessary, or as it may be satisfied. 1 Am. Jur. 2d 914, Administrative Law, §113. Also see Graebner v. Industrial Comm., (1955) 269 Wis. 252, 68 N. W. 2d 714; State v. Grayson, (1958) 5 Wis. 2d 203, 92 N. W. 2d 272; 34 Marquette Law Review 1; 39 Marquette Law Review 154.
The courts have by no means made it clear how far they will go in upholding delegations of legislative power accompanied with only broad and general standards. It does appear settled that the court will not uphold the delegation of unlimited legislative power — that is, that which would place uncontrollable discretion in an administrative agency.

In a search, however, for legislative standards where power has been delegated to an administrative agency, the statute must be considered in its entirety.

This is the principle approved by the court in the Graebner case, supra, where it stated at p. 257:

"* * * they must be construed in connection with the whole ordinance and the scheme adopted to regulate the business or occupation concerned.

"* * * a study of the entire ordinance disclosed that tests and standards of qualifications upon which the agency was to act in granting or withholding a license were prescribed and that the specific provision authorizing the act of the agency must be construed in view of the object which prompted the licensing act. So construed, the ordinance or statute is not to be interpreted as granting power to act arbitrarily or capriciously."

The statute under consideration does impose a requirement with respect to the bylaws of town mutuals: "... such bylaws shall not be inconsistent with or a waiver of any of the provisions or conditions of the standard town mutual policy." In my opinion this is a sufficient standard to sustain the delegation of legislative power to the commissioner to approve or disapprove such bylaws. It necessarily follows, of course, that the commissioner's exercise of discretion in this area must be related to the legislative standard. In other words, the commissioner must approve such bylaws which, in his opinion, meet this standard and disapprove those which do not.

In reaching this conclusion, I am quite aware of convincing arguments which can be made to the point that the commissioner ought to have authority to disapprove bylaws
which violate the principle of mutuality which is the foundation of mutual insurance companies. Appleman, *Insurance Law and Practice*, Vol. 18, sec. 10041, p. 80; *Kennan v. Rundle*, (1892) 81 Wis. 212, 51 N. W. 426; *Huber v. Martin*, (1906) 127 Wis. 312, 105 N. W. 1031. Or the argument that the commissioner ought to disapprove a bylaw which contravenes the principle of mutuality by favoring one member at the expense of others. *J. P. Lamb and Company v. Merchants' National Mutual Fire Insurance Company*, (1909) 18 N. D. 253, 119 N. W. 1098. But the legislature has not seen fit to vest the commissioner with authority to enter these or any other areas, except the area related to the legislative standard quoted above. Administrative agencies have only such powers as are expressly granted to them or are necessarily implied, and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds. *American Brass Co. v. State Board of Health*, (1944) 245 Wis. 440, 15 N. W. 2d 27.

With respect to bylaws of town mutual insurance companies, I therefore conclude that the commissioner may disapprove only such that fail to meet the legislative standard—that is, those which are inconsistent with or a waiver of any of the provisions or conditions of the standard town mutual policy.

**MUTUAL INSURANCE COMPANIES OTHER THAN TOWN MUTUALS**

Sec. 201.02 (3), (4) and (5) deals with the formation of a mutual insurance company, reorganization, and its articles.

Sec. 201.02 (3) provides that persons associating to form a mutual insurance company shall subscribe articles of incorporation which shall contain, among other things, the condition of membership which shall provide that each policyholder have one vote; the manner in which the corporate powers are to be exercised; the number of directors, which shall not be less than 3; the manner of electing the directors, the term, how many shall constitute a quorum, and the manner of filling vacancies; a provision that the
articles may be amended by a vote of 3/4ths of the members voting at a meeting after the proposed amendment has been filed with its secretary and the commissioner and a copy thereof with notice of time and place of meeting has been mailed to each member at least 30 days prior to such meeting.

Sec. 201.08 requires that every insurance corporation shall adopt bylaws, prescribe the manner in which the same may be amended, and file a copy of such bylaws and amendments properly certified with the commissioner of insurance within 30 days after adoption. Although 202.01 (8) gives the insurance commissioner power to approve or disapprove bylaws submitted to him for filing with respect to town mutual insurance companies, I find no similar authority to approve or disapprove with respect to other mutual insurance companies.

Even though some bylaws submitted to the commissioner for filing appear clearly in violation of a law (and I do not suggest that the one in question here does) the commissioner, in my opinion, is without power to refuse to accept them. This is not to say, however, that the commissioner is without other remedies available for use against an insurer who, through bylaws or otherwise, violates the law. For example, he may for specified violations of statute revoke or suspend the certificate of authority of any domestic insurer (201.045 (2)) or foreign insurer (200.03 (4)).

Therefore, with respect to mutual insurance companies, other than town mutuals, it is my opinion that the commissioner has no authority to approve or disapprove bylaws and must accept any bylaws or amendments thereto submitted to him for filing.

BCL:JEΑ

Constitutionality—Divorce laws—Statute proposed by Bill 29, S., relative to personal jurisdiction, would probably be unconstitutional in the light of U. S. supreme court rulings.
The Honorable, The Senate

By Resolution No. 10, S., 1967, you have requested my opinion as to the validity of a statute resulting from the enactment of Bill No. 29, S.

Sec. 247.055 (1), Stats., requires that a court must have acquired personal jurisdiction over the defendant before it may determine claims and enter a judgment in personam with respect to support, alimony or property division.

Sec. 247.05 (4) provides:

"(4) ACTIONS FOR CUSTODY OF CHILDREN. The question of a child’s custody may be determined as an incident of any action properly commenced under sub. (1), (2) or (3); or under s. 247.055; or an independent action for custody may be commenced in any county of this state in which the child is present. The effect of any determination of a child’s custody shall not be binding personally against a defendant parent or guardian unless the defendant has been made personally subject to the jurisdiction of the court in the action as provided in s. 247.06."

Bill No. 29, S., would not change these requirements. However, it proposes to establish the required personal jurisdiction in a Wisconsin court to grant relief in such matters where the defendant has left the state, but where he or she had previously lived in the marital relationship in Wisconsin for at least 180 days and the other party continues to live in Wisconsin and the defendant is personally served with summons and complaint outside the state.

The bill would create 247.06 (3) and 262.05 (11) to provide:

"247.06 JURISDICTION IN ACTIONS IN WHICH PERSONAL CLAIMS ARE ASSERTED AGAINST DEFENDANT.

"* * *

"247.06 (3) Having lived in the marital relationship within this state for not less than 180 days, notwithstanding his
subsequent departure from the state if the other party to the marital relationship continues to reside in this state, cannot with reasonable diligence be served under sub. (1) or (2), is served under s. 247.062 (1); or"

"262.05 (11) CERTAIN MARITAL ACTIONS. In any action for alimony, child support, property division or child custody under ch. 247 against a defendant who has lived in the marital relationship within this state for not less than 180 days, notwithstanding his subsequent departure from the state if the other party to the marital relationship continues to reside in this state, but only if the defendant is served pursuant to s. 247.062 (1)."

The area of personal jurisdiction in custody, alimony, support and property division has been limited by decisions of the United States supreme court.

It has long been the constitutional rule that a court cannot adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant. The court has required that there be service within the state, voluntary appearance in the action, or consent. It would appear that the consent must be prior and active. Pennoyer v. Neff, (1878) 95 U. S. 714, 726-727, 24 L. Ed. 565.

The United States supreme court has extended personal jurisdiction over certain corporate defendants where business connections in a state have been established and has required only "certain minimum contacts." International Shoe v. State of Washington, (1945) 326 U. S. 310, 66 S. Ct. 154.

As will be pointed out later, the United States supreme court has refused to extend personal jurisdiction over the defendant in child custody, support and alimony cases on the "minimum contact" theory.

Bill No. 29, S., apparently rests upon the minimum contact or implied consent theory, rather than resorting to substituted service on a state official or other person as statutory agent, as is done, for example, under 345.09 (1), which deals with the use of Wisconsin highways by nonresidents.
Such substituted service statutes have been held constitutional where the defendant is doing business in the state and the business is of a dangerous nature and subject to the police power of the state. 72 CJS, Process § 50, 1061-1065; Hess v. Pawloski, (1927) 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091; State ex rel Cronhite v. Belden, (1927) 193 Wis. 145, 211 N. W. 919, 214 N. W. 460; Herchelroth v. Mahar, (1964) 24 Wis. 2d 444, 129 N. W. 2d 140.

An agency device is not well suited to domestic relation matters.

“As a general rule, a decree of a foreign court purporting to adjudicate the right or liability of a divorced spouse with respect to alimony or support without having obtained jurisdiction of the person of such spouse by personal service or appearance is not entitled to full faith and credit in other states. * * *” 27B CJS Divorce § 374, p. 866.


In Vanderbilt, it was stated with reference to Thompson v. Thompson, (1913) 226 U. S. 551, 33 S. Ct. 129, 57 L. Ed. 347, which had held that full faith and credit must be given to the refusal of the matrimonial domicile to grant alimony when it granted a divorce on the basis of substituted service at p. 419:

“The Thompson Case, insofar as it held that an ex parte divorce destroyed alimony rights, can no longer be considered controlling.”

In Lachenmaier v. Gehry, (1956) 272 Wis. 188, 191, 74 N. W. 2d 801, 10 A.L.R. 3rd 242, the court held that a provision in a divorce judgment requiring a husband to pay alimony and support money, not payable out of property within the jurisdiction of the court, was void where personal service was not obtained within the state and there had been no general appearance by him in the divorce action.

In a recent Rhode Island case, Accardi v. Accardi, (1964) 197 A. 2d 755, 10 A.L.R. 3rd 206, where the nonresident husband had been served by substituted service outside the
state, it was held that the husband's special appearance did not submit the husband to the court's jurisdiction and that a judgment against him could not be enforced against his property within the state as the action was not prosecuted as an *in rem* proceeding. The case and the annotation at 10 A.L.R. 3rd 306 illustrate the difficulty of establishing jurisdiction over the person of a nonresident in domestic relation cases. Sec. 247.055 (2) permits an action *quasi in rem* for support, alimony or property division where the defendant has property in this state.

The *Accardi* case is important here to illustrate that the courts require a prior and voluntary consent to the establishment of jurisdiction over the person of the defendant where he cannot be served within the state.

The United States supreme court has also required personal jurisdiction over the defendant in custody cases.

In *May v. Anderson*, (1953) 345 U. S. 528, 73 S.Ct., 840, the husband obtained a divorce decree in Wisconsin and received custody of the children who were at that time in Wisconsin. The wife did not appear but was served in Ohio with a copy of the summons. The children were taken to Ohio by the father for a visit with the mother who refused to release them. The United States supreme court held that Wisconsin had not obtained personal jurisdiction over the defendant in the divorce action because Wisconsin statutes had not been complied with. The rationale of the holding is broader, however. At pages 534-535:

"**we recognize that a mother's right to custody of her children is a personal right entitled to at least as much protection as her right to alimony.**

"**We find it unnecessary to determine the children's legal domicile because, even if it be with their father, that does not give Wisconsin, certainly as against Ohio, the personal jurisdiction that it must have in order to deprive their mother of her personal right to their immediate possession.**"

Also see 27B C.J.S. Divorce § 392, 902.

In *Eule v. Eule*, (1960) 9 Wis. 2d 115, 121, 100 N. W. 2d 554, cert. den. 362 U. S. 988, the court stated:
" * * * A parent's right to custody of his children is a personal right and cannot be affected in a divorce action unless the court has personal jurisdiction over the parent. The full-faith-and-credit clause [of the federal constitution] does not entitle a judgment in personam to extraterritorial effect when it is made to appear such judgment was rendered without personal jurisdiction of the person sought to be bound."

At page 122, the court stated:

"A court must have personal jurisdiction over a person to bind him on the issue of alimony. * * *"

At pages 118-122 the case also holds that a foreign court cannot obtain personal jurisdiction over a defendant who has made a special appearance to raise a jurisdictional question.

Since the courts have been unwilling to extend jurisdiction over the person of the defendant in alimony, support, property division and custody matters even in cases where the defendant was apprised of the pendency of the action and its purpose, but chose not to appear or appeared specially, it is questionable whether the Wisconsin or United States supreme court would view any law resulting from enactment of Bill No. 29, S., as establishing jurisdiction over the person. The bill is based on a minimum contact theory which the courts have to date not extended to domestic relations matters, or on an implied consent basis which has not been tested in the courts in the domestic relations area.

Any law resulting from the enactment of the bill would have the benefit of a presumption of constitutionality. Judgments entered pursuant thereto, however, would be subject to constitutional attack and it is questionable whether they could be sustained as valid.

BCL:RJV
Education—Mentally handicapped—Art. X, sec. 3, Wis. Const. requires free public education be provided for mentally handicapped children.

April 13, 1967.

JAMES BOULLION
Executive Secretary, Mental Health Advisory Committee

Pursuant to its responsibilities under sec. 46.52, Stats., the mental health advisory committee asks a series of questions dealing with the rights of mentally handicapped children in the field of education.

You also ask whether the responsibilities to educate or to provide an educational opportunity for mentally handicapped children have been properly discharged by the state, the superintendent of public instruction, and the subordinate school districts and boards in Wisconsin. The answer to this question would constitute a value judgment which I do not feel that I, as attorney general, should make. A sound conclusion can be reached only after careful consideration of the nature of these responsibilities and the ways in which they have been met. Some of the inadequacies of our present system, however, will become apparent during the ensuing discussion of your remaining questions. These will be answered in the order in which they were submitted. I will reproduce the exact questions so as not to alter the meaning or significance in any case.

I. "What constitutional or statutorily created responsibilities do the state, the superintendent of public instruction and the subordinate school districts and boards have for the education of or providing an educational opportunity for mentally handicapped children, including, among others, those who are emotionally disturbed, psychotic, neurotic, brain damaged, epileptic, retarded, have behavior or special learning problems and/or are culturally or socially deprived?"

Free public education for all children is a major principle of the American school system. The constitutions of most
states provide for such education without specifically excluding children afflicted with physical or mental handicaps.

Art. X, sec. 3, Wis. Const., provides:

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

The framers of the constitution considered it one of the paramount duties of government to provide the means of education for every child in Wisconsin. The medium designed to accomplish this objective was the district school maintained at public expense and open to all who may choose to avail themselves of this fundamental right to a free public education. This much is clear from the published debates and contemporary writings prior to the adoption of the constitution. Journal and Debates, Constitutional Convention 1847-1848, 336-339; Quaife, The Movement for Statehood 188, 199, 317-318, 514.

The primary responsibility for implementing this plan was placed upon the local public school systems with financial support often provided in later years by the state and federal government. In view of this firm commitment to free public education, the inability or refusal of a local unit to provide adequate facilities or programs shifts the responsibility to the state.

The specific right to a free education in the district schools, however, was qualified in State ex rel. Beattie v. Board of Education, (1919) 169 Wis. 231, 233-235, 172 N. W. 153, where the court held:

"The right of a child of school age to attend the public schools of this state cannot be insisted upon when its presence therein is harmful to the best interests of the school. This, like other individual rights, must be subordinated to the general welfare. ** **
"** **
"** ** The duty confronting the school board was a delicate one. It was charged with the responsibility of saying whether this boy should be denied a constitutional right because the exercise of that right would be harmful to the school and to the pupils attending the same. He should not be excluded from the schools except for considerations affecting the general welfare. But if his presence in school was detrimental to the best interests of the school, then the board could not, with due regard to their official oaths, refrain from excluding him, even though such action be displeasing and painful to them. ** **

Although the Beattie case did not specifically involve a mentally handicapped child, the principle enunciated by the court places a limitation upon such a child's right to attend the district schools. Moreover, it is well established that the school board has the power to suspend or exclude a pupil if his admission would be detrimental to the interests of the school and its pupils. *State ex rel. Dresser v. District Board*, (1908) 135 Wis. 619, 116 N. W. 232; *State ex rel. Burpee v. Burton*, (1878) 45 Wis. 150.

In seeking to achieve this balance between preservation of an individual child's rights and the protection of the other pupils' rights to an education in the district schools, the board cannot exercise its power in an arbitrary and unreasonable manner. Only a material infringement upon the rights of other children to enjoy these benefits will justify exclusion from a district school.

There is no constitutional or statutory requirement that each district provide special programs or a special school for various classes of children who are excluded from attendance at the district school. The obligation of the local school district or the state to such excluded children, however, does not cease with their expulsion from the district school. It should be noted that in *State ex rel. Beattie v. Board of Education*, (1919) 169 Wis. 231, 172 N. W. 153, the court did not hold that this pupil lost all rights to a free public education. The petitioner pupil sought only reinstatement in
the district school rather than continuing his education in the day school established pursuant to sec. 41.01, Stats.

Keeping in mind the aims of the drafters of the constitution, it is my opinion that the school district or the state must compensate these excluded children in some way for this denial of their fundamental right to attend the district school. The child has not forfeited his right to a free public education through any form of misconduct. Instead, he has been unfortunate enough to be afflicted with a condition which renders his participation in the usual school program unfeasible. It is perhaps more accurate to say that his educational rights have been qualified for his own benefit and the benefit of other pupils.

Although entry to the district school may be barred under certain circumstances, the obligation to provide a meaningful and free public education remains unless it can be shown that a child is not at all educable.

II. "Are the provisions of Chapter 41 of the Wisconsin Statutes, 'Special Schools,' adequate to meet the mandate of Article 10, Section 3 of the Wisconsin Constitution?"

Art. X, sec. 3, Wis. Const., requires that all district schools be as nearly uniform as practicable. The uniformity requirement placed upon the district schools, rather than the school districts, shows that the framers were more concerned with the character of instruction than with the method of forming school districts and systems. *State ex rel. Zilisch v. Auer*, (1928) 197 Wis. 284, 289, 221 N. W. 860.

Although the mandate of Art. X, sec. 3, does not require that special schools be established in each district, this would constitute one means of preserving the mentally handicapped child's right to a free public education. Ch. 41 provides the framework for the establishment of many special schools for those who may be excluded from the district schools. This chapter does not compel any school district to establish special programs for the handicapped as the legislature apparently recognized the unfeasibility of providing separate facilities in those districts with few handicapped children.
State educational agencies, however, are in a particularly unique position with respect to the retarded child. Although the public schools have the primary responsibility for the education of all children, the state agencies can assume an effective role in coordinating resources and services at the community level. This coordination may be essential to achieve equalized educational opportunities for all children in some areas of the state.

III. "Are constitutional rights being denied because many of the provisions of Chapter 41 make it discretionary upon local school districts to provide certain educational facilities for mentally handicapped children?"

As indicated above, school districts are not required by the constitution or by Ch. 41 to establish separate educational facilities for mentally handicapped children. The desirability of initiating such special classes or centers must not be confused with legal requirements.

The legislature clearly has the power to provide for schools other than the district schools anticipated by Art. X, sec. 3, Wis. Const. As stated in 37 OAG 484, 485:

"It cannot be denied that it is important that special provisions be made for the handicapped child and the reasonableness of any legislation which does this cannot be questioned on the ground it makes an arbitrary or unreasonable classification."

The state policy concerning all public education is embodied within 40.66, which provides:

"It is hereby declared to be the policy of this state that education is a state function and that some relief should be provided from local general property tax as a source of school revenues where it is excessive, and that other sources of revenue should contribute a larger percentage of the total funds needed; that in order to provide reasonable equality of educational opportunity for all the children of the state, the state must guarantee that a basic educational opportunity be available to each student, but that the state should be obligated to contribute to the educational program only if
the district provides a program which meets state standards."

Under 20.650 (3) (d), state aid is authorized for day schools, instructional centers, and classes for instruction of mentally handicapped children who are either educable or trainable or emotionally disturbed. In view of the discretionary language used throughout Ch. 41, the decision whether to provide such facilities rests solely with the school district authorities.

On the other hand, the failure of local authorities to act in this area shifts the responsibility to the state to provide such programs, or to offer financial assistance to parents seeking to gain for their child a meaningful educational opportunity. This conclusion is based upon the legislative determination in 40.66, that education is a state function.

IV. "May a parent compel a school district to provide a special program for his mentally handicapped child who has been excused by the school district on the basis of the child causing a disruption of the normal classroom activities?"

Under existing legislation the answer to this question is "no." This conclusion logically follows from the discussion presented under the three preceding questions. Although the legislature determines state policy and provides the framework within which such special programs may be established, the school district determines the necessity and desirability of implementing its basic educational program.

Where a local unit decides not to maintain special facilities, the right to a free education can be guaranteed through other means such as offering financial assistance for use in gaining admission to another public center or a private school.

V. "What discretion does the school district have for determining the scope of the program for the mentally handicapped child — for example, the number of hours?"

In Union F.H.S. Dist. v. Union F.H.S. Dist., (1934) 216 Wis. 102, 107, 256 N. W. 788, the court stated:
"It is generally held that the legislature, in enacting laws, may resort to classification without violating constitutional provisions when a classification is based upon substantial differences or distinctions between classes, is germane to the purposes of the law, is not based upon existing circumstances only, applies equally to members of a class, and the character of one class is so different from another class as reasonably to suggest the necessity or propriety, having regard for the public good, of substantially different legislative treatment. * * *

Thus, reasonable classification by the legislature is permissible in enacting laws relating to education. It follows, therefore, that by force of its public function a school board may resort to reasonable classification by implementing our education laws with rules and regulations.

The power to make rules for the organization, gradation, and government of the schools is specifically granted to the board under 40.30 (17). Although the board possesses certain discretion these rules must be reasonable and necessary. State ex rel. Bowe v. Board of Education of the City of Fond du Lac, (1885) 63 Wis. 234, 237, 23 N. W. 102; State ex rel. Burpee v. Burton, (1878) 45 Wis. 150.

Within the framework of either the regular school program or special programs for the handicapped, the board may broaden or restrict the scope of any program offered to such pupils if these variations are reasonable.

VI. "May a parent compel a school district to enroll his mentally handicapped child at age four or five or six, even though the school district has established a practice of accepting children at age seven or eight or later?"

There is no legal authority to support an affirmative answer to this question. It is my opinion, therefore, that a parent cannot compel a school district to enroll his mentally handicapped child at an age younger than that established for other children within the district. It is again imperative to avoid confusing the desirability of such earlier admission in some or all cases with the legal rights of parent and child.
VII. "Are practical matters such as shortage of teachers, of limited classroom space, waiting lists, justification for refusing admission to mentally handicapped youngsters before age eight or nine, or discharging them at age 16?"

Based upon the preceding discussion concerning the general rights of the mentally handicapped child, the answer is clearly "no." Although a child may be excluded from a district school upon the showing of adequate grounds, the reason for such exclusion must relate to the child's condition and its effect on the other pupils rather than on the circumstances which you have enumerated.

VIII. "Is refusal to enroll children before age eight or nine, or discharge them at 16 or before 20, a deprivation of the constitutional mandate of Article 10, Section 3?"

The refusal to enroll children in some educational program before age eight or nine would violate the mandate of Art. X, sec. 3, Wis. Const. The same is true of early discharge, unless of course the child has successfully completed his primary and secondary education.

Theoretically the constitution grants to any person under age of 20 the right to resist discharge from a public high school notwithstanding the fact that he has received his diploma at age 17, 18 or 19. As a practical matter, however, the likelihood of such a demand occurring is remote in view of the desirability and availability of more advanced training in various industries or in the areas of higher education.

IX. "May a parent compel a school district to pay the tuition and other costs, or a part of the tuition and other costs, if his child is rejected by the district schools and the public school system of the state, but accepted in a private or parochial school within or outside the state primarily for education tailored to the individual conditions, needs, capacities and potentials of the child?"

The basic obligation of the state and the school districts is to see that a child receives a free public education. If a child is rejected by a district school, a reasonable alternative must be offered. As already indicated, this may take the
form of education in a special school established either by
the school district, by a group of school districts, or by the
state itself.

If special classes or special schools are deemed unfeasible
in a given area, the parents of a handicapped child must be
offered another reasonable alternative. One such plan might
be the payment of tuition and possibly certain other costs
in a private school approved by the state. As for the payment
of tuition in a parochial school, constitutional objections
might arise under Art. IV, sec. 24, Wis. Const., which pro-
hibits expenditure of public funds for the benefit of any
religious organization.

The possibilities for providing some program or assistance
outside the district school are limitless. It is sufficient to
say, however, that the state in its own capacity or through
the respective school districts must provide a reasonable
alternative to education in the district school.

X. "What responsibilities do the state or school districts
have for providing an education or educational opportunity
for a mentally handicapped child when that child:

1. Is a resident in a state mental institution or in a private
or public mental institution within or outside the state,
under therapy or treatment or under custodial care?

2. Is resident in a public or private institution other
than a mental institution, whether placed in such institution
as wards of the state or not, and whether placed in such
institution for correctional purposes or otherwise?

3. Is living with his parents, or in a foster home, or in
an institution outside the legal school district, including
children of parents in the military service?"

Upon being placed in a public or private mental institution,
a child's educational rights necessarily become restricted.
Education or training constitute only a part of the program
to be offered to such patients. As it must be assumed that
these children have special problems requiring individualized
treatment, no guidelines can be established regarding any
duty to provide an educational opportunity. Although some
education or training is obviously desirable in most such cases, the individual institution must retain considerable discretion in defining the scope of any program.

A similar approach must be adopted in cases of placement in institutions other than mental institutions. The reason for such placement or commitment may provide some guidance concerning the responsibility for providing an educational opportunity. A prior opinion concluded that children of school age who are inmates of a child welfare agency are entitled to free education in the public schools under Art. X, sec. 3, and that the agency must send them to school. 20 OAG 666. In the absence of concrete facts, however, I hesitate to comment further on this abstract question which may cover a multitude of unanticipated situations.

No school district is required to admit to its schools children who do not reside within that district. State ex rel. Comstock v. Joint School Dist., (1886) 65 Wis. 631, 27 N. W. 829. On the other hand, children of federal officials and employes who reside on government-owned land within a school district possess the same rights as other children within the district. 31 OAG 266.

XI. "May a parent compel a school district to pay the costs of special tutoring for a mentally handicapped child if the district plans to have the child repeat a grade, and the parent is advised by a competent professional, that special tutoring will keep the child in his regular class, but such tutoring is not available through the school district?"

I find no authority which would compel or even authorize a school district to pay the costs of such special tutoring. The obligation of the school district to the child and his parents is satisfied when a reasonable educational opportunity is provided. This does not guarantee that each child will reach the same development from year to year. The school district cannot act as an insurer of such progress.
Civil rights—Picketing—City of Wauwatosa ordinance would probably be unconstitutional in light of the First and Fourteenth Amendments to the U. S. Constitution.

April 28, 1967.

G. Aubrey Young, Director,
Governor’s Commission on Human Rights

You have requested my opinion of the constitutionality of an ordinance enacted by the city council of the city of Wauwatosa. The ordinance, section 9.19 of the city code, purports to prohibit all picketing “before or about the residence or dwelling of any individual”. The ordinance reads as follows:

“Section 9.19 Residential Picketing.

“(1) Declaration. It is hereby declared that the protection and preservation of the home is the keystone of democratic government; that the public health and welfare and the good order of the community require that members of the community enjoy in their homes and dwellings a feeling of well-being, tranquility, and privacy, and when absent from their homes and dwellings, carry with them the sense of security inherent in the assurance that they may return to the enjoyment of their homes and dwellings; that the practice of picketing before or about residences and dwellings causes emotional disturbance and distress to the occupants; obstructs and interferes with the free use of public sidewalks and public ways of travel; that such practice has as its object the harassing of such occupants; and without resort to such practice full opportunity exists, and under the terms and provisions of this ordinance will continue to exist for the exercise of freedom of speech and other constitutional rights; and that the provisions hereinafter enacted are necessary for the public interest to avoid the detrimental results herein set forth and are enacted by the Common Council of the City of Wauwatosa pursuant to the provisions of Section 62.11 (5) of the Wisconsin Statutes.

“(2) It shall be unlawful for any person to engage in picketing before or about the residence or dwelling of any
individual. Nothing herein shall be deemed to prohibit (1) picketing in any lawful manner during a labor dispute of the place of employment involved in such labor dispute, or (2) the holding of a meeting or assembly on any premises commonly used for the discussion of subjects of general public interest.

“(3) Any person violating this ordinance shall upon conviction be fined not more than $100.00 for each offense, and in default thereof, by imprisonment in the House of Correction of Milwaukee County for a period not to exceed thirty (30) days.”


The supreme court has upheld federal and state restraints and prohibitions of picketing when they have been imposed for sound policy reasons. Teamsters v. Vogt, 354 U.S. at 298. But neither the supreme court nor any other federal
court has ruled in a reported decision on the constitutional validity of a flat prohibition of picketing of homes.

Several state legislatures have prohibited picketing of homes in connection with labor disputes. These statutes also reflect legislative concern with the coercive aspects of picketing, particularly picketing of homes. The Wisconsin provision is illustrative: the prohibition of picketing of homes during labor disputes is contained in a section of the statutes dealing with various forms of intimidation.

Some state courts have enjoined peaceful picketing of homes, Hebrew Home and Hospital for Chronic Sick v. Davis, (1962) 225 NYS 2d 318; Pipe Machinery Co. v. DeMore et al., (1948) 149 Oh. St. 582, 76 N. E. 2d 725, aff'd. 79 N. E. 2d 910, or upheld convictions under general public-order laws of pickets who have engaged in residential picketing. State v. Zanker, (1980) 179 Minn. 355, 229 N. W. 311. Where these courts have discussed the policy considerations upon which their decisions were based, they too have expressed concern with the intimidating effect of even peaceful picketing directed at individuals in their homes.

Some of these courts have also noted the infringement of privacy suffered by the objects of residential picketing, and have held that the "right to be left alone" at home transcends the right to picket. That residential picketing may interfere with the right of privacy has also been at least suggested by the United States supreme court. Thornhill v. Alabama, 310 U.S. 85, 105.

In examining other statutory restrictions on picketing, the United States supreme court has relied "on the particular facts in each case", with an "awareness that these cases [involve] not so much questions of free speech as review of the balance struck by the State between picketing * * * and competing interests of State policy". Teamsters v. Vogt, 354 U.S. at 290. The balance to be struck here is between picketing and the security and privacy of the home. While the supreme court has not reviewed the statutes and decisions which prohibit picketing of homes, in examining other restrictions on picketing it has warned that "the mere fact
that there is 'picketing' does not automatically justify its restraint without an investigation into its conduct and purposes”, Teamsters v. Vogt, 354 U.S. at 294; that any enactment curtailing First Amendment freedoms must be “narrowly drawn”, Thornhill v. Alabama, 310 U.S. at 101, and more specifically that picketing may not be restrained merely “to obviate inconveniences or annoyances”, Giboney v. Empire Storage, 336 U.S. at 502.

A municipality has the power to protect its residents from the dangers of massed or violent picketing. It may have the power to protect its residents from the intimidation and interference with privacy imposed by some forms of picketing of homes. But this ordinance goes farther and protects the residents from the inconveniences and annoyances which may attend picketing incidentally “before or about” homes. Moreover, it forbids picketing even if carried on by a single individual. While picketing may be proscribed to protect more substantial interests, this form of expression may not be prohibited merely because it arouses hostility or vexation. The United States supreme court has said that a statute regulating picketing is permitted under the First Amendment only if it is “narrowly drawn to cover the precise situation giving rise to the danger”. Thornhill v. Alabama, 310 U.S. at 105. This ordinance is copied verbatim from a Hawaii statute enacted 20 years ago (See Kamin, Residential Picketing and The First Amendment, 61 N. W. L. Rev. 177 (1960)) which was broadly drawn to cover another situation and another danger.

The ordinance provides only two exceptions to its sweeping prohibition. One is not really an exception at all: The ordinance provides that it shall not be “deemed to prohibit * * * the holding of a meeting or assembly on any premises commonly used for the discussion of subjects of general public interest”. The terms of this ordinance, by the usual rules of construction, are to be given their common meaning. The “holding of a meeting or assembly” is excluded by definition from the term “picketing”, as that term is commonly understood. Hence, the “exception” is of no consequence.

The other exception demonstrates the wide scope of this ban of picketing, and probably defeats the ordinance by its
exclusivity. The ordinance by its terms shall not be "deemed to prohibit * * * picketing in any lawful manner during a labor dispute of the place of employment involved in such labor dispute * * *"). By the maxim of statutory construction, expressio unius est exclusio alterius—the expression of one thing is the exclusion of another—the ordinance can permit no exception other than that for labor picketing. This but confirms that any other peaceful picketing, conducted even incidentally "before or about" homes regardless of object or objective, is prohibited. The protection thus afforded labor groups to the exclusion of all others appears to be, in the terms of Justice Black, "an invidious discrimination" which denies the equal protection of the laws. Cox v. Louisiana, (1964) 379 U.S. at 581.

Section 9.19, Wauwatosa City Code, appears to be too broad a proscription of picketing when weighed against the spectrum of interests it protects. It is not "narrowly drawn to cover the precise situation giving rise to the danger", and the specific exclusion of labor picketing from its coverage appears to deny to all others the equal protection of the laws guaranteed by the constitution.

BCL:ACC

Law Enforcement—State Patrol—Discussion of the broadness of sec. 110.07 in enforcement of nontraffic violations and civil disturbances.


JAMES L. KARNS

Commissioner, Motor Véhicle Department

You point out that over the past few years requests from local law enforcement agencies for assistance from the state patrol have increased considerably, and that since the passage of ch. 430, Laws of 1961, you have received requests not only for assistance in traffic but also in handling viola-
tions of criminal laws not within the purview of the statutes that you are charged with enforcing. You point out that while sec. 110.07 (2m), Stats., broadens the authority of the state patrol, you feel that it is necessary for you to reassess your participation in the enforcement of nontraffic criminal violations in light of recent experiences and to establish new guidelines for your field personnel in regard to this matter.

You mention three specific types of situations which apparently recur and cause some problems for the personnel of the state patrol. You have set them out as follows:

1. A county sheriff contacted state patrol communications center at the state office building asking that enforcement agencies in areas surrounding the county be asked to send assistance to search for a man wanted for abduction and rape.

2. On many occasions local enforcement officials have asked state patrol assistance at motorcycle rallies and races, automobile races, college rallies, fairs, picnics and other affairs where large crowds are gathered.

3. During a farmers organization withholding action in 1964 the state patrol was requested by many sheriffs to assist in various ways to control the highway blocking, destruction of property, personal injury, etc. Much of this trouble took place on private property.

Next you ask a series of questions relating to the obligations of a state patrol officer to respond to the request of a sheriff or deputy sheriff in the apprehension of persons suspected of crime. Before discussing these questions, however, it appears appropriate to set out the authority of traffic officers employed by the state patrol under sec. 110.07. In an opinion issued by this office in 1958, 47 OAG 209, sec. 110.07 (1) and (2) were construed. That opinion pointed out that patrol officers have the authority to "enforce and assist in the administration of chs. 110, 194 and 341 to 349, or orders or rules issued pursuant thereto." In enforcing those chapters the statute provides that such officers shall have the powers of sheriffs. Subsec. (2) authorizes such officers
to "assist local enforcement officers wherever possible in the regulation of traffic and the prevention of accidents upon the public highways."

It was pointed out in the above opinion that when an officer exceeds the statutory authority delegated to him he is no longer clothed with the protection and power accorded by law to state traffic patrol officers. You were advised that "when he assumes to act beyond his delegated authority he has no greater standing or authority than a private citizen, unless impressed by another officer having authority to do so."

Several specific questions were asked and answered in that opinion relating to rendering assistance to local law enforcement agencies where no motor vehicle matters were involved.

Since that opinion, sec. 110.07 (2m) has been enacted which provides:

"In addition to the primary powers granted by subs. (1) and (2), any officer of the state traffic patrol who is in uniform and on duty may arrest without warrant any person who commits a misdemeanor or a felony on the highway in his presence, or who is transporting a stolen motor vehicle or who is fleeing from the scene of a crime or from other law enforcement officers and deliver him to the sheriff or police chief in the jurisdiction where the arrest is made. A state traffic officer making an arrest pursuant to this subsection shall at all times be available as a witness for the state."

This provision is an extension of sec. 110.07 (2), and is designed to further aid local officers, and gives additional arrest power to state traffic patrol officers who are in uniform and on duty. These arrest powers fall into four categories as follows:

1. Where a person commits a misdemeanor or a felony on the highway in the officer's presence.
2. Where a person is transporting a stolen motor vehicle.
3. Where a person is fleeing from the scene of a crime.
4. Where a person is fleeing from other law enforcement officers.

The express authority to make arrests under these circumstances is limited to the officer in uniform, on duty, and "on the highway" as that term is defined in 340.01 (22). In addition to such express authority, an officer in "close pursuit", an officer responding to a call for a posse comitatus as authorized by 59.24, and an officer acting as a private citizen in the case of any felony and in the case of a misdemeanor constituting a breach of the peace and committed in the officer's presence, extends such officer's arrest power beyond the limits of the highway. See 5 Am. Jur. 2d, Arrests, P. 727, sec. 35, and Radloff v. National Food Stores, 20 Wis. 2d 224 at 237b.

An officer acting as a citizen in attempting or making a legal arrest would be performing service growing out of and incidental to his employment by the state, and he would probably have the protection of the Workmen's Compensation Act. See Butler v. Industrial Comm., (1953) 265 Wis. 380, 61 N. W. 2d 490.

Since your questions relate to the circumstances under which your officers may be called to a posse comitatus, it appears appropriate to discuss the mechanics of calling the posse and under what circumstances personnel of the state patrol should respond to requests from local law enforcement officials.

Although there is very little case law in this state on the point, it is apparent that very little formality is needed when a sheriff or other law enforcement official calls a posse comitatus. In Krueger v. State, (1920) 171 Wis. 566, a federal officer was attempting to serve a warrant at the Krueger farm. When the marshal was fired upon by members of the Krueger family, he sent for help to the villages of Owen and Withee where persons were called upon indiscriminately to pass the call along to others to rally at the Krueger farm and respond to the call for the posse comitatus. Holding that all who responded constituted a posse, our court said at page 583:
" * * * We hold that all who were there, constituting the posse, lending assistance to the deputy United States marshal in the apprehension of those for whom he held warrants, were acting under his direction and command, constructively at least, and were entitled to the same protection and immunity extended to the deputy marshal himself. * * *

The court also pointed out in that case that a law enforcement officer must usually call for a posse when he is hard pressed, and so the call may be in the nature of a cry of despair or a bugle call to arms to rally assistance to the officer. In Vilas County v. Industrial Comm., (1930) 200 Wis. 451, 452-453, the court followed the language of the Krueger case. In Shawano County v. Industrial Comm., (1935) 219 Wis. 513, 518-519, the court also adopted the language of the Krueger case stating:

"No particular formality is required, where an officer finds it necessary to call for assistance, to render it a duty of citizenship to respond. * * *

From the language of the above cases it is apparent that the call for help need not be directly from the sheriff to the person being impressed, but may be relayed by third persons acting as intermediaries and all those persons who respond to such call will be considered to be a part of the posse comitatus and entitled to whatever protections and benefits derive therefrom.

As you were advised in 47 OAG 209 at 214, sec. 59.24 contemplates necessity as the occasion for summoning assistance. Sec. 946.40 provides that whoever without reasonable excuse refuses or fails upon command to aid a peace officer is guilty of a misdemeanor. However, this section does not apply where the officer was not authorized to command such assistance.

For a discussion of the question of the authority of a sheriff to impress city policemen, see Cases and Briefs, Vol. 461, City of Milwaukee v. Milwaukee County, (1950) 256 Wis. 580.
Ordinarily, the determination of the existence of an emergency or the necessity for immediate aid are matters that must be left mainly to the exercise of discretion on the part of the officer asking for the aid. However, courts have held that where the officer made a request to a bystander to act in aid of his law enforcement function the necessity for such action on the part of the officer is reviewable by the courts. See Eaton v. Bernalillo County, (1942) 46 N. M. 318, 128 P. 2d 788, where a deputy sheriff impressed one Eaton to direct traffic at the scene of a highway accident and Eaton was killed. The court dismissed the claim for compensation brought by the widow, holding that the facts did not disclose a situation warranting the call to the posse comitatus, nor even suggesting that any such call was made.

In Schofield v. Industrial Comm., (1931) 204 Wis. 84, the court held that the village constable of Schofield, who was shot and killed while attempting to arrest a suspect, was not a member of a posse comitatus where he had been requested by a law enforcement officer of the city of Wausau to accompany that officer, a deputy sheriff, and another officer from Wausau to find a suspect and arrest him in Schofield. The court pointed out that it was the constable's duty to cause to be prosecuted all violations of the law of which he had knowledge and, as with each of the other three persons involved, he owed a duty to perform without any "call" from the sheriff and without being empowered by the sheriff to so act. Therefore the court reasoned that the four men were not acting as a posse comitatus. The court said at page 88:

"We do not consider that the four men were acting under a posse comitatus. This term implies the exercise of the power of the county by which the sheriff calls upon private citizens to aid him in preserving the peace or making an arrest. Here each person involved owed the duty he was performing without any call from the sheriff and without being empowered by him."

The Minnesota Supreme Court reached the same conclusion in McFarland v. Village of Carlton, (1932) 245 N. W. 631. There the sheriff asked McFarland, the constable of
the village of Carlton, to help make an arrest of two men who were at a village restaurant. McFarland was shot while helping the sheriff take the prisoners. The court rejected the theory of the village of Carlton that the sheriff had impressed the village constable into his service to assist in making the arrest. Citing the *Schofield* case, the court stated:

"It was not within McFarland's power nor that of the sheriff to lay aside McFarland's official status and place him in the role of a citizen."

Under the reasoning of these cases a state patrolman who acts to assist another law enforcement officer on the highway in apprehending a person who is suspected of transporting a stolen vehicle, who is fleeing from the scene of a crime, or from other law enforcement officers is probably not acting under a posse comitatus but rather is acting within his own authority. He is merely carrying out the duties imposed on him by the statute and he is not impressed into the service of the sheriff or other local law enforcement official even though a request for assistance is made by such official, because it is not necessary to do so in order to authorize him to act.

When, however, the sheriff or local law enforcement official calls for assistance off the highway to "preserve the peace, * * * suppress all affrays, routs, riots, unlawful assemblies and insurrections", "to serve criminal and civil process", and "to apprehend or secure any person for a felony or breach of the peace", as provided in sec. 59.24, the question of "necessity" may become an issue. Although the requesting officer has broad discretion in summoning help, this discretionary authority may be abused.

For example, the impressing of all state patrol officers of a county to serve civil process could very well be an abuse of discretion and subject to refusal with "reasonable" cause within the meaning of 946.40, especially where the impressed officers must leave duty posts causing public safety to be impaired to a greater extent than it would be if they refused to participate in the posse comitatus. On the other hand,
the reason for calling the posse comitatus may be so compelling and public safety so endangered that all law enforcement officers in the area would have a duty when advised that the sheriff or other officer was calling for aid to respond to such call without question. From the language of sec. 59.24, it can be readily concluded that the statute was enacted for the purpose of enabling an officer to obtain immediate assistance when suddenly confronted with a dangerous emergency.

The specific questions that you ask and my answers are as follows:

1. Q: Does a phone call by a sheriff to a state patrol district commander or other supervisor of the patrol requesting assistance meet the legal requirements for impressment of state troopers at the operational level?

   A: Yes, if the commander or supervisor is within the county of the sheriff calling the posse comitatus. See Krueger v. State, supra.

2. Q: Are the legal requirements of impressment met if the call for assistance is sent to a communications center such as the state patrol center in the state office building and thence to the state patrol supervisor by the communications personnel?

   A: Yes, the same reasoning applies as stated under question 1.

3. Q: If the answer to either of the above questions is "yes," is the state patrol supervisor, in the absence of sufficient personnel on duty, legally correct in calling off-duty men to duty in response to sheriff's call:

   (a) If the personnel were called to duty from the county of the sheriff making the request?

   A: Yes, if he is convinced that a legitimate call for a posse comitatus has been made, he can pass the call on to others.

   (b) If the supervisor had to call men not residing in the sheriff's county?
A: No. The sheriff can call only persons "of their county."

4. Q: Is he legally correct in calling on-duty personnel in the sheriff's county?

A: Yes, if it does not interfere with the duties of on-duty personnel to the point of endangering public safety in the areas of their responsibility. Supervisory personnel should make such determinations.

5. Q: We know that the impressed citizen does not have to determine if the sheriff's call is proper before obeying it. However, is it incumbent upon the state patrol supervisor, who is technically acting as intermediary between the sheriff and the troopers, to make such a determination before assigning his men?

A: Yes, in some situations as set out in the previous answers.

6. Q: Other than under impressment, do state troopers have authority to aid local authorities where violations unseen by the troopers occur on the highways, either at the request of local officials, or under their own initiative upon receipt of a citizen complaint?

A: Yes, if the troopers have reasonable grounds to believe the person is fleeing from the scene of a crime or from other law enforcement officers.

7. Q: If a violation off the highway is seen by state troopers may they assist local officials if:

(a) The culprits do not attempt to flee?

(b) The culprits attempt to flee cross country not on highways?

A: Yes, in both cases, if a felony or misdemeanor amounting to a breach of the peace is committed in his presence and the officer is convinced that an emergency exists. See 5 Am. Jur., p. 727, and Butler v. Industrial Comm., supra.

8. Q: In situation #1 on page one above the request to search the woods was made by a deputy or deputies of a
neighbors county who were also at the same as the result of the call from the sheriff:

(a) Would state troopers be subject to impressment by the sheriff of another county? In other words, does the sheriff have authority to impress when he is outside his own county, either by direct contact or by communications system?

A: Yes, but only if that sheriff is a member of a posse called by the sheriff of the county where the search is taking place. In that instance such sheriff acts only as a communicator for the sheriff who has called the posse.

(b) Are state troopers subject to the command of these deputies?

A: No. They are subject to the command of the sheriff of the county calling the posse, once impressed. However, the sheriff's call for posse may be relayed by deputies or anyone else.

BCL:LLD

Legislature—Apportionment—Enactment of Bill No. 1, S., 1967, would result in an apportionment plan for legislative districts which would be unconstitutional.

May 24, 1967.

THE HONORABLE, THE SENATE

By Senate Resolution 16 you have requested my opinion on the validity of an apportionment act resulting from the enactment of Senate Bill No. 1, 1967.

This bill would enact an apportionment plan substantially similar to the plan adopted by the Wisconsin supreme court in State ex rel. Reynolds v. Zimmerman, (May 14, 1964) 23 Wis. 2d 606, 128 N. W. 2d 16, 128 N. W. 2d 349, which was ordered after the legislature and governor failed to adopt a
law to fill the void caused by *State ex rel. Reynolds v. Zimmerman*, (Feb. 28, 1964) 22 Wis. 2d 544, 126 N. W. 2d 551. The bill would, however, alter the boundaries of Milwaukee assembly districts 1, 9, 13, 18, and 25 and senate districts 4, 5, 6, and 9 to substantially increase the inequality of representation in those districts. The percentage of deviation from the population of the average district in the state is increased significantly. (From +17.3 to +24.4; +5.5 to +22.5; +5.8 to +13.8 in the three most graphic cases.) Deviation figures would be improved in six cases.

While it is presumed that the plan promulgated by the Wisconsin supreme court is constitutional, it was intended only as an interim measure and was not held out as being constitutional in all respects. It is a "better than" plan. It is more equitable than that struck down. The court stated at 23 Wis. 2d 606:

"* * * the following legislative apportionment be effective for the 1964 legislative elections, and thereafter until such time as the legislature and governor have enacted a valid legislative apportionment plan." (Emphasis supplied.)

The court promulgated plan was ordered May 14, 1964, before the United States supreme court handed down the landmark decision in *Reynolds v. Sims*, (June 15, 1964) 377 U.S. 533, 12 L. ed. 2d 506, 84 S. Ct. 1362.

The principles established in *Sims* have been repeated in other United States supreme court cases thereafter decided, including *Swann v. Adams, Secretary of State of Florida*, (1967) 87 S. Ct. 569.

In *State ex rel, Sonneborn v. Sylvester*, (1965) 26 Wis. 2d 48, 54, 55, 182 N. W. 2d 249, the Wisconsin supreme court applied the one man-one vote rule of *Sims* to county government:

"* * * the basic principle of equality among voters within a state and the fundamental principle that representative government is one of equal representation for equal numbers of people without regard to race, sex, economic status, or place of residence * * *."

"** The right to vote whether statutory or constitutional to mean anything in a representative government means the right to secure equal representation. **"

At page 61 the court recognized that whereas the legislature might wish to establish county supervisory districts along town, village or city lines any such plan:

"** must not only be more equitable in respect to population than the existing system but also must establish a substantial equality of population among the various districts in a county **.

The holding of Reynolds v. Sims is extremely important insofar as any Wisconsin legislative apportionment plan is concerned, in that the apportionment held invalid was in part the result of the Alabama legislature's attempt to comply with provisions of the Alabama constitution which provided that each county shall be entitled to one representative in the lower house and that as to senatorial districts:

"** No county shall be divided between two districts, and no district shall be made up of two or more counties not contiguous to each other." (Emphasis supplied.)

Wisconsin has somewhat similar constitutional provisions. Art. IV, sec. 4, Wis. Const., provides:

"The members of the assembly shall be chosen biennially, by single districts, on the Tuesday succeeding the first Monday of November after the adoption of this amendment, by the qualified electors of the several districts, such districts to be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable."

Article IV, sec. 5, Wis. Const., provides in part:

"The senators shall be elected by single districts of convenient contiguous territory, at the same time and in the same manner as members of the assembly are required to be chosen; and no assembly district shall be divided in the formation of a senate district. **"

In The State ex rel. Attorney General v. Cunningham, (1892) 81 Wis. 440, 522, 528, 51 N.W. 724, the Wisconsin
supreme court interpreted Article IV, sec. 4, Wis. Const., as permitting the division of a county into two or more assembly districts, but not the attachment of a portion of a county to one or more counties to form a district.

These constitutional requirements, as previously interpreted by the Wisconsin court, make the task of achieving equality between assembly and senatorial districts a difficult one.

It is possible that the Wisconsin court might now hold that, in light of Reynolds v. Sims, these provisions must give way to the United States constitutional requirements of one man-one vote if a plan embodying them does not result in substantial equality among assembly and senatorial districts.

At pages 578-581 of Reynolds v. Sims, the United States supreme court states:

"A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering. Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multi-member or floterial districts. Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.

"History indicates, however, that many States have deviated, to a greater or lesser degree, from the equal-population principle in the apportionment of seats in at least one house of their legislatures. So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are con-
stitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature. But neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes. Considerations of area alone provide an insufficient justification for deviations from the equal-population principle. Again, people, not land or trees or pastures, vote. Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing.

"A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivisions, as political subdivisions. Several factors make more than insubstantial claims that a State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained. Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions. And a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering. However, permitting deviations from population-based representation does not mean that each local governmental unit or political subdivision can be given separate representation, regardless of population. Carried too far, a scheme of giving at least one seat in one house to each political subdivision (for example, to each county) could
easily result, in many States, in a total subversion of the equal-population principle in that legislative body. This would be especially true in a State where the number of counties is large and many of them are sparsely populated, and the number of seats in the legislative body being apportioned does not significantly exceed the number of counties. Such a result, we conclude, would be constitutionally impermissible. And careful judicial scrutiny must of course be given, in evaluating state apportionment schemes, to the character as well as the degree of deviations from a strict population basis. But if, even as a result of a clearly rational state policy of according some legislative representation to political subdivisions, population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all of the State’s citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired.” (Emphasis supplied.)

Both Reynolds v. Sims and Swann v. Adams recognize that mathematical exactness is not required in state apportionment plans and that de minimis deviations are unavoidable. Equality of population is to be the primary guide, however. In Swann v. Adams, (1967) 87 S. Ct. 569, 572, it is stated:

"Thus that opinion went on to indicate that variations from a pure population standard might be justified by such state policy considerations as the integrity of political subdivisions, the maintenance of compactness and contiguity in legislative districts or the recognition of natural or historical boundary lines. Likewise, in Roman v. Sincock, 377 U.S. 695, 710, the Court stated that the Constitution permits 'such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.'"

The court seems to indicate that a 10% to 15% deviation would be the greatest allowable and that the state would have to prove justification for any deviation.

The Florida apportionment plan which was struck down in Swann v. Adams had senate districts, which ranged from 15.09% overrepresented to 10.56% underrepresented with
the ratio between the largest and the smallest district 1.30 : 1, and house districts which ranged from 18.28% overrepresented to 15.27% underrepresented with a ratio of 1.41 : 1 between the largest and smallest district. The state was unable to give adequate reasons for the large deviations.

In *Reynolds v. Zimmerman*, 23 Wis. 2d 606, at page 623 it is stated, with respect to the court promulgated plan, the largest Wisconsin senate district deviation is 14.5% overrepresented and that the smallest is 16% underrepresented. Assembly districts deviation range is from 32.5% overrepresented to 43.7% underrepresented. Whether such deviations could be defended on the basis of Wisconsin constitutional restrictions and state policy considerations as to integrity of political subdivisions, maintenance of compactness and continuity in legislative districts or the recognition of natural or historical boundary lines is open to question.

In *Swann v. Adams* it was stated that what is marginally permissible in one state may be unsatisfactory in another depending on the particular circumstances of the case. The rule against splitting counties for attachment established in 1892 in *Cunningham* and followed in 1964 by *Reynolds v. Zimmerman*, before *Reynolds v. Sims*, was based on constitutional interpretation rather than express constitutional provision. This might make the rule even more difficult to sustain if substantial deviations result therefrom.

It is, therefore, questionable whether the reapportionment plan adopted by the Wisconsin supreme court in *Reynolds v. Zimmerman* would be constitutional under the rules later established by the United States supreme court in *Reynolds v. Sims*. Bill No. 1, S., would establish districts with significantly greater deviations than those in the plan adopted by the Wisconsin supreme court. I am of the opinion, therefore, that an apportionment act resulting from enactment of Bill No. 1, S., 1967, would be unconstitutional.

BCL:RJV
Obscenity—Legislature—Constitutionality—Statutes proposed by Bill 78, S., regarding dissemination of obscene materials by persons under age of 21, would be unconstitutional.

June 1, 1967.

THE HONORABLE, THE SENATE

By Senate Resolution 17, you have requested my opinion on the constitutionality of Senate Bill 78, relating to the dissemination of obscene materials.

The bill would create a special investigative committee and provide penalties for dissemination of obscene materials to persons under 21 years of age. The penalty portions of the act are virtually the same as those contained in Senate Bill 102 (1965), and which were found to be violative of the constitution in 54 OAG 152. Thus, to a large extent, the conclusions herein stated were foreshadowed by that opinion.

Since the issuance of the 1965 opinion, the United States supreme court has handed down several decisions which have modified the legal concept of obscenity. A Book Named "John Cleland's Memoirs of a Woman of Pleasure et al." v. Attorney General, (1966) 383 U.S. 413, 16 L. ed. 2d 1, 86 S. Ct. 975; Ginzburg et al., v. United States, (1966) 383 U.S. 463, 16 L. ed. 2d 31, 86 S. Ct. 942; Mishkin v. New York, (1966) 383 U.S. 502, 16 L. ed. 2d 56, 86 S. Ct. 958. These decisions, now as then, are binding upon the Wisconsin supreme court in obscenity cases under our court's pronouncement in McCauley v. Tropic of Cancer, (1963) 20 Wis. 2d 134, 121 N. W. 2d 545. The changes wrought by these recent decisions may be summarized as follows:

(1) The three elements which, when viewing the questioned material as a whole, must coalesce in order to result in a determination of obscenity (patent offensiveness, prurient appeal and utter lack of social importance) are independent, and each element must be considered separately. Neither of the first two, for example, may be "balanced" against the social importance of a work;
(2) The court will look to the specific segment of the general public at which the material is directed in order to determine whether it has "prurient appeal";

(3) Commercial exploitation is of probative value in determining whether certain material is obscene.

Of the above, only the second has real relevance to Senate Bill 78 and to this opinion, for it indicates further acceptance of the principle of variable standards of obscenity—that is, the propriety of establishing different standards for children than are applicable to the general public. One of the qualifications here, of course, is that the children's standard must not be imposed upon the adult community, who, in a free society, must be secure in the enjoyment of the freedoms granted by the First Amendment. Here, as in all instances of legislative prohibition against the dissemination of obscene materials, one of the crucial questions is whether the proposed law endangers the rights of free speech and free expression guaranteed by the First Amendment to the United States Constitution, and by Art. I, sec. 3, Wis. Const. It should be noted also that the courts will protect a child's right to freedom of speech as well as an adult's. Interstate Circuit, Inc. v. City of Dallas, (5th Cir., 1966) 366 F. 2d 590, 598-599.

On May 8, 1967 the United States supreme court handed down three decisions reversing obscenity convictions obtained in New York, Kentucky and Arkansas. The court issued a per curiam opinion which restated the rules discussed above, and found the publications involved to be not obscene. Redrup v. New York, Austin v. Kentucky, and Gent v. Arkansas, 35 Law Week 4396.

The heart of Senate Bill 78 is the penalty provision of proposed sec. 947.09 (2), which reads:

"(2) PENALTY. (a) Whoever wilfully or knowingly sells, lends, advertises or offers for sale, gives, transfers, shows, exhibits, displays or distributes to any person under the age of 21 any lewd, lascivious, pornographic, obscene or indecent motion picture, still picture or photograph, or any book, pocketbook, pamphlet or magazine the cover or con-
tents of which exploits, is devoted to or is principally made up of descriptions of illicit sex or sexual immorality, or which is obscene, lewd, lascivious, pornographic or indecent, or which consists of pictures of nude or partially nude figures posed or presented in a manner to provoke or arouse lust or passion or to exploit sex, lust or perversion, or which advertises services, facilities or articles for sexual deviation, shall be fined not more than $5,000 or imprisoned not more than 5 years or both.”

As indicated in 54 OAG 152, 158, the Rhode Island supreme court upheld language essentially identical to that of proposed 947.09 (2), in State v. Settle, (1959) 90 R.I. 195, 156 A. 2d 921. The statute under consideration in Settle contained the following standards for determination of whether or not a work was obscene:

“* * * any book, pocket book, pamphlet or magazine the cover or content of which exploits, is devoted to, or is principally made up of descriptions of illicit sex or sexual immorality or which is obscene, lewd, lascivious, or indecent, or which consists of pictures of nude or partially denuded figures posed or presented in a manner to provoke or arouse lust or passion or to exploit sex, lust or perversion for commercial gain * * * .”

Two differences between the Rhode Island law and Senate Bill 78 should be noted: (1) The age limit in the Rhode Island law is 18, whereas in the bill under consideration the limit is 21; and (2) the language of the Rhode Island law is qualified by the phrase “for commercial gain”, whereas Senate Bill 78 contains no similar language. The effect of these differences will be discussed below.

In considering the Rhode Island statute against the sole objection that its language was so vague and indefinite as to be unconstitutional (an objection grounded upon the due process clause of the Fourteenth Amendment), the court in Settle held that the language was clear enough to survive a “void-for-vagueness” challenge. This holding was based primarily upon a determination that the addition of “alternatives” (e.g., “any book, the cover or contents of which
As indicated in 54 OAG 152, *State v. Settle* is far from determinative of the questions presented by the language of the 1965 bill, and by Senate Bill 78. There are problems not only with the variations from the Rhode Island law mentioned above, but also some significant obstacles presented by a line of more recent New York cases.

The first of these variations—a 21 year cutoff age—may well of and by itself render the law unconstitutional. An opinion issued by this office on February 7, 1967, dealing with a statutory plan for motion picture licensing proposed by Assembly Bill 890 (1965), referred to *Paramount Film Distributing Corp. v. City of Chicago*, (D.C. N.D. Ill., E.D., 1959) 172 F. Supp. 69, 72, wherein the court stated as follows:

"(5, 6) This section is invalid on another ground as well. Even if clearly drawn, it would be invalidated by the age limit of twenty-one years. A censorship statute is necessarily an invasion of the First Amendment right to freedom of expression. Although the City may under its police power limit that right to prevent an evil, any restrictive action must be reasonable, not capricious. Assuming without deciding that the City might correct the evil of exhibiting films unfit for 'children' the present section is unsuitable for the purpose. Under it, a twenty year old, married service man would be prevented from seeing a film that might not be suitable for a girl of twelve. As Justice Frankfurter remarked in a similar situation, 'Surely, this is to burn the house to roast the pig'. As in the case just cited, the remedy is not appropriate for the end at which it is presumably aimed and is an invalid exercise of police power."

As indicated in the aforementioned opinion, a 21-year age designation tends to "burn the house to roast the pig." Senate Bill 78 excludes public and educational libraries from the penal provisions of the proposed law. This exclusion,
while an attempt to strike a happy medium would, however, mean little to a bookseller faced with a request from a 20-year-old, married, a Viet Nam veteran seeking to purchase books required for use in his college or university courses. It would mean still less to the person borrowing the book from a library, for under proposed 954.032 (1) possession alone is enough to start the enforcement wheels turning. While the library would be exempt from the proposed law in lending the book, the borrower would immediately come within the purview of the sections dealing with possession. Our marriage laws permit women to marry at 16 and men at 18 with parental consent, and a current resolution which has already passed one house of the legislature, would alter the constitution to permit persons to vote at age 18. Yet Senate Bill 78 might well keep such people from reading many universally acclaimed works of literature.

Proposed 954.032 (1), mentioned above, provides for the filing of complaints against persons whom the complainant (who may be either a private citizen or a law enforcement officer) "knows or has reason to believe" has "knowingly supplied or permitted obscene or indecent material (particularly that material described in sections 944.21, 944.22, 947.08 and 947.09) to be kept in his possession * * *" Sec. 947.09, referred to in the parentheses, is of course the penalty portion of Senate Bill 78. The "complaints" contemplated by proposed 954.032 (1) must be submitted to the district attorney within 10 days. The section gives the district attorney two choices. He must within 10 days either issue a warrant or report to the attorney general. In the latter event, the statute may be interpreted to give the attorney general only two choices—either issue the warrant and prosecute the case, or direct the district attorney to issue a warrant. In such an event there would be no officer empowered to weed out the patently frivolous complaints and every complaint would result in an arrest.

The chief significance of 954.032 (1) insofar as constitutional questions are concerned is found in the reference to 947.08—the new "standard" for minors—and the lack of any age limitation or other qualification. The net result of pro-
posed 947.032 (1), then, is that an adult could be charged with possessing material declared to be unfit for children. This is squarely opposed to Butler v. Michigan, (1957) 352 U.S. 380, 1 L. ed. 2d 412, 77 S. Ct. 524, which is discussed at 54 OAG 152, 161. As indicated in the Butler case, the defect is fatal.

In addition, the procedure embodied in proposed 954.032 (1) flies in the face of a 1965 opinion of the Wisconsin supreme court which held that a district attorney, not being the equivalent of a "neutral and detached magistrate," cannot constitutionally be empowered to authorize the issuance of an arrest warrant. See State ex rel. White v. Simpson, (1965) 28 Wis. 2d 590, 597-598. The reasoning of the Simpson case is equally applicable to the issuance of arrest warrants by the attorney general. Since the proposed section requires that warrants be issued by either the district attorney or the attorney general, it must fail for this reason also.

On May 15, 1967, the United States supreme court held the Oklahoma obscenity law unconstitutional in Holding v. Blankenship, et al., and Blankenship, et al. v. Holding, Nos. 1088 and 1089, October Term, 1966. Since one of the sections of this law which was specifically struck down provided for a "Citizens' Committee" with hearing and other powers, the case should be carefully considered in any attempt to create a similar committee. The lower court opinion sets forth the text of the Oklahoma statute, and is cited as Holding v. Nesbitt, (D.C., W.D. Oklahoma, 1966) 259 F. Supp. 694.

As indicated earlier the Rhode Island law, which could have served as a model for the penalty provisions of Senate Bill 78, contains the qualifying phrase "for commercial gain". This phrase does not appear in Bill 78, and it may fairly be said that for this reason a parent might come within its provisions by giving to his 20-year-old son a copy of a book which comes within the ban of the proposed law. The Rhode Island court emphasized that this could not happen under the statute under consideration in State v. Settle, supra, and distinguished State v. Pocras, (1958) 166 Neb.
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642, 90 N. W. 2d 263, on this basis. In the Pocras case, the Nebraska court voided a city of Lincoln ordinance which made it unlawful to sell "or dispose of in any manner" any obscene material. The court held this language to be so vague and indefinite that "men of common intelligence must necessarily guess at its meaning and differ as to its application", and that, as a result, the statute violated "the first essential of due process of law" in that it was not sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. 166 Neb. at p. 645.

In view of the above cases, I cannot say that Senate Bill 78 would be constitutional if enacted into law. The 21-year age limit, coupled with the fact that its terms could apply not only to one selling a required book to the veteran college student, but also to the father of the same student who might permit him to read the same book, would in my opinion make its chances of surviving a constitutional test very slim indeed.

Prior to 1965, sec. 484 of the New York Penal Law prohibited the dissemination to minors (defined as any individual under the age of 18) of any film, book, etc.:

"The cover or content of which exploits, is devoted to, or is principally made up of descriptions of illicit sex or sexual immorality, or which is obscene, lewd, lascivious, filthy, indecent or disgusting, or which contains pictures of nude or partially de-nuded figures, posed or presented in a manner to provoke or arouse lust or passion or to exploit sex, lust or perversion for commercial gain * * * ."

This law, which was enacted after New York's former obscenity law was ruled unconstitutional by the United States supreme court, came before the state's highest court in People v. Bookcase, Inc., (1964) 14 N.Y. 2d 499, 252 N.Y.S. 2d 438. As indicated in 54 OAG 152, the revised law was again struck down, the court stating (252 N.Y.S. 2d at pp. 437-438):

"The quality of the printed or pictorial material which is forbidden by the portion of the statutory enactment which
is now before us is, consequently, not to be judged by whether it tends to incite minors or adults to immoral acts, or by whether it is in its nature obscene in the eyes of minors or of adults, but whether the Legislature can constitutionally prevent the sale to minors of this age of material which deals mainly with illicit sex or sexual immorality. The purpose and the only object of this clause in the statute, under which defendants stand convicted, was to prevent or limit publications or pictures coming before the eyes of the young which are principally based upon the theme of sexual conduct that is contrary to the mores of society. This statute does not distinguish between material regarded as obscene for teenagers but unobjectionable to adults; it sets no variable standards of what constitutes obscenity according to the age or other type of group at which the material in question is principally aimed, nor does this clause in the statute render it necessary to conviction that the material dealing with illicit sex or sexual immorality shall have been presented in a salacious manner. A statute could hardly be drawn which would permit exhibition of intimate sexual details of married life, for example, and at the same time exclude similar presentations where the participants are not married. On the contrary, the only construction of which this statutory language is susceptible is that the subject of illicit sex or sexual immorality is not to be brought before the young by pictures or writings — scientific, fictional or otherwise which are devoted principally thereto.

"The decisions of the United States Supreme Court leave no doubt that legislation designed to restrict the sale or other distribution to adults of material principally devoted to, or even advocating, illicit sex or sexual immorality would be unconstitutional, both upon the grounds of vagueness, in case of criminal statutes, and of abridgment of freedom of speech or of the press in case of all statutes **.*"

The court then discussed whether the constitutionality of sec. 484 could be saved by the circumstance that it related only to persons under the age of 18:
"The issue shapes itself into whether the Legislature can constitutionally restrict the sale, circulation or exhibition of pictures or printed material to minors under 18 years, for the reason that it is principally devoted to the subjects of illicit sex or sexual immorality. These words are either too vague to apprise possible defendants of what they mean, or, if they are to be interpreted as referring exclusively to extra-martial sex or sexual perversion, then they would forbid all publications or pictures mainly devoted to those subjects, regardless of the manner in which they are presented, whether by way of fiction, sociological discussion, moralizing, or otherwise. The Oedipus legend in classic Greek drama would be forbidden because it is principally devoted to incest, the Tristan and Isolde legend and Hawthorne's 'Scarlet Letter' would be illicit reading for the young because it is principally made up of adultery, Bernard Shaw's 'Mrs. Warren's Profession' would be outlawed for obvious reasons, as well as all writings dealing with homosexuality. Such a list could be extended almost indefinitely. It is not suggested that these or other parallel works of literature are likely to be offered for sale at the same newstands where the type of comic books are purchased which was the main reason for the adoption of this legislation, but the constitutionality of a statute governing publications is to be tested by what can be done under it and not by the particular violation which is charged with having occurred. It seems to us that this statute is drawn so broadly as to render criminal sales or other exhibition to the young of pictures and publications of all kinds which are principally devoted to these subjects, in however serious or dignified a manner, and, in our view, it is so broad and so obscure in its coverage as to abridge the constitutionally protected freedom of speech and of the press as well as the due process clauses in the Federal and State Constitutions." (252 N.Y.S. 2d at pp. 439-440.)

After the court's decision in People v. Bookcase, the New York law was amended, only to fall again in People v. Kahan, (1965) 15 N.Y. 2d 311, 258 N.Y.S. 2d 391. The following year the legislature again amended the law, and the New York court, in People v. Tannenbaum, (1966) 18 N.Y. 2d
268, 274 N.Y.S. 2d 131, upheld the revised statute over several constitutional challenges.

Insofar as the question of the validity of Senate Bill 78 is concerned, we are faced with State v. Settle on one hand, and People v. Bookcase, Inc., on the other. I have indicated the significance of the difference between Bill 78 and the Rhode Island law in regard to State v. Settle, which in my opinion weakens the bill tremendously as far as a constitutional test is concerned. Even more significant, however, is the New York court's decision in People v. Bookcase, Inc., a more recent case wherein essentially the same language was held to be violative of the constitution.

In view of the above, and also applicable portions of the opinion in 54 OAG 152, it is my opinion that Senate Bill 78 would, if enacted into law, be unconstitutional.

The difficulty in drafting a workable law in this area is shown not only by the experience in New York, but also by the fact that the three obscenity cases decided by the United States supreme court last year (Mishkin, Fanny Hill and Ginzburg) resulted in fourteen separate opinions. I have elaborated upon the constitutional questions in this opinion, and have cited the New York experience in arriving at a constitutionally sound obscenity law, in the hopes that study will be given to these principles in the drafting of a workable law for the state of Wisconsin.

BCL:WFE

 Compatibility—Regulations would not preclude one person, otherwise qualified, from serving on both the banking review board and the consumer credit review board if the governor and senate consent.

June 7, 1967.

THE HONORABLE, THE SENATE
By Senate Resolution 20, 1967, you have requested to be advised whether the offices of member of the banking review board and member of the consumer credit review board are incompatible so as to preclude one person from serving on both boards at the same time.

The governor has, under sec. 220.035 (1), Stats., appointed Francis J. Conway as a member of the banking review board, to succeed himself for a term ending the first Monday in January, 1972. The appointment is subject to the advice and consent of the senate where action is pending. Mr. Conway is also presently serving as a member of the consumer credit review board, a position to which he was first appointed on January 10, 1961, pursuant to 220.037, and reappointed and confirmed in 1965 for a term ending July 17, 1970.

Both positions are state offices as members of each board and exercise a portion of the sovereign power of the state. Martin v. Smith, (1941) 239 Wis. 314, 330,1 N. W. 2d 163.

At 42 Am. Jur., Public Officers §§ 58 and 59, p. 926 it is stated:

"§ 58. Generally. Since a public office is a public agency or trust created for the benefit and in the interest of the people, the holder of such an office is subject to such regulations and conditions as the law may impose. * * * The common law recognizes certain limitations on double office holding, and there are provisions in the Constitutions and statutes of the various states declaring or extending the common-law rule. Their manifest purpose is to prevent multiple office holding so that offices and places of public trust will not accumulate in a single person. Where a person is prohibited from holding two offices at the same time, his nomination to a second office may operate to vacate the first, or he may be ineligible to the second. * * *

"§ 59. Common-law Rule. Even in the absence of express prohibitions against the holding by one person of more than one office at the same time, there is a well-established limitation on the right so to do. This limitation operates upon offices that are in their nature incompatible, for it is a
settled rule of the common law that a public officer cannot hold two incompatible offices at the same time. The rule is founded upon the plainest principles of public policy. It is imbedded in the common law and has obtained from very early times. Its correctness and propriety are so well established as to have been assumed without discussion in many cases in which the matter of common-law incompatibility has arisen. However, at common law it extends no farther than incompatible offices. There are no inhibitions, except constitutional or statutory ones, against the holding by the same person of more than one compatible office. The considerations which enter into the determination of incompatibility will be stated later, and various illustrations will be given of incompatible and compatible offices."

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 may be incompatible by reason of express statute, and others which appear to be incompatible because of possible conflict of duties or power of one over the other as to appointment, supervision and pay, may be designated as compatible by statute.

I have found no constitutional or statutory provision which would prohibit one person from holding the offices of member of the banking review board and member of the consumer credit review board at one time. Neither officer has supervisory power over the other nor is either involved in establishing the pay or work rules of the other. If incompatibility exists it is by reason of conflict of duties.

The consumer credit review board is a part of the banking department and is composed of five members appointed by the governor with the advice and consent of the senate.

Sec. 220.037 (2), (4), and (7) provides:

"(2) One member shall be an individual holding a license, certificate of authority or permit issued under chapter 214 and with 5 years' practical experience in that field or as executive of a similarly qualified corporation. One member
shall be similarly qualified under chapter 115 and one under section 218.01.

"* * *

"(4) Members shall receive no compensation for their services as such but shall be reimbursed their necessary and actual expenses.

"(7) It shall be the duty of the board to counsel and advise with and to review the acts and decisions of the commissioner of banks under chapters 115, 214, 217 and 218. In performing such review functions, the board shall have all the powers granted to the banking review board under section 220.035 (2) and its final orders and determinations shall be subject to judicial review as provided in chapter 227."

The banking review board is a part of the banking department and is composed of 5 members appointed by the governor with the advice and consent of the senate. At least 3 members shall be bankers with at least 5 years' experience in the banking business. No member is qualified to act in any matter involving a bank in which he is an officer, director or stockholder, or to which he is indebted. Members receive $25 per day for board work and are reimbursed for expenses as in the case of other state officers.

The banking review board is created by secs. 220.01, 220.035. Under 220.02 it approves the salaries of banking department examiners and employees as fixed by the commissioner. Under 221.205 it has the duty to notify the attorney general of instances of probable violation of the criminal statutes by any bank, trust company, financial institution under the supervision of the banking commissioner, or by any officer or employee thereof. Under 220.08 the banking review board decides whether the commissioner should take possession of a delinquent or unsafe bank.

The main duty of the banking review board is to advise and review the acts of the commissioner. The consumer credit review board also has this duty in its assigned area. Sec. 220.037 (7) quoted above, and Nuesse v. Home Loan Co., (1964) 23 Wis. 2d 473, 478, 128 N. W. 2d 57.
In granting power to the banking review board, the statutes attempt to separate areas of jurisdiction assigned to the consumer credit review board under 220.037, and to the credit union review board under 186.015.

Sec. 220.02 (3) gives the commissioner power in the following areas:

"The commissioner of banks shall enforce all laws relating to banks and banking in this state, including those relating to state banks in chs. 220 and 221, mutual savings banks in ch. 222 and trust company banks in ch. 223; all laws relating to credit unions in ch. 186 and the business done by them in this state; and all laws relating to small loan companies in ch. 214 or other laws relating to the lending of money in ss. 115.07 and 115.09 or those relating to finance companies, motor vehicle dealers, adjustment service companies and collection agencies in ch. 218; and those relating to persons desiring to or who are engaged in the foreign exchange business contained in ch. 217; and he shall enforce and cause to be enforced every law relating to the supervision or control thereof."

Sec. 220.037 (7) empowers the consumer credit review board to:

"* * * advise with and to review the acts and decisions of the commissioner of banks under chapters 115, 214, 217 and 218. * * *"

Sec. 220.02 (7) provides in part:

"(7) Except as otherwise provided in section 220.037, any interested person or any bank or banking corporation aggrieved by an act, order or determination of the commissioner may, within 10 days from the date thereof, apply to the banking review board to review the same. * * *"

Sec. 220.035 (2) (a) provides, as to the banking review board:

"The duties of the board are to advise with the commissioner of banks and others in respect to improvement in the condition and service of banks and banking business in this
state and to review the acts and decisions of the commissioner of banks, except for such acts and decisions subject to review under sections 186.015 and 220.037, and to perform such other review functions in relation to banking as may be provided by law. The banking review board may require the commissioner of banks to submit any of his official actions to said board for its approval. The board may make rules of procedure as provided in chapter 227."

While there is a possibility of conflict of jurisdiction as between the banking review board and the consumer credit review board, it is not of sufficient probability as to make the offices of member of each incompatible as a matter of law.

It is therefore a matter of policy for the appointing authority and senate as to whether a person otherwise qualified should serve in both offices at the same time.

BCL:RJV

**Counties—Curfew**—County curfew ordinance would not apply in cities and villages within the county.

June 8, 1967.

**Willis J. Zick**

*Corporation Counsel, Waukesha County*

You have requested my opinion as to whether a county curfew ordinance applies within the corporate limits of cities and villages within the county. It is my opinion that it does not.

You state that Waukesha county has recently enacted a curfew ordinance, which in essence prohibits unaccompanied persons under 17 years of age from loitering on public streets after 11 p.m. without express parental authorization. It also bars persons under 17 from hotels or motels after 10 p.m., and prohibits anyone from frequenting school
buildings or adjacent playgrounds after 8 p.m. except upon occasions of "official attendance or on official school business."

For the purposes of this opinion, it is presumed that if the ordinance is within the power of the county board it is valid, having been duly enacted. It should be pointed out, however, that any such ordinance must be reasonable in its terms and application in order to be held valid if tested. Some curfew ordinances, prohibiting persons under a specified age from being on the streets after a specified hour of the night except under certain conditions, have been held invalid as an undue invasion of the personal liberty of the citizen. 62 C.J.S. Municipal Corporations §243 Curfew, p. 600.

On the other hand, ordinances of municipal corporations which prohibit idling, loitering, or loafing on the streets have been held valid where they were not discriminatory and where the power to enact has been expressly conferred or necessarily implied. 62 C.J.S. Municipal Corporations §275, Loitering, p. 625.

Sec. 990.01 (22) provides:

"MUNICIPALITY. 'Municipality' includes cities and villages; it may be construed to include towns."

Sec. 59.001 (3) provides that in ch. 59, " 'Municipality' includes cities, villages and towns."

A county is a quasi-municipal corporation and an arm of the state. It is created for purposes of political organization and civil administration in matters of state concern, performing primarily the functions of the state locally, and is not created for the local convenience of the inhabitants as are cities and villages. State ex rel. Bare v. Schinz, (1927) 194 Wis. 397, 216 N. W. 509; Columbia County v. Board of Trustees of Wisconsin Retirement Fund, (1962) 17 Wis. 2d 310, 116 N. W. 2d 142.

County boards of supervisors 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, 84 N. W. 2d 76.

In 20 C.J.S. Counties §92, p. 869, it is stated:

*Territorial limitations.* A county ordinance is effective only within the boundaries of the county. Furthermore, since municipalities and counties are separate and distinct governmental entities * * * a county ordinance which involves the exercise of any of the police powers granted to municipalities cannot be effective within the limits of municipalities located within the county."

This general statement cannot be said to be the Wisconsin rule in every case where there is a possibility of conflict between state, county, town, city and village jurisdiction concerning the exercise of the police power. In each area, the applicable statutes must be referred to and compared.

In some areas the state may have pre-empted the field with its criminal statutes, and in other areas the legislature has provided that counties or municipalities may enact ordinances providing for civil forfeitures in conformity with or not in conflict with state statutes. In certain areas the legislature in anticipation of jurisdictional conflicts has specifically provided that county ordinances shall not apply in municipalities, as in the case of sec. 59.07 (69) relating to dogs running at large; in sec. 59.07 (18) relating to dance halls, roadhouses and other places of amusement; in 59.07 (49) as to billboards; 59.07 (50) as to riding horses; or that a county ordinance shall supersede and nullify a municipal ordinance in conflict therewith as in the case of 59.07 (53) relating to air pollution. *Highway 100 Auto Wreckers, Inc., v. City of West Allis*, (1959) 6 Wis. 2d 637, 97 N. W. 2d 423. The legislature may provide that the county ordinance shall apply in cities or villages unless such cities or villages have adopted ordinances or codes concerning the same subject matter, as in the case of sec. 59.07 (51) relating to building and sanitary codes. On the other hand the legislature may have intended that cities, villages and towns have precedence. This was the holding in *Maier v. Racine County*, (1957) 1 Wis. 2d 384, 84 N. W. 2d 76 in
which the court held that the county board was not authorized by sec. 59.07 (64), Stats., to enact an ordinance prohibiting the sale or gift of beer to any person under 21 unless accompanied by parent or guardian since the legislature had by sec. 66.054, Stats., expressly delegated power to cities, villages and towns to adopt nonconflicting supplementary regulations, in the nature of local option, to raise the age limit under which sale is prohibited from 18 to 21. The court stated the familiar rule that where a general statute and specific statute relate to the same subject matter, the specific statute controls.

The ordinance was enacted under the provisions of 59.07 (64), which must be construed in light of the introduction to 59.07:

"59.07 General powers of board. The board of each county may exercise the following powers, which shall be broadly and liberally construed and limited only by express language:

"(64) PEACE AND ORDER. Enact ordinances to preserve the public peace and good order within the county."

In 46 OAG 12 it was stated that this section probably enables a county to enact ordinances prohibiting drunkenness and disorderly conduct. The Waukesha county ordinance, however, is apparently not directly concerned with disorderly conduct or with drunkenness.

Sec. 59.07 (64) might be interpreted to give a county power to prohibit loitering. However, the statute is a general statute. The legislature has neither expressly stated that a county can enact an anti-loitering law nor, assuming that it can, that such law would take precedence over ordinances of cities and villages within the county on a similar subject, or would be effective as to any such city or village which has power to enact ordinances on such subjects.

While cities and villages do not have specific authority to enact curfew ordinances, they have express authority to enact reasonable ordinances to prohibit loitering.

Sec. 947.01 is concerned with disorderly conduct; 947.03 with drunkenness, and 947.02 with vagrancy and loitering.
All three statutes are referred to to indicate the varying authority which the legislature has given towns, cities and villages in the area in 66.051 (3) and (4), below.

Sec. 947.02 provides that:

"Any of the following are vagrants and may be imprisoned not more than 6 months:

“(1) A person, with the physical ability to work, who is without lawful means of support and does not seek employment; or

“(2) A person found in or loitering near any structure, vehicle or private grounds who is there without the consent of the owner and is unable to account for his presence; or

“(3) A prostitute who loiters on the streets or in a place where intoxicating liquors are sold, or a woman who, in a public place, solicits men to commit a crime against sexual morality; or

“(4) A person known to be a professional gambler or known as a frequenter of gambling places or who derives part of his support from begging or as a fortune teller or similar imposter.”

Section 66.051 provides in part:

“The board or council of any town, village or city may:

“* * *

“(3) Prohibit conduct which is the same as or similar to that prohibited by s. 947.01 or 947.03.

“(4) Nothing in this section shall be construed to preclude cities and villages from prohibiting conduct which is the same or similar to that prohibited by chs. 941 to 947.”

Also see the general grant to the town meeting in 60.18 (3) as to peace, welfare and good order and specific grant as to drunkenness or disorderly conduct.

Wisconsin does not have a home rule provision which is applicable to counties or towns similar to Art. XI, sec. 3, Wis. Const., which provides in part:
"Cities and villages organized pursuant to state law are hereby empowered, to determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of state-wide concern as shall with uniformity affect every city or every village. The method of such determination shall be prescribed by the legislature. * * *"

Sec. 66.01 implements the home rule amendment, and while the issue at hand is not strictly a matter of home rule, such matters are of some importance in any question of resolving conflicts of jurisdiction. While the legislature has provided that the powers of a county board shall be liberally construed, counties and towns, unlike cities and villages, have not been given their powers with the statutory instruction that such powers are to be liberally construed to promote self-government. See introduction to 59.07 above.

Sec. 62.04 provides:

"Intent and construction. It is declared to be the intention of the revision of the city charter law, to grant all the privileges, rights and powers, to cities which they heretofore had unless the contrary is patent from the revision. For the purpose of giving to cities the largest measure of self-government compatible with the constitution and general law, it is hereby declared that sections 62.01 to 62.26, inclusive, shall be liberally construed in favor of the rights, powers and privileges of cities to promote the general welfare, peace, good order and prosperity of such cities and the inhabitants thereof."

Sec. 61.34 (5) provides:

"CONSTRUCTION OF POWERS. For the purpose of giving to villages the largest measure of self-government in accordance with the spirit of the home rule amendment to the constitution it is hereby declared that chapter 61 shall be liberally construed in favor of the rights, powers and privileges of villages to promote the general welfare, peace, good order and prosperity of such villages and the inhabitants thereof."
A city or village council's decision not to enact a curfew ordinance is in a sense an exercise of home rule powers just as a decision to enact such an ordinance. When a municipality makes such a decision respecting the exercise of a home rule power it is not within the power of a county to enact an ordinance in effect reversing that decision.

It is my opinion that, assuming for this opinion only that the county has power to enact an ordinance prohibiting loitering, such ordinance would not apply in cities or villages within the county.

BCL:RJV

**Insurance—Free Choice**—Bill 259, A., if enacted into law, would not affect policies in force; would remove unfair discrimination in some instances; and would require new policy forms.


**THE HONORABLE, THE SENATE**

By Senate Resolution 21 you have asked for my opinion as to the effect of Assembly Bill 259.

The bill would create, in ch. 207, "Unfair Insurance Business Methods", sec. 207.04 (1) (k), Stats., to read:

"Free choice of doctors. Every policy providing accident and sickness benefits, including policies under plans established pursuant to s. 148.03 (1), for treatment of feet shall provide such payment benefits for medical, surgical or other services of podiatrists which may be rendered under the laws of this state, to the same extent as provided under the terms of the policy, if rendered by a physician."

Your resolution asks what would be the effect of the bill, if enacted into law, in the following areas:

(1) The redrafting and filing of all policy forms in Wisconsin;
(2) The application to in-force policies;

(3) The types of unfair discrimination which are prohibited under the bill.

The bill would add language to 207.04 (1), which starts out "The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:" Then follows a number of specifically enumerated acts, practices or methods, such as misrepresentations, false advertising, stock operations, rebates, etc. To these is to be added the "Free choice of doctors" provision quoted above.

Under 207.05 the commissioner of insurance may investigate whether a person (including a corporation) is engaging in any unfair method, act or practice. Under 207.05 and 207.06, he may cause hearings to be held and issue cease and desist orders. These orders are subject to judicial review.

Sec. 204.31 (2) provides the "Form of Policy" for accident and sickness insurance. Sec. 204.31 (3) specifies provisions which are required in these policies. Additional provisions for special types of accident and sickness insurance policies are found in 204.32 (franchise), 204.321 (group), and 204.322 (blanket).

The uncertainty as to the effect of the bill, as to filing of policy forms, arises from the apparently anomalous placing of the new language in ch. 207, which is the Unfair Insurance Business Methods chapter, instead of ch. 204, or more specifically sec. 204.31, et seq. For example, an argument can be made that an insurance company could, by a policy provision, be in violation of sec. 207.04 without being legally required, except through the procedures prescribed in ch. 207, to file new policy forms. This interpretation in this situation would hardly be effective in furthering the legislative intent. And principles of statutory construction require all reasonable avoidance of a conclusion that the legislature acted in vain.

Section 1 of the bill, declaring legislative intent, states that some accident and sickness insurance policies unfairly
discriminate against doctors qualified under the laws of Wisconsin to perform necessary surgical and medical services, and that all such policyholders should be permitted a free choice of doctors. Reading this with section 2 it is reasonably clear that the "doctors" referred to are podiatrists who, under ch. 154, may use the title "doctor" and may perform certain surgical and medical services upon the feet. In my opinion, the discrimination referred to must be the provisions in some accident and sickness policies that exclude from coverage certain surgical and medical services when performed by a licensed podiatrist but include the same services when performed by a licensed physician. The foregoing is responsive to your third question.

Taking into account the declaration of legislative intent plus the plain language of the bill that "Every policy * * * shall provide such payment benefits for medical, surgical or other services of podiatrists * * *", it is my opinion that should the bill become law it would require the filing of new policy forms in certain instances. These instances would include those policy forms which contain language inconsistent with the language of the bill or its intended effect. This would not necessarily apply to policy forms whose language can reasonably be given a construction consistent with the intent of the legislature. As to the procedures and details of implementing this requirement where conflict between policy provisions and the proposed law clearly appears, these would be administrative determinations within the discretion of the insurance commissioner, subject to other applicable statutes and the administrative code.

Because of its relationship to the general subject matter, I have considered State Medical Society v. Manson, (1964) 24 Wis. 2d 402, but I deem it not relevant to the questions discussed here.

As to your second question, Art. I, sec. 10, U.S. Const., provides that no state shall pass any law impairing the obligation of contracts. If this bill is enacted into law its application to in-force policies of insurance would raise serious constitutional questions. It is therefore my opinion that
the courts would adopt the interpretation which would avoid the constitutional issue and hold the law inapplicable to in-force policies of insurance.

BCL:JEA

Education—Federal Aid—Bill 217, A., which would create statutes providing that federal funds received for education aids be placed in a fund outside the state treasury, would not violate the prohibitions in Art. I, sec. 18, Wis. Const. but other constitutional restrictions would apply.


THE HONORABLE, THE ASSEMBLY

By Assembly Resolution 17, an opinion is requested as to the effect of Assembly Bill 217 on programs available for educationally deprived children attending nonpublic schools.

Assembly Bill 217 would designate a federal education assistance fund which is declared to be separate from the funds in the state treasury. Under the terms of the bill, money received by the state under the federal elementary and secondary education act of 1965 (P.L. 89-10), 79 Stats. 27 (1965), 20 USCA §241 (a) - 241 (1), would not be paid into the state treasury and would not be subject to the laws, rules and regulations governing payments made by the state treasury. Instead, the federal funds would be put in a separate nonlapsible fund. Money in the separate federal educational assistance fund would be appropriated to the state department of public instruction to carry out the purposes of the federal act.

Title I of the federal elementary and secondary education act establishes a program of “financial assistance to local educational agencies for the education of children of low income families.” Under the program the United States commissioner of education is authorized to make payments to state educational agencies for “basic” and “special incen-
tive" grants to local school districts. Federal grants under Title I are intended to help local school districts establish programs and projects to meet "the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families".

The Act provides that the control of federal aid funds and title to property acquired with such funds "shall be in a public agency * * * and that a public agency will administer such funds and property;" but the Act also provides that local school districts must "make provision for special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment)" * * * in which educationally deprived children enrolled in private schools may participate.

The federal program is therefore designed to make grants available to state educational agencies for distribution to local public school districts according to general distribution criteria established in the federal law. Federal funds which the state agency distributes are to support public school projects and programs designed to meet special needs of children, including those attending nonpublic schools.

In an opinion issued July 20, 1966, 55 OAG 124, I stated that when Title I federal education aids were received by the state and placed in the general fund they became subject to Art. I, sec. 18, Wis. Const., which provides in part:

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

I further stated that Art. I, sec. 18 would prohibit the use of such funds to pay the salary of a public school teacher who is sent into a parochial school to teach, but that such aids could be used to support some types of shared time, educational radio and television, and mobile education programs which reach eligible nonpublic school students.

My opinion, of course, reflected the existing law regarding the handling of federal aid funds. The law which applied
to such funds in 1966, and which still applies, calls for the placement of funds received by the state from the federal government in the state treasury or general fund. See 16.54, 20.550 (68), and 20.951 (1), Stats. Assembly Bill 217 would amend these laws to provide that federal education aids received by the state are not to be placed in the state treasury, but rather are to be maintained in a separate fund under state management.

The issue to which I now address myself is the effect of such separate handling on the range of uses to which the funds may be placed.

The portion of Art. I, sec. 18 quoted above is a restriction specifically directed at expenditure of funds "drawn from the treasury." Federal education aids which are not deposited in the state's treasury or general fund, would seem to escape the prohibition. It is true that the funds would come into state possession and would be managed and expended by state officers. Yet the monies would maintain their intact, segregated character. They would not be mixed with state treasury revenues, since the federal law does not require matching on the part of the state. 20 USCA §241 (c) and (d). Nor would state revenues necessarily be expended in administering the special fund, since federal administrative grants are made available to state agencies. 20 USCA §241 (g) (b).

The legal status of the proposed federal education assistance fund is analogous to that of special, separate funds which other state agencies regularly maintain. The university of Wisconsin board of regents, for example, accepts and administers private donations without paying such funds into the state treasury. Sec. 36.065, Stats. These separate accounts, which may or may not be the product of a formal trust (see 47 OAG 124, 126-128 (1958)), are controlled only by the limitations placed upon them by their donors. They have been held to be totally outside the scope of state constitutional restrictions on the expenditure of state treasury funds. 47 OAG 124 (1958); Glendale Development, Inc. v. Board of Regents, (1960) 12 Wis. 2d 120, 106 N. W. 2d
The proposed federal education assistance fund would, in a sense, also be analogous to segregated funds established early in the state’s history to accumulate the proceeds from sale of federal lands granted to the state for education purposes. These early “school funds” were mentioned in the state’s charter, Art. X, sec. 2, Wis. Const., and explicit sanction was given to the use of the segregated funds for projects which would be forbidden if state revenues were being employed. Art. VIII, sec. 10, Wis. Const.; Hurst, Law and Economic Growth, 21, 148 (1964).

The distinction between ordinary state revenues and special funds from “outside” sources, usually the federal government or private donors, can therefore be traced far back into Wisconsin’s history. The special separate funds have been held not to be subject to constitutional protections directed at ordinary state revenues. Freedom from such restraints was explicitly provided in the state constitution for the land grant funds. In the case of latter day special funds, this freedom has been recognized by the court as a general principle of law.

It is therefore my opinion that the proposed federal education assistance fund would not be subject to the Art. I, sec. 18 rule against expenditures for the benefit of parochial schools. This would broaden the purposes for which the funds may be used beyond those which were suggested as permissible in 55 OAG 124.

Precisely how much latitude state administrators may have in disbursing the funds for projects that serve the educational needs of nonpublic school students cannot be answered in the abstract. While the Art. I, sec. 18 ban on expenditures of state funds to benefit parochial schools is probably the most sweeping of all state constitutional provisions relating to religion, it is not the only such restriction. Other portions of the state constitution provide:

“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 minis-
try, against his consent; nor shall any control of, or inter-
ference with, the rights of conscience be permitted, or any
preference be given by law to any religious establishments
or modes of worship; * * *” Art. I, sec. 18, Wis. Const.

“The legislature shall provide by law for the establishment
of district schools, which shall be as nearly uniform as prac-
ticable; and such schools shall be free and without charge
for tuition to all children between the ages of four and twen-
ty years; and no sectarian instruction shall be allowed

The provisions apply to all forms of state and local gov-
ernmental action. It is clear, for example, that “sectarian
instruction” may not be given in public schools, no matter
who pays for the activity. State ex rel. Weiss v. District
Board of School District No. 8 of City of Edgerton, (1890)
76 Wis. 177, 44 N. W. 967. A 1959 opinion of Attorney Gen-
eral John W. Reynolds suggests that the Article I, Section
18 prohibition against laws which give preference to any
religious establishments or modes of worship might be
violated if public officials were to have authority to decide
that students from some parochial schools are eligible for
assistance while students from other schools are not. 48
OAG 121, 133 (1959). It is impossible to render an opinion
on the effect of the above provisions without knowing the
precise mechanics of various assistance plans that may be
attempted.

This opinion has not attempted to examine the federal
constitutional issues created by state use of federal educa-
tion aids. This question should be answered by the federal
courts. It should be noted that there is a proposal now before
the Congress to give individual federal taxpayers standing
to test the federal aid act. S. 3, 90th Cong., 1st sess. (1967).

I conclude that Assembly Bill 217 would broaden the
range of activities which could be supported by federal edu-
cation aids received by the state under P.L. 89-10. If the
federal aids were to be maintained in the federal education
assistance fund, they would not be subject to the Article I, Section 18 prohibition against benefiting parochial schools with funds drawn from the state treasury. Programs supported with monies in the federal education assistance fund would, however, be subject to other restrictions contained in Art. I, sec. 18 and Art. X, sec. 3, Wis. Const.

BCL: RAL

Advertising—Tobacco ads—Bill 291, S., which would prohibit advertising tobacco products in Wisconsin news media, would be unconstitutional.

June 20, 1967.

THE HONORABLE, THE SENATE

By Senate Resolution 19, you have requested my opinion as to the constitutionality of Senate Bill 291, which reads:

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

"SECTION 1. The provisions of this act shall be construed as an enactment of state-wide concern of the hazards involved in smoking. Much evidence has been made public in recent years concerning the dangers to health, such as correlation between smoking and lung cancer or heart disease. Because of the difficulty of controlling the constant exposure of the pleasures of smoking, especially to the young people, it is felt that making it unlawful to advertise tobacco products is an appropriate beginning.

"SECTION 2. 134.66 of the statutes is created to read:

"134.66 TOBACCO ADVERTISEMENTS. (1) It is unlawful for any newspaper, magazine, periodical or brochure published in this state to advertise tobacco products of any kind.
“(2) It is unlawful for any radio or television station to broadcast or telecast any commercials originating at the local studio advertising tobacco products of any kind.

“(3) In this section ‘tobacco advertisement’ means any public notice or announcement or the calling to public attention by any means of the desirable qualities in any tobacco product in order to arouse a desire on the part of any person to purchase tobacco products. ‘Tobacco advertisement’ shall not include an advertisement on any package, box, carton or vending machine or any other advertisement which may be used by the retailer to identify the product.

“(4) Any person who violates this section may be fined not less than $25 nor more than $100 or imprisoned not more than 5 days or both.”

It is my opinion that Senate Bill 291, if enacted into law, would be unconstitutional as imposing an undue restraint upon interstate commerce in violation of the commerce clause of the federal constitution.

It is well settled that radio and television broadcasts as well as publications that circulate beyond state lines constitute a type of interstate commerce. *Head v. New Mexico Board of Examiners*, (1963) 374 U.S. 424, 10 L. ed. 2d 983, 83 S. Ct. 1759; *Lorain Journal Co. v. United States*, (1951) 342 U.S. 143, 96 L. ed. 162, 72 S. Ct. 181; *Allen B. DuMont Laboratories, Inc. v. Carroll*, (3rd Cir. 1950) 184 F. 2d 153, cert. den. 340 U.S. 929, 95 L. ed. 670, 71 S. Ct. 490; 15 Am. Jur. 2d Commerce, §62. Although the legislation proposed in Senate Bill 291 would not affect tobacco commercials or advertisements originating outside Wisconsin, it would affect the interstate activity of broadcasts and publications originating within Wisconsin. Thus, Senate Bill 291 would interfere with the free flow of interstate commerce to the extent that tobacco advertising would be prohibited in the out-of-state activity of Wisconsin publications and broadcasts. The only question is whether such interference amounts to an undue burden upon interstate commerce.

The line of demarcation between permissible and unconstitutional restraints upon interstate commerce is often ob-
scure. Generally, however, the constitutionality of state regulation of advertising depends upon factors such as the product involved, the advertising media affected, the need for national uniformity and the extent of congressional action in the area regulated. See 3 Am. Jur. 2d, Advertising, §5; 10 L. ed. 2d 983, "Statute or ordinance regulating or prohibiting advertising as unconstitutional burden on interstate commerce—federal cases." Thus, legislation prohibiting the advertising of certain products that might be offensive to public decency, such as birth control devices, have been upheld as valid exercises of the state's police power. See, for example, State v. Arnold, (1935) 217 Wis. 340, 258 N. W. 843. And, in a leading case, the United States supreme court permitted the application of a state statute prohibiting the advertising of the price of eyeglasses against a newspaper and radio station operating in interstate commerce on the ground that the regulated field did not require national uniformity and there existed no conflict with any federal regulatory system. Head v. New Mexico Board of Examiners, supra. And see 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.

In the field of tobacco advertising, the United States supreme court has upheld the constitutionality of a state statute prohibiting the advertising of tobacco products on billboards, street car signs and placards. Packer Corporation v. Utah, (1931) 285 U.S. 105, 76 L. ed. 643, 52 S. Ct. 273. The court in the Packer case was careful to point out, however, that the prohibition against tobacco advertising operated "wholly intrastate, beginning after the interstate movement of the poster * * * ceased." Packer Corporation v. Utah, supra, 285 U.S. 105, 111. On the other hand, there is case law to the effect that state legislation banning tobacco advertising in newspapers and other media in interstate commerce is unconstitutional. In Little v. Smith, (1927) 124 Kan. 237, 257 P. 959, and State v. Salt Lake Tribune Pub. Co., (1926) 68 Utah 187, 249 P. 474, the highest courts of Kansas and Utah held that a state may not prohibit tobacco advertising in newspapers engaged in interstate commerce even though the papers are published within the state. And
in *Post Printing & Publishing Co. v. Brewster*, (D.C. Kan., 1917) 246 F. 321, it was held that a state statute prohibiting tobacco advertising could not be applied to restrain the tobacco advertising of an out-of-state newspaper selling within the state. All three of these cases were based upon the proposition that state legislation forbidding tobacco advertising in newspapers engaged in interstate commerce constitutes an undue burden upon that commerce.

Since these decisions were handed down, persuasive medical evidence has been collected relating to the harmful effects of smoking tobacco products. Such evidence might be viewed as justifying more extensive state control over the advertising and sale of tobacco products. Congress, however, rather than encouraging state control over tobacco advertising, has clearly enunciated a policy that nationwide uniformity is essential in dealing with the possible hazards of smoking. This policy is set forth in the comprehensive Federal Cigarette Labeling and Advertising Act, 15 USC §§1331-1339, Act of July 27, 1965, 79 Stat. 282, as follows:

"§ 1331. Congressional declaration of policy and purpose

“It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

“(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

“(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.”

It is quite clear that congress, by including the above quoted language in the Federal Cigarette Labeling and Advertising Act, has declared that problems with respect to cigarette advertising are to be handled by a comprehensive nation wide program rather than by diverse state advertis-
ing regulations. In light of such a declaration Senate Bill 291 would most certainly unduly interfere with interstate commerce. The bill would create the anomalous situation in which a Milwaukee newspaper selling in Chicago could not contain a cigarette advertisement while a Chicago newspaper selling in Wisconsin could publish cigarette advertisements with impunity. In my opinion, such a law would be exactly the type of diverse advertising regulation which congress intended to avoid and would therefore constitute an undue restraint upon interstate commerce.

Indeed, there is considerable evidence to support the conclusion that the Federal Cigarette Labeling and Advertising Act pre-empts all state legislation relating to cigarette advertising and health. 15 USC §1334 (b), under the heading “Pre-emption”, provides that:

“(b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.”

Certainly this section pre-empts all state legislation requiring a statement relating to smoking and health in the advertising of cigarettes. Read together with the policy statement in 15 USC §1331, it probably even pre-empts all state legislation of any nature relating to cigarette advertising and health. For it is well settled that when congress exerts its authority over a subject in interstate commerce by means of a comprehensive regulatory program, it is deemed to have occupied the field, thus displacing or forbidding regulation of the same subject by the states. Campbell v. Hussey, (1961) 368 U.S. 297, 7 L. ed. 2d 299, 82 S. Ct. 327, reh. den. 368 U.S. 297, 7 L. ed. 2d 547, 82 Sup. Ct. 596; State of California v. Taylor, (1956) 353 U.S. 553, 1 L. ed. 2d 1034, 77 S. Ct. 1037; United Auto, Aircraft and Agr. Implement Workers of America v. Wisconsin Employment Relations Board, (1955) 351 U.S. 266, 100 L. ed. 1162, 76 S. Ct. 794. For example, in Campbell v. Hussey, supra, it was held that the declaration of purpose in the Tobacco Inspection Act, 7 USC §511 (a), to the effect that “uniform standards of classification and inspection [are] imperative” pre-empted state
law covering the same area even though there was no showing that the state law in question conflicted with federal law.

Absent any case law construing the Federal Cigarette Labeling and Advertising Act, it is difficult to determine to what extent state authority to regulate cigarette advertising has been pre-empted. For example, to what extent if any has the application of state false advertising and unfair trade practice statutes to cigarette advertising been displaced by the Act? Such questions can obviously only be answered on a case-by-case basis so that no general guidelines concerning the types of state legislation that have been pre-empted by the federal Act can be formulated in this opinion.

In any event, it is quite clear that Senate Bill 291 would conflict with the congressional policy of national uniformity set forth in the Cigarette Labeling and Advertising Act. It is therefore my opinion that Senate Bill 291, if enacted into law, would be unconstitutional as imposing an undue restraint upon interstate commerce in violation of the commerce clause of the federal constitution.

BCL:JDJ

Constitutionality—Annexation—Bill 210, S., which establishes a new municipal annexation procedure and provides for state administrative review of municipal decisions not to accept annexations proposed under sec. 66.021, would be constitutional.

June 20, 1967.

The Honorable, The Senate

By Senate Resolution 18, an opinion is requested on the constitutionality of Senate Bill 210 relating to the annexation of unincorporated territory to cities and villages.

Senate Bill 210 proposes two revisions in the law governing annexations. One revision would establish an entirely
new alternative procedure for annexations started by a city or village. The second revision would provide a procedure for state level administrative review of municipal decisions to reject annexations which are proposed by residents of town territory.

I. Constitutionality of the new annexation procedures proposed in Senate Bill 210

According to Senate Bill 210, annexation could be initiated by adoption of a resolution by a city council or village board. The resolution, which needs a two-thirds vote for passage, would declare the intent of the municipality to annex territory. This resolution would be sent to the circuit court with a petition for court approval of the proposed boundary change. The resolution and petition would also be sent to the director of the planning function in the Wisconsin department of resource development.

The court and the director would hold separate hearings and make separate findings. The court would determine whether the annexation is "reasonable," and the director would determine whether the annexation is "in the public interest." The bill specifies standards and factors by which these determinations are to be made. The director's determination on the public interest question would be reviewable by the court under ch. 227 procedures.

A negative determination by the court on the question of reasonableness would cause dismissal of the petition. A favorable determination by the court would need to be joined by a favorable determination by the director on the question of "public interest," before the annexation petition could receive final approval of the court.

The court determination of reasonableness is governed by the following section of the bill:

"Unincorporated territory to be annexed under this section must be reasonably suitable and adaptable to the needs of the annexing city or village as determined by the court. The determination of the court shall be based upon factors, such as a substantial increase in population; a need for addi-
tional area for construction of homes, mercantile, manufacturing or industrial establishments; a need for additional land area to accommodate the present or reasonably anticipated future growth of the municipality; the extension of police, fire, sanitary protection or other municipal services to substantial numbers of residents of adjacent areas.”

The director's determination of public interest is governed by this language:

"* * * In determining whether an annexation is in the public interest, the director shall consider and make findings in accordance with the following standards:

"(a) Whether the territory is reasonably compact in relation to the existing boundaries of the annexing city or village;

"(b) Whether the annexation would be conducive to the good order and welfare of the territory proposed to be annexed;

"(c) Whether it is feasible for the annexing city or village to provide necessary municipal services within a reasonable time, and whether the services could be better provided by another existing municipality;

"(d) Whether in a metropolitan community, as defined in s. 66.013 (2) (c), the annexation will have an adverse effect upon the future rendering of governmental services within the territory proposed to be annexed or elsewhere within the metropolitan community.”

The Wisconsin supreme court has often held that annexation is a legislative function. Scott v. Merrill, (1962) 16 Wis. 2d 91, 113 N. W. 2d 846; Madison v. Monona, (1960) 10 Wis. 2d 32, 102 N. W. 2d 206; City of Milwaukee v. Sewerage Commission, (1954) 268 Wis. 342, 67 N. W. 2d 624. This broad "prerogative of the legislature to fix the ground rules for the annexation of territory," Scott v. Merrill, supra, is limited only by state constitutional restrictions. Hunter v. City of Pittsburgh, (1907) 207 U.S. 161.

A 1961 Wisconsin Law Review comment stated:
“In Wisconsin, the constitution does not place many serious restrictions on the exercise of the annexation power. The only significant provision is the prohibition on special legislation amending municipal charters. (Wis. Const. Art. IV, §31, par. 9) This provision has been held to prohibit the legislature from passing special annexation laws affecting particular municipalities. State ex rel. City of Shawano v. Engel, (1920) 171 Wis. 299, 177 N. W. 33; Smith v. Sherry, (1880) 20 Wis. 210, 6 N. W. 561.”


The procedure spelled out by Senate Bill 210 does not appear on its face to be limited to any particular municipality. It applies to all cities and villages without distinction as to class. The restrictions on the type of land that may be annexed under the procedures it proposes are general and do not indicate that only particular areas in the state could meet approval. It therefore appears that the constitutional restriction on special legislation, Art. IV, sec. 31, Wis. Const., would not be violated by the bill.

It may be questioned whether Senate Bill 210 is consistent with the separation of powers between the legislature and the judiciary. Separation of powers have been held to be an implicit guarantee of the state constitution. Clintonville Transfer Lines v. Public Service Commission, (1945) 248 Wis. 59, 21 N. W. 2d 5.

The circuit court would, under Senate Bill 210, be required to make an original determination on the question of whether the “unincorporated area to be annexed * * * [is] reasonably suitable and adaptable to the needs of the annexing city or village.” This determination is entirely distinct from the court’s other duty under Senate Bill 210 of reviewing the director’s determination on the question of public interest. The latter function is one of ordinary judicial review of an administrative decision pursuant to the review standards of ch. 227. On the other hand, when the court is making an original determination of reasonableness it is quite clearly approaching confrontation with “a question of
public policy and statecraft, not in any sense a judicial question * * *, the kind of determination that cannot be delegated to the courts. *In re Incorporation of Village of North Milwaukee*, (1896) 93 Wis. 616, 624, 67 N. W. 1033, 1036.

However, it is instructive to examine the origin of the “reasonableness” test for annexations and the precise language employed in the bill to outline the proposed duty of the courts. The recent case of *Elmwood Park v. Racine*, (1965) 29 Wis. 2d 400, 139 N. W. 2d 66, provides this background. In this case the supreme court quoted with approval from the trial court’s memorandum opinion as to the following principles:

1. That Wisconsin courts have authority to review annexations and apply “the test of reason.”

2. That this authority “is firmly established in the Case Law of Wisconsin.”

3. That this authority has been applied to post — 1959 annexations undertaken pursuant to Wis. Stats., sec. 66.021 which provides for advisory determinations of public interest by a state officer — the director of the planning function in the Department of Resource Development.

4. That “the rule of reason with respect to the enlargement of boundaries of a municipal corporation, may be satisfied by the establishment of a number of factors, among which we note, by way of illustration, a substantial increase in population; a need for additional area for construction of homes, mercantile, manufacturing or industrial establishments; a need for additional land area to accommodate the present or reasonably anticipated future growth of the municipality; the extension of police, fire, sanitary protection or other municipal services to substantial numbers of residents of adjacent areas.” Quoting from *Nix v. Village of Castor*, (La. 1959) 116 So. 2d 99, 101.

The *Elmwood Park* decision therefore holds that a judicially promulgated test of “reasonableness” may be applied by courts to annexation questions, even when there is no statutory mandate for such a test and regardless of whether
a particular annexation statute provides for a public interest opinion by a state administrative officer. The opinion also approves, as a definition of "reasonableness," precisely the language used in Senate Bill 210 to define the court's original determination role.

It is impossible for me to conclude that our court would hold the statutory delegation proposed by Senate Bill 210 invalid as a shifting of legislative functions to the circuit court when the bill does nothing more than codify a long-standing "common law" division of responsibilities which the supreme court has originated and repeatedly reaffirmed. The fact that the director's determination of public interest would have more weight under Senate Bill 210 than it has under present sec. 66.021, Stats., procedures appears to have a neutral bearing on the separation of powers question. Thus I must conclude that Senate Bill 210 would not violate the state constitution with respect to separation of powers or special legislation.

This opinion does not conflict with the memorandum decision of Circuit Judge Orton in the case of In the Matter of the Petition of the City of Beloit, decided in the Rock County Circuit Court on May 12, 1967. Judge Orton's decision holds that courts may not make public interest determinations under 66.021 (11) (b). The judicial determination of public interest called for under 66.021 (11) (b) is a determination established by the legislature. It does not share the judicial or "common law" origin of the "rule of reason." It is much more likely, therefore, that the courts might find the public interest test an invalid delegation of power to the judicial branch of government. See also Sharping v. Johnson, (1966) 32 Wis. 2d 383, 34 N. W. 2d 11.

II. Constitutionality of the new administrative review procedures proposed in Senate Bill 210 to apply to municipal rejection of annexations proposed by town residents.

Under the main annexation law now on the books, sec. 66.021, Stats., annexations are begun by petitions submitted to the city or village by electors and property owners in the area to be brought within the municipality. The petition asks either for "direct annexation" or "annexation by refer-
endum," depending upon what proportion of electors and property owners are willing to sign the petition.

The governing body of the annexing municipality may effect the annexation by adopting an ordinance by a two-thirds vote after successful completion of any necessary referendum. If the annexation involves one square mile of land or more the municipality must have its action in accepting the annexation reviewed by the circuit court, which applies a "public interest" test after obtaining an advisory report from the director of the planning function. Under present law, the municipality has the option of refusing the annexation even if all electors and property owners in the proposed area want to join the city and have taken all necessary steps toward that end.

Senate Bill 210 would amend this procedure to provide that if a city or village rejects an annexation properly proposed under 66.021, the person who initiated the proposed annexation could "file an objection with the director" of the planning function. The director would make a public interest determination which could then be appealed by an aggrieved party through the normal administrative review process. The bill as now drafted fails to spell out what would happen upon a favorable determination by the director. A negative finding by the director presumably would ratify the council or board's negative position. However, even if the bill were amended to provide that the director could, in effect, overrule the local governing body and force adoption of the annexation ordinance, upon an administrative determination that the annexation would be in the public interest (see Comment, 1961 Wis. L. Rev. 123, 139), there would appear to be no constitutional problems. This procedure would fall well within the sweeping authority the legislature holds over annexation procedures.

It is therefore concluded that the annexation procedures proposed in Senate Bill 210 would not violate the state constitution.

BCL:RAL
Courthouse—General fund—Appropriations—Funds specifically allocated over the years for construction of a courthouse can only become a part of the general fund again by two-thirds vote of the entire board. The same holds for funds appropriated for highway purposes.


ALEX J. RAINERI

District Attorney, Iron County

You ask my opinion on this question: Can monies set aside and accumulated by the county board of Iron county over a period of some years for the purpose of building a new court house, be transferred in whole or in part to the general fund of such county? As background for this question, you state:

The Iron County Board of Supervisors for several years has been setting aside $5000 in a court house fund for the building of a new court house. They have accumulated some $110,000. Now, they have decided that under present conditions a new court house is unnecessary.

You have further informed me that although at one time such board submitted an application to the federal government for a so-called "area rehabilitation loan," to be used to finance in part the building of a new court house, such application was subsequently withdrawn by the board. Moreover, a resolution that such court house be constructed was rescinded. In connection with the above mentioned application, plans for a new court house were prepared by an architect who was paid in full for his services. No present contract exists between Iron county and any architect for further work in connection with the new court house. No contract for its construction now exists, nor has any such contract ever existed.

However, the municipal accounting division of the department of state audit reports that an analysis of the Iron county court house budget reveals there is a segregated fund for the construction of a new court house. As of December
31, 1965, the court house account had accumulated $125,944.04. Consequently, it appears that there is a "definite and positive" appropriation of monies for the specific purpose of building a new court house.

In *Fiore v. Madison*, (1952) 264 Wis. 482, 59 N. W. 2d 460, the common council of Madison appropriated $600,787.06 from its general fund to a "city-county nonlapsing building-reserve fund." The plaintiff contended that at the time of the adoption of the budget this amount was unallocated surplus funds required by law to be applied to budgeted expenses and to reduce the amount to be raised by taxation.

The court in *Fiore* stated that the definite and specific appropriation made by the council ceased to be an unallocated surplus available to defray budget costs in relief of taxes. 264 Wis. 482, 486. Since it appears Iron county also made a definite appropriation to the court house fund, then such fund would not be part of the general fund. It will only become such when authorized by a vote of two-thirds of the entire membership of the county board. See 65.90 (5) (a), Stats. Also, 46 OAG 230, 231 (1957).

You also ask my advice on this question: Can the Iron County Board of Supervisors by resolution transfer into the general fund of the county certain funds which have been set aside for highway purposes and which are held by the highway committee of the board?

As background for this question, you have informed me that the funds therein involved have definitely been appropriated for highway purposes. You also have advised me that such appropriation is made from general property taxes levied by the county.

Where a county board by definite appropriation for a specific purpose creates a fund with the monies therefor derived from general property taxes and not "earmarked" by statute for some particular usage, it is my opinion that such fund cannot be considered as "funds on hand" within the meaning of that term as employed in 65.90 (1), nor can it be considered as part of the general fund of the county. See 37 OAG 586-589; *Fiore v. Madison*, (1952) 264 Wis. 482. A
transfer of a fund of this kind, such as the "highway purposes" fund referred to in your above stated question, to the general fund of the county can only be effected pursuant to 65.90 (5) (a). Under such statute, a vote of two-thirds of the entire membership of the above mentioned board would be required in order to effect the transfer.

BCL:JHM

Municipalities—Oak Creek law—The amendments proposed by Bill 582, A., relative to the incorporation of towns under certain conditions would probably be constitutional only if such were subject to review.


THE HONORABLE, THE ASSEMBLY

By Assembly Resolution 20, an opinion has been requested on the validity of Assembly Bill 582 which sets forth a method by which towns may become cities.

Under current law, a town may be incorporated as a fourth-class city if it contains more than 5,000 population and more than $20 million in equalized valuation and if it is adjacent to a city of the first class. Sec. 60.81, Stats. This provision which was enacted in 1955 is commonly known as the "Oak Creek Law".

Assembly Bill 582 would amend the Oak Creek law to permit incorporation as a third or fourth-class city of any town having population in excess of 5,000 and equalized valuation in excess of $20 million. The requirement that the town be adjacent to a first-class city would no longer apply. The result of the amendment proposed in Assembly Bill 582 would be to allow incorporation of towns having between 5,000 and 39,000 population, since the latter figure is the top limit set by statute for third-class cities. Sec. 62.05.

In a 1955 opinion of the attorney general, it was stated that the bill which created present sec. 60.81 "appears on
its face to be in possible conflict with Art. IV, secs. 23 and 31, Wis. Const.” 44 OAG 151. The bill nevertheless was enacted. To date its validity has not been challenged in the supreme court. In Milwaukee v. Oak Creek, (1959) 8 Wis. 2d 102, 98 N. W. 2d 469, the city of Milwaukee attempted to challenge an incorporation begun under sec. 60.81, but was held not to be a party in interest. An objection to the attack was sustained and the merits were never reached by the court.

The opinion at 44 OAG 151 concluded that the three conditions for application of the Oak Creek law—namely, population in excess of 5,000, equalized valuation in excess of $20 million, and location next to a first-class city—might be found only in “an unwarrantedly restricted” number of places in the state. If the law had this practical effect, it might violate the constitutional prohibition against “special” legislation relating to municipal incorporations, Art. IV, sec. 31, Wis. Const., and the constitutional guarantee of one system of town and county government as nearly uniform as practicable, Art. IV, sec. 23, Wis. Const.

It is improbable that this objection can be maintained in relation to Assembly Bill 582. The bill makes the powers of the Oak Creek law available to more areas of the state, by virtue of abandoning the proximity to a first-class city requirement and by raising the population ceiling.

44 OAG 151 discussed, but did not rest upon, the “Lammers” doctrine. This doctrine, which originated in State ex rel. Holland v. Lammers, (1902) 113 Wis. 398, 86 N. W. 501, holds that areas cannot be incorporated as cities or villages unless they have certain urban characteristics. See Cutler, “Characteristics of Land Required for Incorporation or Expansion of a Municipality,” 1958 Wis. L. Rev. 6, 10-12. The doctrine is grounded in Art. XI, sec. 3 and Art. IV, sec. 23, Wis. Const.

The Oak Creek law has been described as an attempt by the legislature to repeal the Lammers doctrine, Cutler, supra at p. 13, since the law fails to require the presence of city
or village attributes such as urban population density, see sec. 66.015, or "a reasonably compact center or nucleus of population," see In re Village of Oconomowoc Lake, (1955) 270 Wis. 530, 535, 72 N. W. 2d 544, 547. There is nothing to indicate that Assembly Bill 582 would make the Oak Creek law more consistent with the Lammers doctrine. The proposed amendment would allow towns of greater population to be incorporated. This does not, however, guarantee that towns of greater population will have urban densities, or settlements with urban characteristics. See secs. 66.015 and 66.016. The bill would eliminate the requirement that towns incorporated under the Oak Creek law be adjacent to a large city. Thus, any town in Wisconsin with $20 million in equalized valuation and between 5,000 and 39,000 population could become a city, without any requirement that it be within the orbit of a large city or metropolitan complex. If anything, the amendments proposed by Assembly Bill 582 would tend to accommodate areas which could not meet even a liberalized interpretation of the urban characteristics test.

Questions have been raised in recent years about whether the court will continue to apply the Lammers doctrine. See Cutler, supra pp. 35-38. A portion of the court's opinion in Scharping v. Johnson, (1966) 32 Wis. 2d 383, 145 N. W. 2d 691, creates some confusion on this subject. In Scharping the court upheld a circuit court's judgment affirming the determination of the director of the planning function denying a petition for incorporation of a proposed village. The petition for incorporation was made pursuant to secs. 66.013—66.019. In the concluding paragraph of the opinion, the court stated at pp. 397-398:

"The appellant also claims that the statutory scheme of classification offends against sec. 23, Art. IV (uniform town and county government), and sec. 3, Art. XI (home rule), Wisconsin constitution. The appellant has not defined his objections based on these sections of the constitution. However, a perusal of these sections of the constitution makes apparent their inapplicability to the case at hand. Even assuming the relevance of these sections, it is apparent that
they are concerned with the treatment of municipalities and their form of government after organization and not with the constitutional power to create cities and villages by act of the legislature.” (Emphasis supplied.)

Art. IV, sec. 23, is of course the principal constitutional base for the Lammers incorporation rule. In the past the court has clearly stated that the provision applies to formation of municipalities, but not to subsequent boundary changes through annexation. For example, in Town of Brookfield v. City of Brookfield, (1957) 274 Wis. 688, 644, 80 N. W. 2d 800, 803, the court said: “Whether or not an area has the characteristics of a city is not an issue in annexation proceedings. It is an issue in incorporation proceedings.”

I do not feel that the quoted language from the Scharping opinion can be interpreted as a deliberate repeal of the Lammers doctrine. The language was mere dicta. It also is inconsistent with a prior footnote in the opinion. In commenting upon the director’s findings that the area proposed for incorporation was not “reasonably homogeneous and compact,” the court noted:

“This decision accords with decisions by this court involving the earlier incorporation statutes, which held that a village may not be incorporated where the territory to be included therein involves a large amount of sparsely settled rural or agricultural lands not having the distinctive characteristics of the village area itself. See In re Town of Hallie, (1948) 258 Wis. 35, 38, 39, 33 N. W. 2d 185; In re Village of Elmwood Park, (1960) 9 Wis. 2d 592, 600, 101 N. W. 2d 659 (concurring opinion of Mr. Justice Currie).” 32 Wis. 2d 383, 391, 145 N. W. 2d 691, 696 (1966).

Both of the cited opinions applied Art. IV, sec. 23, to incorporations. Thus I do not believe that the dicta in the concluding paragraph of the Scharping opinion can reasonably be interpreted as a reversal of the long standing doctrine that Art. IV, sec. 23, is applicable to municipal incorporations; and that this provision requires that areas proposed for incorporation have urban characteristics.
The 1959 legislature enacted new incorporation statutes which provide for dual court and administrative review of incorporation proposals. Secs. 66.013—66.019, Stats. The statement of purposes to this act declares:

“It is declared to be the policy of this state that the development of territory from town to incorporated status proceed in an orderly and uniform manner and that toward this end each proposed incorporation of territory as a village or city be reviewed as provided in ss. 66.013 to 66.019 to assure compliance with certain minimum standards which take into account the needs of both urban and rural areas.” Sec. 66.013 (1), Stats.

The statutes establish procedures for referral of incorporations to the circuit court and the director of the planning function in the Wisconsin department of resource development. The court is empowered to review a proposed incorporation for minimum requirements relating to population, area and density. The director of the planning function is empowered to determine whether the proposed incorporation is in the “public interest” according to statutory standards. After these reviews have been successfully accomplished the proposal is put to a referendum vote. The dual reviews are intended, in part, to assure that areas proposed for incorporation have minimum population densities and contain an urban “core” area. In short, they call for the factors sought in the Lammers test.

The Oak Creek law makes no mention of the dual review procedures, nor does Assembly Bill 582 which would amend that law. It is unclear whether secs. 66.013—66.019, Stats., the review procedures, would apply to annexation of towns begun under 60.81. On the one hand, 66.013 (1) speaks of application to “each proposed incorporation of territory as a city or village.” See also Report of the Interim Urban Problems Committee to the 1959 Legislature, 14 (1959). On the other hand, the Oak Creek law fails to provide procedures for routing a proposed incorporation to the court and state administrative officer for review prior to referendum.

If a challenge were to be made to a town incorporation begun under 60.81, I believe it probable that the court would
apply some version of the Lammers test to the proposed incorporation. See Cutler, supra, note 63 at pp. 24 and 38. The court might apply its own definition of urban characteristics. See State ex rel. Holland v. Lammers, supra; In re Village of Oconomowoc Lake, supra; In re Village of Oconomowoc Lake, (1959) 7 Wis. 2d 400, 97 N. W. 2d 189; In re Village of Elmwood Park, (1960) 9 Wis. 2d 592, 101 N. W. 2d 659.

On the other hand, it is conceivable that the court could hold that incorporations begun under the Oak Creek law are subject to the urban characteristics requirements of secs. 66.013 — 66.019, Stats. It was clearly the intent of the 1959 legislature to subject all new incorporations to the dual review process established in the new incorporation statutes. Report of the Interim Urban Problems Committee, supra. The fact that the 1959 legislature did not amend 60.81 to provide directives for court and state agency review undoubtedly reflected a judgment that the Oak Creek law would have only a one-time application. Report of the Interim Urban Problems Committee, supra at 10.

The court could, therefore, save the constitutionality of 60.81 by holding that the powers of the statute are available only where a town has urban characteristics. The court took this approach in the Lammers case itself, holding that a statute which on its face allowed incorporation of any town land of more than one-half square mile in area and containing 300 or more residents would be valid if it were subject to an “implied limitation” of applicability only where land proposed for incorporation had requisite urban characteristics. State ex rel. Holland v. Lammers, (1902) 113 Wis. 398, 415, 89 N. W. 501, 503. However, the existence of the incorporation review procedures in 66.013—66.019, and the evidence that it was the intent of the 1959 legislature to apply the review tests to all incorporations commenced after 1959, makes it more likely that the court would hold that incorporations begun under sec. 60.81 (either in its present form or as amended by Assembly Bill 582) are subject to the new review standards.

It therefore is my opinion that Assembly Bill 582 would be valid only if incorporations commenced under its authori-
ty are consistent with judicial or statutory tests of urban characteristics. It is my further opinion that the court would probably hold that incorporations pursuant to sec. 60.81, as amended by Assembly Bill 582, are subject to the review standards contained in secs. 66.013—66.019.

Animals—Constitutionality—Sec. 174.13 (4) is constitutional.


THE HONORABLE, THE SENATE

By Senate Resolution 22 you have requested my opinion as to the constitutionality of sec. 174.13 (4), Stats., which reads:

"(4) It shall be unlawful for any person to take or send outside the state or to purchase or otherwise acquire in this state for the purpose of taking or sending outside the state, any living cat or dog to be used for any medical, surgical or chemical investigation, experiment or demonstration."

Sec. 174.13 (1), reads:

"(1) The public health and welfare of this state as expressed by existing statutes is protected and promoted by permitting the humane use of animals for diagnosis and treatment, thereby aiding in the advancement of veterinary, dental, medical and biological sciences, and in the testing, improvement and standardization of laboratory specimens, biological products, pharmaceuticals and drugs. It is the purpose of this section to assure that there shall be an adequate supply of dogs for these purposes."

Subsec. (2) of such statute deals with the disposition of unclaimed or unredeemed live dogs. Subsec. (3) of such statute imposes certain requirements of record keeping and
report making on persons or organizations having custody of unclaimed or unredeemed dogs, and gives the state board of health authority to enforce such statute through inspection of records and other means; and subsec. (5) of such statute provides for the imposition of certain penalties upon any humane society which fails or refuses to comply with the provisions of subsec. (2) of such statute in regard to the disposition of unclaimed or unredeemed live dogs.

Sec. 174.13 (4) is, of course, entitled to the presumption of constitutionality accorded all acts of the legislature. See Forest Home Dodge, Inc. v. Karns, (1965) 29 Wis. 2d 78, 93. This opinion is, however, not grounded on such presumption, but on bases hereinafter shown.

It is my opinion that 174.13 (4) is constitutional, not only as it applies to unclaimed or unredeemed dogs and cats, but to such animals in the possession of their private owners.

Regents v. Dane County Humane Society, (1951) 260 Wis. 486, clearly establishes the constitutionality of 174.13 (4) as applied to unclaimed or unredeemed dogs. Such case involved a challenge to the constitutionality of 174.13 (2), but the following statement therein manifestly applies to (4) thereof, insofar as that statute applies to unclaimed or unredeemed dogs. The court stated at p. 491:

"It does not require serious argument to establish that the capture and impounding of stray dogs and the disposition of them is a proper exercise of the police power of the state. 2 Am. Jur., Animals, pp. 719, 721, 799, secs. 31, 34, 146. As such, the state may impose the rules and the conditions under which the power is exercised. We have not found any law which confers a property right in such a dog in the person or society reducing the dog to custody. Without a property right in the dog there is no property right to dispose of it. Such rights do not accrue from mere custody. * * *" (Emphasis supplied.)

While the above quoted language from Regents v. Dane County Humane Society (and the Am. Jur. citations referred to therein) deal with stray dogs and not with stray cats, there is ample authority showing that the police power of
the state is as properly exercisable with respect to stray cats as to stray dogs. In 4 Am. Jur. 2d, Animals, §48, it is stated:

"The necessity for summary treatment of property interests in stray cats and dogs is unquestioned, and where a statute reasonably treats lost cats and dogs as abandoned property, the former owners have no remaining property interest which the constitutions protect, and the state may assert a paramount interest in respect to the ownership, disposition, or use of such property. It may take title to, or destroy the property, or authorize its destruction as a potential nuisance, and, absent a constitutional prohibition, there is nothing which bars the state from the alternative course of requiring and using its agencies to facilitate some other disposition of abandoned animals. Thus, a state may by statute provide that impounded dogs and cats which fall within the meaning of abandoned property, may be turned over to specified institutions for medical experimentation and research, and it is not essential to the validity of such a statute that there be no other sources of experimental animals, since the police power of a state extends to preventing waste of resources which can be usefully devoted to the public health and welfare. * * *

It is true that while 174.13 (4) refers to "any living cat or dog" and sets forth prohibitions relative to the disposition of either, (1) thereof states that, "It is the purpose of this section to assure that there shall be an adequate supply of dogs for" the purposes set forth therein. The failure of 174.13 (1) to indicate a purpose to maintain an adequate supply of cats as well as dogs in this state for the purposes therein described is not, in my opinion, fatal to the constitutionality of subsec. (4) of such statute, as applied to stray cats. Despite the omission (apparently mere oversight) of any reference to "cats" in 174.13 (1), it is clearly the purpose of subsec. (4)—a valid, police power purpose—to conserve in the interests of public health and welfare in this state not only the supply of dogs herein for the kinds of "investigation, experiment or demonstration" described therein, but also the supply of cats to be used therefor. It is not essential to the constitutionality of 174.13 (4) as applied to
stray cats that such purpose be expressly spelled out in the statute, where it is so clearly evident in the light of the common knowledge that cats as well as dogs are used in scientific experiments beneficial to mankind, and in the light of the language of the first sentence of 174.13 (1) (with its reference to "animals", not merely "dogs").

Is sec. 174.13 (4) constitutional when applied not to the stray dog or cat, but to the dog or cat in possession of its owner?

There can be no doubt that dogs are property in this state, and their owners "are protected in their property rights by law". *Hagenau v. Millard*, (1924) 182 Wis. 544, 548. While Wisconsin case law contains no such holding as to cat owners, I am certain that their property rights, too, are entitled to protection under our laws, since "It is generally recognized that the owner of a cat has a property right therein, subject to the police power of the state and the reasonable demands of civilized society." 4 Am. Jur. 2d, Animals, §7. So when 174.13 (4) is applied to the dog or cat in possession of its owner, it is clear that it imposes a statutory qualification of such animal ownership, in that it denies to such owner the property right which he would have absent such statute, "to take or send outside the state" his living cat or dog "to be used for any medical, surgical or chemical investigation, experiment or demonstration". Is the denial of such right in any sense unconstitutional? In my opinion, it is not. Such denial is, in my judgment, a lawful exercise of the police power which the legislature determined to be in the best interests of public health and welfare in this state.

It is a matter established beyond dispute that, "The use of all property is subject to the police power of the state, to be exercised for the protection of the health, safety and general welfare of the public * * *". *David Jeffrey Co. v. Milwaukee*, (1954) 267 Wis. 559, 578. A host of authorities supports this principle, among them 16 Am. Jur. 2d, Constitutional Law, §290, wherein it is stated (pp. 564-566):

"* * * the fact that rights of property are protected by constitutional guaranties does not mean that the use thereof
cannot be regulated under the police power in behalf of the general welfare. No rule in constitutional law is better settled than the principle that all property is held subject to the right of the state reasonably to regulate its use under the police power, and that the possession and enjoyment of all rights are subject thereto, in order to secure the general safety, public welfare, public convenience, and general prosperity, and the peace, good order, and morals of the community. * * *” (Emphasis supplied.)

This principle sustains as lawful the exercise of the police power found in 174.13 (4) as applied to the dog or cat in the possession of its owner. It is plain from the language of 174.13 that the legislature, in enacting the prohibitions of subsec. (4) thereof, did so after having arrived at a judgment that the supply of dogs and cats in this state required protection. The prohibitions were enacted to keep an adequate supply for “the humane use of animals for diagnosis and treatment” referred to in 174.13 (1) which use, in the further judgment of the legislature expressed in such statute, “protected and promoted” the “public health and welfare of the state”. It would be presumptuous of me to fault the statute here in question on constitutional grounds by taking issue with such judgments of the legislature, especially in view of our supreme court’s recently expressed approval of the proposition that a legislative judgment is “presumed to be supported by facts known to the legislature unless facts judicially known or proved preclude that possibility”. South Carolina Highway Dept. v. Barnwell Brothers, (1938) 303 U.S. 177, 191, 58 S. Ct. 510, 82 L. ed. 734, cited with approval in Clark Oil & Refining Corp. v. Tomah, (1965) 30 Wis. 2d 547, 553. It must be presumed that the legislature in enacting 174.13 “knew the existing facts” and had “made careful investigation of the entire situation” leading to its enactment. See State ex rel. Madison v. Industrial Comm., (1927) 193 Wis. 423, 448.

Finally, in addition to the opinions above expressed it is my further opinion that 174.13 (4) is constitutional in its application to any person seeking “to purchase or otherwise
acquire in this state for the purpose of taking or sending outside the state, any living cat or dog to be used for any medical, surgical or chemical investigation, experiment or demonstration”. Such person clearly has no property right, even an inchoate one, in dogs or cats he intends to purchase or otherwise acquire for the purpose described in the statute, but if he had such a right it would be subject, for reasons hereinabove discussed, to the valid exercise of the police power represented by 174.13 (4). He might conceivably claim, not a property right in the living dogs or cats in this state which he intended to acquire for the purpose referred to in 174.13 (4), but simply a right wrongfully denied by such statute, to acquire such animals for that purpose by purchase or otherwise. But such right in my judgment would be properly denied him by 174.13 (4) as a valid exercise of the police power serving the public health and welfare of this state.

BCL:JHM

Public Assistance—Medical aid—Where a recipient of medical assistance under the statutes has no legal settlement in the state, no county is liable for pro-rata share nor eligible for share of federal reimbursement. Parental legal settlement discussed.


WILBUR J. SCHMIDT, Director,
Department of Public Welfare

You ask a number of questions regarding application of the new reimbursement and charge back formula under the medical aid program established by ch. 590, Laws of 1965.

Ch. 590, Laws of 1965, as applicable to your questions created secs. 49.45, 49.46, 49.47 and 49.52, Stats.

Sec. 49.45 deals generally with the administration of the new medical assistance program. On the subject of reimbursement 49.45 (3) provides:
“(3) REIMBURSEMENT. (a) Reimbursement shall be made to each county agency for the administrative services performed in the medical assistance program on the basis of s. 49.52 (1) (b) and (2).

“(b) The contractor, if any, making payment of benefits under s. 49.46 or 49.47 shall be entitled to reimbursement from the department for benefits so paid when a certification of eligibility is properly on file with the contractor in addition to the payment of administrative expense incurred pursuant to the contract and as provided in sub. (2) (a) 4, but the contractor shall not be reimbursed for benefits erroneously paid where no certification is on file.”

Sec. 49.46 provides medical assistance to persons who are already receiving social security aids while 49.47 provides similar benefits for those who are medically indigent as defined within subsec. (4).

The provisions relating to the sharing of federal aid and the apportioning of liability for these medical expenses between state and county are found in 49.52 (1) and (3), respectively. Sec. 49.52 (1) provides:

“Reimbursement to counties. (1) FEDERAL AID. (a) From the federal funds received by the state for grants of aid, excluding medical aid issued under s. 49.46, in the aid to the blind, aid to dependent children, old-age assistance and aid to totally and permanently disabled persons there shall be determined in each of said programs the percentage of the federal fund in relation to the total amount expended for such purpose and the state shall reimburse from these moneys to each county the percentage as computed of the total amount expended by such county in each program.

“(b) From the federal funds received by the state for the administration by counties of aid to the blind, aid to dependent children, old-age assistance and aid to totally and permanently disabled persons including medical assistance there shall be computed the percentage that such federal funds relate to the total cost of county administration of said programs and the state shall pay to the counties from
these moneys the amount determined on the basis of such percentage to the total administrative costs of each county.”

Sec. 49.52 (3) provides in part:

“(3) REIMBURSEMENT PROCEDURE, CLAIM AND AUDIT. (a) The county treasurer and county agency administrator of each county shall monthly certify under oath to the department, in such manner as the department prescribes, the claim of the county for state and federal reimbursement under this section, and if the department approves such claim, it shall certify to the department of administration for reimbursement to the county the amounts due under subs. (1) and (2) and payment claimed shall be made to the counties monthly.

“(b) Each county shall be liable for its prorata share of the medical expenses paid by the state under ss. 49.46 and 49.47 and shall reimburse the state for such prorata share. For the purposes of administration the state may deduct the amount of such medical payment owing to the state from the claim submitted under par. (a) and pay the remaining balance to the county pursuant to par. (c).”

In a large number of cases the individual receives a grant of aid from the county and medical assistance from the state under 49.46. In many other cases, an individual receives state medical assistance under 49.47, even though he is not receiving a specific grant of aid by the county. Where the certification for eligibility is made by the county of legal settlement, no problems arise concerning the application of the new reimbursement and charge formula.

The questions which you present arise from situations in which the individual is not certified by the county because he is not a resident. In such instances certification for medical aid is made through a state agency.

You illustrate the nature of this problem by reference to two situations. First, as children have the same settlement status as their parent or parents under the rules set forth in 49.10, some children do not have any legal settlement within the state as a result of the issuance by the juvenile
court of an order terminating parental rights. You indicate that these children are sometimes residents of a colony or training school and that they may continue there into adulthood. Second, there are a number of persons in mental hospitals who have no legal settlement. Your initial inquiry is whether any county should be charged for the medical aid furnished to these individuals who have no legal settlement because of the above stated circumstances.

A slightly different problem arises when dealing with children who retain legal settlement in some county because parental rights have not been terminated. These are children whose custody has been transferred to the state department of public welfare, the county department of public welfare or a private child welfare agency, by the juvenile court. In each case the responsibility for the routine care of the child lies with the particular agency and not with the parent. It has been customary, therefore, for the agency to provide all of the necessary expenses for such child including medical expenses. There is a charge back, however, to the county of legal settlement for the cost of foster care including medical expenses under 48.55, which provides:

"Liability of counties. The county of legal settlement shall be liable for the cost of care of children in legal custody of the department, except for children in homes which do not receive board payments. The charge shall be one half of the average cost, excluding administration, for children placed in foster homes by the department and for which board payments are made. These charges shall be adjusted in accordance with s. 46.106."

With the enactment of ch. 590, Laws of 1965, the medical expenses for some of these children are now covered by 49.46 and 49.47.

Against this background, you asked four questions with which I will deal in the order in which they are presented.

(1) If a person has no legal settlement in the state, should there be a charge back under 49.52 (3) to any county?
The fundamental rules relating to legal settlement are found in 49.10. In the legislative council note to Bill 14A, 1959, from which the settlement statute was enacted, the following introductory note describes the purpose and effect of 49.10:

"This bill is a complete revision of s. 49.10 of the statutes relating to the determination of legal settlement of individuals. The legal settlement of the individual, in turn, determines the liability of units of government as between each other, for the charges incurred in furnishing relief to the individual.

"This statute does not determine the eligibility of a person to obtain relief. It does fix the responsibility for support of a dependent individual upon the political subdivision which presumably benefited from his productive years."

The rule is well established, therefore, that the municipality or county is ultimately responsible for providing relief or assistance only where the applicant has legal settlement therein except where a statute expressly extends this responsibility, such as in the case of temporary assistance under 49.04 (1).

It is my opinion, therefore, that where a person has no legal settlement in Wisconsin no charge back should be made to any county under 49.52 (3). It follows that no county is entitled to any share of the federal reimbursement and that these funds are to be retained by the state.

(2) If a person with no legal settlement is committed to the division for children and youth, mental hygiene or corrections and then placed in a licensed foster home, rather than in a specific state institution, would there be a charge back to any county inasmuch as the state department of public welfare is responsible for the full care of such person?

Under 46.106 counties are liable for a share of the care of a person committed to a mental institution including a colony or training school, if such person has legal settlement in any county. All collections made pursuant to 46.10 are credited to the account of the individual with the county of
legal settlement receiving credit for its pro rata share. Under these circumstances, when the county is fully credited with the collection that county may be charged with the pro rata share which is due under 49.52 (3) (b) for expenses paid by the state under 49.46 and 49.47.

Where no legal settlement can be established in any county, there is no provision within ch. 46 or elsewhere which would make any county liable under 49.52 (3) (b). The same is true with respect to commitments to the division for children and youth or corrections division. Where there is no legal settlement, no county is liable under 49.52 (3) (b), and no county shares in the federal reimbursement under 49.52 (1).

(3) Would the answers to the above questions be any different in relation to a charge back to a county if, upon termination of parental rights, the guardianship and legal custody of the child were given to a private child welfare agency which is unable to provide the medical care needed by that child?

If a court terminates parental rights, the court may transfer guardianship and legal custody of a minor to a child welfare agency licensed to accept guardianship of children. Sec. 48.43 (1) (b). Under such circumstances, the private child welfare agency assumes the same rights and duties relative to guardianship and legal custody, pursuant to 48.02 (9) and (10) as the state department of public welfare does when it assumes guardianship and legal custody.

I find no ground upon which these two types of transfers can be distinguished so as to affect the conclusions reached under the first two questions. If there is no legal settlement in any county, the fact that a child has been placed under the guardianship of a private child welfare agency would not warrant a charge back to any county. Such child should be certified as a state charge for the purpose of receiving medical assistance benefits.

(4) In the event that the answers to the prior questions are to the effect that a charge back can be made to the county of legal settlement, would the change in the factual
situation wherein a legal settlement still exists in some county cause a change in the answer for those children, wherein only custody has been granted and legal settlement does exist?

Your department informs me that this question would typically arise where the department assumes only legal custody and not guardianship because there has been no termination of parental rights. In order to resolve this issue, it is important to distinguish between two duties set forth within 48.02 (10).

Sec. 48.02 (10) defines legal custody to include the duty to provide ordinary medical care for the child. This subsection further provides, however, that:

"* * * If legal custody is taken from a parent without termination of parental rights, the parents' duty to provide support continues even though the person having legal custody may provide the necessities of daily living."

It is clear, therefore, that the primary responsibility for medical care in such instances rests with the parents. As a minor child derives his settlement status from his parent or parents under 49.10 (2) (a) and (b), the county of the parents' legal settlement would be liable for its pro rata share of medical aid provided under 49.46 and 49.47. It follows that that county would be entitled to its share of the federal reimbursement under 49.52 (1).

BCL:DPJ

Witness fees—Law enforcement officers—Where it is the duty of a sheriff, deputy sheriff, county traffic officer or city police officer to enforce state statute or municipal ordinance he is obligated to testify without being entitled to witness fee.

June 30, 1967.
You request my opinion on a number of questions relating to the right of certain law enforcement officers to witness fees.

Your first question is whether a sheriff, county traffic officer, deputy sheriff or city police officer has an official duty to prosecute and testify when said officer has knowledge material to a violation of an ordinance or state statute and where such officer has acquired such knowledge while acting as a police officer.

Your second question is whether such officers are entitled to witness fees for testifying in cases involving violations of ordinances or state statutes, of which they have a duty to enforce, where such officers have knowledge material to the case being tried and have acquired such knowledge while acting as a police officer.

Your questions are of a general nature, and I cannot give a meaningful answer which would apply to the many different fact situations which might arise in the administration of justice. A general discussion of the area of law will be undertaken, however, as an aid to county prosecutors and court officials.

The reason you have placed question one first is because it in a large part controls the answer to question two if the general rule is applicable in Wisconsin. As stated in 30 OAG 214, 215:


The test in 97 CJS, Witnesses, §38, p. 425, states that an early Pennsylvania case held that it was not the duty of a
policeman to testify in court and that he was therefore entitled to a witness fee. While the duties of the specific officer in question must always be referred to, the rule in Wisconsin has been that, at least where the officer is so employed at the time of trial, it is his duty to testify as to information acquired while acting as such officer.

With respect to question one it may be said that if one of the specified officers has power to enforce a state statute or ordinance, it is his duty to bring the alleged violation to the attention of the prosecuting attorney or to the attention of the proper court, and to testify if need be as to matters within his knowledge and material to the trial which were acquired while acting as such officer. State v. Lombardi, (1959) 8 Wis. 2d 421, 431, 99 N. W. 2d 829.

Different officers have different statutes and ordinances to enforce and their geographical areas of jurisdiction vary.

The power of county traffic patrolmen is limited. Sec. 83.016 (1) provides in part:

“(1) The county board, or one of its committees to which it may delegate such authority, may appoint traffic patrolmen for the enforcement of laws relating to the highways or their use, or the maintenance of order upon or near the highways.”

Patrolmen also enforce county traffic ordinances but are not, as officers, charged with the duty of enforcing town, village or city ordinances. There are situations where they might be called as witnesses in relation to prosecution under one of the latter three types of ordinances, and in such cases they would be entitled to the statutory witness fee.

City policemen have powers pursuant to 62.09 (13), including:

“(13) POLICE. (a) The chief of police shall have command of the police force of the city under the direction of the mayor. It is his duty to obey all lawful written orders of the mayor or common council. The chief and each policeman shall possess the powers, enjoy the privileges and be subject to the liabilities conferred and imposed by law upon con-
stables, and be taken as included in all writs and papers addressed to constables; shall arrest with or without process and with reasonable diligence take before the municipal justice or other proper court every person found in the city in a state of intoxication or engaged in any disturbance of the peace or violating any law of the state or ordinance of such city. * * *

Sec. 60.54 provides that a constable shall, in addition to other duties, have power:

"(6) To cause to be prosecuted all violations of law of which he has knowledge or information."

Sec. 349.02 provides in part:

"It is the duty of the police and traffic departments of every unit of government and each authorized department of the state to enforce chs. 346 to 348."

Sheriffs and deputy sheriffs are primarily concerned with the enforcement of state criminal statutes and county ordinances with respect to peace and order in the county. Whether it is within their power to enforce general city, village and town ordinances in any other capacity than a citizen complaining of a violation is certainly debatable and need not be further considered here, except to note that in 46 OAG 280, 283, it is stated:

"Unless otherwise provided by statute, this general principle applies with equal force to both privately and state-owned lands and buildings. In other words, law enforcement officers have the same law enforcement powers, and duties upon state-owned lands as they have everywhere else within their county, town, village or city, as the case may be, provided the offense is one falling within the cognizance of their enforcement power. This is limited, however, to enforcement of the state law and does not include local ordinances. 62 C.J.S. 319, sec. 157; 46 OAG 131."

Whether it is the official duty of any specified public officer to prosecute and testify when said officer has material knowledge acquired when acting as such officer and whether
he has a right to compensation for so testifying involves mixed questions of fact and law.

In addition to reviewing the statutory powers and duties of such officers, it would be necessary in the case of county and city officers to examine ordinances or resolutions of the board concerned with the employment and pay status of each officer.

In certain cases officers may have a duty to collect fees authorized by law, and remit all those not reserved to them by enumeration to the county treasurer each month. See 59.15 (1) as to compensation, salary, fees or a combination thereof and accounting with treasurer, and 59.15 (2) as to compensation and duties of appointive officials.

It is also necessary to consider why the officer is in court. If he were there as custodian of the accused, he would not be entitled to a witness fee by reason of express statute if he testified.

Sec. 885.05 (2) provides:

"A witness or interpreter shall be entitled to fees only for the time he shall be in actual and necessary attendance as such; and shall not be entitled to receive pay in more than one action or proceeding for the same attendance or travel on behalf of the same party. No person shall be entitled to fees as a witness or interpreter while attending court as an officer or juror; nor shall any attorney or counsel in any cause be allowed any fee as a witness or interpreter therein."

The word "officer" in the statute is construed to mean officer of the court.

Witness fees payable under 885.05 are for required "attendance" before the court and required traveling and not for testimony. The statutes recognize that where attendance is required in an official capacity before the court as officer, juror, or attorney in the cause, the fee shall not be allowed. Wisconsin also follows the rule that a plaintiff testifying in his own case is not entitled to a witness fee. Leonard v. Bottomlay, (1933) 210 Wis. 411, 245 N. W. 849.
A plaintiff may be entitled to a witness fee if he is called to testify adversely. 97 C.J.S. Witnesses §87, 424. A police officer might be a complaining witness but would not be a plaintiff in any of the matters under consideration.

In 97 C.J.S. Witnesses §85, p. 421, it is stated:

"Witnesses are entitled to compensation only under statutes providing therefor. They are not entitled thereto at common law, or in cases for which the statute does not provide. Statutes relating to calling of witnesses and making no provision for their compensation do not entitle them thereto. A statutory provision of compensation for witnesses is not intended to compensate them for testifying, but simply to pay their expenses while away from home."

This rule is stated with approval in 30 OAG 214.

The law abhors payment of double compensation to a public officer for the same task. It is presumed that the police officers referred to are compensated in salary, or salary and fee basis for the period that they are engaged in court attendance, whether it be as a witness or otherwise, with relation to the prosecutions referred to. The amount of compensation is largely for the local unit of government subject to statutory limitations where a fee basis is involved. If it is insufficient in the eyes of the officer, it is a matter for negotiation. A public officer takes his office cum onere and must perform the duties of the office for the compensation provided. If court appearances are required outside the officer's regular hours of duty the municipal unit should consider the advisability of additional payment if the law permits, or compensatory time off.

In 1910 OAG 666, it was stated that a state factory inspector receiving salary and expense money had a duty to prosecute and act as a witness in connection with laws he was required to enforce and was not entitled to witness fees. This opinion relied on Healy v. Hillsboro County, (1901) 70 N.H. 588, 49 A. 89, wherein it was held that a police officer who was entitled to compensation for attending police court was not entitled to a witness fee in addition thereto because he testified at the trial. The court stated: "So it is improb-
able that the legislature intended to pay officers who were attending court for testifying."

In *Starmont v. Cummins*, (1899) 120 Mich. 627, 79 N. W. 897, it was held that where an officer made an arrest and brought the prisoner before the court and testified he was not entitled to compensation as a witness because he was entitled to compensation for attendance at court.

These cases are cited as the authority for the general rule which is stated in 58 Am. Jur. Witnesses §877, p. 502:

"Where a public officer is not required, in the performance of the duties of his office, to be present in person upon the trial of a particular case, he is entitled to the same fees as any private person if he is called as a witness therein. However, the contrary is true if it is his legal duty to be in attendance upon the trial of a case in his official capacity. In some states there are statutes dealing specifically with the allowance of witness fees and mileage to public officers."

In 97 C.J.S. Witnesses §38, p. 425 it is stated:

"Allowance of witness’ fees to public officers is determined by the statute and whether claimant is within its terms. The fact that one who is subpoenaed and attends as witness is a public officer does not, in itself, generally defeat his right to compensation; if, in the discharge of his official duties, he is not required to be present in person on the trial of a particular case, he is entitled to compensation as a witness if he is called as a witness therein. However, an officer who is called on to testify while present in court in the performance of his official duties is not entitled to compensation; the distinction between attendance by a public officer in performance of duty and attendance merely as a witness is specifically made in some statutes."

In 1912 OAG 894, it was stated that public officers, including the state fire marshal and deputies, who are required to devote full time to their offices and were charged with the duty of enforcing certain laws were not entitled to witness fees for testifying in a case brought to enforce the law.
In 12 OAG 52 it was stated that a state treasury agent called to testify in a prosecution for violation of the peddlers law was entitled to receive and keep a witness fee, he not being on a fixed salary nor having a duty to enforce said law.

In 16 OAG 385 it was stated that a sheriff, deputy sheriff and county traffic officer were not entitled to witness fees, even though the deputy sheriff served without pay. The opinion without citation of authority also concludes that although the county traffic officer was not entitled to a witness fee, because he was paid a regular salary, the county could tax a fee against the defendant to reimburse itself.

In 18 OAG 644 it was stated that officers and employes of the state in any municipality are entitled to witness fees even though they are charged with enforcing the laws in question. The only authority listed is former sec. 325.08, Stats.

In 30 OAG 214 it again applied the general rule referred to in citations to Am. Jur. and C.J.S. above, and stated where a state employe is subpoenaed to testify in matters concerning his employment but not in connection with prosecution of laws he is charged to enforce, he is entitled to the witness fee and mileage tendered, should not be removed from the regular payroll, but is not entitled to any expense money from the state if such fees are insufficient to cover his expenses.

In 34 OAG 9, 12, it was stated that conservation wardens are not entitled to witness fees in cases where it is their duty to prosecute and act as witnesses. At p. 12 it is stated:

"We appreciate the fact that sec. 23.14 (2) requires wardens to turn over to the conservation warden pension fund 'all witness or other fees.' However, we do not construe this as changing the general rule of law above set forth to the effect that an officer is not entitled to witness fees where it is his duty to prosecute and act as a witness in the performance of his official functions, although it is clear that if the warden should receive a witness fee, whether properly or improperly, in a game law violation case, he may not keep
the same but must pay it into the conservation warden pension fund."

With the exception of the opinion in 18 OAG 644, the general rule has been followed in past opinions of the attorney general.

There are strong public policy reasons why the rule should continue to apply. If he is an officer at the time of the trial he is obligated to testify for the prosecution without being entitled to a witness fee concerning matters within his knowledge and material to the prosecution for violation of ordinances or statutes he has a duty to enforce.

Your third question is whether, assuming the answer to the second question is "no," the clerk of court may tax witness fees against the defendant in such cases where the officer testifies, notwithstanding said officer is not entitled to a witness fee.

It is my opinion that the clerk of court is without authority to tax witness fees against the defendant in criminal or civil cases where the officer is not entitled to a witness fee.

It has been argued that the state, county, or municipality should be thus able to reimburse itself for the cost of the officers' salary or other compensation in this manner. However, sec. 271.04 permits taxation of only necessary disbursements, and 959.055 (2) (b) which is concerned with criminal matters provides for "Fees and travel allowance of witnesses for the state at the preliminary examination and the trial."

If an officer is not entitled to a witness fee, there is nothing which could pass to the state or municipality.

I am aware that the sec. 885.07 was amended by ch. 643, Laws of 1961, to include:

"* * * In forfeiture actions by municipalities the clerk shall tax witness fees; however witness fees for police officers of any such municipality when collected shall be paid by the clerk to the Treasurer of the municipality."
This provision would erase any right of personal enjoyment of any witness fee by the police officer of any such municipality, but it is insufficient in my opinion to entitle the police officer to a witness fee where he has a duty to enforce the ordinance in question. There being no right in the police officer, there is nothing which can pass to the municipality.

It has no application to criminal statutes or state statutes involving forfeitures which the officer may be charged to enforce in any event.

If the legislature intended to deviate from the general rule which has been long followed in Wisconsin, it could have done so by more express language. I construe the language of sec. 885.07, Stats., as permitting taxation in forfeiture actions by municipalities of only such witness fees as the witnesses, police officers or otherwise, may be legally entitled.

The files of the legislative reference bureau indicate that the 1961 amendment to sec. 885.07 was requested by the city of Milwaukee. The file does not state the reason for its introduction. However, it was evidently intended to insure that if witness fees could legally be taxed for attendance of police officers such fees should pass to the treasury of the municipality. It is insufficient, however, to establish a right in the police officer to a witness fee in the first instance where he testifies for the prosecution.
Counties—Welfare department—Contracts—Fond du Lac county's proposed contract for providing office space for the public welfare department would be in violation of the statutes.


Frederick Foster
Corporation Counsel, Fond du Lac County

You have requested my opinion whether a proposed plan for providing office space for the county public welfare department would violate sec. 59.08, Stats. Under the plan, which will be discussed later in detail, the county would contract for the construction of the office space without obtaining bids.

The county public welfare department is a county agency organized pursuant to 46.22. The department is now housed in offices in the basement of the courthouse, but is in need of larger and more adequate quarters.

The county board of supervisors has a duty to provide the department with suitable office space which may be in the courthouse or other suitable building.

Sec. 59.14 (1) provides in part:

"Every sheriff, clerk of the circuit court, register of deeds, county treasurer, register of probate and county clerk shall keep his office at the county seat in the offices provided by the county or by special provision of law; or if there is none, then at such place as the county board directs. The county board may also require any elective or appointive county official to keep his office at the county seat in an office to be provided by the county. * * *"

Sec. 59.68 (1) provides in part:

"Each county shall provide a courthouse, jail, fireproof offices and other necessary buildings at the county seat and keep them in good repair. * * *"
Historically, counties have owned buildings which were required for continuing needs, such as the courthouse, jail, county garages and office buildings, and it can be argued that statutes such as secs. 59.14, 59.67, 59.07 (1) (d) and 59.68 contemplate that buildings for permanent county use be owned by the county.

Property "owned" by a county is exempted from general property taxes.

In *Linden v. Babcock*, (1942) 241 Wis. 209, 5 N. W. 2d 759, the court construed 59.07 and 59.14 (1) as permitting the county board to provide offices for the county welfare department at a village other than the county seat in the village hall without cost to the county.

In view of this case and in light of 59.01 and 59.07 (1) it is my opinion that the county may lease suitable rooms for the county public welfare department if county owned buildings are insufficient. 52 OAG 356.

A county can construct a suitable office building on land owned by it if it complies with the bidding statute. It can acquire an existing office building by purchase or lease and use it, without submitting the matter to bids. After acquisition the county can improve the building by complying with the bidding statute.

Sec. 59.01 provides:

"(1) STATUS. Each county in this state is a body corporate, empowered to sue and be sued, to acquire and hold, lease or rent real and personal estate for public uses or purposes, including lands sold for taxes, to sell, lease and convey the same, including the authority to enter into leases or contracts with the state for a period of years for the uses and purposes specified in s. 23.09 (7) (d), to make such contracts and to do such other acts as are necessary and proper to the exercise of the powers and privileges granted and the performance of the legal duties charged upon it."

Sec. 59.07 (1) provides in part:
59.07 General powers of board. The board of each county may exercise the following powers, which shall be broadly and liberally construed and limited only by express language:

"(1) PROPERTY. (a) How acquired; purposes. Take and hold land sold for taxes and acquire, lease or rent property, real and personal, for public uses or purposes of any nature, including without limitation acquisitions for county buildings, airports, parks, recreation, highways, dam sites in parks, parkways and playgrounds, flowages, sewage and waste disposal for county institutions, lime pits for operation under s. 59.878, equipment for clearing and draining land and controlling weeds for operation under s. 59.874, ambulances and for transfer to the state for state parks and for the uses and purposes specified in s. 23.09 (7) (d).

"* * *

(d) Buildings; maintenance. Construct, maintain and operate all county buildings and structures including without limitation swimming pools, stadiums, golf courses and other recreational facilities, dams in county lands and sewage disposal plants at county institutions, and if the buildings are insufficient, provide suitable rooms for county purposes."

In Cullen v. Rock County, (1943) 244 Wis. 237, 240, 12 N. W. 2d 38 it was held that in the absence of statutory requirements county contracts need not be let under competitive bidding, and that where no bidding requirement was present the county could make any sort of contract to construct a building that it deemed provident. Also see Pembar, Inc. v. Knapp, (1961) 14 Wis. 2d 527, 111 N. W. 2d 476; Consolidated School District v. Frey, (1960) 11 Wis. 2d 434, 105 N. W. 2d 841.

After the Cullen case, the legislature enacted a very stringent bidding statute, sec. 59.08, which provides:

"(1) All Public work, including any contract for the construction, repair, remodeling or improvement of any public work, building, or furnishing of supplies or material of any kind where the estimated cost of such work will exceed $1,000 shall be let by contract to the lowest responsible bid-
The contract shall be let and entered into pursuant to s. 66.29, except that the board may by a three-fourths vote of all the members entitled to a seat provide that any class of public work or any part thereof may be done directly by the county without submitting the same for bids. This section shall not apply to highway contracts which the county highway committee is authorized by law to let or make.

"(2) The provisions of sub. (1) are not mandatory for the repair or reconstruction of public facilities when damage or threatened damage thereto creates an emergency, as determined by resolution of the county board, in which the public health or welfare of the county is endangered. Whenever the county board by majority vote at a regular or special meeting determines that an emergency no longer exists, this subsection no longer applies."

In Fond du Lac county it is proposed that the county public welfare department be moved from the courthouse to suitable office space. A survey was first made as to whether there were existing buildings which were suitable or which could be feasibly remodeled. Allocation of available county office space among the various agencies of county government is a policy matter for the county board. 52 OAG 356, 368.

The proposed building to be constructed will, at least at present, house no other county offices. One of the considerations in the Fond du Lac plan is the fact that the state and federal governments make no contribution to the cost of housing a county public welfare department where county owned buildings are involved, but do provide matching funds where the county is obligated to pay rent for suitable offices. You state that matching funds include contribution to rental of office space, heating, janitorial service, maintenance and some other items.

In essence, the Fond du Lac proposal provides that a developer who owns or has an option on a parcel of land across the street from the courthouse has agreed to build an office building of approximately 12,800 square feet, according to plans and specifications developed by him after taking
into consideration the space requirements and general layout furnished by the county public welfare department. On completion of construction and on occupancy he has agreed to deed the land to the county, subject to any mortgage lien, the lease, and to a reverter to the lessor in the event of any default in the performance of the lease. The lease would be for about 10,000 square feet or 78% of available space, for 15 years, lessor to furnish heat, water, maintenance, repairs and janitorial services. The lease is for the total sum of $520,500, payable in 180 equal installments. The county is to also pay the lessor 78% of any real estate taxes in excess of $5,250 per year. Lessor is saved harmless from damage or injuries caused by the use of the county. At the end of the full 15-year term the lessor agrees to convey title to the land and building to the county free and clear of all liens and encumbrances except those created by the county. The county has no right to sublet except to the state or another municipality without written consent.

The acceptance resolution by the county board refers to the proposal as one “for the construction and rental of a new office building for Fond du Lac County Public Welfare Department”.

The land in question is the same parcel another developer sought to utilize to build a building for lease to the county for the welfare department, but he was unable to get the city to rezone the property to permit the building. The county owns adjacent land which can be used for parking and the proposed conveyance to the county of the land on completion of construction and occupancy was an attempt to get city approval for the construction insofar as zoning was concerned.

While it is unnecessary to review every clause, it is possible that the conveyance to the county of land only, on construction and occupancy, may also be an attempt to gain tax exemption for at least the value of the land. Sec. 70.11 (2) exempts county-owned property from taxation and 70.17 provides that improvements on leased lands may be assessed either as real property or as personal property.
You state that the amount of the rent reserve will be sufficient to cover the landlord’s expenses “and likewise the cost of construction and reasonable return on investment”.

The purpose of requiring bids on public work is to prevent fraud, favoritism, imposition, improvidence, to promote actual, honest and effective competition, to protect the public against unwise contracts, and to secure the performance of public work upon the best terms and at the lowest possible cost. A county has no power to make contracts for public improvements unless it proceeds in the manner prescribed by law, and a contract entered into without complying with essential statutory provisions is void. Bechthold v. Wauwatosa, (1938) 228 Wis. 544, 562, 564, 277 N. W. 657, 280 N. W. 320; Victora v. Village of Muscoda, (1938) 228 Wis. 455, 279 N. W. 663; Chippewa Bridge Co. v. Durand, (1904) 122 Wis. 85, 99 N. W. 603; 43 Am. Jur. Public Works and Contracts, §26, p. 767.

If the Fond du Lac plan involves “public work”, the bidding requirements of 59.08 apply. Public work includes the construction of a public building. Where 59.08 is applicable, the benefits and protection afforded by 66.29 as to contractor’s responsibility and 66.293 as to compliance with prevailing wage scales apply.

On the basis of information contained in the minutes of the welfare board, the proposal by the developer, the acceptance resolution by the county board of supervisors, and the proposed “lease”, a court could find that public work was involved, and that since the estimated cost of such work was over $1,000, 59.08 is applicable.

I am of the opinion that a court would find the Fond du Lac plan in violation of sec. 59.08.

The so-called “lease” is really much more than that. It is a contract to construct a building suitable to the needs of the county. The land is to be conveyed to the county at the end of construction and on occupancy. Such conveyance is to be subject to the lease, subject to any mortgage lien, and with reversion to the grantor-lessee in the event of default. The obligation of the county is for a substantial sum of
$520,500 payable in 180 monthly installments, plus other contributions as to taxes. In the event of default the county, if the arrangement were valid, might be liable for a substantial portion of the $520,500 and specific performance might require the county to comply with the terms of the "lease" which has many of the attributes of a land contract. The building is permanent and the contract provides that the developer convey the building and land to the county at the end of the 15-year-period free and clear of all liens except those created by the county.

It is of critical importance that the interest and liability of the county would commence when the so-called contract of "lease" was signed. The county interest would be an interest in reality and in a building construction contract. While the contract prohibits the lessee to sublease without consent of the lessor, the lessee's obligation to carry out the terms of the contract continues even in case of subletting with consent. The contract does not prohibit the lessor from assigning the contract, nor does it on its face permit the county to determine whether the building has been constructed in accordance with the specifications, or include a termination clause for the benefit of the county should the developer default. When the county assumes such a firm and substantial ownership interest in a building to be constructed, it cannot escape the protective measures applicable to ordinary public construction under sec. 59.08.

Thus the proposal is a contract for the construction of a public building in which the county has an interest at the inception. Even though the county might enter such a contract in good faith, persons dealing with the county are deemed to have notice of statutory contractual limitations, and I am of the opinion that a court would hold any such contract void, the bidding requirements of 59.08 not having been complied with.

While the welfare board may have advertised for interested investors to build quarters for the department, it cannot be claimed that this was compliance with 59.08 as the terms of 66.29 were not complied with. There were no county specifications or plans of a formal nature which
would form a common standard for bidding and promote competition.

BCL:RJV

Public Assistance—Illegitimacy—In order to recover lying-in, medical, and funeral expenses paid by the county in an illegitimate birth the district attorney may proceed under secs. 52.23 and 52.24 The court cannot substitute its judgment for that of the district attorney, but may refuse to issue a warrant under certain circumstances.

JAMES C. BOLL

District Attorney, Dane County

Your predecessor called to my attention certain problems experienced by the district attorney's office when trying to recover lying-in and medical expenses paid by the Dane county department of public assistance in connection with the birth of an illegitimate child.

These problems arise from an attempt to use certain sections of ch. 52 under the following factual situations:

(1) The unwed mother terminates her parental rights to the illegitimate child before a paternity complaint is signed.

(2) The unwed mother terminates her parental rights to the illegitimate child after a paternity complaint has been signed.

(3) The illegitimate child dies before its unwed mother signs a paternity complaint.

(4) The illegitimate child dies after its unwed mother signs a paternity complaint.

(5) The unwed mother marries the putative father before she signs a complaint alleging that he is the father of the illegitimate child.

(6) The unwed mother marries the putative father after signing a paternity complaint alleging that he is the father of the illegitimate child.

The ultimate question is under what circumstances may the district attorney legally seek to recover expenses paid by the county for the benefit of the illegitimate child. It is also important to note what conditions must be met before the district attorney may proceed under any of the applicable statutes.

Sec. 52.23, Stats., provides:

"52.23 Prosecution continued by district attorney. If the mother of a child born out of wedlock commences a paternity proceeding and fails to prosecute, the district attorney, if he determines it to be to the best interest of the child shall prosecute the proceedings commenced by the mother to final judgment."

The district attorney may act under 52.23 only after the mother of a child born out of wedlock "commences" a paternity proceeding and fails to prosecute the same. Paternity proceedings are not commenced by the mother until she signs a complaint against the putative father. This constitutes the least possible action which could be deemed to commence such a proceeding. See 20 OAG 364, 369.

If the mother fails or refuses to sign a complaint, the district attorney is precluded from acting under 52.23. Instead, he may consider prosecution under 52.24, which provides:

"52.24 Inquiry by district attorney. If any woman bears a child out of wedlock which is or is likely to become a public charge, or is pregnant with a child likely to be born out of wedlock and to become a public charge, the district attorney, if he believes it to be to the best interest of the child, shall apply to any court or court commissioner of the county, who shall thereupon examine such woman on oath respecting the father of such child, the time when and the place where such child was begotten and such other circumstances as he deems necessary; and such court or court commissioner shall reduce such examination to writing and shall
thereupon issue a warrant, without further or formal complaint, to apprehend the reputed father, and the same proceeding shall be had thereon and with like effect as provided in cases of complaint made by such woman."

In order to initiate action under this section, the district attorney must find that the child is or is likely to become a public charge and that initiation of such action is to the best interest of the child.

The first condition presents no problem in the situations which are posed because the child already is a public charge. The phrase "public charge" means any person for whom support and care are provided at public expense, including children supported on relief under ch. 49, Stats. Madison v. Dane County, (1940) 236 Wis. 145, 150, 153, 294 N. W. 544. If your office is attempting to recover lying-in and medical expenses paid by the Dane county department of public assistance, it is clear that public monies have been expended for the support and care of the child.

It might be argued that in some of these six situations you have mentioned, the child is not likely to be a public charge in the future, and therefore that sec. 52.24 cannot be applied. This construction, however, would lead to absurd consequences under this and related provisions and would be wholly unrealistic.

For example, it would be absurd to base such a determination upon the actual date on which the lying-in and medical expenses are paid by the county or on the date when the application for such benefits is filed. If a prospective mother filed her application before the child was delivered, it is clear that such child is likely to become a public charge within the meaning of the statute. If the prospective mother files her application after the child is delivered, the child's status as a future public charge would be dependent upon whether the district attorney acted before or after the county paid these benefits. In other words, if the district attorney properly attempted to institute this type of proceeding of the day before the benefits were paid, the child clearly would be likely to become a public charge. On the other hand, if the
district attorney waited until the day after such benefits were paid, the child may not be likely to become a public charge under this construction of the statute. On its face, this construction is wholly unrealistic and could not have been intended by the legislature. Moreover, as a practical matter, the effect of this construction could easily be circumvented by delaying the issuance of these benefits until the district attorney was ready to begin the prosecution. Although this does not necessarily mean that such tactics would become prevalent, the possibility of unnecessary long delays in administering these claims does exist. This might have an adverse effect on the county's fulfillment of its duty and on financial status and bookkeeping operations of those who perform these medical services.

The second condition establishes a duty on the part of the district attorney to apply to the court or court commissioner so that the mother may be examined under oath if the district attorney believes such action to be "to the best interest of the child." The exercise of this duty is not subject to review by the court or commissioner in light of this statutory language and cases dealing with an analogous duty in criminal cases.

The language of 52.24 does not provide any basis for the contention that the court or court commissioner has the authority to review the district attorney's determination. If the district attorney finds such action to be to the best interest of the child, he must apply "to any court or court commissioner of the county, who shall thereupon examine such woman on oath" on various matters. This examination is reduced to writing, and the prosecution proceeds as if the complaint had been originally filed by the mother. Up to this point the court or court commissioner must follow the clear mandate of the statute, and cannot in effect second guess the district attorney concerning whether the proceeding is in the best interest of the child.

Moreover, it is well established that when a district attorney, acting in good faith and pursuant to statute providing for a second preliminary examination upon discovery of admissible evidence, decides that the evidence discovered is
sufficient to convict the person previously discharged, his conclusion is not open to review upon an objection to the legality of the second examination, nor is it a jurisdictional fact that he should recite in the proceedings that he has discovered additional evidence. Tell v. Wolke, (1963) 21 Wis. 2d 613, 616, 124 N. W. 2d 655; State ex rel. Tessler v. Kubiak, (1950) 257 Wis. 159, 164, 42 N. W. 2d 496; Dreps v. State ex rel. Kaiser, (1935) 219 Wis. 279, 282, 262 N. W. 700; Campbell v. State, (1901) 111 Wis. 152, 157-158, 86 N. W. 855.

In Campbell v. The State, (1901) 111 Wis. 152, 158, 86 N. W. 855, the court said:

"* * * To say that his conclusion is open to trial by jury is to substitute the judgment of others for that of the officer designated by law and who was charged with a legal duty to make the determination. The law deals tenderly with the rights of accused persons, but we cannot believe that it was the legislative intent that the judgment of the prosecuting officer should thus be open to review, or that public policy demands that any such construction should be given to the statute."

In the present situation the district attorney has been charged with a similar legal duty. As in the Campbell case where the propriety of a second preliminary examination was in question, we are not faced with a situation where a final determination on the merits will be reached at this stage. In Campbell the preliminary examination was defined as "an investigation in the interest of public justice, with a view of ascertaining responsibility for crime and developing the particulars thereof". Under 52.24 the examination of the mother is designed to determine whether the reputed father can be apprehended and proceeded against. The initiation of both procedures falls within the discretion of the district attorney.

As for the specific situations which are set forth at the beginning of this opinion, certain observations follow from application of these standards. First, as already indicated, the child in each case is a public charge by reason that relief has been provided by the county.
Second, it is likely that any attempt to proceed under 52.24 would meet with a valid objection of bad faith on the part of the district attorney under some of these factual situations. For example, where the child has died or where a subsequent marriage has legitimized the child, the district attorney could not contend in good faith that resort to 52.24 was necessitated in the interest of the child.

It must be emphasized that the interest of the child may take a number of forms other than the receipt of support from the father. Without attempting to summarize all of these possibilities, I wish to give one illustration of such an interest.

Under 237.06 every child born out of wedlock is considered an heir of the person who acknowledges himself to be the father of such child by means of a writing signed in the presence of a confident witness or who shall be adjudged to be such father under the applicable position of ch. 52, Wis. Stats. Even when the court terminates the parental rights of the mother and transfers guardianship and legal custody to a specified agency under 48.43, this right of inheritance continues to exist until an order of adoption is entered, thereby altering the legal consequences of this relationship. See sec. 48.92. The district attorney, therefore, could find this interest sufficient to warrant proceeding under 52.24 at any time before an order of adoption is entered.

The discussion to this point has related to active prosecution by the district attorney. In addition to the previously cited statutes it is necessary to consider the provisions dealing with settlement agreements. Sec. 52.28 provides:

“52.28 Settlement agreements. A woman who has borne a child out of wedlock or who is pregnant with a child which is likely to be born, out of wedlock, may enter into an agreement with the person claimed by her to be the father of the child. Such agreement may be entered into at any time prior to final judgment, either before or after issuance of process, or at any time while said judgment is still in effect. No agreement shall be entered into before the birth of the child unless the court finds that there are special circumstances
making it advisable to do so. The agreement shall include a
determination of all facts and orders which s. 52.37 requires
the court to determine in its order for judgment, except that
where the parties are unable to agree as to the paternity
of the child, the alleged father may deny paternity in the
agreement. By the terms of the agreement the defendant
must submit personally to the jurisdiction of the court, and
consent to entry of judgment in accordance with the terms
of the agreement. Upon motion of the district attorney, the
judge of a court of record having power to enter final judg-
ment in paternity proceedings, being satisfied with the terms
of the agreement, shall order judgment in accordance there-
with if paternity of the child is admitted. Where the paterni-
ty of the child is not admitted, after said agreement is ap-
proved by the court, it shall be filed but judgment shall not
be rendered until there is a default of the payments agreed
upon, when, upon motion of the district attorney, judgment
shall be rendered and entered forthwith. All agreements re-
ferred to in ss. 52.21 to 52.45 shall be drawn by the district
attorney. No other agreement or settlement of any paternity
proceeding shall be valid.”

The district attorney also is authorized to enter into a
settlement agreement under 52.29, which provides:

“52.29 Agreement by district attorney. In all cases where
the mother commences any proceedings under this chapter
and fails to prosecute the same, or where she has been de-
levered of a child born out of wedlock which is likely to
become a public charge or shall be pregnant with a child
likely to be born out of wedlock and to become a public
charge, the district attorney of the county in which she
resides shall have power to make an agreement with the
putative father in the same manner and with the same
force and effect as might be made by the mother.”

When a settlement agreement is reached under either of
these sections, the county is entitled to reimbursement from
the father for all lying-in, medical and funeral expenses un-
der 52.37 (1), which provides:

“52.37 Judgment. (1) If the defendant is found the father
of the child, or admits the truth of the allegation, or enters
into a settlement agreement, he shall be adjudged to be the father of such child, unless paternity is denied in such settlement agreement, and shall be ordered to pay all expenses incurred for lying-in and attendance of the mother during pregnancy, and also for the past care and support of the child, from the time of its birth until the date of the approval of the agreement or the entry of judgment. If the child is dead at time of trial he shall pay the expenses of the funeral and the expenses of the last illness. All payments and expenses stated herein shall be paid by the accused to a trustee, and the settlement agreement or judgment shall specifically provide for the amount of disbursement and indicate the person to whom the trustee shall make such disbursement."

Certain practical problems may arise when an attempt is made to act under secs. 52.29 and 52.37 (1). Obviously if the father refuses to enter into a settlement agreement or if the mother refuses or fails to identify the father, it may be necessary to resort to the procedure set forth in 52.24.

BCL:DPJ

Clerk of Circuit Court—Fees—Discussion of several situations in which the clerk of courts must act to collect fees and payments and to preserve records.

July 5, 1967.

DONALD J. BERO

Corporation Counsel, Manitowoc County

You have requested my opinion on three unrelated questions involving the duties of the clerk of circuit court.

Question One

Under sec. 247.29, Stats., is the clerk of circuit court required to collect or take proceedings to collect amounts ordered by the court under 247.23 (1) to be paid by the husband to enable a wife to carry on or defend the action?
The answer to this question is "yes" unless such action is taken by the family court commissioner.

Sec. 247.29 (1) provides:

"247.29 Alimony, clerk of court, family court commissioner, fees and compensation. (1) All orders or judgments providing for temporary or permanent alimony or support of children shall direct the payment of all such sums to the clerk of the court for the use of the person for whom the same has been awarded. A party securing an order for temporary alimony or support money shall forthwith file said order, together with all pleadings in the action, with the clerk of the court. Said clerk shall disburse the money so received pursuant to said judgment or order and take receipts therefor. All moneys received or disbursed under this section shall be entered in a record book kept by said clerk, which shall be open to inspection by the parties to the action, their attorneys, and the family court commissioner. If the alimony or support money adjudged or ordered to be paid shall not be paid to the clerk at the time provided in said judgment or order, the clerk or the family court commissioner of said county shall take such proceedings as either of them deems advisable to secure the payment of such sum including enforcement by contempt proceedings under s. 295.03 or by other means. Copies of any order issued to compel such payment shall be mailed to counsel who represented each party when such alimony or support money was awarded." * * *

Sec. 247.23 (1) provides in part:

"(1) In every action affecting marriage, the court or family court commissioner may, during the pendency thereof, make such temporary orders concerning the care, custody and suitable maintenance of the minor children, requiring the husband to pay such sums for the support of the wife and the minor children in her custody and enabling her to carry on or defend the action." * * *"
to sometimes treat suit money as a separate subject, it is really a part of temporary alimony.

In 27 A C.J.S. Divorce 873, it is stated:

"Strictly speaking, temporary alimony, or alimony pendente lite, is that allowance which the husband may be compelled, pendente lite, to pay his wife, who prosecutes a suit for divorce or separation, or defends and answers where the proceedings are instituted by him. It differs somewhat in character from support, in that, while temporary alimony makes provision for support of the wife during the divorce or separation proceeding, it generally includes an allowance to cover the wife's expenses in prosecuting or defending the action also known as 'suit money;' and it frequently includes attorneys' fees. * * *"

The awarding of attorney's fees and expenses to the wife in a divorce action is within the discretion of the court under 247.28. King v. King, (1964) 25 Wis. 2d 550, 559, 131 N. W. 2d 357. When awarded by the court by order or judgment, such amounts should be paid through the office of the clerk of circuit court as provided by sec. 247.29, and if not paid, the clerk or family court commissioner should institute appropriate proceedings to secure payment including enforcement by contempt proceedings under 295.03 if necessary.

Question Two

What fees should the clerk of court collect for filing of papers in connection with settlement or compromise of a cause of action in favor of or against a minor or mentally incompetent person where no action has been commenced by service or summons or complaint?

Sec. 269.80 (2) provides:

"(2) COMPROMISE OR SETTLEMENT WITHOUT ACTION. A cause of action in favor of or against a minor or mentally incompetent person may, with the approval of any court of record, be settled by a guardian ad litem without the commencement of an action thereon; and for such purpose, the court may appoint a guardian ad litem upon appli-
cation made as provided in s. 260.23 (2). An order approving a settlement or compromise under this subsection and directing the consummation thereof shall have the same force and effect as a judgment of the court."

While no action is commenced, the statute clearly provides that it is the settlement of a cause of action. However, there is no prosecution of the cause in the courts by ordinary court proceedings. Approval of the settlement is by the court, after petition for approval has been filed with the court. Settlement is by the guardian ad litem and such guardian ad litem may be appointed under 269.80 (2) and 260.23 (2).

Sec. 260.02 provides:

"260.02 Remedies divided. Remedies in the courts of justice are divided into:

“(1) Actions.

“(2) Special proceedings.”

Sec. 260.03 provides:

"260.03 Action defined; special proceeding. An action is an ordinary court proceeding by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Every other remedy is a special proceeding."

I am of the opinion that where no summons is served the approval of settlement procedure constitutes a special proceeding.

Sec. 271.21 provides in part:

"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 * * *.”

I am of the opinion that a state suit tax of §5 is applicable and payable to the clerk of court at the time of filing the
initial documents as provided by 59.42 (2). The remaining question is whether a clerk's fee of $4 or $8 is proper.

Sec. 59.42 (2) (b) and (c) provides:

"(b) All special proceedings independent of an action taken at the instance and for the benefit of one party without notice to or contest by any person adversely interested; and any proceeding under s. 245.10 for court permission to marry, but notwithstanding s. 271.21 no state suit tax shall be collected on any such matter $4

"(c) All other actions and special proceedings $8"

I am of the opinion that the $8 clerk's fee is proper.

While contests in such matters are not usual, the guardian ad litem may raise certain questions and in some cases may have a duty to contest the proposed settlement. In addition, while the proceeding may be brought at the special instance and for the benefit of the minor or incompetent, it may in other cases be brought at the instance and request of the other party seeking or offering the settlement. In nearly every instance all parties would be on notice of the proceedings. Finally, such special proceeding is not independent of an action but is based on a cause of action which 269.80 permits to be settled with court approval without commencement of an action thereon.

Question Three

What period of time must the clerk of circuit court retain the original documents in small claims matters, state traffic violations, and city and county ordinance violations?

You state that the clerk of court is interested in microfilming these documents for preservation if the originals may be destroyed after the passage of a period of years.

Sec. 59.39 (1) provides that the clerk of circuit court shall:

"(1) File and keep all papers properly deposited with him in every action or proceeding unless required to transmit such papers. If such papers have been filed for 30 years a
microfilm record may be retained in lieu of the original papers and such papers may be destroyed upon compliance with ss. 59.715 and 59.717.”

Sec. 59.715 (20) provides:

“Court records and exhibits in any civil, criminal action and proceeding, or probate proceedings of any nature under the jurisdiction of the courts of record in the state, provided the same shall first be photographed or microphotographed and preserved as provided in s. 889.30 in all cases except exhibits not of a documentary nature:

“(a) After 10 years from the entry of a final order or judgment therein, or

“(b) After 10 years from the date when the same shall have been commenced; provided that the same shall have been dormant for 10 years and that the destruction thereof shall be authorized by the order of the judge of the court whose records are to be destroyed, or

“(c) Upon a written order of the judge of the court, the records of which are to be destroyed, the records and exhibits of that court which the judge deems obsolete and useless, but not including inventories and final accounts of deceased persons, may be destroyed after 10 years as provided in pars. (a) and (b) without being first reproduced, photographed or microphotographed.”

There is an apparent conflict which must be resolved. Under sec. 59.39 (1) it would appear that originals could not be destroyed until after 30 years. This statute appeared in the same form in the 1955 statutes, including the reference to secs. 59.715 and 59.717. In the 1955 statutes then sec. 59.715 (20) (a) read “after 30 years” and (20) (b) read “after 30 years”. These two sections were amended so that each provided “after 10 years” by ch. 230, Laws of 1957. However, there was no change in sec. 59.39 (1).

Sec. 59.715 (20) is a specific statute regulating the destruction of obsolete records. I am of the opinion that its provisions control over 59.39 (1) to the extent necessary to resolve any conflict. In addition it is a later enacted statute.
It comes into effect, however, only if it is necessary to gain needed vault and filing space and the terms of 59.716 relating to offer to the state historical society and 59.717 (3) requiring photographing or microphotographing before destruction apply. Reproduction is not necessary as to certain records deemed obsolete by written order of the judge of the court involved.

Sec. 59.715 (20) provides for preservation by methods authorized by 889.30. Under 889.30 (3) photographic reproductions are deemed original records. It is noted that 889.30 (1) provides that the powers granted shall not be exercised without prior approval of the county board evidenced by resolution duly adopted.

BCL:RJV

Optometry—Optician—Discussion of the statutes regulating opticians and the possibility of dual identity. Advertising regulations considered.

Paul C. Whyte
Secretary, Board of Examiners in Optometry

You ask my opinion on the legality of licensed optometrists having a dual public identity as an optician in certain situations hereinafter described.

In providing this opinion, I am assuming that your use of the word “legality” in the context of the above quoted language calls for my advice on the matter of whether such situations involve “unprofessional conduct” on the part of the optometrist in question, though such conduct might not be unlawful in the sense that it would be punishable as a misdemeanor under sec. 153.11, Stats. I will, then, hereinafter refer to an optometrist as acting “unlawfully” where his conduct in the situations you describe would in my judgment be unprofessional.
You are, of course, well aware that guilt of unprofessional conduct is one of the specified grounds for denying, suspending or revoking the license or certificate of registration of an optometrist, pursuant to sec. 153.07. See subsec. (f) thereof.

A.

The first situation you describe is one where the optometrist “advertises services as an optician, using the same name as the one under which he is licensed to practice optometry”. Dealing with this situation, it is my opinion that an optometrist licensed under ch. 153 may not lawfully advertise services as an optician, using the same name as the one under which he is licensed to practice optometry. Such advertising is clearly “unprofessional advertising”, a species of unprofessional conduct dealt with in detail in 153.08 (2) (a) through (f). Subsec. (e) thereof provides among other things that the office signs of an optometrist “may contain only the name of the duly licensed optometrists practicing therein, their titles and office hours”. Subsec. (f) provides among other things that an optometrist’s printed advertisement “may contain only the names of the duly licensed optometrists, their titles, office hours, location or place of business, telephone numbers, and any one specialty”. These statutory provisions plainly do not permit an optometrist, within the bounds of professional conduct, to advertise his services as an optician using the name under which he is licensed or any other name. Nor does the administrative rule provision of Opt 7.06 (6) permit such advertising, for it brands as unprofessional conduct, “The use of any advertising, by whatever media, containing other than the name of a duly licensed optometrist, his title, office hours, location or place of practice, telephone number and any one specialty” (emphasis supplied). When the above quoted statutes and rule refer to “their titles”, they manifestly mean an optometrist’s title as such—either “Optometrist” or “O.D.”—and they do not mean any other “title” he might choose to insert in his advertising, such as, “Optician”, “Optical Dispenser”, or the like.
B.

Your second situation you describe as one “Where the optometrist does not use his name or license, but directly controls advertisements, listings and other communication approaches involving a company—which is not incorporated”. Illustrative of this situation would be John Jones, an optometrist duly licensed in Wisconsin, doing business as Quality Optical Company, but advertising an optician’s services or optical services only as “Quality Optical Company”. Such advertising, although innocent on its face, would in reality be a “Potemkin village”, a facade concealing an unpleasant truth—namely, unprofessional conduct of the optometrist doing business as Quality Optical Company and employing it, at least in part, as a device to avoid the restrictions imposed upon him as a licensed optometrist in the matter of advertising—the restrictions noted hereinabove. The optometrist who chooses to do business as an unincorporated company is free to do so, but in my opinion he may not, without being guilty of unprofessional conduct, then employ the name of such company in any of his business advertising, but must instead pursuant to the statutory and code provisions above mentioned use only his own name and title in advertising his business, and must in all other respects advertise only in a manner consistent with professional conduct of an optometrist as delineated by ch. 153 and the rules of the board of examiners in optometry.

C.

Your third situation is the same as that dealt with in part B hereinabove, but “this time with an incorporated company”. I assume that by this you mean (using the imaginary John Jones, O.D., above mentioned) that Jones controls a corporation—call it “Quality Optical Company, Inc.”—and conducts his business as an optometrist in such corporate form, with his business advertising (under his control, of course) being in the name of the corporation only.

In this situation, Jones might be disposed to argue that the corporation, as a legal entity distinct from himself despite his control of it, can lawfully advertise optical services in such fashion as it desires, free of any of the restraints im-
posed by ch. 153, on advertising by an optometrist. He might cite in support of such contention Milwaukee Toy Co. v. Industrial Comm., (1931) 203 Wis. 198, 495, 496, wherein the court said:

"* * * By legal fiction the corporation is a separate entity and is treated as such under all ordinary circumstances. * * * this court early took the position that although an individual owned all the stock of a corporation the corporation was a separate entity and the owner of property purchased prior to the individual's acquisition of the stock, and the individual could not maintain replevin of such property. Button v. Hoffman, 61 Wis. 20, 20 N. W. 667. Although one individual owns all the stock he does not thereby become the corporation. Petersen v. Elholm, 130 Wis. 1, 109 N. W. 76; Oeland v. Wildenberg, 185 Wis. 510, 513, 201 N. W. 807. The corporation is an entity, no matter how much of its stock an individual owns. Lee v. Young, 147 Wis. 53, 54, 132 N. W. 595. The power of the court to disregard the corporate fiction in some instances and fix liability for corporate acts on the owners as individuals does not warrant holding the owner of ninety-eight per cent of the corporate stock personally liable on a note executed in the name of the corporation. Lipman v. Manger, 185 Wis. 68, 200 N. W. 663. From the above it appears that the fiction of corporate entity is not to be lightly regarded. * * *"

While Jones might make such an argument supported by the case above quoted and others, it is an argument which, in my judgment, favors fiction over fact and form over substance, because the reality of the matter is that Jones is the true advertiser in the third situation you describe, and not the corporation he controls. And it is his business as an optometrist that such advertising relates to, although neither his name nor his title appears therein. Under such circumstances the corporation, though all other purposes it serves may be licit, is clearly being used to serve an illegal purpose or accomplish an illegal act insofar as the advertising in question is concerned, employing the corporate name and reference to optical services. In short, it is being used by Jones to circumvent provisions of ch. 153, and of the rules of the board relating to advertising and binding on him as
an optometrist. This being so, it is my opinion that the corporation entity of "Quality Optical Company, Inc." may and should be disregarded, in an application of the principle well established in the law of corporations that "The corporate entity is generally disregarded where it is used as a cloak or cover for * * * illegality * * *" 18 Am. Jur. 2d §15. As was said in State v. Koon, (1947) 201 S. W. 2d 446, 455, "Courts disregard the fiction of the corporate entity when, as here, a corporation is attempted to be used as a means of accomplishing a fraud upon a court or an illegal act." (Emphasis supplied). See also, Kulukundis v. Dean Stores Holding Co., (1946) 132 Conn. 685, 47 A. 2d 133, 184; Jenkins v. Moyse, (1930) 254 N.Y. 319, 172 N. E. 521, 522. The rationale behind the above mentioned principle is well and concisely stated in 18 Am. Jur. 2d §14, wherein it is said:

"The doctrine that a corporation is a legal entity existing separate and apart from the persons composing it is a legal theory introduced for purposes of convenience and to subserve the ends of justice. The concept cannot, therefore, be extended to a point beyond its reason and policy, and when invoked in support of an end subversive of this policy, will be disregarded by the courts." (Emphasis supplied.)

D.

The fourth situation you describe is "Where the O.D. has an optician's sign attached to his place of practice or in the immediate vicinity."

I take it that this situation is one wherein the sign (using the fictitious John Jones again) might show his name followed by the word, "Optician"; or would contain the word "Optician" only; or would show the name of an employee of Jones (or names of employees of his) who are opticians, using "Optician" thereon to designate them as such. I would also assume that any of such signs not attached to Jones' place of practice would contain some directional indicator showing the direction in which it is to be found.

It is my opinion that this situation involving any of the uses of "Optician" above described would represent unprofessional conduct on the part of Jones in using such signs. If
the sign were an office sign, it would violate the requirement of 153.08 (2) (e), that such sign, "may contain only the names of the duly licensed optometrists therein, their titles and office hours". If not an office sign but one located in the immediate vicinity of Jones’ office, its use would constitute unprofessional conduct because it would come within the purview of one of the practices defined as such by Opt 7.06 (6), WAC, namely, "The use of any advertising, by whatever media, containing other than the name of the duly licensed optometrist, his title, office hours, location or place of practice, telephone number and any one speciality.”

E.

The fifth situation you describe is “Where the O.D. lists himself as an optician under one heading; listing himself as an optometrist under another”.

I assume that this situation might involve such listing in a telephone directory; in a business directory of any kind; in a newspaper or other publication; or possibly on a business card. Wherever employed, it is my opinion that the use of such listing is unprofessional conduct, falling within the purview of the practice condemned as such by Opt 7.06 (6) WAC, quoted above.

BCL:JHM

County Boards—Tape recordings—Under sec. 18.01 tape recordings of county board proceedings must be made available to the public except in rare instances where harm to the public interest would outweigh the benefits.

July 26, 1967.

William Leitsch
Corporation Counsel, Columbia County

You inquire whether a tape recording of proceedings of the county board is required to be made available to the public.
The county board authorizes the recording of its meetings. Representatives of the press have requested use of the tapes for the purpose of compiling reports on county board meetings. The meetings are open to the public and adequate provisions are made for the accommodation of the press during such meetings. You state that some board members are reluctant to make the tapes available, since recordings may not provide a completely accurate portrayal of what takes place at meetings. It is, at times, difficult to identify particular speakers from recordings. It is also impossible for recordings to portray gestures or expressions which accompany verbal statements.

Sec. 18.01 (1) and (2), Stats., provides:

“(1) Each and every officer of the state, or of any county, town, city, village, school district, or other municipality or district, is the legal custodian of and shall safely keep and preserve all property and things received from his predecessor or other persons and required by law to be filed, deposited, or kept in his office, or which are in the lawful possession or control of himself or his deputies, or to the possession or control of which he or they may be lawfully entitled, as such officers.

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

This statute received examination and interpretation in *State ex rel. Youmans v. Owens*, (1965) 28 Wis. 2d 672, 137 N. W. 2d 470, 139 N. W. 2d 241. That case involved documents compiled by a city attorney and deposited with the mayor. The documents related to an investigation of alleged misconduct by members of the city police department, and consisted in part of sworn statements of persons interviewed by the city attorney.

A newspaper publisher was refused access to the documents and began the lawsuit. The supreme court applied in
Youmans the following rules of law which pertain to the situation at hand:

(1) The "property and things" covered by sec. 18.01 (1), Stats., includes records kept by a public officer as a matter of convenience. The section is not limited to only those records which an officer is required by law to keep;

(2) Sec. 18.01 (2), Stats., does not give members of the public an absolute right to inspect all records that are covered by subsec. (1). Specifically the court said, "There may be situations where the harm done to the public interest may outweigh the right of a member of the public to have access to particular public records or documents." 28 Wis. 2d at 681, 137 N. W. 2d at 474.

(3) By way of procedure, the court held that:

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

"In reaching a determination so based upon a balancing of the interests involved, the trial judge must ever bear in mind that public policy favors the right of inspection of public records and documents, and, it is only in the exceptional case that inspections should be denied. * * *" (footnote deleted) 28 Wis. 2d at 682, 137 N. W. 2d at 475.
It is my opinion that the tape recording question is controlled by 18.01 and the Youmans case. A tape recording of county board meetings, when such recording is officially authorized by the board, is clearly a form of “property” which is “in the lawful possession or control” of some county officer. As such, it must be available for public scrutiny under the limitations expressed in 18.01 (2) and in the Youmans case.

These limitations are: (1) Records may be denied to the public if the custodian determines that inspection would “result in harm to the public interest which outweighs any benefit that would result from granting inspection.” This will only occur in an “exceptional case”, and when it does the custodian must state specifically his reasons for refusing access. His decision may be reviewed by a court if an action is commenced to obtain access to the tape recording; (2) if access is permitted, the custodian may demand that “proper care” be used in the inspection and may establish orders and regulations governing procedures for the inspections. In the case of a tape recording, the county board probably could establish fairly restrictive rules about tape handling and use for the purpose of preventing harm to the tape itself.

It is true that the Youmans opinion and prior cases cited in that opinion talk about written records, specifically books, papers, and documents. There is no reason to think, however, that the rules of law enunciated do not extend to tape recordings. This is especially true in light of the fact that the basic statutory provision about public records, sec. 18.01, Stats., uses the expansive phrase “all property and things.”

My answer to your question is, therefore, that a county board may not establish a blanket policy of refusing public inspection of tape recordings of board sessions. Inspection may be denied only in specific instances where the board or a custodial officer to whom such responsibility has been duly delegated finds that such inspection would result in harm to the public interest outweighing any benefit that would result from granting it. Such a denial must be made according to the procedures outlined in the Youmans case. Under these procedures, denial of access might apply to all
or part of a recording. Except for these "exceptional cases", the public must have access to the tapes, subject to reasonable regulations designed to guarantee among other things that proper care is exercised in the use of the tapes.

The Youmans case requires that a custodian who wishes to deny public access to records pursuant to sec. 18.01 must state specifically the reasons for the refusal. While the court did not say that these reasons must be set forth in writing, I would advise custodial officers to provide written statements in cases where access is to be denied. Written statements will help to avoid unnecessary misunderstandings as well as facilitating any court review process that may be initiated.

In the Youmans case, the court stated:

"We deem it unwise to attempt to catalog the situations in which harm to the public interest would justify refusal to permit inspection. It is a subject which had best be left to case-by-case decision." 28 Wis. 2d at 682, 187 N. W. 2d at 474-5.

The court did not, therefore, lay down guidelines that would assist the county board in deciding when to allow or deny use of tape recordings.

The opinion did state quite clearly that public access could legitimately be denied only in rare instances. The city argued that the sworn statements contained in the investigation report might contain material that would damage reputations. The court indicated that:

"* * * If the report contains statements of persons having first-hand knowledge, which disclose police misconduct, the fact that reputations may be damaged would not outweigh the benefit to the public interest in obtaining inspection. On the other hand statements based upon hearsay or suspicion, or inconclusive in nature, would be of small public benefit if made public, and might do great harm to reputations." 28 Wis. 2d at 685, 137 N. W. 2d at 476. See also, State ex rel. Youmans v. Owens, (1966) 32 Wis. 2d 11, 144 N. W. 2d 793.
This language suggests that the county board would not be permitted to deny public access to tape recordings solely because of a fear that the tapes may not provide an accurate portrayal of events at board meetings. The fact that such meetings are open to the public except for the limited exceptions provided in 14.90 (3), tends in itself to indicate that public knowledge about what occurs at the meetings would seldom be damaging to the public interest. But, as the court pointed out, the responsibility for the initial decision about when recordings may be denied to the public rests with the county board.

It, therefore, is my opinion that tape recordings of county board proceedings are subject to 18.01 as interpreted in the Youmans case, and only in those rare cases where disclosure would cause harm to the public interest outweighing the benefits of the general policy of open access may such recordings be denied to the public.

BCL:RAL

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Juvenile records—Court orders—Under sec. 48.26 (1) law enforcement agencies cannot make juvenile records available to representatives of the U. S. armed forces without court order.

September 13, 1967.

ROBERT READ

District Attorney, Walworth County

You ask whether peace officers’ records should be made available to representatives of the United States armed forces without court order, pursuant to sec. 48.26 (1), Stats., which reads:

“Peace officers’ records of children shall be kept separate from records of persons 18 or older and shall not be open to inspection or their contents disclosed except by order of the court. This subsection shall not apply to the representa-
tives of newspapers or other reporters of news who wish to obtain information for the purpose of reporting news without revealing the identity of the child involved or to the confidential exchange of information between the police and officials of the school attended by the child or other law enforcement or social welfare agencies or to children 16 or older who are transferred to the criminal courts."

The statute is framed in terms of a blanket prohibition of public inspection or disclosure of juvenile records without court order. It then lists three specific exceptions to the broad prohibition:

1. Newspaper reporters who want to obtain information without revealing the identity of the child involved;

2. School officials, social welfare agencies, and law enforcement agencies who want to confidentially exchange useful information; and

3. Records of juveniles, 16 and older, who are transferred to criminal court.

The fact that the legislature spelled out these exceptions in the body of the statute demonstrates that the legislature specifically considered the question of when peace officers' records should be made available without court order. The fact that the legislature provided for only these specific exemptions evokes the clear inference that the legislature intended the records to be confidential in all other cases, and that they be released only in individual cases under the supervision of a juvenile court judge.

The educational, welfare, and law enforcement agencies provided for in the second exception use information contained in peace officers' records to confidentially evaluate and decide upon a course of action which significantly affects the individual involved. The legislature, therefore, did consider the same sort of confidential, evaluative use that the armed services make of the records, and allowed the above agencies free access to peace officers' records for that use. The fact that the legislature did not include the armed services in the list of agencies making such use of the records
again leads me to the conclusion that the legislature did not intend to allow representatives of the armed forces to have access to these records without court order.

The legislative history of 48.26 (1) affirms this interpretation. Sec. 48.26 (1) was part of a broad revision of Wisconsin's Children's Code adopted in 1955 upon recommendation of the child welfare committee of the Wisconsin legislative council. In its report that committee stated what they considered to be the number one problem with confidentiality of records at that time:

"At present there are provisions requiring that records of certain proceedings relating to children be closed. . . . but other types of records are open although they contain much the same information as the closed records. For example, police records are not closed although they frequently contain much of the information in the juvenile court record. . . . The result is that in some cases the purpose of requiring the other records to be closed is lost."


The child welfare committee's recommendation was as follows:

"Police records of children be kept separate from adult records and be closed except on order of the court." Child Welfare Committee Report, P. 30.

Their recommendation was embodied in the draft of the revised Children's Code included in the report as Bill No 444, S.:

"48.26 RECORDS. (1) Peace officers' records of children shall be kept separate from records of persons 18 or older and shall not be open to inspection or their contents disclosed except by order of the court. This subsection shall not apply to children 16 or older who are transferred to the criminal court." Child Welfare Committee Report, Bill No. 444, S., P. 38.
The language of 48.26 (1) referring to reporters, and referring the confidential exchange of information between educational, social welfare and law enforcement agencies, was not included in the original draft of this subsection. The fact that this language was included in the bill as finally adopted is convincing evidence that the legislature gave specific consideration to the subject of these exceptions, and that they determined that peace officers' records should be available without court order under the circumstances provided for in the exceptions but only under those circumstances.

The U. S. supreme court in In re Gault, 35 L. W. 4399, May 15, 1967, was highly critical of the juvenile justice system as it is administered in the United States today. Justice Fortas pointed out that in most cases the system had failed to achieve its intended purpose. As originally conceived, the juvenile justice system was intended to remove the child from the adult system. A separate system was set up whose purpose was not to determine the "guilt" or "innocence" of the child, but how that child might be treated and set back on the road to a useful adult life. The system was designed to operate informally and to be shielded from the public eye. One of the reasons for this private, closed system was to protect the child from any stigma that might attach to his youthful mistakes, thereby allowing him to lead a normal adult life free from the civil disabilities that usually result from a criminal conviction.

One of the failures that Justice Fortas specifically singled out for criticism was the failure to provide, in fact, the protection theoretically afforded the juvenile through confidentiality of juvenile records:

"As the Supreme Court of Arizona phrased it in the present case, the summary procedures of juvenile courts are sometimes defended by a statement that it is the law's policy "to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past." This claim of secrecy, however, is more rhetoric than reality. Disclosure of court records is discretionary with the judge in most jurisdictions. Statutory restrictions almost invari-
ably apply only to the court records, and even as to those
the evidence is that many courts routinely furnish information
to the FBI and the military, and on request to government agencies and even to private employers. Of more importance are police records. In most States the police keep
a complete file of juvenile ‘police contacts’ and have complete discretion as to disclosure of juvenile records. Police departments receive requests for information from the FBI and other law-enforcement agencies, the Armed Forces, and social service agencies, and most of them generally comply.
Private employers word their application forms to produce information concerning juvenile arrests and court proceedings, and in some jurisdictions information concerning juvenile police contacts is furnished private employers as well as government agencies." In re Gault, 35 L. W. 4899, 4405, 4406.

It is clear that 48.26 (1) was intended to plug the sort of gaps that Justice Fortas so severely criticizes. It seems to me that one of the major thrusts of In re Gault is its clear warning that the juvenile justice systems of America must provide in fact the built-in protections that the system provides in theory. This is but another reason for a strict reading of sec. 48.26 (1).

I am aware that the armed forces' standard procedures established by the United States department of defense is to send an inquiry about a potential enlistee's, or draftee's arrest record, including any juvenile record, directly to local law enforcement agencies. Their procedure taken as a whole completely bypasses the juvenile courts, despite the fact that the juvenile codes of some states, such as Wisconsin's, contain provisions requiring a court order for the release of such information. It is my opinion that the standard defense department procedure cannot be followed in Wisconsin, but that representatives of the armed forces must obtain a court order in each individual case in order to gain access to the information they seek. Law enforcement agencies cannot respond to armed forces inquiries in any way that will convey information about records kept pursuant to 48.26 (1) including the presence or absence of such records. I recom-
mend that law enforcement agencies adopt a standard re-
sponse to the "yes-no" question contained in the defense
department questionnaire, such as: "State law prohibits any
response to this question." This answer should be given to
all armed forces inquiries, regardless of whether or not any
records relating to the person involved exist.

BCL:SMS

County assistance—Urban renewal—Counties may estab-
lish programs of assistance to local urban renewal projects
under authority granted by secs. 66.431 (13) and 66.435 (6).

September 18, 1967.

F. R. SCHWERTFEGER

Corporation Counsel, Dodge County

You have requested an opinion on the legal basis for a
program of county assistance to local urban renewal pro-
jects. The program which you propose would entail: 1) the
establishment of a county urban renewal agency which would
employ a staff of technicians; 2) the funding of the county
agency by the county board, at least initially; 3) the provi-
sion of technical advice and assistance by the county urban
renewal agency to municipal officials; and 4) the loaning of
county staff personnel to local redevelopment authorities,
pursuant to contractual agreements with municipalities, to
help conduct the planning and execution of renewal projects
and programs.

These activities would be done cooperatively with muni-
cipalities which have formed the necessary local planning
and renewal agencies. Some of the county activities would be
financed through general county revenues, augmented per-
haps by state and federal aids. When the county agency be-
comes involved in the planning or execution of a particular
renewal project, the work would be financed with local rath-
er than county revenues, again probably augmented with
aids from other levels of government.
It is not anticipated that the county agency would function as a redevelopment authority. Even when the county agency enters into a contractual agreement with a municipality to provide staff services for a specific local project, there would be an active municipal redevelopment authority which would receive and expend funds, buy and sell property, etc.

To sustain such an operation, it is necessary to find statutory language which permits county activities and expenditures of the type outlined above. *Spaulding v. Wood County*, (1935) 218 Wis. 224, 228, 260 N. W. 478. I believe that the statutory authorization can be found in the municipal urban renewal laws.

The basic urban renewal statute in Wisconsin is the Blight Elimination and Slum Clearance Act of 1958. Sec. 66.431, Stats. This statute must be read in conjunction with the 1954 Urban Renewal Act, sec. 66.435, which contains enabling legislation for rehabilitation and conservation activities, as well as for preparation and implementation of a "workable program."

Both the Blight Elimination and Slum Clearance Act and the Urban Renewal Act contain subsections on cooperation by other government agencies. These sections are set forth below:

"CO-OPERATION BY PUBLIC BODIES AND USE OF CITY FUNDS. To assist any redevelopment or urban renewal project located in the area in which the authority is authorized to act, any public body may, upon such terms as it determines: furnish services or facilities, provide property, lend or contribute funds, and perform any other action of a character which it is authorized to perform for other general purposes, and to enter into co-operation agreements and related contracts in furtherance of the purposes enumerated. Any city and any public body may levy taxes and assessments and appropriate such funds and make such expenditures as may be necessary to carry out the purposes of this subsection, but taxes and assessments shall not be levied under this subsection by a public body which has no power to levy taxes and assessments for any other purpose." Sec. 66.431 (13), Stats.
"ASSISTANCE TO URBAN RENEWAL BY MUNICIPALITIES AND OTHER PUBLIC BODIES. Any public body is hereby authorized to enter into agreements (which may extend over any period, notwithstanding any provision or rule of law to the contrary) with any other public body or bodies respecting action to be taken pursuant to any of the powers granted by this section, including the furnishing of funds or other assistance in connection with an urban renewal plan or urban renewal project." Sec. 66.435 (6), Stats.

The phrase "public body" in 66.431 (13) is defined in 66.431 (4) (b) to include counties. The same definition would probably apply to the phrase "public body" in 66.435 (6). See 66.43 (3) (m) and 66.435 (7) (c).

The two cooperation provisions set forth above fully authorize counties to assist municipal redevelopment authorities in the ways enumerated. These provisions empower counties to provide services or facilities, property, and funds, and to perform any other actions of a character which counties are allowed to perform for other general purposes. The provisions also enable counties to enter into cooperation agreements and contracts for these purposes and to appropriate funds.

The types of county urban renewal assistance which you suggest are actions of a character which counties are authorized to perform for other general purposes. For example, counties are authorized to provide many forms of technical assistance to agricultural enterprises. Secs. 59.87—59.875. Aids provided through a county cooperative extension service are similar in character to assistance that would be provided by a county urban renewal agency.

A word should be said about another urban renewal statute, the Blighted Area Law, sec. 66.43. This 1945 law also contains a cooperation provision:

"CO-OPERATION AND USE OF CITY FUNDS. (a) To assist any redevelopment project located in the area in which it is authorized to act, any public body may, upon such terms as it may determine: Furnish services or facilities, provide property, lend or contribute funds, and
perform any other action of a character which it is authorized to perform for other purposes." Sec. 66.43 (13) (a), Stats.

The Blighted Area Law cooperation provision would not appear to authorize a county to provide assistance to municipal urban renewal agencies. The section provides that a public body may not provide assistance for any project located in an area in which the public body is not authorized to act. Counties are not generally authorized to act within incorporated areas. However, the fact that the Blighted Area Law cooperation provision may not be applicable to the situation at hand presents no real problem, since the Blighted Area Law has been superseded by the Blight Elimination and Slum Clearance and Urban Renewal Acts. See Sundby, The Elimination and Prevention of Urban Blight, 1959 Wis. L. Rev. 73, 78-83.

I, therefore, conclude that the cooperation provisions in the Blight Elimination and Slum Clearance Act and the Urban Renewal Acts, secs. 66.431 (13) and 66.435 (6), Stats., authorize counties to conduct the type of urban renewal assistance program outlined above.

BCL:RAL

County boards—Open housing—County boards under and over 250,000 population have authority to enact open housing ordinances.

September 22, 1967.

JOSEPH C. FAGAN, Chairman
Department of Industry, Labor and Human Relations

You ask whether or not a county may enact an ordinance to prevent or remove discrimination in housing, and whether sec. 66.433 (3) (c), Stats., bears directly on this question.

On October 3, 1966, we issued an opinion to you stating that cities and villages had the power to enact open housing
ordinances, and that their authority to regulate against discrimination in housing had not been pre-empted by the state through the passage of sec. 101.60. (55 OAG 231). In that opinion I pointed out that the authority to enact such an ordinance is not derived from the home-rule powers of cities and villages, but rather directly from the legislature.

With the exception of counties having a population over 250,000, counties in Wisconsin do not have home-rule powers. Their authority to act is derived from powers specifically conferred on them by the legislature, pursuant to Art. IV, sec. 22, Wis. Const. The question you present here, therefore, is essentially the same as that presented in 55 OAG 231: Has the legislature conferred upon county boards the power to enact an ordinance to prevent or remove discrimination in housing?

In your letter you have asked whether sec. 66.433 (3) (c) bears directly on this problem, and I believe that it does. Sec. 66.433 authorizes municipalities to establish community relations-social development commissions, and provides for, and urges, them to be organized on an intergovernmental basis within a county. Sec. 66.433 (1) defines “municipality” as including a county for purposes of that section. Sec. 66.433 (3) sets forth the functions of such a commission, and reads, in part, as follows:

“(3) * * * The commission shall:

“(c) Recommend to the municipal governing body and chief executive or administrative officer the enactment of such ordinances or other action as will tend:

“2. To insure to all municipal residents, regardless of race or color, the rights to possess equal housing accommodations and to enjoy equal employment opportunities.”

The same act that established sec. 66.433 (c. 543, Laws of 1963), amended sec. 59.07 (11) relating to the powers of county boards to read as follows:

“(11) JOINT CO-OPERATION. Join with the state, other counties and municipalities in a co-operative arrangement as
provided by s. 66.30, including the acquisition, development, remodeling, construction, equipment, operation and maintenance of land, buildings and facilities for regional projects, whether or not such projects are located within the county; and enact ordinances as set forth in s. 66.433 (3) (c) if approved as part of such co-operative arrangement for an intergovernmental community relations-social development commission.”

By this section, the legislature specifically conferred upon all counties the power to enact open-housing ordinances. Such power is, however, qualified. It is my opinion that sec. 59.07 (11) must be read in conjunction with sec. 66.438, and that the procedures outlined in the latter section, including the establishment of a community relations-social development commission, and the recommendation by such a commission of an open housing ordinance, are necessary conditions to the enactment of such an ordinance under sec. 59.07 (11). If such a commission is established on an intergovernmental basis, the arrangement or contract establishing the commission must include authorization for the enactment of such ordinances or any ordinance enacted by the county board under sec. 59.07 (11) may not apply to all participating units of government.

There is another source of authority for the enactment of open-housing ordinances, which presently applies only to Milwaukee county. It is sec. 59.083 which confers home-rule powers on counties with a population of 250,000 or more:

“(1) Except as elsewhere specifically provided in these statutes, the county board of any county with a population of 250,000 or more, is hereby vested with all powers of a local, legislative and administrative character, including without limitation or restriction because of enumeration, the subject matter of water, sewers, streets and highways, fire, police, and health, and to carry out these powers in districts which it may create for different purposes, or throughout the county. . . . The powers hereby conferred may be exercised by the county board in any town, city or village, or part thereof located in such county upon the request of any
such town, city or village, evidenced by a resolution adopted by a majority vote of the members-elect of its governing body, designating the particular function, duty or act, and the terms, if any, upon which the same shall be exercised by the county board. . . . Such resolution shall further provide whether the authority or function is to be exercised exclusively by the county or jointly by the county and the town, city or village. . . . Upon the receipt of the resolution, the county board may . . . elect to assume the exercise of such function, upon the terms and conditions set forth in the resolution presented by the town, city or village.

"(2) The county board of any such county may, by a resolution adopted by a majority of its membership, propose to the towns, cities and villages located in such county, or any of them, that it offers to exercise such powers and functions therein in order to consolidate municipal services and functions in said county. Such resolution shall designate the particular function, duty or act and the terms and conditions, if any, upon which the county board will perform the same. The powers conferred in subsection (1) and designated in such resolution may thereafter be exercised by the county board in each such town, city or village which shall accept such proposal by the adoption of a resolution by a majority vote of the members-elect of its governing body or by direct legislation in the manner provided in s. 9.20 of the statutes.

"* * *

"(5) * * * The procedure herein provided for the request or acceptance of the exercise of the powers conferred on the county board in cities and villages is hereby prescribed as a special method of determining the local affairs and government of such cities and villages pursuant to section 3 of article XI of the constitution.

"(6) The powers conferred by this section shall be in addition to all other grants of power and shall be limited only by express language."

This section constitutes a broad grant of legislative authority to the county boards affected. In 37 OAG 526, 528-529, it was stated that sec. 59.083 (1):
"... on its face purports to delegate to the county board of any county of over 250,000 population all powers which the legislature has the right to delegate to any county board under the constitution, except as elsewhere specifically provided in the statutes."

There is no question that the legislature can, under the constitution, confer upon county boards the power to enact ordinances to prevent or remove discrimination in housing. Indeed, it has already done so, to a limited extent, through secs. 66.433 and 59.07 (11). The power to enact such an ordinance, therefore, must have been delegated under 59.083 to counties having a population over 250,000.

The question remains whether the legislature has preempted or limited the county board’s power to act in this area. Sec. 59.083 (6) states:

"(6) The powers conferred by this section shall be in addition to all other grants of power and shall be limited only by express language."

The above language is identical to the language contained in secs. 61.34 (1) and 62.11 (5), which constitute broad legislative grants of home-rule powers to villages and cities, similar to the grant to county boards contained in sec. 59.083. This language has been interpreted to mean that the powers granted under such sections can be limited only by express language of the legislature, and not by merely implications drawn from the wording of particular statutory section. See Fox v. Racine, (1937) 225 Wis. 542, 544-545, 275 N. W. 513.

It is true that the legislature, by 59.07 (11) has conferred upon all counties the authority to enact such ordinances under specified conditions. But there is no language in sec. 59.07 (11) which expressly states that the procedures outlined there are to be the only way that such an ordinance can be enacted.

It is also true that sec. 101.60 (7) states:

"(7) INTENT * * *. 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 * * *.

The above language could be read as an implied limitation on the power of local units of government to enact open housing ordinances by means other than those provided in sec. 66.433. Such a construction, I believe, would be totally contrary to the intent of the legislature. Furthermore, as in the case of cities and villages, it could not act as a limitation on the power of a county board to enact open housing ordinances under sec. 59.083. That power can be limited only by express language, and not by implications drawn from legislative language.

It is my opinion, therefore, that counties with a population of 250,000 or more have the power to enact ordinances to prevent or remove discrimination in housing pursuant to sec. 59.083, subject to the provisions in that section for request or approval by towns, cities and villages within such counties and subject to the other provisions of that section.

BCL:SMS
Building permit—Courthouse—County may proceed to construct an addition to its courthouse in a city on county-owned lands after plans are approved by industrial commission without a building permit.

October 2, 1967.

Willis J. Zick
Corporation Counsel, Waukesha County

Waukesha county is in the process of constructing an addition to its courthouse which is located within the city limits of Waukesha. The city has demanded that the county apply for a building permit and pay the standard permit fee provided in the city ordinance. The fee would be $300 for the permit if it were considered a new building, or $1000 if considered an addition.

You have requested my opinion whether the county is subject to the city building ordinance.

I am of the opinion that it is not and that the city is without authority to enforce its building ordinance as against the county where the county plans have been approved by the state industrial commission.

Sec. 59.68 provides:

"(1) Each county shall provide a courthouse, jail, fireproof offices and other necessary buildings at the county seat and keep them in good repair. Rehabilitation facilities as extensions of the jail need not be at the county seat.

"* * *

"(3) When the courthouse from any cause becomes unsafe, inconvenient or unfit for holding court, the board shall provide some other convenient building at the county seat for that purpose temporarily, and this building shall then be deemed the courthouse for the time being.

"(4) The construction of any courthouse shall be in accordance with plans and specifications accompanied by the certificate of the circuit judge in whose circuit the building is to be erected, to the effect that after consultation with
competent experts he is advised and believes that the court-
rooms provided for will possess proper acoustical properties.
The fee for this advice shall be paid by the county upon the
judge's certificate.

"(5) Repairs which amount substantially to a reconstruc-
tion of a courthouse shall be governed by the same restric-
tions, so far as practicable.

"* * *"

Sec. 59.07 (1) (d) empowers the county board to "con-
struct, maintain and operate all county buildings * * *." 

A county courthouse is a public building and plans, design
calculations and specifications for its construction must be
approved by the state industrial commission. Secs. 101.305,
101.10 (2),(5),(12).

In constructing and operating a courthouse a county is
engaged in a governmental function as an agent and arm of
the state. In such a case general statutes granting powers to
a city with respect to public buildings do not apply to the
state or its agency, a county, where a special statute requires
building at the county seat and where state law requires
state approval of plans and inspection of the completed fa-
cility.

In Green County v. Monroe, (1958) 3 Wis. 2d 196, 201,
202, 87 N. W. 2d 827, the court stated:

"* * * By statute the county board must construct the
jail at the county seat. Under our statutes counties have
extensive police powers. The state has its own building code
governing the construction of public buildings. The state
code is very comprehensive and covers safety in construction,
sanitation, ventilation, and other details. The responsibility
for the enforcement of the state building code is not left to
cities but is delegated to the state industrial commission and
in the case of a county jail the plans are also subject to in-
spection and approval by the state department of public wel-
fare. The general words of the statutes conferring zoning
powers on cities cannot be construed to include the state, or
in this instance the county, when in conflict with special statutes governing the location and construction of a county jail."

In *State ex rel. Lake D. B. Church v. Bayside*, (1961) 12 Wis. 2d 585, 108 N. W. 2d 288, the court refused to extend the exemption to churches, holding that a village by reasonable zoning ordinances could regulate the location of churches. This case does not dilute the holding in the *Green County* case as the reasoning of the latter case as to a county jail is equally applicable to a county courthouse. The *Green County* case is in line with other cases cited in 61 ALR 2d 970 insofar as exemption from municipal zoning laws where a governmental function is involved.

In *Milwaukee v. McGregor*, (1909) 140 Wis. 35, 121 N. W. 6482 it was held that the provisions of the city of Milwaukee building ordinance could not be enforced as against the state board of college regents, a state agency. While a county is not a state agency in the same sense, it is an arm of the state, an instrumentality of the state created to carry out state functions at the local level. *State ex rel. Bare v. Schinz*, (1927) 194 Wis. 397, 400, 216 N. W. 509; *State ex. rel. Sonneborn v. Sylvester*, (1965) 26 Wis. 2d 48, 56, 132 N. W. 2d 249.

In *County of Los Angeles v. City of Los Angeles*, (1963) 212 C.A. 2d 160, 28 Cal. Rpts. 32, it was held that a county as a political subdivision of the state was not subject to the city's building and zoning ordinances in the construction of county buildings on county land located within the city's territorial limits.

I am aware of the provisions of sec. 62.23 (7) (g), with respect to conflicts in zoning, however this statute was in its approximate same form at the time the *Green County* case was decided. I am also aware of the provisions of sec. 101.16 which is designed to alleviate conflicts between state and local authorities. The statute refers to public buildings, but not specifically to state-owned or county-owned public buildings. It is a general statute and not designed to grant municipal boards authority over county-owned public build-
ings which a county may construct or operate in a governmental capacity as an arm of the state.

BCL:RJV

Escheats—Real Estate—Real estate escheats to the state immediately upon death under secs. 237.01 (7) and 318.03 (4) and such property is exempt from the general property tax. Erroneous tax roll may be corrected.

October 3, 1967.

Don Paul Novitzke

District Attorney, Polk County

You have asked whether title to land vests in the state by escheat immediately upon the death of an intestate owner, and whether the state would be liable for taxes for subsequent years.

You submit the following facts: The owner died intestate presumably without heirs on February 2, 1964, a resident of Monroe county owning lands in Polk county. The administration of the estate was concluded in Monroe county by a judgment dated August 2, 1966, escheating the property to the state. A certified copy of this judgment was recorded in the office of the register of deeds for Polk county on August 15, 1966. The state sold this property on January 4, 1967. Real estate taxes for the years 1963, 1964, 1965 and 1966 are still outstanding.

The common law rule that real estate descends at the instant of death is still the law in Wisconsin. *State v. Gether*, (1931) 203 Wis. 311, 313, 314, 234 N. W. 331; *6 OAG 22* (1917) has not been changed or modified.

You state that the questions arise in spite of *6 OAG 22*, because of sec. 318.03 (4), which reads in part:

"* * * If real property has been adjudged to escheat to the state pursuant to s. 237.01 (7) the county court which
made the adjudication may adjudge at any time before title has been transferred from the state that the title shall be transferred to the proper owners pursuant to the proceedings brought in the manner provided in this subsection." (Ch. 66, Laws of 1949.)

An adjudication of escheat is proof of heirship. An escheat cannot be ascertained unless a finding is made that the deceased died intestate, or the will was invalid, that he had no heirs or next of kin, and that he owned property which can descend. An adjudication of escheat is merely a confirmation that certain title passed to the state on a given date.

Sec. 318.03 (4) provides a procedure by which the rightful owner may claim property which was erroneously adjudicated as having escheated. The fact that the public administrator took possession and probated the estate pursuant to 311.11 and 311.16 does not affect title.

Your second question is whether the state of Wisconsin is liable for taxes for the years 1964, 1965 and 1966. The answer is "no".

State owned lands are not subject to general property taxes. Sec. 70.11 (1), Stats. Sec. 74.57 provides that lands acquired by the state are not subject to tax sale.

Sec. 74.135 (3), provides for the cancellation of taxes after the tax roll has been delivered to the treasurer:

"(3) When the property is exempt by law from taxation."

Property which escheated to the state is liable for outstanding taxes, but no taxes shall accrue or be collectible after date of death. 33 OAG 143 (1944).

Open Housing—The legislature is not prohibited from enacting legislation conferring on county boards the power to enact open housing ordinances.
Robert P. Russell,
Corporation Counsel, Milwaukee County

You requested that I review my opinion of September 22, 1967, to Joseph C. Fagan, and clarify it with respect to the question of whether the legislature was prohibited by Art. IV, sec. 22, Wis. Const., from conferring the authority to enact open-housing ordinances on county boards because such legislation is a matter of state-wide concern. The question you raise under Art. IV, sec. 22, is based on an interpretation of Muench v. Public Service Commission, (1952) 261 Wis. 492, 53 N. W. 2d 514, 55 N. W. 2d 40. In light of the confusion that exists in the interpretation of that case, and in light of subsequent authorities that have done much to explain it, I believe it would be useful at this time to attempt to clarify the doctrine of the Muench case in response to the question you present.

Your question is based on two premises. First, that the prevention and removal of discrimination in housing is a matter of state-wide concern. In support of this premise you cite my opinion of October 3, 1966, to Joseph C. Fagan, in which I stated it was my opinion that:

"* * * cities, villages and towns possess the power * * * to promulgate local regulations to prevent and remove all discrimination in housing, even though regulation of non-discrimination in housing is a matter of state-wide concern."

With this first premise I can only heartily agree.

Your second premise is based on your interpretation of Muench v. Public Service Commission, supra, which you cite as holding that:

"Under Sec. 22, Art. IV of the Wisconsin Constitution the legislature was prohibited from delegating to county boards the right to legislate on all matters of state-wide concern even though the attempted delegated power was to be exercised only within the boundaries of the county."

From this you conclude that the legislature under 59.083 (1):
You question whether the legislature did confer the authority to enact open-housing ordinances on counties having a population of 250,000 or more. Although your question is raised only with respect to 59.083 (1), your interpretation of the Muench case raises the more basic question of whether the legislature is prohibited by Art. IV, sec. 22, from conferring upon county boards the power to enact such an ordinance. It is this latter question which this opinion will address. By answering it, I believe I will have answered your question as well.

It is my opinion that the question raised here is based on a common misinterpretation of the holding in the Muench case. The relevant language appears at 261 Wis. 515f-515g, where the court states:

“As to some subjects of legislative action it is possible to say that they are exclusively of state-wide concern, while others may be fairly classified as entirely of local character, affecting only the interests of the people in a particular locality of the state. However, as to many subjects of legislative action it is not possible to fit them exclusively into one or the other of these two categories. The right to fish and hunt, or to enjoy scenic beauty, as an incident to the right to navigate the navigable waters of this state (which is the subject of legislative action in the instant case) is an example of a type of legislation which affects the interests of the people of the entire state, as well as those of a particular county.

“It would therefore seem that the test which ought to be applied in determining the validity of delegation of legislative power in such a case is that of paramount interest.” (Emphasis supplied.)

From the language underlined above, it is clear that the “paramount interest” test promulgated by the Muench case was meant to apply only to subjects of legislative action that are matters of both local concern and state-wide inter-
est. It is similarly clear that the court was not holding that the delegation of legislative power to counties under Art. IV, sec. 22, is invalid in all matters which may be of state-wide interest. Rather, the court held that such delegation is invalid only when local and state-wide interests are in conflict and the state-wide interest is paramount.

The opinion in the Muench case does not fully explain the point that the paramount interest test applies only where there is a conflict between local and state-wide interests. This aspect of the Muench case was recently clarified, however, in State ex rel. Bowman v. Barczak, (1967) 34 Wis. 2d 57, 74, 148 N. W. 2d 683, where sec. 59.071, the Industrial Development Act, was challenged on the ground that the powers delegated under the statute to county boards exceeded the constitutional limits of Art. IV, sec. 22. The realtor in that case cited Muench v. Public Service Commission, supra, as the basis of his challenge, and the Wisconsin supreme court responded by stating:

"In the Muench Case there was an obvious conflict between the statewide interests and local interests. * * * However, in the case at bar, there is no potential conflict between state and local rights, and we see no need to engage in a balancing of interests under the Muench Case to determine whether the state interest or the local interest is paramount."

Thus it is clear that the paramount interest test applies only to situations where there is potential conflict between local and state-wide interests.

In both 55 OAG 231 and my opinion of September 22, 1967, to Joseph C. Fagan, I stated that it was my opinion that sec. 101.60 does not prevent local governments from enacting open-housing ordinances. When it comes to the enactment of legislation guaranteeing equal opportunity for housing, there is no paramount state-wide or local interest—every unit of government, be it city, village, town, county or state, has an equal interest in guaranteeing basic constitutional right to all its citizens. The Wisconsin legislature recognized this when it stated in sec. 101.60 (7), Stats., that:
"* * * It is the declared policy of this state that all persons shall have an equal opportunity for housing regardless of race, color, religion, national origin or ancestry and 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. * * *

Furthermore, I can see no potential conflict under present law between state-wide and local interests in the prevention of discrimination in housing. Therefore, the question you raise under Muench v. Public Service Commission does not apply here.

It is my opinion, therefore, that the legislature is not prohibited by Art. IV, sec. 22, Wis. Const., from conferring upon county boards the power to enact ordinances to prevent or remove discrimination in housing.

BCL:SMS

Medical education—Medical school—The plan of Milwaukee county to contract with the Marquette medical school for a program of medical education does not appear to be violative of the Wisconsin constitution.

October 14, 1967.

ROBERT P. RUSSELL

Corporation Counsel, Milwaukee County

By letter of October 6, 1967, you have requested my opinion on the following question:

If Milwaukee county should contract with the Marquette medical school for a program of medical education, pursuant to enabling legislation, could state funds be appropriated to reimburse Milwaukee county for any part of the cost of financing such a program?

You indicate that Milwaukee county is planning to develop a comprehensive medical center on county institutions
grounds at Wauwatosa, and that an integral part of such a center would be the operation and maintenance of a medical school. It is contemplated that the county would contract with Marquette medical school to provide a program of medical education, and that legislation authorizing such action and providing state grants to defray the cost of the program will be sponsored by Milwaukee county.

You have also supplied me with extensive factual information on the Marquette medical school as it is presently constituted, as well as reports of various task forces and groups interested in medical education in Milwaukee.

Although the answer to your question is in the affirmative, there are many reasons why this answer must be qualified. Since the legislation implementing the plan has not been drafted, it is impossible to tell at this juncture whether proper restrictions will be contained therein so as to insure adequate protection of the public interest in the expenditure of state funds. In addition, many of the facts essential to a determination of the constitutionality of the plan are, at this point, mere "paper facts" for there is no indication as to the nature of the actual working relationship between the Marquette medical school, Marquette university, and Milwaukee county, once the plan is implemented.

What is now the Marquette School of Medicine, Inc., had its origin in 1907 when Marquette university and the Milwaukee medical college joined together to form the medical department of Marquette university. In 1918 the university acquired the assets of another private medical school in Milwaukee, which also was placed under the aegis of the university. The following year a separate and independent nonprofit corporation comprising the 2 medical schools was formed under the name "The Marquette University School of Medicine".

The Article of Association of the Marquette University School of Medicine as amended to June 26, 1964, formed the basis of the relationship between the medical school and the university. Article I of the charter recognized that the corporate entity, the Marquette university school of Medi-
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cine, constituted a "department of Marquette university * * * with the proviso * * * that there shall be no deviation from the fundamental, ethical, and educational principles established by said Marquette University * * *"). The power of appointment of all members of the permanent medical school faculty and the authority to formulate procedures for dealing with reprimand or removal of faculty members were placed in the members and directors of the medical school corporation. The charter provided, however, that "breaches of the fundamental, ethical and educational principles established by Marquette University shall be determined and acted upon with full power of discharge by the directors of said Marquette University * * ".

The power of the members and directors of the medical school corporation to appoint the faculty was delegated by the bylaws to the president of Marquette university. Article I of the charter also provided that in the event the medical school failed to perform the functions for which it was organized, all of its assets would be transferred to the university.

Article IV of the charter placed the management and control of the medical school in the hands of a 15-member board of directors consisting of all members of the corporation. Of the 15 members and directors 10 were elected, and were usually lay or public members without any necessary connection with the university. The remaining 5 memberships and directorates were to be filled by the president, secretary and treasurer of Marquette university, the dean of the medical school, and one nominee of the university trustees.

In all other respects, the charter and bylaws of the medical school established a corporate entity separate and distinct from Marquette university. The power over administrative and financial affairs of the school was vested in the corporate board. The school owned all of its assets and operated under its own budget, without financial support from the university.

On September 30, 1967, the members and directors of the medical school corporation adopted a revised charter which
substantially altered the relationship between the medical school and Marquette university. In general, the restated articles made the following changes in the corporate structure:

(a) The name of the corporation was changed from Marquette University School of Medicine, to “Marquette School of Medicine, Inc.”;

(b) The requirement that the medical school be operated as a “department” of Marquette university was eliminated; as was the requirement that the medical school operation be consonant with the “fundamental, ethical and educational principles” established by the university;

(c) The power of Marquette university to discharge any member of the medical school faculty for breach of the university’s “fundamental, ethical, and educational principles” was eliminated;

(d) The provision whereby medical school assets reverted to Marquette university in event of failure of the purposes of the charter was eliminated;

(e) All other references to Marquette university were eliminated from the charter;

(f) The medical school corporation was empowered to set all standards within the school and to confer degrees;

(g) The category of “members” of the corporation was eliminated and a new provision inserted directing that the affairs of the medical school corporation would henceforth be managed and controlled by a 15-man board of directors, all of whom would be elected.

You have also supplied me with certain facts concerning the organization of the medical school pursuant to the restated articles which I will summarize.

Recognizing that any first-rate medical school must have academic affiliation with a university, you indicate that such arrangements as the directors may establish with Marquette university or any other university will be con-
tractual in nature, and that each institution will bear its prorata share of any expenses involved in joint programs.

You also indicate in regard to the medical curriculum itself that ethical considerations incident to the practice of medicine generally frequently are discussed by faculty and students. In addition, seminars held under the aegis of the department of preventive medicine deal with particular aspects of the various ethical creeds and religious faiths which students may expect to encounter in their practice.

In selecting students for admission to the medical school, the admissions committee does not give preference to students from any particular college nor to factors other than academic standing, medical admission test scores, and the opinions of those who have interviewed the applicant concerning his suitability for the study of medicine. A prospective student's religion or lack of it is a factor unknown to the admissions committee, and is not considered by the committee in selecting candidates for admission to the medical school. Experience has shown, however, that the proportion of Catholic students at the medical school is higher than the proportion of Catholics in the general population.

Beyond the environment of the medical school campus proper, extensive joint programs and services are carried on by the medical school in close conjunction with 4 major Milwaukee institutions: (1) The Milwaukee county general hospital, owned and operated by Milwaukee county; (2) the Milwaukee childrens hospital, owned and operated by a non-profit corporation devoted to the care of children; (3) the veterans administration hospital at Wood, Wisconsin, a unit of the federal veterans administration hospital system; and (4) the Milwaukee psychiatric hospital, owned and operated by a private foundation.

These collaborative arrangements take the form of affiliation agreements which, among other things, provide for joint appointments of Marquette medical school faculty members to professional staff positions in the hospitals. These jointly-appointed faculty-staff members not only engage in the teaching of medicine, but also provide professional medical
services to patients in the hospitals. They also conduct clinical and laboratory research programs in the hospitals. The jointly-appointed faculty-staff of Milwaukee county general hospital receives financial support from both the hospital and the medical school. At the present time 43% of the total cost of salaries paid to the hospital faculty-staff is derived from county funds, and 57% is paid either from funds of the medical school corporation or from research grants awarded to the medical school.

Other types of affiliation agreements exist between the medical school and Marquette university in order that joint graduate programs leading the Ph.D. and other degrees may be conducted. These agreements permit students enrolled in doctoral and other non-M.D. programs in the medical school to take certain courses at Marquette university. The tuition of such students, paid to the medical school, is allocated between the two institutions in proportion to the number of hours of instruction received in each. This affiliation will continue in the future under contractual standards established by the medical school board of directors who are, as indicated above, fully responsible for the appointment of the faculty of the medical school and for the programs of instruction conducted by the faculty.

In 1966, 3,257 graduates of the Marquette medical school were in practice throughout the United States. Approximately 1,300 of these graduates are in practice in Wisconsin, and this figure represents 57% of all Wisconsin trained physicians now practicing within the state. Of the total number of physicians now practicing in Wisconsin, approximately 32% are graduates of the Marquette medical school.

The medical school provides other services, such as biomedical research, and promises certain specialized medical care skills not generally otherwise available in the community.

Forty-four of the 189 M.D. degrees held by 246 full time medical school faculty members are degrees of the Marquette university medical school. Five of the 57 nonmedical degrees held by full time faculty members are Marquette degrees.
Wisconsin's physician-patient ratio is below the national average, although it is at the median of the 50 states. All indications point to a continued rapid demand for health care and a resulting increased need for physicians and other health care personnel. It has been estimated that Wisconsin's relative position of today will decline unless positive steps are taken to increase the state's supply of physicians.

At the present time, student personnel being trained at the Marquette medical school and affiliated hospitals include physicians, dentists, graduate medical students, allied health workers such as medical technologists, laboratory assistants, etc., X-ray technicians, dental technicians, nurses, hospital administration residents, occupational therapists, operating room technicians, clinical psychologists, physical and music therapists, speech pathologists, psychiatric social workers and general social workers.

The Marquette medical school presently operates at an annual deficit of approximately 1.8 million dollars, and it is expected that this deficit will increase to 2.7 million dollars by the mid-1970's.

You have also supplied me with material concerning future medical needs and future plans for medical services in the southeastern Wisconsin area, most of which is immaterial to the legal discussion.

This opinion is based only upon the organizational structure of the medical school as reflected in the restated articles of an incorporation, and the information appearing above concerning the variety of medical and health care services provided by the medical school and affiliated hospitals to the citizens of Milwaukee and the state as a whole. The other materials are best suited to the type of policy determinations made by the legislature.

There are two basic questions presented by your request:

(1) Would the use of state funds to help finance a program of medical education at the Marquette medical school be unconstitutional as appropriations made for non-public purposes?
(2) Would state participation in such a program violate Art. I, sec. 18, Wis. Const., concerning religious freedom?

The Public Purpose Doctrine

Although not expressly stated in the constitution, it has long been recognized that taxes can be raised only for a "public purpose". See Heimerl v. Ozaukee County, (1949) 256 Wis. 151, 158, 40 N. W. 2d 564.

The rule for determining whether a public purpose is served by a particular expenditure of public funds is found in State ex rel. Thomson v. Giessel, (1953) 265 Wis. 207, 215-216, 60 N. W. 2d 763:

"The general rule as to the public purpose of the expenditure of public funds is stated in 81 C.J.S., States, p. 1149, §133, as follows:

"Generally, in connection with the validity of the expenditure of state funds, what is . . . a public purpose, is a question for the legislature to decide, with respect to which it is vested with a large discretion, which cannot be controlled by the courts unless its action is clearly evasive. . . . Where a doubt exists whether the purpose of an appropriation is public or private, it will be resolved in favor of the validity of the appropriation * * *."

The Thomson case, supra, at p. 216 cited with approval Carmichael v. Southern Coal and Coke Co., (1937) 301 U.S. 495, 57 S. Ct. 868, 81 L. ed. 1245, which states:

"* * * The existence of local conditions which, because of their nature and extent, are of concern to the public as a whole, the modes of advancing the public interest by correcting them or avoiding their consequences, are peculiarly within the knowledge of the legislature, and to it, and not to the courts, is committed the duty and responsibility of making choice of the possible methods. [Citations]. As with expenditures for the general welfare of the United States [Citations], whether the present expenditure serves a public purpose is a practical question addressed to the lawmaking department, and it would require a plain case of departure
from every public purpose which could reasonably be conceived to justify the intervention of a court. [Citations.].”

See also State ex rel. La Follette v. Reuter, (1966) 33 Wis. 2d 384, 397, 147 N. W. 2d 304.

If a public purpose can be conceived which might rationally be deemed to justify an act of the legislature, courts cannot further weigh the adequacy of the need or the wisdom of the method. State ex rel. Zillmer v. Kreutzberg, (1902) 114 Wis. 530, 549, 90 N. W. 1098, State ex rel. Bowman v. Barczak, (1967) 34 Wis. 2d 57, 68, 148 N. W. 2d 683. The Wisconsin court in the Barczak case sustained an act providing state funds (through the vehicle of “dummy corporations”) to aid localities in achieving and improving industrial development.

State ex rel. La Follette v. Reuter, supra, held that the construction of local facilities for the construction of water pollution abatement facilities was a “public purpose”, for which state funds could be appropriated, and emphasized the promotion and protection of health as serving this purpose (33 Wis. 2d at p. 397).


In *Opinion of the Justices*, (1965) 99 N.H. 519, 113 A. 2d 114, the New Hampshire court approved a program of state aid for nursing instruction even though many of the grants-in-aid went directly to private (and sometimes sectarian) institutions.

The Wisconsin legislature frequently appropriates public funds to private organizations for the furtherance of goals stated to be "public" in nature.

Sec. 45.40, authorizes the transfer of $50,000 to the American Legion for the purpose of purchasing and maintaining a camp for disabled veterans and their dependents. Similarly, Ch. 51, Laws of 1967, appropriated $50,000 to the American Legion to defray the expenses of holding their national convention in Milwaukee.

Ch. 137, Laws of 1963, appropriated $25,000 for the manufacture of the "World's Largest Cheese", and $10,000 for advertising and promotional costs in exhibiting the cheese at the New York world's fair.

Under secs. 20.670 (1) (c) and 51.38 state aids are payable to day-care centers for the mentally handicapped operated by "any nonprofit corporation". Sec. 58.06 (2) provides for commitment of persons to private tuberculosis sanatoriums, for which state aids are provided by 50.04. Similar provisions are made for private insane asylums by 58.05 (2).

Twelve thousand dollars has been appropriated to the Wisconsin association of the deaf, which does not appear to be a state institution (see sec. 20.300), and state aid is also provided to incorporated agricultural associations by 27.30 (5).
Although far from exclusive, these examples of appropriations are indicative of a state policy to aid private organizations serving "public" purposes.

The work of educating physicians and supporting medical personnel—particularly in a state ranking below the national average in the ratio of doctors to population—if not a sufficient "public purpose" in and by itself must certainly become so when this work also involves the furnishing of hospital, clinical and various other services to the public at large. It follows that the interest of the public will indeed be served by the general objectives of the plan described in your letter. This being a proper governmental purpose—in fact an obligation of government—it is my opinion qualified by what follows that it is legally permissible for the state to furnish financial aid to a private institution such as the Marquette medical school.

The fact that courts will look to the specific situation in determining the "public purpose" served by a given legislative enactment is in itself a limitation on the scope of this opinion. There must be a further qualification, however. In Wisconsin Industrial School for Girls v. Clark County, (1899) 103 Wis. 651, 667, 79 N. W. 422, the court considered the question of whether the legislature could employ private corporations or persons at public expense to care for and maintain dependent children. The act in question provided for county payments to private institutions to whom delinquent or dependent girls were committed by the local courts. In holding the act constitutional, the court stated:

"* * * The test to be applied in determining whether a particular agency may be employed by the state or some particular subdivision thereof by legislative authorization, to perform any particular work, is not whether the agency is public, but whether the purpose is public within the legitimate functions of our constitutional government. If the purpose be public and constitutional, and the agency be an appropriate means to accomplish it, and not expressly or by necessary implication prohibited by state or national constitution, its employment, under reasonable regulations for
control and accountability to secure public interests, is legitimate and constitutional. * * *” (Emphasis supplied.)

Although it might be said that the “public interest” is adequately protected by state and federal laws and regulations pertaining to medical education and eligibility to practice medicine, as well as by state and nationwide professional requirements and certifications, the fact remains that there is no provision in the restated articles of incorporation for governmental representation on the board, or governmental participation in the allocation of the state funds, once paid. It might be claimed as a result that the use of the medical school board as a means of achieving a public, governmental purpose is not subject to “reasonable regulation for control and accountability to secure public interest”, as mentioned in the Wisconsin Industrial School case.

It is my opinion, however, that this is not necessarily fatal to the plan which is the subject of your inquiry. The legislature, after all, has the authority to place sufficient conditions on any appropriations for these purposes, and in this manner may adequately “secure” the public interest.

What has been said should be kept in mind, however, for although I find no contravention of the “public purpose” doctrine in the “paper proposal” its validity will in the final analysis depend upon the manner in which the program is carried out. This point will be discussed further at the conclusion of this opinion.

Religious Freedom

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

“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.”
It has long been said that Wisconsin's constitutional bar against preference for, or discrimination against, any religious society is probably more strict than that of other states, and that it is clearly more restrictive than the provisions of the First Amendment. *State ex rel. Weiss v. District Board*, (1890) 76 Wis. 177, 44 N. W. 967; *State ex rel. Reynolds v. Nusbaum*, (1962) 17 Wis. 2d 148, 115 N. W. 2d 761.

Even so, our court has recognized that the separation of church and state is not absolute, even in Wisconsin. See Justice Fairchild's dissent in the *Nusbaum* case, *supra*, p. 167. Indeed, absolute separation of the activities of government and the interests of religious denominations is impossible in either a practical or intellectual sense, for it assumes both that the state and religion coexist in mutually exclusive and self-contained spheres, and that each can be sharply defined. See *Zorach v. Clauson*, (1952) 343 U.S. 306, 312-313, 72 S. Ct. 679, 96 L. ed. 954. See also, 77 Harvard L. Rev. 1353, 1357. Nowhere is this impossibility more clearly illustrated than in the fields of medicine and education. In 1956 church affiliated hospitals in the United States numbered one out of every 6—accounting for one-fourth of all hospital patients. *Truitt v. Board of Public Works*, (1966) 243 Md. 375, 387, 221 A. 2d 370.

Despite stringent bans there are many instances in which religious instrumentalities are employed to carry out specific functions which are not in themselves regarded as religious, such as those relating to public health. *Bradfield v. Roberts*, (1899) 175 U.S. 291, 20 S. Ct. 121, 44 L. ed. 168; *Schade v. Allegheny Co. Institution Dist.*, (1956) 386 Pa. 507, 126 A. 2d 911. See also 1966 Wis. L. Rev. 217, 223.

Because the question here involved is close and highly significant, it is instructive to see how courts in other states have approached the problem of state aid to sectarian institutions.

In *Ellis v. City of Grand Rapids*, (D.C., W.D. Mich., E.D., 1966) 257 F. Supp. 564, the court approved an urban redevelopment law which using public funds would provide incidental benefits to a church owned hospital. In upholding
the plan the court stated that hospital care has an "overriding public interest", and that since this was the primary purpose of the legislation it did not violate the constitutional ban against religious preferences.

The New Hampshire court in *Opinion of the Justices*, (1965) 99 N.H. 519, 113 A. 2d 114, considered the effect of a constitutional ban against providing tax money for "the use of schools or institutions of any religious sect or denomination," upon an act establishing a system of state aids for nursing education. The act provided grants-in-aid to all hospitals providing training for nurses, a substantial number of which were conducted under the auspices of various religious denominations. In upholding the validity of the act the court noted that the constitutional provision was intended to prevent the use of public funds "for sectarian purposes", and stated that the purpose of the grant was not to aid any particular sect or denomination, but rather to further the science of the nursing education. The court determined that this method of furthering the "public purpose of public health" did not violate the constitutional ban, even though some denomination might derive an incidental benefit from the act (113 A. 2d at p. 116).


The most sweeping of the recent cases on this point is *Horace Mann League of U. S. v. Board of Public Works*, (1966) 242 Md. 645, 220 A. 2d 51, *cert. den. 385 U.S. 97, 87 S. Ct. 317, 17 L. ed. 2d 195*. There an action was commenced challenging the validity of 4 separate laws providing grants for the construction of buildings at 4 private colleges, at least one of which was a sectarian institution.

The court enunciated 6 standards for determining whether an educational institution is "religious or sectarian" under the First Amendment (220 A. 2d at pp. 65-66):
(1) The stated purposes of the college;

(2) The college personnel and student body—with "considerable stress" laid upon the extent of religious control over the governing board;

(3) The college's relationship to religious organizations—such as the extent of religious ownership and financial assistance, affiliations, etc.;

(4) The place of religion in the college program—both curricular and extra-curricular;

(5) The nature and character of the alumni; and

(6) The work and image of the college in the community.

These criteria were applied to the 4 colleges; 2 were held to be sectarian and the laws pertaining to them were declared invalid.

The court also applied the provision of the Maryland Constitution which prohibits compelling persons to maintain or contribute to the maintenance of "any place of worship, or any ministry", holding that none of the laws in question contravened this section.

The Horace Mann case was followed by Truitt v. Board of Public Works, (1966) 248 Md. 875, 221 A. 2d 870, which involved an act creating a $50,000,000 state loan fund, half earmarked for church-affiliated hospitals and half for non-sectarian hospitals. In approving the act, the court emphasized the fact that the hospitals involved pursued a completely nonsectarian policy as to admission and treatment of patients and the hiring of personnel. The court also recognized the secular nature of the state's interest in aiding the public health and welfare (221 A. 2d at pp. 386-388).

It may be seen from the above cases—and this compilation is by no means exclusive—that the trend is to permit state aid to private (sometimes sectarian) hospitals and educational institutions. I have cited examples of the type of reasoning used to sustain such aids as an indication of the changing concepts in the area of church-state relations. This is not to deny the history of strict construction of our
own constitutional provisions pertaining to religious freedom. The concept of "overriding public purpose" evinced by these cases cannot be ignored, however, even in the rigid atmosphere of Art. I, sec. 18, Wis. Const.

The Wisconsin supreme court has not considered the precise situation outlined in your letter. In fact, the court has only infrequently considered Art. I, sec. 18.

State ex rel. Weiss v. District Board, (1890) 76 Wis. 177, 44 N. W. 967, involved a challenge to the constitutionality of Bible-reading in the Edgerton public schools. The court held this practice to be violative of Art. I, sec. 18, stating at p. 215:

"** The question thus recurs whether the money thus drawn from the state treasury for the maintenance and support of the school in question is for the benefit of a religious seminary, within the meaning of this clause of the constitution. ** The thing that is prohibited is the drawing of any money from the state treasury for the benefit of any religious school. **"

The court also held Bible-reading to be a form of "worship", and that as a result the schools were "places of worship" in the constitutional sense. Portions of the court's discussion of the general purposes and objectives of Art. I, sec. 18, should also be noted (pp. 207-208):

"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. **"

Much more recently, in State ex rel. Reynolds v. Nusbaum, (1962) 17 Wis. 2d 148, 115 N. W. 2d 761, the court again considered Art. I, sec. 18—this time in connection with the "School Bus Law" ch. 648, Laws of 1961 which required certain public school boards to furnish transportation to non-public school pupils. The law also provided for payment of
state aids to the affected school districts. The law was held unconstitutional and the court stated that the phrase "religious societies" in Art. I, sec. 18, was synonymous with "religious organizations". It was also recognized that the word "seminary" is synonymous with "school".

In holding that free transportation provided a prohibited "benefit" to the parochial schools involved, the court stated at p. 157:

"* * * It must be conceded that there are benefits to religious organizations and parochial schools resulting from the expenditures of public funds which are not a violation of this constitutional prohibition. Examples are the providing of police and fire protection, the supplying of water and sewerage services on a basis whereby all the cost of the system or service is not charged to the users, and the building or improving of public sidewalks and streets. However, all of these public services and facilities are provided to the public, or to property, generally on a basis whereby no classification is made as to religious organizations or schools. * * *"

The court responded as follows to the argument that the bus law promoted the health, safety and welfare of the pupils (p. 160):

"* * * 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. * * *"

Thus the attitude of the Wisconsin supreme court in construing Art. I, sec. 18, may be compared to and contrasted with the interpretations of other constitutions—some similar, some not—by other courts. That there is further room for interpretation of Art. I, sec. 18, is indicated by the dissent of Justices Fairchild and Hallows in the Nusbaum case, pp. 167, 170-171:

"These provisions, however, have not meant that the laws must be completely sterile of benefit to religious societies or parochial schools. As recognized in the majority opinion,
traditionally such support and benefit as is implicit in tax exemption both of gifts to, and property of religious bodies has not been thought to violate sec. 18, art. I, Wis. Const.

"We do not know in how many cases such financial benefit flows to the religious association or parochial school rather than directly or indirectly to the parents of the children. That some indirect and incidental advantage of this type will accrue to some religious groups or parochial schools which now do or might in the future provide bus transportation themselves, I have no doubt. But I do have serious doubt that the type of advantage just referred to is the type of benefit which is forbidden by the constitution. This advantage results incidentally to the religious group from the benefit conferred primarily on the children themselves, and on their parents. It is, of course, not identical to, but it has some similarity to the advantage flowing incidentally by reason of the paving of good highways providing access to a parochial school or a church."

It would appear from the above discussion that persuasive arguments could be made on either side of the question, even if Marquette medical school had continued under its former organization. However, the recent reorganization of the medical school under a private board does achieve sufficient separation from Marquette university, on paper, to remove Art. I, sec. 18, as a bar to the receipt of state aid. As indicated above, the purported purposes of the aid program are public, and as such may be served through the interposition of a private instrumentality. The severance of the pre-existing alliance with Marquette university being sufficient to overcome Art. I, sec. 18, objections, the answer to your inquiry must be "yes".

Early in this opinion I indicated that this answer was not without qualification. The restated articles of incorporation and the other information furnished me in connection with your request present only a bare outline of the future working relationship between the medical school and Marquette university. The actual operation of the medical school in its myriad areas of education endeavor—from social work to surgery to medical technology—may result in situations and
relationships which would be abhorrent to Art. I, sec. 18, Wis. Const. The mere possibility of operational illegality does not provide sufficient support for a declaration, or even an opinion, of unconstitutionality. If it should appear as an objective fact at some future time after the board commences operation of the school under its new charter, that the operative effect of the enterprise is to violate Art. I, sec. 18, it would then be proper for judicial intervention.

When state funds are appropriated to a private instrumentality to achieve a public purpose the constitution requires "reasonable regulation for control and accountability to secure the public interest". Wisconsin Industrial School for Girls v. Clark County, (1899) 103 Wis. 651, 79 N. W. 422.

That the validity of the state aid program may well depend upon the nature and extent of such checks and controls is clearly indicated by the opinion in State ex rel. Bowman v. Barczak, (1967) 34 Wis. 2d 57, 69, 148 N. W. 2d 683. See also, Lien v. City of Ketchikan, (Alaska, 1963) 383 P. 2d 721, 725-6; Opinion of the Justices, (1965) 99 N.H. 519, 113 A. 2d 114, 116.

It therefore seems appropriate for the legislature, in making the necessary appropriations and otherwise implementing the plan, to make the actual expenditures subject to checks and controls similar to those applicable to the university of Wisconsin and the other state universities. Examples of these controls are the pre- and post-audit procedures, building commission approval of construction projects, etc.

Out of a proper regard for the right of the legislature to serve the public need as it sees fit and out of a similar regard for the ability of the county and the medical school board to administer their affairs so as to avoid constitutional pitfalls, it cannot be said at this stage that the plan is invalid. The answer can only come from examination of the operation itself once it is commenced.

In summary, it is my opinion that the plan suggested by your letter is not on its face violative of either the "public purpose doctrine" or of Art. I, sec. 18, Wis. Const. This opin-
Constitutionality—Budget bill—Bill 445, S., would probably be constitutional as an exercise of the broad prerogative which the legislature possesses under the constitution.

October 16, 1967.

THE HONORABLE, THE SENATE

You have asked for an opinion on the constitutionality of Senate Bill 445, the "budget trailer bill".

This bill is an appropriation measure intended as an adjunct to the general fund budget bill for the 1967-1969 biennium, which has been enacted and signed by the governor (ch. 43, Laws of 1967). The budget trailer bill was introduced by several senators.

It is my understanding that the concern of the senate is not with the validity of individual appropriation items included in Senate Bill 445. The bill proposes to make new or enlarged appropriations for about 45 separate state agency programs or payments to local governments. The total fiscal impact of the bill has been estimated at $5-6 million. I have reviewed the language of the bill dealing with these appropriations and find no apparent constitutional defects.

The senate is, instead, concerned about the form of the bill; the linking together of appropriation items in a bill that seems to parallel the broad-gauged executive budget bill for the state's general fund programs. Many of the funding proposals in Senate Bill 445 were items that had been suggested for inclusion in the general fund budget bill. If these items are rejected for inclusion in the general fund budget bill, may they subsequently be reviewed in a separate
There is a legitimate concern on the part of some senators that use of a budget trailer bill will detract from the seriousness of preparation and debate on general budget bills. Employment of trailer bills might lead to fiscal irresponsibility by discouraging rational comparison of overall revenue and expenditure estimates. However, as much as I can sympathize with these concerns, there are as shown below no constitutional restraints on the enactment of budget trailer bills.

Our constitution provides few rules concerning legislative handling of budget and appropriation matters. *Chicago & N.W.R. Co. v. State*, (1906) 128 Wis. 553, 108 N. W. 557; *State ex rel. Board of Regents v. Zimmerman*, (1924) 183 Wis. 132, 197 N. W. 823. One constitutional provision specifies that no money shall be paid out of the state treasury except in pursuance of an appropriation by law. Art. VIII, sec. 2, Wis. Const. Another provides that votes upon appropriation measures shall be taken by yeas and nays, and that a three-fifths quorum is needed for such votes. Art. VIII, sec. 8, Wis. Const. Still another directs the legislature to:

"* * * provide for an annual tax sufficient to defray the estimated expenses of the estate for each year; and whenever the expenses of any year shall exceed the income, the legislature shall provide for levying a tax for the ensuing year, sufficient, with other sources of income, to pay the deficiency as well as the estimated expenses of such ensuing year." Art. VIII, sec. 5, Wis. Const.

It cannot be said that Senate Bill 445 would violate any of these constitutional provisions. Art. VIII, sec. 8, deals with the process of enactment of an appropriation measure, rather than with the content of such a bill. It is impossible to determine from the face of Senate Bill 455 whether the appropriations it proposes would unbalance the overall state budget for either of the fiscal years in the biennium. Even if it were somehow possible to predict from reading the bill that it would result in a deficit, this would not be a valid
reason for holding the bill unconstitutional. This is because Art. VIII, sec. 5, provides a remedy for experienced shortages —namely, that the legislature shall levy taxes to raise deficit-eliminating revenues in the year following any such shortage of state funds.

The legislature is therefore directed by the constitution to enact tax legislation sufficient to meet estimated annual state expenses plus meeting any deficit experienced in the previous year. There is no constitutional requirement that all revenue or expenditure legislation be processed in the form of single bills. Statutes provide that the governor shall submit a biennial budget report to the legislature, including executive budget bills for each of the 3 major state funds, and suggestions for the best methods for raising the needed revenues. Sec. 16.45, Stats. This procedure is not required by the constitution but is established as a voluntary matter by the legislature. State ex rel. Board of Regents v. Zimmerman, (1924) 183 Wis. 132, 139, 197 N. W. 823, 826.

In addition, the procedure outlined by sec. 16.45 has been complied with in the introduction and enactment of the general fund, highway and conservation budget bills for the 1967-1969 biennium.

I therefore conclude that Senate Bill 445 would probably be constitutional as an exercise of the broad prerogative which the legislature possesses under the constitution in regard to fiscal and budgetary procedures.

BCL:RAL

Retirement fund—Prior service credits—A county may not borrow under sec. 67.12 (12) to pay entire obligation to Wisconsin retirement fund for prior service credits.

October 23, 1967.

WILLIAM L. SEYMOUR

Corporation Counsel, Walworth County
In 1960 Walworth county elected to become subject to the provisions of sec. 66.90, et seq., relating to the Wisconsin retirement fund effective January 1, 1961.

In connection with that action the county assumed the cost of financing the prior service credits which accrued to its employes. The present net obligation of the county to the Wisconsin retirement fund therefor is approximately $800,000. Under 66.905 (2) (a), Stats., this obligation is payable by the county in installments over a period of 40 years from its aforesaid effective date of January 1, 1961. However, under 66.905 (1) (b) the county could pay this obligation off at any time.

The county board is of the opinion that it would be to the financial advantage of the county to borrow a sum sufficient to pay the entire prior service obligation of the county to the Wisconsin retirement fund at once, instead of taking the 40-year period allowed by statute in which to do so, since the interest which would be credited thereon would probably exceed the interest on the borrowed money.

The question which you desire to have answered is:

"Does a county have authority to borrow on promissory notes under section 67.12 (12), Stats., for the purpose of paying its existing obligation to the Wisconsin Retirement Fund?"

Sec. 67.03 (1) provides in part:

"Except as provided in s. 67.01 (8), municipalities may borrow money and issue municipal obligations therefor only for the purposes and by the procedure specified in this chapter. * * * ."

Sec. 67.01 (8) has no application to the proposed borrowing. Sec. 67.01 (1) states that "municipalities" include a county and (2) states that " 'Municipal obligation' includes every lawful promise or engagement in writing by a municipality to pay at a specified future time a specified sum of money". Borrowing under 67.12 (12) must be evidenced by the issuance of one or more promissory notes. Sec. 67.12 (12) (b), (c), and (cc).
Sec. 67.12 (12) (a) provides in part:

"In addition to the powers heretofore given, any county may borrow money for general and current municipal expenses."

This is the only purpose enumerated in this statute which reasonably could be construed to authorize the proposed borrowing. To be included in this purpose the expense must be both "current" and "general." It does not appear that there is any Wisconsin case which defines either "general and current expense" or "current expense".

In Seabord Air-Line Ry. Co. v. Wright, 157 GA. 722, 122 S. E. 35, it was held that "current expense" is a "regular, ordinary expense".

In Atchison, T. & S. F. Ry. Co. v. City of Topeka, 95 Kan. 747, 149 P. 697, the court said that "current expenses" as used in connection with municipal finances means the usual, ordinary, running and incidental expenses of a municipality.

Osage County Excise Bd. v. Missouri-Kansas-Texas R. Co., (Okl.) 340 P. 2d 217, held that "current expense" is ordinary, regular and continuing expenditures for the carrying on of a municipal government. See also State ex rel. Oster v. Jorgenson, (S.D.) 136 N. W. 2d 870.

While 66.905 provides that the county must make a payment on the prior service obligation each year, the statutes contemplate that the county shall have 40 years in which to liquidate this obligation which is not regarded as being a county indebtedness within the meaning of Art. XI, sec. 3, Wis. Const. Columbia County v. Wisconsin Retirement Fund, (1961) 17 Wis. 2d 310, 116 N. W. 2d 142. Any additional payment which the county would make upon this obligation in any year would be entirely voluntary. Under these circumstances the payment of the entire balance of such obligation in one year could not be regarded as an ordinary, regular expenditure for such year, and hence a "current expense".
I share your opinion that sec. 67.12 (12) (a) would not authorize the county to borrow money to pay the entire balance of its obligation to the Wisconsin retirement fund for prior service credits.

BCL:JRW

Investments—Earmarked funds—Earmarked funds of a county may be invested in insured farm loans under the Farmers Home Administration.

October 30, 1967.

ROGER HARTMAN
District Attorney, Buffalo County

You have requested that I review an opinion of this office to the district attorney of Clark county dated August 12, 1957, 46 OAG 218, which stated that funds accumulated by a county earmarked for future use but not needed immediately by such county could not be invested in insured farm loans made and serviced by the Farmers Home Administration and fully insured and guaranteed by the United States as to principal and interest. The opinion referred to sec. 66.04 (2), 1957 Stats., and was based on reasoning that the items, although guaranteed by the United States government were not securities of the United States government or of a commission, board or other instrumentality of the United States government.

The wording of 66.04 (2), 1965 Stats., is almost identical with that in the 1957 statutes, and is somewhat unusual.

Sec. 66.04 (2) provides in material part:

"Any county * * * may invest its funds, not immediately needed * * * in bonds or securities issued or guaranteed as to principal and interest of the United States government, or of a commission, board or other instrumentality of the United States government, or bonds or securities of any county, city, drainage district, village, town or school dis-
trict of this state, or in the case of a town, city or village in any bonds or securities issued under the authority of such municipality, whether the same create a general municipality liability or a liability of the property owners of such municipality for special improvements made therein, and may sell or hypothecate the same. * * *"

In the 1933 Statutes, sec. 66.04 (7), the predecessor statute provided:

"INVESTMENTS. Any county, city, village, town, school district, or other governing board as defined by subsection (4) of section 34.01 may invest any of its funds, not immediately needed, in bonds or securities of the United States or of any county, city, village, town or school district of this state, or in the case of a town, city or village in any bonds or securities issued under the authority of such municipality, whether the same create a general municipality liability or a liability of the property owners of such municipality for special improvements made therein, and may sell or hypothecate the same."

This section was altered by ch. 421, Laws of 1935, to provide in material part:

"* * * invest any of its funds, not immediately needed, in bonds or securities issued or guaranteed as to principal and interest of the United States government or bonds or securities of any county, city, village [etc]. * * *"

The drafting record in the legislative reference bureau does not aid in the construction of the statute. It is my opinion that the statute was intended to permit investment in bonds or securities issued by, or guaranteed as to principal and interest by, the United States government.

The year 1935 was during a period in which the federal government became active in guaranteeing loans under the National Housing Act. Ch. 45, Laws of 1935, created ch. 219 of the statutes which permitted banks, financial institutions, the state and its agencies and municipalities to invest in notes or bonds secured by mortgages or trust deeds insured by the federal housing administration.
It is likely that the amendment to then sec. 66.04 (7) was to permit cities and counties to invest in that type of obligation.

I am advised that under present federal laws and practice all Farmers Home Administration mortgages and notes run to the government. All loan making, loan servicing and collecting is done by the government which holds the mortgages. An investor holds only the insured note and the government's insurance endorsement. Repayment of principal and interest on an insured note held by a private investor is fully guaranteed by the federal government. The lender receives installment payments directly from the federal government by United States treasury check whether the Farmers Home Administration collects on schedule or not. The notes are easily assignable on notice to the government.

The loans are made under, and the notes refer to, either the Consolidated Farmers Home Administration Act of 1961 or Title V of the Housing Act of 1949.

My opinion that such notes are proper investments for county funds not needed immediately is further buttressed by the provisions of ch. 219, Stats. 1965.

Sec. 219.01 provides in part:

"Credit unions, savings and loan associations, investment associations, state banks, savings banks, trust company banks, land mortgage associations, insurance corporations, including life companies, and fraternal benefit societies, executors, guardians, trustees, administrators, and other fiduciaries, except where it is contrary to the will or other instrument of trust, the state of Wisconsin and its agencies and its municipalities, districts, and other subdivisions, and all institutions and agencies thereof, and all other persons, associations, and corporations, subject to the laws of this state, are authorized:

"* * *

"(3) To invest their funds, and moneys in their custody or possession (which are eligible for investment and which they are by law permitted or required to invest), in notes or
bonds secured by mortgage or trust deed insured by the federal housing administrator, and in debentures issued by the federal housing administrator, and in securities issued by national mortgage associations.

"***

"(5) To make loans and to sell, buy, or otherwise invest in notes, bonds, or other instruments evidencing loans secured by mortgages insured, or with respect to which commitments to insure have been made under Title I of the Bankhead-Jones Farm Tenant Act (7 USC 1000 et seq.) as heretofore or hereafter amended. Restrictions of any character imposed by the laws of Wisconsin with respect to location of the real estate security shall not be applicable to loans or investments so secured by mortgages under Title I of said act."

The Consolidated Farmers Home Administration Act of 1961 is the successor, by amendment, of the Bankhead-Jones Farm Tenant Act.

In Title 7 U.S.C.A., Agriculture, the historical note to §1921, p. 477, states that the section may be cited as the Consolidated Farmers Home Administration Act of 1961 and that "Section 341 of Pub. L. 87-128 provided that: ‘(a) Reference to any provisions of the Bankhead-Jones Farm Tenant Act * * * shall be construed as referring to the appropriate provision of this title.’"

Title V of the Housing Act of 1949 as amended provides that the secretary of agriculture, acting through the Farmers Home Administration may make loans to farm owners and tenants to construct, alter or replace dwellings to insure such loans. Title 42, U.S.C.A. Farm Housing §§1471-1486.

I am of the opinion that the term "federal housing administrator" as used in 219.01 (3) is broad enough to include the secretary of agriculture when he acts for the government in insuring farm home loans.

While I am of the opinion that the county board of supervisors can authorize the investment of county funds not immediately needed in such federally guaranteed notes, the
decision as to whether such funds should be so invested is for the board. The present note provides that the govern-
ment cannot be compelled to repurchase the note until the expiration of one year from the date of the insurance endorsement. In past years this restriction has been as long as five years and as short as six months. Liquidity and yield must be considered along with security and purpose for which the accumulated funds are earmarked.

BCL:RJV

Cryogenic Interment—Statutes do not expressly or by im-
plications prohibit cryogenic interment. Structures to house such interments must comply with statutory regulations.

November 1, 1967.

E. H. JORRIS
State Health Officer

You ask my opinion as to the legality of cryogenic inter-
ment in Wisconsin.

In requesting this opinion, you indicate that it was prompted by a letter from a Wisconsin law firm, asking the advice of the division of health on several questions relative to cryogenic interment, one of them the question of whether sec. 69.44, would prohibit such interment in this state.

The law firm in question, in directing its inquiries to you, indicated that it was acting in behalf of a client interested in handling arrangements for cryogenic interments in Wisconsin, and stated that such client envisioned construction of a building (apparently in Wisconsin) to house the bodies of persons cryogenically interred.

Before stating my opinion on the legality of cryogenic inter-
ment, it seems advisable to set out the definitions of certain terms. They and their definitions are as follows:

Cryogenic — of or relating to the production of very low temperatures.
Cryogenics — the branch of physics that relates to the production and effects of very low temperatures.

Cryogenic Interment — This term, in the letter to you of the above-mentioned law firm, is “Briefly defined” as meaning, “the freezing of a dead body, using liquid nitrogen or helium as the agent, and the storing of it in a container and a structure in such a fashion that from time to time as the freezing agent ‘burns off’ more can be added.”

It also seems advisable, by way of a prelude to my opinion herein, to quote a recently published account of how a cryogenic interment was accomplished in the case of one James Bedford, who died January 12, 1967, in Glendale, California.

In the February, 1967, issue of The Director, a publication of the National Funeral Directors Association, this account of Bedford’s interment is given:

“On January 12, 1967 a 73 year old professor, Dr. James Bedford, died in Glendale, California. Moments after death, a physician who was in attendance, started a mechanical heart and the deceased’s heart ‘resumed its beating’, oxygenating the blood plasm and a chemical formula as it was pumped through the arteries and brain of the deceased. At the same time this perfusion was going on, the temperature of the body was being lowered. Once the temperature was lowered to 25 degrees and the perfusion completed with the formula frozen in the arteries, the body was placed in dry ice and frozen to a temperature of 100 degrees below zero.

“The body was then transported by private conveyance pursuant to a California removal permit to Phoenix, Arizona for scientific research and observation. The remains arrived in a dry ice packed casket at the Cryo-Care Equipment Corporation, located in Phoenix.

“* * *

“We saw the capsule into which the body of Dr. Bedford had been placed. It was explained to us that his body was placed frozen in wrappings, put inside a tube which was sealed and this tube placed into the outer capsule. The inner
capsule was filled with liquid nitrogen to bring the temperature down to 300 degrees below zero fahrenheit. The outer capsule was bolted shut and a vacuum created between the inner tube and outer capsule. Mr. Hope [president of the Cryo-Care Equipment Corporation] maintained that when once the vacuum is achieved, liquid nitrogen would have to be added for 20 minutes every two months or so.” (Bracketed material mine.)

It should here be noted that a cryogenic interment might also take place with ordinary embalming of the deceased as the first major step, rather than perfusion of the DNSO solution. If ordinary embalming is used, rather than such perfusion, then, as noted in the issue of The Director above-mentioned, “the sole purpose of deep freeze interment would have to be the simple cosmetic preservation of the remains as there is no probability of re-animation or future life”. But, states The Director, “where there is no embalming and where the perfusion herein described as given to the body of Dr. Bedford is properly administered to the remains there could be, according to some cryo-scientists, a holding of the body for future research and developments about freezing and re-animation. There are presently no known approved methods of freezing to preserve life nor processes for restoring life. Thus, the purpose of some is to have enough persons cryogenically interred to create a purpose for research and development in these fields. Those scientists who encourage cryogenic interment state that there may some day be re-animation and those whose bodies are deep frozen will be available to benefit thereby”.

As to the legality of cryogenic interment in Wisconsin, whether for one or both of the purposes above-indicated, it is my opinion that no Wisconsin statute, expressly or by implication, prohibits such interment; and it is my further opinion that: (1) the ordinary embalming or perfusion of the DNSO solution, involved in cryogenic interment, must under Wisconsin law be done by an embalmer licensed in this state, where such embalming or perfusion takes place herein; and (2) the structure housing the capsules or cylinders wherein bodies are cryogenically interred must be built in
compliance with regulations of the division of health, department of health and social services, and in accord with plans and specifications for such structure previously approved by the division.

A.

Neither 69.44, nor any other Wisconsin statute, in my opinion, prohibits cryogenic interment in Wisconsin. Indeed, it may be argued that 69.44 contains language which might be said to encompass cryogenic interment, and to imply approval thereof, as follows:

"The body of any person whose death occurs in this state shall not be interred, deposited in a vault or tomb, cremated, or otherwise disposed of, until a permit for burial or removal is issued, and no burial or removal permits shall be issued until a complete and satisfactory certificate of the death has been filed as herein provided."

Webster's Third New International Dictionary, Unabridged, defines "inter" as meaning: "To deposit a dead body in the earth or in a grave or tomb". The same dictionary defines "tomb" as meaning, among other things, "a house, chamber or vault formed wholly or partly in the earth or entirely above ground for the reception of the dead". In the light of these definitions, it may be that cryogenic interment, although decidedly different from ordinary interment, comes within the ambit of the word "interred" employed in 69.44, or within the ambit of the phrase "deposited in a vault or tomb" used therein. But if there is some doubt that cryogenic interment is encompassed in either such word or such phrase, with an implicit approval of it as a lawful means for disposition of the body of a deceased person in this state, it can then be reasonably contended that such interment comes within the scope of the phrase, "otherwise disposed of" used in 69.44. In any event, it is clear that such statute contains neither an express nor implied prohibition of cryogenic interment in this state, and may, for reasons above shown, imply approval of such interment as a lawful method for disposition of the body of a deceased person in Wisconsin.
I find no other Wisconsin statute prohibiting cryogenic interment, expressly or by implication. In so stating, let me add that I have carefully considered the provisions of 69.45-69.48, inclusive, and find no prohibition of cryogenic interment therein, or in chs. 155 (Corpses), 156 (Funeral Directors and Embalmers), and 157 (Cemeteries) of the Wisconsin statutes.

It is worthy of note here that the statutes of Wisconsin, relative to the disposal of dead bodies, reflect the fact that, "Generally speaking, the law does not seem to require any particular mode or manner of disposing of dead bodies, provided the disposition is sanitary and decent". 22 Am. Jur. 2d Dead Bodies, Sec. 14. As stated in 25A C.J.S. Dead Bodies, Sec. 5, "The public has a vital interest in the proper disposition of the bodies of its deceased members, and it is a universally recognized principle that there is a duty owing both to society and to decedent that the body of decedent shall be decently buried without unnecessary delay". The information which I have relative to cryogenic interment indicates that it constitutes a "sanitary and decent" disposition of a dead body, at least so long as the body is maintained in the frozen state characteristic of such interment. If and when our legislature considers the need, if any, to regulate such interment, it may be that it will enact a law containing specific requirements designed to safeguard the public health from any possible hazard arising out of a situation where a body cryogenically interred would, for whatever the reason, be in a temperature state other than that characteristic of such interment, i.e., frozen at a temperature in the order of -300 degrees F.

B.

It is my opinion, as above-stated, that the ordinary embalming or perfusion of the DNSO solution involved in cryogenic interment must under Wisconsin law be done by an embalmer licensed in this state, where such embalming or perfusion takes place herein.

Sec. 156.01 (4) defines an "embalmer" as, "a person engaged in, or holding himself out as engaged in, the practice of disinfecting or preserving dead human bodies, entire or
in part, by the use of chemical substances, fluids or gases in the body, or by the introduction of same into the body by vascular or hypodermic injection, or by direct application into the organs or cavities for the purpose of preservation or disinfection”. Sec. 156.05 (1) provides: “No person shall engage in, or hold himself out as engaged in, the practice of an embalmer unless licensed by the board”. [formerly the State Board of Health, now the Division of Health, Department of Health and Social Services]. In my judgment, these statutes plainly require the services of an embalmer licensed in Wisconsin, where the initial step in cryogenic interment (ordinary embalming or perfusion of the DNSO solution) takes place in this state. It should perhaps be noted, in this connection, that while ch. 156, clearly contemplates that embalming in this state will ordinarily be done in a “funeral establishment” as defined in sec. 156.01 (5) specially equipped for embalming, there is no statutory requirement that embalming can take place only in such an establishment; and in fact, a rule of the Division of Health (H 17.11, WAC) specifically recognizes the right in a licensed embalmer to “embalm and prepare for burial human bodies in the home of the deceased or in the home of a relative when such procedure is found desirable”.

C.

Sec. 157.12 (1) (a) provides in part as follows:

“No person shall build a structure for corpses, wholly or partly above ground, except in compliance with regulations of the state board of health, and plans and specifications previously approved by such board in writing. The state board of health may adopt and enforce regulations governing the location, materials and construction of the same.”

It is clear that by virtue of this statute any structure erected in Wisconsin to house the capsules or cylinders wherein bodies are cryogenically interred must be built in compliance with regulations of the State Board of Health, and in accord with plans and specifications for such structure previously approved.

Such structure would be subject to regulations governing the location, materials and construction of structures of its
kind, adopted pursuant to sec. 157.12 (1) (a); and it would also be subject to the requirements of sec. 157.12 (1) (bc), which reads: “No deposit of the remains of the human dead shall be made in a surface burial chamber, vault or tomb wholly or partially above the surface of the ground unless the part thereof below the natural surface of the ground be of a permanent character, constructed of materials capable of withstanding extreme climatic conditions, be waterproof and air-tight, and can be sealed permanently to prevent all escape of effluvia; that portion of the same above the natural surface of the ground shall be constructed of natural stone and material necessary to protect the construction of the same of durability sufficient to withstand all conditions of weather and of a character to insure its permanence”.

In closing this opinion, I feel compelled to state that if and when our legislature considers the subject of cryogenic interment and its possible regulation, it would, it seems to me, do well to make clear whether or not the services of a licensed funeral director are to be required to effect a lawful cryogenic interment in this state. Whether under present statutes they would be is a question which I have not overlooked in drafting this opinion, but to give an answer there-to is a task so fraught with difficulty under present statutes, for reasons unnecessary to detail here, that I am convinced that the only clear and unequivocal answer to such question must and should be provided by our legislature, and no doubt will be when the need therefor is felt.

BCL:JHM

Wisconsin Retirement Fund—Dividends—Excess reserves in the annuity reserve fund of the Wisconsin retirement fund cannot be used to reduce the state’s current contribution nor can a dividend to previously retired annuitants be paid.

November 16, 1967.
It was reliably estimated as of December 31, 1966, that the reserve for annuities granted under the Wisconsin retirement fund included about $15,700,000 in excess of the total liabilities for such annuities. This excess had accumulated since the inception of the fund in 1944, principally because the actual earnings upon the investment of the retirement funds was greater than the estimated earnings which were used in calculating the annuities granted.

It appears that under the existing statutes which govern the operation of the Wisconsin retirement fund the only use which could be made of the aforesaid excess reserve is to liberalize the annuity rates to an extent which would not be justified by subsequent investment experience so that such excess reserves would be exhausted, or at least substantially depleted, because of the annuities which would be granted under the more favorable rates.

It has been recommended that the statutes be amended to grant the board of trustees of the Wisconsin retirement fund authority to distribute the said excess reserves in such manner as it deemed equitable. It was proposed that said authority be substantially the same as that under which the state teachers retirement board has declared dividends to retired teachers from accumulated earnings in the state teachers retirement system.

Accordingly, you have submitted a request for my opinion upon the following two questions:

1. Could these excess reserves be used to reduce the State's current employer contributions to the retirement funds?

2. Could the Wisconsin Retirement Fund pay dividends to its annuitants in the same manner as the State Teachers Retirement System?

The presumed "authority" of the state teachers retirement board to declare dividends to which you refer is found in
the last sentence of sec. 42.34 of the statutes, which provides:

"42.34 Teachers retirement board to fix annuities. The state teachers retirement board shall make such investigations of the mortality, disability, service and compensation experience of the several funds as are necessary. On the basis of such investigation the board shall determine, adopt and certify the rates at which the annuities and other benefits shall be granted. The rates shall be adequate to provide for all benefits as near as may be at actual cost, but shall not be less than the rates based on the minimum standard prescribed by law for granting annuities in this state. The rates last adopted by the state annuity and investment board shall continue to be the prevailing rates until changed by action of the state teachers retirement board. No revision of rates shall affect adversely the rights of any beneficiary or annuitant under an application made prior to the date when such revision becomes effective. The state teachers retirement board shall from time to time order and make such distribution of gains and savings as it deems equitable including transfers to the state accumulation fund from any surplus in the annuity reserve fund."

Both assembly bill No. 400 which constitutes the "segregated funds budget bill of the 1967 legislature", and assembly substitute amendment 1 thereto, propose to amend 66.916 (1) (a) of the statutes relating to the Wisconsin retirement fund in the following manner:

"The annuity payment surplus shall be determined as of the end of each year as the amount by which the reserve for annuities previously granted exceeds the actuarially determined liability with respect to such annuities. Whenever such surplus exceeds 25% or there is a deficiency exceeding 15% of such reserve, the tables used for the determination of annuities shall be revised in such manner as the board deems appropriate equitable. The board may order and make such distribution of said annuity payment surplus as it deems equitable."
Bill 400 A making said amendment has now been passed and was published as Chapter 110, Laws of 1967, on the fifteenth day of August, 1967.

A similar question was raised in State ex rel. Smith v. Annuity & Pension Board, (1942) 241 Wis. 625, 6 N. W. 2d 676. Ch. 308, Laws of 1941, purported to amend ch. 396, Laws of 1937, which created a retirement system for certain employees of the city of Milwaukee so as to require the city to increase the retirement allowance to persons who formerly were active members of said system but who were compulsorily retired thereunder on or after January 1, 1941. The court held this Act to be unconstitutional, saying at pp. 629-630:

"* * * It is clear that respondent's status and his rights are determined under the provisions of the employee's retirement system, as it existed at the time of his retirement. Thereafter he rendered no services to the city and made no contribution to the retirement fund. On June 28, 1941, however, the legislature enacted ch. 308, Laws of 1941, amending the provisions of ch. 396, Laws of 1937. * * * Subd. 4 [of ch. 308, Laws of 1941] provides that if the retirement allowance of a member entitled to prior service is less than $60 per month, the pension shall be increased so that the retirement allowance is equal to $8 per month for each creditable year of service, but limited not to exceed $60 per month. Subd. 5 provides that the provisions of subd. 4 shall apply to all persons who were formerly active members of the system and who were compulsorily retired on or after January 1, 1941."

The annuity and pension board contended that the 1941 amendments to the employees' retirement system amount to appropriating public funds for a private purpose in violation of constitutional prohibition. The supreme court agreed, saying:

"* * * In 1 Dillon, Mun. Corp. (5th ed.) p. 754, sec. 430, referring to pensions for municipal services, it is said:
"To be valid under constitutional requirements, the pensions must be conferred upon persons who at the time of receiving the right to them are officers or employees of the municipality. They cannot be conferred upon persons who had, previously to the grant, retired from the service of the city. A pension to such persons is an appropriation of public funds for the benefit of individuals, and a gift or gratuity.' To same effect see Mahon v. Board of Education, 171 N.Y. 263; People v. Abbott, 274 Ill. 380; Porter v. Loehr, 332 Ill. 353, 360; Raines v. Board of Trustees Pen. Fund, 365 Ill. 610, 615; Mead v. Acton, 139 Mass. 341; Lamb v. Board of County Peace Officers Retirement Comm., etc., 84 Pac. 2d 183.

"In 40 Am. Jur. p. 972, sec. 16, in reference to pensions for municipal employees, it is said:

"Pension acts are valid only in so far as they confer pensions upon persons who at the time of the grant of the right to receive them are officers or employees of the municipality. And a statute which authorizes a municipal corporation to pay a pension to persons who were formerly in its service but have retired or withdrawn therefrom before the statute was enacted is unconstitutional.' " (241 Wis. 635)

In Tesch v. Board of Deposits, (1941) 237 Wis. 527, 297 N. W. 379, it was held that moneys of the Milwaukee policemen's annuity and benefit fund, contributed by both the city and the policemen constituted a public fund since it was made up in part of contributions raised by taxation, and taxes may not be assessed and collected for a private purpose. The court said at page 531:

"* * * It is axiomatic that a municipal corporation cannot constitutionally assess and collect taxes for a private purpose. Collection of the fund is authorized by a public law; it is paid to a public officer; it is held in trust by him and by the board for whom he acts as custodian; it is deposited in a public depository; and although not usable for general governmental expense, is nevertheless a public fund. * * *"
See, also, the early case of State ex rel. Risch v. Board of Trustees of the Policemen's Pension Fund, (1904) 121 Wis. 44, 98 N. W. 954.

In State Teachers' Retirement Board v. Giessel, (1960) 12 Wis. 2d 5, 106 N. W. 2d 301 the court held that the legislature could not use earnings of the state teachers' retirement system to pay a part of the cost of a study of public employee retirement systems, including the state teachers system. The court said:

"The nature of the state teachers' retirement system and the rights of the members thereof have been the subject of four prior decisions of this court: State ex rel. Dudgeon v. Levitan, (1923) 181 Wis. 326, 193 N. W. 499; State ex rel. O'Neil v. Blied, (1925) 188 Wis. 442, 206 N. W. 213; State ex rel. Stafford v. State Annuity & Investment Board, (1935) 219 Wis. 31, 261 N. W. 718; State ex rel. Thomson v. Giessel, (1952) 262 Wis. 51, 53 N. W. 2d 726. The result of these decisions is that the teachers have a contractual relationship with the state and a vested right in the state teachers' retirement system. The contractual right and vested interest of the teachers in the retirement system are not disputed by the appellant, but it is argued the right of the teachers is not such as would exclude payment of the charge for the governor's study commission out of the earnings of the state teachers' retirement fund. It is argued that the plaintiff board is required to pay out funds according to law and appropriations from the earnings of the fund have been made by law each year, and therefore there is no vested right in the gross earnings of the fund. We do not agree. The teacher's right, based on contract, extends to the retirement system. The earnings on investments, part of which represent contributions made by the teachers and part contributed by the state under the contract with them, constitute assets of the system. The reserve for contingencies set up by the board is a part of the system.

"The appellant's argument would deny any rights to the earnings on the investment until they are allocated and credited to the individual teacher's account. The right cannot be construed so narrowly. The right includes the proper
use of the earnings. The expense of administering the system, losses on investments, and other proper expenses and charges are, of course, to be paid by the system. However, the legislature and the plaintiff board are not free to spend or appropriate the earnings of the fund except in a manner authorized by statute relating to the state teachers' retirement system."

Under the decision in this case and the others cited therein it is my opinion that the legislature would not have the right to use the excess reserves in the annuity reserve fund of the Wisconsin retirement fund to reduce the state's current employer contributions to the fund. Although case law relating to the Wisconsin retirement fund has not been developed as fully as that relating to the state teachers' retirement system, the funds of the latter system are also held in trust by the State (sec. 66.911 (1), Wis. Stats.) for the members of said fund whose essential features are similar to those of the former system. In my opinion the reasoning in the Giessel case would be equally applicable to the earnings of the Wisconsin retirement fund.

The Wisconsin retirement fund includes not only the state and its employees but also many cities, villages, towns, school districts and other governmental entities and their respective employees, excluding teachers. These employees of said governmental units contribute to the fund and the units themselves make employer contributions to the fund from moneys raised by public taxation.

A part of the excess reserves in the annuity reserve fund accrued from earnings upon the investment of funds contributed by them as well as funds contributed by the state and its employees. It would be at least grossly unfair and inequitable, and probably illegal, for the state to confiscate the excess reserves attributable to earnings on funds contributed by these municipal units and employees to lessen its own financial obligation to the fund. I believe that such a course of action would be not only a breach of faith but a breach of contract.
Both the Wisconsin retirement fund and the state teachers' retirement system were created as joint contributory, money-purchase systems. It seems probable that our court would be disposed to reach similar legal conclusions with respect to kindred problems in the two systems.

Ch. 551, Laws of 1951, created sec. 42.535 of the statutes and provided that certain teachers who had retired under the state teachers' retirement system prior to June 30, 1951, should be paid "an additional $1 per month for each year of teaching experience in the public schools, teachers' colleges, and the university of this state". This act was enacted to become a part of the state retirement law and the additional benefit would have been payable from the annuity reserve fund of said system.

At the time of the passage of this act, Art. IV, Sec. 26, Wis. Const. provided in part:

"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; * * *

In State ex rel. Thomson v. Giessel, (1952) 262 Wis. 51, 55-56, 61-63, the court said:

"Sec. 42.535, Stats., provides that every qualified retired teacher 'shall be paid an additional $1 per month for each year of teaching experience' and it designates such payments as an 'additional benefit' and an 'additional annuity.' The benefits and annuities to which these are additional are those provided by other sections of ch. 42, Stats. By sec. 42.42 every contract of employment as a teacher made after July 8, 1921, is subject to the provisions of the State Retirement Law (secs. 42.20 to 42.54), which confers specific benefits. Thereby such retirement benefits become part of the teaching contract and are consideration for the teachers' services; that is, compensation for them. Hence, 'additional benefits' and 'additional annuities' at first glance appear quite plainly to be additional compensation. Just as clearly, additional compensation is extra compensation;—
that is, compensation outside of that previously agreed upon. Sec. 42.535 grants such benefits to certain teachers who retired before June 30, 1951. The new section became effective July 19, 1951. It is apparent, therefore, that this extra compensation is not granted until after the teaching contracts had not only been entered into but the teachers' services had been performed and the teacher had ceased to serve. If it be true, then, that the additional benefits and annuities form extra compensation, which was not granted until after the contracts were entered into or until the services had been rendered, the prohibition of sec. 26, art. IV, Const., renders the legislation void.

"* * * The teachers' contracts for retirement benefits were contracts with the state and the compensation provided therein may not thereafter be increased by the legislature when the teaching is over. * * *

"* * * The state gets the money to make payments to the contingent fund from the general fund, into which all income-tax collections go, including the proceeds of the teachers' retirement surtax. * * * Among all the contentions which have been made in this action it has not been asserted that the general fund is not a public fund. The progress of the money which pays the controversial additional annuity is from the general fund, to the contingent fund, to the annuity reserve fund, to the retired teacher. Each of these transfers is said to be of a public purpose but somewhere under the three shells it is asserted that the little pea has shed its public character and become private and, as such, acquired freedom from the restraints of sec. 26, art. IV, Const. We yield to no one in our realization of the intricacies of governmental finance and our admiration of the man who understands it, but we confess inability to follow the taxpayer's dollar from the general fund through the others, each transfer being to effect a public purpose, and arrive at a conclusion that before it gets into the hands of the teacher it has somehow ceased to be public money. To be sure, the constitutional prohibition does not distinguish between public and nonpublic funds. If the time comes when the legislature awards extra compensation pay-
able out of funds which are not public we may have to construe the Article with that in mind, but that question is not presented here. We conclude that the present benefits are payable from public funds * * *

"* * * the framers were well aware that public servants, including teachers, were employed for compensation accepted or agreed upon by express or implied contract and that an agreement to render personal service for a consideration is a contract equally with one for the furnishing of materials or accomplishing some specific result. They knew the meaning of every word in the Article and the meanings have not changed with the passage of time. 'Services,' 'contracts,' and 'compensation' are not new terms or new concepts. The language of the Article admits of no doubt that it was the intent of the draftsmen who prepared it and the electors who adopted it that, when a person rendered public service for compensation agreed upon, his right to compensation depended upon and was limited by his agreement. * * *

The court then suggested that if the people wished to grant additional compensation to certain retired public servants they should amend Art. IV, sec. 26, to make an exception. This was done on April 3, 1956, upon which day the people voted in a referendum to amend Art. IV, sec. 26, by adding at the end thereof:

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

This amendment, of course, does not purport to authorize any increase in the retirement benefit of a municipal or state employe who had formerly retired under the provisions of the statutes relating to the Wisconsin retirement fund.

In State ex rel. Holmes v. Krueger, (1955) 271 Wis. 129, 72 N. W. 2d 734, the court held that sec. 38.25, Stats., enacted in 1951, which provided that each annuitant under the Milwaukee teachers retirement system who retired before June 11, 1947, should be paid an additional $1 per month
for each year of teaching experience did not violate Art. IV, sec. 26, Wis. Const., because said teachers were not paid out of the public treasury of the state, and hence were not the kind of servants or contractors covered by said constitutional prohibition. It was held that the expenditure of public funds for a moral obligation is an expenditure for a public purpose and that sec. 38.25 authorized an expenditure in satisfaction of a moral obligation and hence was for a public purpose.

There was a vigorous dissent in which it was said "The only difference between sec. 42.535, the statute which we struck down as invalid in State ex rel. Thomson v. Giessel, (1952) 262 Wis. 51, 53 N. W. 2d 726, and sec. 38.25, which is under attack here, is that the former was intended to provide additional benefits to retired teachers throughout the state, and the latter would provide additional benefits only to the retired teachers of the City of Milwaukee. * * *

The court did not specifically overrule the Giessel case but attempted to distinguish it.

In view of the contrary holdings in these two cases I cannot be confident of the answer to your second question. In my opinion, however, the decision in the Giessel case (262 Wis. 51) is not only better reasoned but more in consonance with the prior holdings of this court than the Krueger case which was supported by a bare majority of the court and from which there was a strong dissent. Notwithstanding the fact that the Wisconsin retirement fund is a trust, under the doctrine of cases hereinbefore cited the moneys therein are public funds and the use of excess reserves in the annuity reserve fund to declare a dividend to annuitants who had retired and who would be rendering no further service to the state or any municipal employer would constitute the use of public funds for a private purpose. Hence, I am of the opinion that 66.916 (a), as created by ch. 110, Laws of 1965, would not authorize such use of said excess reserves unless in view of the present wording of Art. IV, sec. 26, Wis. Const.

This result in my opinion is required by the language of Art. IV, sec. 26. It is quite possible, however, to take action
similar to that taken in 1956 to amend the constitution to permit the use of excess funds to increase the annuities of retired members.

I realize that the state teachers retirement board and its predecessor, in reliance upon the provisions of 42.34 distributed excess reserves as "gains and savings" to certain annuitants after they had retired and would not be rendering teaching service thereafter. I have not been requested to rule upon, and do not pass upon, the validity of these actions. In passing, however, it may be noted that the portion of 42.34 which purports to authorize a distribution of gains and savings was included in ch. 459, Laws of 1921, which created the state teachers' retirement system so that it became a part of the contract between each teacher under the system and the state of Wisconsin which the court held to exist in the cases of State ex rel. Dudgeon v. Levitan, (1923) 181 Wis. 326, 193 N. W. 499; State ex rel. O'Neil v. Blied, (1925) 188 Wis. 442, 206 N. W. 213, and State ex rel. Stafford v. State Annuity and Investment Board, (1935) 219 Wis. 31, 261 N. W. 718. It is possible that this might be held to give the members of the system a contractual right to share in excess reserves which might develop in the annuity reserve fund through a distribution thereof as gains and savings.

BCL:JRW

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Fishing laws—Boundary waters—Discussion of boating and fishing regulations and their enforcement on boundary waters whether malum in se or malum prohibitum.

November 30, 1967.

ROGER L. HARTMAN

District Attorney, Buffalo County

You have asked for my opinion on the limits of the jurisdiction of the state of Wisconsin to enforce its boating and
fishing laws on the Mississippi river, which forms the boundary between Wisconsin and Minnesota. Your letter emphasizes certain problems involved in the enforcement of boat safety and seasonal fishing regulations on the boundary waters.

I. CONCURRENT JURISDICTION

Art. II, sec. 1, Wis. Const., sets the western boundary of the state as "the center of the main channel" of the St. Croix and Mississippi rivers. As a general rule, the sovereignty and jurisdiction of a state extend to "all places within the boundaries thereof". Sec. 1.01, Stats. See also 49 Am. Jur., States, Territories and Dependencies, sec. 24, p. 244. States separated by boundary waters may, with the consent of Congress, grant concurrent jurisdiction over such waters to each other.

The act of Congress admitting Wisconsin to the Union (9 Stat. 57), provides in part as follows:

"** * ** the said State of Wisconsin shall have concurrent jurisdiction on the Mississippi, and all rivers and waters bordering on the said State of Wisconsin, so far as the same shall form a common boundary to said State and any other State or States now or hereafter to be formed or bounded by the same; ** * **.

Similarly, Art. IX, sec. 1, of our constitution provides in part:

"The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state * * ."

Similar provisions exist in Minnesota's organic law. "Concurrent jurisdiction" pertains to the effect of the law of each state within that portion of the domain of the other which is covered by the boundary water. 49 Am. Jur., States, Territories and Dependencies, p. 245, sec. 24.

The U. S. supreme court considered the effect of the concurrent jurisdiction of the states of Oregon and Washington over the Columbia River in Nielsen v. Oregon, (1909)
212 U.S. 315, 29 S. Ct. 383, 53 L. Ed. 528, wherein a Washington resident was convicted by the Oregon Courts of setting a trammel net on the Washington side of the river. Oregon law prohibited the setting of such nets, but Washington law did not. In reversing the conviction, the court stated (212 U.S. at pp. 320-321):

"The present case is not one of the prosecution for an offense malum in se, but for one simply malum prohibitum. * * * The plaintiff in error was within the limits of the State of Washington, doing an act which that State in terms authorized and gave him a license to do. Can the State of Oregon, by virtue of its concurrent jurisdiction, disregard that authority, practically override the legislation of Washington, and punish a man for doing within the territorial limits of Washington an act which that State had specially authorized him to do? We are of opinion that it cannot. . . . It is enough to decide, as we do, that for an act done within the territorial limits of the State of Washington under authority and license from that State one cannot be prosecuted and punished by the State of Oregon."

The opinion in the Nielsen case provides authority for the following conclusions:

(1) Jurisdiction of both states over acts mala in se (acts "bad" in themselves and therefore prohibited) extends the full width of a boundary water. In this situation, the state first commencing the prosecution obtains primary jurisdiction;

(2) In the case of acts which are merely mala prohibitata (not inherently "bad" but prohibited by law for a variety of purposes), and are illegal in only one of the two adjoining states, jurisdiction of the "prohibiting" state extends only to the territorial limits thereof—e.g., to the thread or center of the main channel of the boundary water;

(3) Even if an act is only by nature malum prohibitatum, if it is made illegal by the law of both adjoining states, the principles of No. (1), above, apply, and each state's jurisdictional arm extends the full width of the boundary water. The state first asserting jurisdiction over a given act simi-
larly obtains priority, and, as in the first-described situation, its judgment is final in both states. See 37 OAG 570, 572 (1948).

In the latter situation, it is not necessary that the adjoining state prohibit the particular act in the same language that appears in the law of the other state. The emphasis is on the nature of the act, and if it can be ascertained that the act itself is prohibited in both jurisdictions, the rule is applicable.

Violations mala in se comprise generally those acts which are immoral or wrong in themselves, or naturally “evil”, such as murder, arson, burglary, breach of the peace, forgery, drunken driving, etc. State v. Kelison, (1948) 233 Iowa 1274, 11 N. W. 2d 371; State v. Darchuck, (1945) 117 Mont. 15, 156 P. 2d 173. The term malum prohibitum, on the other hand, embraces those things which are not inherently “evil”, but which are prohibited by statute because they infringe upon the rights of others. They are crimes only because they are so prohibited. Violation of licensing laws, automobile speed restrictions, gambling, etc., are examples of acts considered to be merely malum prohibita. Macco Const. Co. v. Farr, (9th Cir. 1943) 137 Fed. 2d 52; Hurt v. State, (1947) 184 Tenn. 608, 201 S. W. 2d 988; Hofferman v. Simmons, (1941) 177 Misc. 962, 32 N.Y.S. 2d 244. For other examples of both types of conduct, see 26 Words and Phrases, pp. 343-348; 22 C.J.S., Criminal Law, pp. 19-20, sec. 8.

Before applying these principles to the laws here involved, two Wisconsin cases—both closely in point—should be considered.

The leading Wisconsin case on “concurrent jurisdiction” is Roberts v. Fullerton, (1903) 117 Wis. 222. The action there was for damages for the taking and destruction of the plaintiff’s fish net, which was staked to the bottom of Lake Pepin, a small lake on the Wisconsin side of the main channel of the Mississippi river. The defendant, a Minnesota game warden, answered, contending that he was carrying out the law of that state. The court sustained a demurrer to the answer, stating (117 Wis. at p. 237):
"* * * It is our opinion that the term [concurrent jurisdiction] refers to that authority commonly exercised concurrently upon water divided by the boundary line between two countries, according to the public law as recognized in this country at the time the use of the term became common in our legislative history; that it relates to matters at least in some way connected with the use of the water for navigable purposes, to things afloat, or in some legitimate sense on the water—things difficult to deal with if it were necessary to determine in each instance of the exercise of jurisdiction the precise location of the particular act involved as regards the boundary line; but that it does not include the right to regulate the enjoyment, by the people of one state within its domain, of rights incident to their situation, such as the right to navigate or fish. It does not empower one state to spread its mere police regulations over territory of another, regulating the sovereign property right of the latter in or to the water flowing over such territory, or to the fish therein or fowls thereon, . . ."

In *State v. Bowen*, (1912) 149 Wis. 203, 205, the court held that the circuit court of La Crosse county did not have jurisdiction over a prosecution for setting a trap net in the Mississippi river west of the main channel (i.e., the Minnesota side), stating:

"* * * In *Roberts v. Fullerton*, 117 Wis. 222, 93 N. W. 1111, it was held that the jurisdiction of a state for the enforcement of its fish and game laws is co-extensive with, and limited by, the boundaries of the state, even though they consist of the thread of a navigable stream over whose waters the adjacent states have concurrent jurisdiction for other purposes. . . ."

**II. REGULATION OF BOATING**

The basic boating regulations are found in secs. 30.50-30.80, Wis. Stats., and deal with everything from display of registration numbers to operating a boat while intoxicated. Generally, these laws fall into two categories insofar as any reference to the specific water areas are concerned: (1) those applicable to "waters of the state"; and (2) those containing no location reference whatsoever.
The phrase, "waters of the state" is defined as follows by sec. 30.50 (4), Wis. Stats.:

"... any waters within the territorial limits of this state, including the Wisconsin portion of boundary waters."

Thus, as a general rule, wherever this phrase appears in the boating laws, the particular statute is applicable to the Mississippi river, and other boundary waters, to the center of the main channel.

The sections which do not contain the above phrase must be similarly construed as applying within the territorial limits of the state of Wisconsin—that is, to the center of the main channel of the boundary water. This conclusion follows from the general principles of state sovereignty and jurisdiction discussed above.

Your letter mentions a dispute over enforcement of Wisconsin's boat toilet law (sec. 30.71, Wis. Stats.). I have been aware of the conflict between Minnesota's acceptance of chemical treatment devices and Wisconsin's prohibition against all devices other than those providing for retention and shore disposal of wastes. However, since Buffalo county is bordered by the Mississippi river, which is presently exempted from the prohibitions of sec. 30.71, Wis. Stats., I can foresee no immediate problems in your county in this regard.

As indicated above, we begin with the general proposition that enforcement of Wisconsin laws must stop at the state boundary. The question then becomes whether any of the acts prohibited by the boating laws are either mala in se, or else mala prohibita but also prohibited by Minnesota law; for in either of these situations, the laws involved are enforceable by Wisconsin officers on the full width of the Mississippi.

With two exceptions which will be discussed below, violation of any portion of the boating laws carries a uniform penalty of $50 or 30 days (or both) for the first offense and $100 or 90 days (or both) for the second offense within a one-year period. The types of acts prohibited by these statutes are clearly mala prohibita under the authorities
cited earlier in this opinion. As a result, they are enforceable by Wisconsin authorities only to the center of the main channel—except where these same acts are also prohibited by Minnesota law. Where so prohibited they are enforceable over the full width of the river.

The two exceptions—the violations carrying a much more substantial penalty ($200 or 6 months)—are:

"30.67 * * * (1) DUTY TO RENDER AID. Insofar as he can do so without serious danger to his own boat or to persons on board, the operator of a boat involved in a boating accident shall stop his boat and shall render to other persons affected thereby such assistance as may be practicable and necessary to save them from or minimize any danger caused by the accident and shall give his name and address and identification of his boat to any person injured and to the owner of any property damaged in the accident.

"30.68 * * * (2) INTOXICATED OPERATION. No person shall operate a boat upon the waters of this state while under the influence of an intoxicant or a narcotic drug or while under the influence of any dangerous drug. . . ."

The nature of the conduct condemned by these two subsections, together with the substantially increased penalties, are, in my opinion, sufficient to render violation of either one malum in se, and they thus become enforceable over the full width of the boundary water—whether or not they are also prohibited by Minnesota law.

It should be noted that a former attorney general found the prohibition against "Reckless Motor Boating" (sec. 30.06 (8), Wis. Stats. (1957)) to be an offense malum in se, basing his opinion primarily upon the fact that the penalty provided was nearly double that applicable to other boating violations. See 48 OAG 236, 239. Subsequent amendments to the boating laws have changed the title of this section (now sec. 30.68 (2), Stats.) to "negligent operation"—although the basic prohibition (operation in a "careless, negligent or reckless manner so as to endanger the life, property or persons of others") is identical to that of the former statute. In addition, the penalty provision in the present section
is no longer more severe, but the same as that applicable to the violations which are merely *mala prohibita*, such as registration, required equipment, etc.

Nevertheless, it is my opinion that the nature of the acts prohibited by sec. 30.68 (2), Stats., fall within the class *malum in se*, and thus the jurisdiction of Wisconsin authorities to enforce this section also extends the full width of the river.

While it might be contended that the phrase "waters of this state", as it appears in sec. 30.68 (1), limits enforcement of the "Intoxicated Operation" statute to the Wisconsin side of the river, the conduct prohibited thereby was described by a former attorney general as the type of conduct "which the legislature would not permit on any waters over which it had any jurisdiction whatever"—even though the statute then contained the phrase "on the water of the state". See 48 OAG 236, 239 (1959). I agree with this conclusion.

As indicated above, the remaining portions of the Wisconsin boat law being merely *mala prohibita*, are not enforceable beyond the center of the main channel of the river unless the same acts are prohibited by Minnesota law. Recourse must be made to the Minnesota Statutes for individual determinations on this point.

III. FISHING REGULATIONS

Although the maximum penalties for violation of those portions of Chapter 29, Stats., dealing with fishing seasons, limits, etc., are often substantial, it is generally accepted that these acts are, by nature, *mala prohibita*. The laws involved are, therefore, enforceable only within the territorial limits of the state, notwithstanding the fact that the state may have concurrent jurisdiction on the boundary water. See *Roberts v. Fullerton* and *State v. Bowen*, supra.

It follows that, where one state permits a certain act to be done (such as taking walleyes on a certain date) officers of the adjoining state, whose laws prohibit the same act, cannot reach beyond the borders of that state—in this case the center of the main channel of the river. Under *Nielsen*
v. Oregon, supra, if the law of the State of Minnesota also prohibits the particular act, the authority of Wisconsin officers to enforce Wisconsin law extends the full width of the river.

IV. SUMMARY

Wisconsin boating regulations (secs. 30.50-30.80, Stats.) may be enforced on the Minnesota side of the Mississippi river only if one of the following situations exist:

(1) The violation is *malum in se*—e.g., violation of secs. 30.67 (1), 30.68 (1), or 30.68 (2).

(2) The violation, though not *malum in se*, is also prohibited by Minnesota law.

Wisconsin fishing regulations, being merely *malum prohibitum* may be enforced on the Minnesota side of the Mississippi only if the act involved is prohibited by Minnesota law.

In all other instances involving the boating and fishing laws and regulations, the jurisdiction of the State of Wisconsin extends only to the territorial limits of the State—in this case the center of the main channel of the Mississippi River. Pursuit of Wisconsin fish and game law violators on boundary waters is discussed in 37 OAG 570 (1948), and it is there stated that, in certain situations, Wisconsin wardens may pursue and apprehend violators anywhere on the river.

State debt—Constitutional amendment—Discussion of several questions relating to proposed constitutional amendments which would permit the state to borrow money, issue bonds, and set annual and aggregate debt limitations.

December 8, 1967.

THE HONORABLE, THE SENATE
By Senate Resolution 29 (1967), you have asked my opinion on approximately 20 questions concerning Assembly Joint Resolution 1, which would amend the constitutional restrictions against state debt. I am informed that the joint resolution was passed by the 1965 session of the legislature and would be submitted to the people following passage by the current legislature. I am sure you will appreciate the fact that this is a matter of no small consequence, deserving of much more study and analysis than the remaining few weeks of the 1967 session will permit. As a result a hurried attempt to furnish precise answers to all of your questions would be unwise, and the opinions which follow must of necessity, be general in nature, and in some instances qualified.

Two substitute amendments to Assembly Joint Resolution 1 have been introduced and will be considered where appropriate.

I. THE BASIC RESOLUTION

Assuming that Assembly Joint Resolution 1 is adopted by the legislature and ratified by the people. You ask the following questions:

(A) May either existing public building corporations or the state issue bonds after the effective date of the amendment to retire existing short-term unbonded debt of such public building corporations? If the answer is in the affirmative, is there still sufficient doubt as to be likely to affect the marketability of such bonds?

The amendment to Art. VIII, sec. 7, Wis. Const., proposed by the joint resolution includes the following language in subsec. (3):

"The outstanding bonds issued by any public building corporation of this state prior to the effective date of this amendment shall be included in determining such five per centum limit. After the adoption of this amendment, no new state building corporation shall be created and no existing state building corporation shall incur any debt."
This language on its face appears to exempt the non-bonded indebtedness of the corporations from the debt limitation. However, proposed sec. 7 (3), quoted above, would prohibit the corporations from incurring "debt". As a general rule, refunding a validly existing obligation does not result in the creation of a new "debt" in the constitutional sense. 49 Am. Jur., States, Territories and Dependencies, p. 280, §68; 97 A.L.R. §452. However it also has been said, and rightly so, that the single relevant Wisconsin case is ambiguous on this point. See Kiernan, "Wisconsin Municipal Indebtedness—Part I", 1964 Wis. L. Rev. 173, 217-18, citing Montpelier Sav. Bank & Trust Co. v. School Dist., (1902) 115 Wis. 622, 92 N. W. 439.

As a result the matter is not free from doubt, for although the general rule is as indicated above the Wisconsin court might well hold that the issuance of refunding bonds does create a new debt. It is quite conceivable, for example, that the refunding bonds would mature at different times and carry different interest rates, and facts such as these could well cause the court to hold that a new debt is in fact incurred at the time such bonds are issued.

Insofar as the ability of the state to "refund" existing obligations of the corporations, it is well established that the debts of the building corporations are not "debts of the state." Indeed this is the foundation of the so-called "dummy corporation" financing idea, based on the principle that such corporations are private and thus separate and distinct from "the state". See State ex rel. La Follette v. Reuter, (1967) 33 Wis. 2d 384, 147 N. W. 2d 304. As a result it would be impossible for the state to "refund" obligations of the corporations, since these obligations were never state obligations in the first place. The state could, of course, issue bonds to assume the obligations of the corporations provided that proper purposes (as defined in proposed sec. 7 (2)) are involved. Such bonds would be included in the debt limitation.

I am of the opinion, therefore, that the building corporations may refund existing short-term debt by issuing bonds therefore, without "incurring a debt" within the purview
of proposed sec. 7 (3). There is some doubt, however, as to whether the Wisconsin court would so hold.

It is my further opinion that the state could not "refund" existing obligations of the corporations, since the corporate debts were never debts of the state.

(B) Would long-term bonds be the only kind of obligation or evidence of indebtedness authorized for issuance by the state?

The general issuing authority is found in proposed Art. VIII, sec. 7 (2), and provides:

"(2) The legislature may also borrow money and issue bonds therefore for the purchase and improvement of real property, for the construction and improvement of buildings, structures, improvements, facilities and highways, for the acquisition, development and preservation of recreation and forest areas in the state and for the purchase of equipment and other capital items related thereto, provided that the aggregate amount of all state bonds outstanding at any time shall not exceed five per centum of the value of the taxable property in the state as determined by the last preceding state assessment."

Although it might be argued that the phrase "borrow money and issue bonds" permits borrowing in addition to, and through means other than, the issuance of bonds, such an interpretation would in my opinion contravene the intent of the proposed amendment as clearly expressed in succeeding subsections.

The proper construction appears to be that the legislature may borrow money for the stated purposes only through the issuance of bonds. This follows from the provisions of other portions of the proposed amendment which regulate and limit the issuance of "bonds"; for if the legislature could incur debt through other means, these regulations and limitations would not be applicable. The result would be unlimited borrowing power, which is inconsistent with the intent and purpose of Art. VIII of the Constitution. In addition, the term "bond" is not commonly regarded as including or con-

I have been informed, however, that it is often desirable, in order to adequately finance state governmental operations at the lowest possible cost, to secure interim financing through notes issued in anticipation of permanent or bond financing at a future time when interest rates may be more favorable. Since Art. I, sec. 12, Wis. Const., protects contracts from impairment, we must strive for a construction which would accommodate both provisions. Bond anticipation notes are, after all, tied directly to the issuance of bonds and constitute an integral part of a realistic state bonding program. As such, these procedures are in my opinion compatible with the intent and spirit of the proposed amendment. Consequently, while bonding is the only means by which the state may incur debt under the amendment, the use of anticipation notes for interim financing purposes would not be prohibited thereby.

It should be noted, however, that my opinion on the propriety of anticipation notes under the amendment is like several other opinions expressed herein subject to strong arguments on the other side which might well cause a court to hold otherwise.

There is no restriction in the proposed amendment pertaining to the term of any debt incurred thereunder. Thus, if your question asks whether short-term bonds may be issued (as opposed to long-term bonds) the answer is in the affirmative.

(C) Under proposed article VIII, section 7 (2):

(1) Could bonds be issued in the name of the state or would they have to be issued in the name of the legislature? If bonds had to be issued in the name of the legislature, who would issue, execute and deliver the bonds?

In this situation, as in most others described in the various questions you have asked, the implementation of the plan is left to the legislature, who will consistent with constitutional language and policy, be responsible for designing the
ministerial machinery through which the state bonding program will be operated. This machinery must, of course, avoid constitutional pitfalls—under the amended Art. VIII, sec. 7, as well as other relevant sections of the constitution.

The language in section 7 (2) of proposed Art. VIII (quoted above) providing that “the legislature may borrow money and issue bonds therefor” does not, in my opinion, require that all bonds be issued in the name of the legislature. It is rather, as indicated above, an investiture of borrowing and bond-issuing authority, which may consistent with existing law be further defined and delegated by the legislature. Through implementing legislation the legislature clearly could provide for the issuance of bonds in the name of the state of Wisconsin.

(2) Would the legislature be required to authorize, by passage of a separate law, the issuance of each individual bond issue?

Subsec. (4) of proposed Art. VIII, sec. 7, provides in part:

“Each state bond issue shall be authorized by law for purposes which shall be stated clearly in such law; and a vote of the majority of all the members elected to each house * * * shall be necessary to the passage of such law.”

The language is clear in its requirement that “each issue” must be “authorized by law”. Provision is also made for the number of votes necessary to passage in both houses of the legislature. There being no contrary indication anywhere else in the proposed amendment, the answer to this question is in the affirmative.

(3) Would each bond issue require passage of two laws, one to authorize the advertising of the proposed sale of bonds and one to authorize the awards of bonds?

Since the proposed amendment requires legislative authorization of each “issue”, the question arises whether an “issue” means the actual delivery of the bonds, or the advertising, or the entire process. As might be surmised, courts have supported each of these views—some holding
that the term "issue" means delivery others holding that it
pertains only to the initial authorization and still others
holding that the term encompasses the entire procedure. See
Corning v. Board of County Commissioners, (1900) 102 Fed.
57; Perkins County v. Graff, (1902) 114 Fed. 441; Schu-
macher v. Flint, (1930) 252 Mich. 1, 232 N. W. 406; Wright
v. East Riverside Irrigation Dist., (1905) 138 Fed. 313. See
also, 1 Jones, Bonds and Bond Securities (4th Ed.) 7.

The Wisconsin supreme court has not passed on the
question, and there is no indication at this time as to what
its position might be. The initial answer to your question,
therefore, must come from implementing legislation which
would have to be tested against the constitutional provisions
at such time as it is enacted.

It may well be that one law would have to be passed stat-
ing the purpose and setting the dollar amount of the bonds,
and perhaps authorizing their sale to the prevailing bidder;
and a second law enacted after the bids are all received fix-
ing the maturity and interest schedules to accord with the
winning bid. I am informed, for example, that this two-step
procedure is followed in the issuance of municipal bonds.
It may also be that the legislature could delegate to some
state agency circumscribed powers to consummate the sale
and execution of the bonds, and thus accomplish its purpose
through the passage of a single law. As indicated above,
delegation of administrative functions to an agency would
under certain conditions be entirely proper.

Since a definite answer to this question would have to
take into account many nonlegal considerations—such as
advertising and bidding procedures, the chances of an
authorized issue not selling at anticipated rates, etc.—I do
not feel that I can advise you further on this point without
being furnished the necessary data.

(4) Could the legislature, by passage of a single law,
authorize the issuance of various bond issues for the financ-
ing of a class of state facilities or purposes?

* * *
(5) Could the legislature, by passage of a single law, authorize the issuance of various bond issues for the financing of several classes of state facilities or purposes?

Under Art. VIII, sec. 4, the state is prohibited from contracting public debts "except in the cases and manner herein provided". Proposed Art. VIII, sec. 7 (4), requires that each state bond issue be "authorized by law for purposes which shall be stated clearly".

The obvious purpose of prohibitions against the incurring of indebtedness except in pursuance of an appropriation by law is to confine the creation of indebtedness to such subjects and to such amounts as are expressly approved by the legislature. See 49 Am. Jur., States, Territories and Dependencies, p. 280, §66.

Although a strict reading of this language would seem to permit a law authorizing a single issue for several "purposes", such a construction would not be in accord with the type of legislative control apparently contemplated by the requirements of sec. 7 (4)—e.g., authorization of each issue by the affirmative vote of a majority of the members of the legislature.

Borrowing for general purposes or for generally anticipated but uncertain requirements in those areas in which borrowing is permissible would be prohibited. The degree of specificity required is a question for the legislature in the first instance, subject of course to the provisions of proposed Art. VIII, sec. 7 (4). While each building, structure or facility for which borrowing would be permitted need not be precisely identified in the law authorizing the issue, it is doubtful that an all inclusive law, using only the broad language of sec. 7 (2), would be sufficient.

Again, this is a question that is incapable of definite answer at this point in time. The legislation authorizing the issue will have to be balanced against the language and policy of Art. VIII. The only positive statement that can be made at this stage is a warning that the authorizing legislation cannot be over broad in describing the purposes of the individual bond issue and the amount of money involved.
In short, while proposed sec. 7 (4) would on its face appear to empower the legislature to authorize a single bond issue for a multiplicity of purposes, a court if confronted with such a question might well conclude that such a law would violate the spirit and purpose of the constitutional state borrowing plan.

(D) Would existing debt incurred by the public building corporations for facilities which are self-liquidating be included in assessing "debt" in relation to the proposed "debt" limitation?

Proposed sec. 7 (3) provides in part that all "outstanding bonds issued by any public building corporation" prior to the effective date of the amendment shall be included in determining the five per centum debt limitation. The plain language of this section would apply to all outstanding building corporation bonds, regardless of the method of payment. As a result the face amount of all such bonds, including those issued for self-liquidating facilities, would be included in computation of the five per centum limitation.

(E) May bonds be issued for general anticipated requirements?

The answer must be "no". The discussion appearing under question I (c) (3) above is relevant to this question as well. While absolute specificity is not necessary in the legislation authorizing a bond issue, I doubt that an all-inclusive, generally phrased authorization would suffice in view of the requirements of proposed sec. 7 (4), and of existing Art. VIII, sec. 4.

(F) In view of the present existence of the term "state assessment" in article VIII, section 10 of the Wisconsin Constitution, is the meaning of that term in proposed article VIII, section 7 (2) sufficiently clear? What will be the effect if 5% of "the value of the taxable property in the state as determined by the last preceding state assessment" drops below the value of the aggregate amount of all outstanding state bonds?

The term "state assessment" has not been defined by the Wisconsin court nor is it defined in the proposed amend-
ment. Sec. 70.10, Stats., provides for an annual assessment of all real and personal property in furtherance of collection of the tax on all general property within the state. See also sec. 70.01. The assessment, while organized on county level, is governed by state law, and apparently is the "state assessment" contemplated by proposed sec. 7 (2). In addition, sec. 70.575, Stats., indicates that the "state assessment" is the total of all county assessments and "shall be the full market value of all general property of the state liable to state, county and local taxes in the then present year".

The same term appears in Art. VIII, sec. 10, as an annual limitation on appropriations for certain public works, and has been used and discussed by the Wisconsin court without comment. See State ex rel. Ekern v. Zimmerman, (1925) 187 Wis. 180, 193, 206, 204 N. W. 803.

It is my opinion, therefore, that the phrase is sufficiently clear.

You also inquire as to the effect of a decrease in assessed valuation on the debt limitation. If a particular "state assessment" reveals that the valuation of the taxable property in the state has dropped to such an extent that the figure is exceeded by the aggregate amount of all outstanding state bonds, there would appear to be a violation of the precise language of proposed sec. 7 (2).

The situation you describe, however, is not the situation where bonds are issued after the debt limit has been reached or exceeded. Here the bonds would have been validly issued in the first instance and would be binding legal obligations of the state. It is highly unlikely that a court would invalidate such obligations in the event of a decrease in property valuation and thus impair and destroy the contract rights of innocent purchasers.

II. SENATE SUBSTITUTE AMENDMENT 1

You also ask the following questions relating to Senate Substitute Amendment 1 to Assembly Joint Resolution 1:

(A) Does the description of nonprofit corporations proposed by article VIII, section 7 (2) (d) include any organizations other than the public building corporations?
Proposed sec. 7 (2) (d) provides:

"No money shall be paid out of the treasury, with respect to any ** agreement entered into after January 1, 1970, to any nonprofit corporation or any entity organized for public purposes pursuant to which such nonprofit corporation or such other entity undertakes to finance or provide a facility for use or occupancy by the state or any agency, department or instrumentality thereof."

Ch. 182, Stats., provides for many private (including those regarded as "private" in the several "dummy corporation" cases) nonprofit corporations, some of which are organized for public purposes and are authorized to carry on projects which could be financed by the state under proposed sec. 7 (2) (a). Such corporations include the Turnpike Corporation (secs. 182.30-182.48), the surplus federal property development corporations authorized by sec. 182.60, and may well include other types of corporations mentioned in the chapter as well as the thousands of nonprofit corporations existing under ch. 181, Stats.

Thus the language of proposed sec. 7 (2) (d) is unclear in that it might encompass some or all of these corporations. Moreover, this section may well prohibit any agreement between any state agency and any nonprofit corporation, where the consideration to be furnished by the state is money and the consideration to be furnished by the corporation is the financing or providing of any public facility. Further, the overbroad designation of "any other entity organized for public purpose" would appear to include all municipal corporations within the state, and in this manner might be construed as prohibiting the state financial assistance program for water pollution abatement facilities under ch. 144, Stats. See State ex rel. La Follette v. Reuter, (1967) 33 Wis. 2d 384, 147 N. W. 2d 304.

(B) The main thrust of this proposal to to amend Art. VIII, Section 7 of the Constitution. Proposed Art. VIII, Section 7 (2) (f) contains language which may impliedly amend Art. VIII, Section 2 as well. Does the cited paragraph deal with a sufficiently different subject so as to require a separate question when the proposal is submitted to the people?
You are correct in pointing out the apparent conflict between proposed sec. 7 (2) (f), which requires the state treasurer to set aside general fund revenues to pay the principal and interest on bonds if at any time the legislature fails to make any such appropriation, and Art. VIII, sec. 2, which provides that "no money shall be paid out of the treasury except in pursuance of an appropriation by law." Whether or not this amounts to an "implied amendment" is another question, however.

Art. VIII, sec. 1, provides in part that if more than one constitutional amendment is submitted to the people they must be submitted separately. The Wisconsin supreme court considered the meaning of this provision in State ex rel. Hudd v. Timme, (1882) 54 Wis. 318, 11 N. W. 785. The court there determined that a proposed amendment changing the legislative sessions from an annual to a biennial basis, and also changing the salary of legislators, was a single amendment under Art. XII, sec. 1. The court stated that the requirement of "separate submission" applies to amendments which have different objects and purposes in view, and that in order to constitute more than one amendment the propositions submitted must relate to more than one subject and have at least two distinct and separate purposes not dependent upon or connected with each other (54 Wis. p. 336).

The court took a narrower view in State ex rel. Thomson v. Zimmerman, (1953) 264 Wis. 644, 60 N. W. 2d 416, when it held that Art. XII, sec. 1, had been violated where a proposed constitutional amendment provided for: (1) the apportionment of state senate districts on an area basis, and of assembly districts by population; (2) removal of the prohibition against including Indian and military lands in the population base; and (3) changing the provision relating to boundaries of assembly districts.

On the basis of these cases, the attorney general advised the legislature in 1959 that questions dealing with four-year terms for the offices of attorney general, secretary of state, and state treasurer had to be submitted separately, while the same questions relating to the offices of governor and lieutenant governor could be submitted as one proposal.
48 OAG 188 (1959). That opinion also advised separate submission of questions relating to terms of several county offices in order to be “absolutely safe”. In 50 OAG 65 (1961), the attorney general advised the senate that questions pertaining to the creation of a county executive to exercise such administrative duties as may be delegated by the county board, and granting him a veto power over county ordinances, were so different as to require separate submission. See also 54 OAG 13 (1965).

Assuming arguendo that your statement as to an implied amendment is true—and this in itself may well require judicial determination—it is doubtful under the rules just stated that submission to the people on separate questions would be required, since the object of the joint resolution, to permit limited state borrowing for certain purposes, is singular.

It should be noted, however, that a very persuasive argument may be made that because of the conflict the proposed section 7 (2) (f) deals with a sufficiently separate subject so as to require separate submission. This argument arises from the fact that the existing method of legislative authorization of all payments from the treasury need not be altered or amended in order for the state to incur debt, which is after all the fundamental purpose of the amendment.

While I feel that separate submission is unnecessary, the language of proposed section 7 (2) (f) is open to challenge on this point, and I cannot speculate on the outcome of such a challenge. Since this language is not necessary to implementation of the state bonding plan, the best and safest course would be to eliminate the problem by altering the wording of the section.

(C) Is the inclusion of proposed Article VIII, section 7 (2) (h) necessary to permit the issuance of revenue bonds which would not be chargeable to the debt limitation set forth in proposed article VIII, section 7 (2) (b)?

The Wisconsin court, while never passing on the precise question of whether revenue bonds are within the scope of the constitutional debt restrictions, has indicated that the state may acquire property and pledge the revenues there-
from in payment of the purchase price without creating a state debt. The court has long held this to be the rule in regard to cities. See *Connor v. Marshfield*, (1906) 128 Wis. 280, 197 N. W. 639. It should be noted, however, that the provision of the constitution dealing with municipal debt (Art. XI, sec. 3) contains language specifically excluding from the debt limitation a pledge of the assets of an existing utility in connection with the financing of improvements thereto, where the loan is payable solely out of future revenues of the utility.

In *Loomis v. Callahan*, (1928) 196 Wis. 518, 525, 220 N. W. 816, the Wisconsin court held that the board of regents could purchase property, and in payment therefor pledge moneys arising from the operation of the property thus acquired without creating a “debt” in the constitutional sense. The court based its holding on the line of cases approving similar transactions by cities. Several years later in *State ex rel. Thomson v. Giessel*, (1954) 267 Wis. 331, 65 N. W. 2d 529, the court reconsidered the *Loomis* case, and overruled it insofar as it authorized the incumbering of an interest in state property as security for a loan. The opinion in the *Giessel* case, however, does not appear to affect the *Loomis* decision insofar as that case held a pledge of revenues to be outside the scope of the constitutional debt restrictions.

As a general rule, a state does not create a “debt” in the constitutional sense by purchasing property to be paid for wholly out of the income or revenue to be derived from the property purchased. See 49 Am. Jur. *States, Territories and Dependencies*, p. 283, §71. Indeed, courts in some states have held that the issuance of state revenue bonds to provide university buildings where payment is to come solely from a fund derived from student fees does not create a “state debt”. See 46 OAG 65, 68 (1957).

Thus, it is my opinion that if faced with the precise question the Wisconsin supreme court would hold revenue bonds to be outside the definition of “debt” as that term appears in our constitution, whether or not the bonds were issued in connection with the purchase or acquisition of the particular revenue-producing property. It follows that while the
inclusion of subsection (2) (h) of proposed sec. 7 may not be absolutely necessary to permit issuance of "non-debt" revenue bonds, it does secure the desired result without retaining the possibility, however slight, of a future question on this point.

(D) In view of the holding in State ex rel. La Follette v. Reuter (1966) 33 Wis. (2d) 284, would the financing of water pollution abatement facilities (or other facilities under a similar program) for localities through the issuance of state bonds constitute a violation of the constitutional prohibition against lending the credit of the state?

Art. VIII, sec. 3 provides:

"The credit of the state shall never be given or loaned, in aid of any individual, association or corporation."

In State ex rel. La Follette v. Reuter, (1967) 33 Wis. 2d 384, 397-398, 147 N. W. 2d 304, the court reiterated its definition of the prohibited "lending of credit" as occurring only when the state incurs an enforceable legal obligation to pay the debt of another, and quoted as follows from State ex rel. W. D. A. v. Dammann, (1938) 228 Wis. 147, 197, 277 N. W. 278, 280 N. W. 698:

"* * * There is no such giving or loaning of the state's credit * * * when all that is done by the state is to incur liability directly or only to such other party as, for example, where the state lawfully employs someone to perform an authorized service for the state."

The Reuter case also held that matters pertaining to the abatement of water pollution are proper state governmental functions and are matters of public, state-wide concern. (33 Wis. 2d at pp. 397, 403). These matters would thus be proper subjects for state bonding, and indeed are made so under proposed sec. 7 (2) (a) of Senate Amendment 1.

As a result, it is my opinion that water pollution abatement facilities for localities may be financed through state bonding under the proposed amendment without violating the prohibitions against lending the credit of the state. The liabilities incurred by the state would be direct, and thus not
within the definition quoted above. Whether this would be true in other situations or under other programs would of course depend upon the particular facts involved.

(E) Would existing debt incurred by the public building corporations for facilities which are self-liquidating be included in assessing "debt" in relation to the proposed "debt" limit?

Senate Amendment 1 contains a provision not appearing in the Assembly Joint Resolution—a provision empowering the legislature to authorize the issuance of revenue obligations by public corporations. However, the language of this section (proposed 7 (h)) would seem to lend itself to an interpretation that its terms are prospective only, and that it does not encompass revenue obligations previously incurred by the corporation or corporations.

Proposed sec. 7 (2) (b) sets the debt limitation in terms of "the aggregate public debt contracted by the state in any calendar year" for the purposes set forth in proposed sec. 7 (2) (a). Since the public building corporations are not "the state" under the long line of "dummy corporation" cases, their existing debts are not "public debts contracted by the state" and would not be included in arriving at the limitation.

It follows that existing, self-liquidating debts of the public building corporations to the extent that they are supported by, or payable from, the state treasury would not be included in the assessment of "debt" for purposes of the limitation.

(F) Does the prohibition in proposed Article VIII, section 7 (2) (d) against any future borrowing by the public building corporations deal with a sufficiently different subject so as to require a separate question on that part of the proposed amendment?

A reading of the entire proposal indicates that the elimination of the "dummy corporation" method of financing is part and parcel of the proposed state bonding program. In fact, if a separate question were used for proposed sec. 7 (2) (d), and if it were to be answered in the negative, the
resulting situation would be absurd—an increased but firm debt limitation, and a procedure which would allow contra-
vention of the limitation through dummy corporation bor-
rowing. In other words, we would be setting a realistic limit with one hand and completely nullifying the limit with the other. It would seem incongruous and inconsistent to con-
clude that an opportunity should be afforded to the electors to approve the establishment of a debt limitation, and at the same time authorize the total circumvention thereof by voting “no” on a separate question dealing with future dummy corporation borrowing. Cf. 54 OAG 18, 14-15 (1965).

This question, like question II (B) above, is incapable of definite answer at this time. The courts are in agreement that the difficulty here is not with the test but with its application. Although the legislature determines compliance with constitutional provisions relating to amendments in the first instance, it is in the final analysis for the courts to determine whether an attempted constitutional amend-
ment is proposed in the required manner. State v. Marcus, (1915) 160 Wis. 354, 152 N. W. 419.

Although it is my opinion that separate submission is not required, it is again impossible to do more than speculate as to the outcome of a court test at this time. The safest method, both here and in the similar situation discussed above in relation to the basic resolution, would be to submit the question separately, and only after altering the language so as to escape the possibility of an absurd result such as that discussed above.

This question deserves further comment. The so-called “dummy” corporations are creatures of the legislature and exist only through legislative sufferance. Their powers may be limited or extinguished altogether by the legislature at any time. Specific reference to these corporations in the proposed amendment will stamp them with the seal of con-
stitutional recognition and perhaps tacit identification as agencies of the state; yet the very reason for their existence is that they are regarded as private bodies in no way sub-
ject to financial and other limitations of the sovereign. The
danger of destroying the usefulness of such corporations by constitutional identification with the state and its government should not be underestimated if it is intended to retain their existence for limited purposes. Due consideration should be given to other less complex methods of obtaining the desired results in this respect.

III. SENATE SUBSTITUTE AMENDMENT 2

You have asked the following questions in regard to Senate Substitute Amendment 2 to Assembly Joint Resolution 1:

(A) Does the language of proposed article VIII, section 7 (2) (d) permit the "nonprofit private corporation organized for public purposes" to issue evidences of indebtedness for purposes specified in section 7 (2) (a) where the state has reached the limit specified in section 7 (2) (b)?

Proposed sec. 7 (2) (d) provides:

"No money shall be paid out of the treasury, with respect to any lease, sublease or other agreement entered into after January 1, 1970, to any nonprofit private corporation organized for public purposes or any similar entity, to finance any project which the state may carry on and for which paragraph (a) authorizes the state to contract public debt."

Under the proposed amendment only "the state" is authorized to contract public debt for the purposes specified in proposed sec. 7 (2) (a). The building corporations are of course not "the state" under a long line of cases beginning with Loomis v. Callahan, supra. Also, the language of the rest of the proposed amendment—particularly proposed sec. 7 (2) (d)—indicates an intent to limit the amount of debt burdening the taxpayers, whether incurred in the name of the state per se or in the name of a dummy corporation. See, for example, proposed sec. 7 (2) (b). It is noteworthy in this regard that proposed sec. 7 (2) (g) provides a method for "emergency" financing without regard to the debt limitation.

It is my opinion, therefore, that under the language of the proposed amendment the corporations would not be able to issue evidences of indebtedness for the specified purposes insofar as the indebtedness involves payments out of the treasury.
(B) Would existing debt incurred by the public building corporations for facilities which are self-liquidating be included in assessing "debt" in relation to the proposed "debt" limitation?

The limitation provisions of Senate Substitute Amendment 2 provide as follows:

"(b) The aggregate public debt contracted by the state in any calendar year pursuant to paragraph (a) shall not exceed an amount equal to the lesser of:

1. Three-fourths of one per centum of the aggregate value of all taxable property in the state; or

2. Five per centum of the aggregate value of all taxable property in the state less the sum of: a) the aggregate public debt of the state contracted pursuant to paragraphs (a) and (c) outstanding as of January 1 of such calendar year after subtracting therefrom the amount of liquid assets on hand on January 1 of such calendar year which are applicable exclusively to repayment of such outstanding public debt; and, b) the outstanding indebtedness as of January 1 of such calendar year of any entity of the type described in paragraph (d) to the extent that such indebtedness is supported by or payable from payments out of the treasury of the state."

As indicated above, it is probable that the court would hold self-liquidating obligations to be outside the notion of "debt". In addition, the above-quoted language would exclude from the limitation all building corporation indebtedness which is not supported by or payable from the state treasury.

It follows that the answer to this question is in the negative, but only insofar as such of the corporations is not supported by, or payable from, the state treasury.

(C) In view of the holding in State ex rel. La Follette v. Reuter (1966), 33 Wis. (2d) 384, would the financing of water pollution abatement facilities (or other facilities under a similar program) for localities through the issuance of state bonds constitute a violation of the constitutional prohibition against lending the credit of the state?
Under the authorities discussed in relation to question II (d) above, there is no "loaning of the state's credit" in the constitutional sense when all that is done by the state is to incur liability directly.

As a result, the financing of local water pollution facilities through state bonds would not violate Art. VIII, sec. 3, Wis. Const.

Handicapped children—Transportation—Mentally handicapped children may be transported to private schools or centers by the school district, but not by the county handicapped children's education board.

December 18, 1967.

WILLIAM C. KAHL
State Superintendent, Public Instruction

You have requested my opinion with respect to the transportation of mentally handicapped children to "day-care centers" such as the Belle School in Racine county. Specifically you inquire:

1. Does sec. 40.53 (1), Stats., as amended by section 4, chapter 68, Laws of 1967, provide for the transportation of mentally handicapped children by a school district to a facility such as the Belle School?

2. May a county provide for transportation of mentally handicapped children to a facility such as the Belle School and receive state aids under 41.01 (1r) (f) and (g)?

Ch. 68, Laws of 1967, amended parts of sec. 40.53, Stats., to permit school districts to transport pupils to private schools. Sec. 40.53 (1) (b) 1., as amended by ch. 68, reads as follows:

"Except as provided in s. 40.55, beginning with the 1967-68 school term the school board of each school district shall
provide transportation to and from the school he attends for each pupil residing in the school district who attends any elementary grade including kindergarten or high school grade, comparable to any grade offered by such school district, at a private school located 2 miles or more from his residence, if such private school is the nearest available private school which the pupil may reasonably choose to attend and is situated within the school district. The school board may elect to provide transportation during the 1967-68 school term for pupils to a private school situated no more than 5 miles beyond the boundaries of the school district if a private contractor has transported public and private pupils on the same bus during the 1966-67 school year.”

You point out in your request that 40.58 (2) which relates to the transportation of handicapped children was not affected by ch. 68. I do not believe that this is critical to the questions you have asked for the following reasons:

a. Sec. 40.53 (2) does not appear to be restricted to the transportation of pupils to public schools. That section provides for transportation for physically disabled children, including mentally handicapped, to “any elementary or high school.”

b. Even if sec. 40.53 (2) were construed to relate only to public schools of the state of Wisconsin, that section is an enlargement of the general transportation provisions of 40.53 and would not prevent transportation of handicapped children under the provisions of 40.53 (1) (b) 1.

In determining whether a district is to provide transportation it is to be recognized that parents may select a private school for their children for various reasons, i.e., religion, special training, etc. The only question which must be answered is: Does the private facility selected by the parent fall within the definition of a “private school” set forth in ch. 68, Laws of 1967.

Sec. 3, ch. 68, created sec .40.52 (2), to read:

“In ss. 40.53 to 40.57 ‘private school’ means any parochial or private elementary or high school in this state offering
any academic grades comparable to those described in s. 40.01 (2), including kindergarten."

Sec. 40.01 (2) referred to above reads:

"(2) GRADES. The educational work of the public schools is divided into 12 grades (besides kindergarten) which are numbered from one to 12 beginning with the lowest. The first 8 are the elementary grades. The last 4 are the high school grades. A common school is an elementary school. A school in which only the seventh to ninth, or seventh to tenth grades, inclusive, are taught is a junior high school; one in which only grades 10, 11 and 12 are taught is a senior high school. This classification is not a limitation of the character of work or the studies that may be carried on in either the elementary or the high schools."

I believe that it is implicit in ch. 68 that, with respect to the transportation of children to private schools, the school district must make a determination as to whether or not the facility in question comes within the definition set forth above. To the extent a facility operating as a day-care center under 51.88 falls within the definition of a private school the school district has the obligation of transporting pupils resident in the district to that facility to the same extent which it provides for the transportation of pupils within the district to any other private school.

As to the Belle School specifically, this facility might very well fail to come within the definition of a private school under ch. 68, Laws of 1967. I am informed that the program of the Belle School is designed for children below the educable and trainable level. In order for a facility to be regarded as a private school as defined above it must conform in some degree to the criteria established for public schools. This would, at the minimum, require a program of training of the mentally handicapped to some degree comparable to training received by children attending public school kindergartens. The determination of comparability, however, is to be made by the school officials.

As to your second question, it is my opinion that county handicapped children's education boards have no authority
to transport pupils to "day-care centers" such as the Belle School. The only authority provided in ch. 41 relates to the transportation by a county handicapped children's education board to county special schools established under that chapter.

Further, the county handicapped children's education boards may not look to the amendment of 40.53 by ch. 68, Laws of 1967, for authority to transport to a private school. Ch. 68 is effective as to school districts only and makes no provision for the granting of state aids for transportation of private school pupils by other than a school district. This is made clear by the fact that sec. 40.56 (3), which previously permitted granting state aids to municipalities, was amended by ch. 68 so as to exclude municipalities from such aid.

It should be noted, however, that even though the county handicapped children's education board is not authorized to transport children to day-care centers these children are not deprived of transportation to such centers since it may be seen from my answer to your first question above that if the facility in question falls within the definition of a "private school", the child attending that facility may be provided transportation by the school district of his residence.

BCL:DGM

Handicapped children—School districts—A school district has no implied or express authority to appropriate monies to defray cost of participation of district children in a day-care program.

December 19, 1967.

WILLIAM C. KAHL

State Superintendent, Public Instruction

You ask whether a school district may appropriate district monies for the participation of resident district children in
programs sponsored by day care centers established pursuant to sec. 51.38, Stats.

Although this question has been asked in other areas of the state, you refer specifically to the existing situation in the Marinette school district. It appears that some mentally handicapped children residing in the Marinette school district attend the Marinette day care center, which is a non-profit corporation organized by local citizens to help retarded children. This center has asked the Marinette school board to include in its 1968 budget an item to provide for the cost of children attending the center who might otherwise attend a school within the Marinette school district. The request for this appropriation is based upon my prior opinion concerning the educational rights of mentally handicapped children.

In my opinion to the Mental Health Advisory Committee, I concluded that mentally handicapped children who are excluded from participation in regular public school classes must be offered an alternative in order to assure reasonably equal educational opportunities. Pursuant to your request for a clarification, I informed you on August 18, 1967, that the constitutional guarantees are not self-executing, and that there is a need for statutory authorization before certain officials and agencies can act.

Moreover, I emphasized that the mere fact that a private, non-profit organization might receive some benefit from expenditures made in connection with providing these alternatives would not necessarily contravene the public purpose doctrine. I still see no constitutional objection to any program in which a school district or your department might defray the costs of providing a reasonable educational opportunity for such children in a private institution or center. There can be no question that education of the mentally handicapped is a state function and that the accompanying expenditures would be used for a public purpose. It is equally clear from my prior rulings that state funds may not be used to pay salaries of public school teachers who are sent into parochial schools to teach or to otherwise benefit reli-
gious societies within the meaning of Art. I, sec. 18, Wis. Const.

Notwithstanding these conclusions concerning the constitutionality of the proposed action in the Marinette school district, the question which you have raised specifically concerns the school district's authority to appropriate this money under existing statutes. It is my opinion that no such authority exists at the present time.

It is fundamental that, being a quasi-municipal corporation, a school district has only the powers given to it by statute or such implied powers as are necessary to execute the powers expressly given to it. Schaut v. Joint School District, (1926) 191 Wis. 104, 107, 210 N. W. 270; State ex rel. Van Straten v. Milquet, (1923) 180 Wis. 109, 113, 192 N. W. 392.

It is equally well accepted that the school district is an agent of the state for the purpose of administering the state's system of public education and that its powers are necessarily limited to the furtherance of that purpose. Zawerschnik v. Joint County School Comm., (1955) 271 Wis. 416, 429, 73 N. W. 2d 566; Iverson v. Union Free High School Dist., (1925) 186 Wis. 342, 353, 202 N. W. 788.

Chs. 39 and 40 of the Wisconsin statutes dealing with school administration and school districts, respectively, stress powers and duties primarily relating to the operation of public schools. The word "school" is a generic term which denotes an institution for instruction or education. State ex rel. Dick v. Kalahere, (1911) 145 Wis. 243, 247, 129 N. W. 1060.

I find no authority within ch. 40 or any other chapter which specifically authorizes a school district to help defray the costs of a child's attendance at a day care center. Recognizing the above stated purposes for which school districts are organized, the only remaining question is whether such authority exists by necessary implication.

The provisions for education of the mentally handicapped are found generally within ch. 41 dealing with special
schools. Sec. 41.01 defines the powers and duties of various educational boards and agencies, including the bureau for handicapped children within your department, in providing special educational facilities for the mentally handicapped. You inform me that the department of public instruction has interpreted these provisions as applying only to education in public school classes or special public schools.

In contrast, community day-care programs are established pursuant to 51.38 under the department of health and social services. These local programs are often privately operated and serve a number of purposes other than education of the mentally handicapped.

Based upon these differences between public educational programs and community day-care services, it is my opinion that a school district has no implied authority to appropriate district monies to help defray the cost of participation by resident district children in a day-care program.

BCL:DPJ
### STATUTES AND CONSTITUTIONAL PROVISIONS, SESSION LAWS, LEGISLATIVE BILLS, AND RESOLUTIONS REFERRED TO AND CONSTRUED

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