OPINIONS

OF THE

ATTORNEY GENERAL

OF THE

STATE OF WISCONSIN

VOLUME 57

January 1, 1968 through December 31, 1968

BRONSON C. LA FOLLETTE
Attorney General

MADISON, WISCONSIN
1968

ATTORNEYS GENERAL OF WISCONSIN

FROM THE ORGANIZATION OF THE STATE

JAMES S. BROWN, Milwaukee from June 7, 1848, to Jan. 7, 1850
S. PARK COON, Milwaukee ..... from Jan. 7, 1850, to Jan. 5, 1852
EXPERIENCE ESTABROOK, Geneva ..... from Jan. 5, 1852, to Jan. 2, 1854
GEORGE B. SMITH, Madison from Jan. 2, 1854, to Jan. 7, 1856
WILLIAM R. SMITH, Mineral Point ..... from Jan. 7, 1856, to Jan. 4, 1858
GABRIEL BOUCK, Oshkosh .... from Jan. 4, 1858, to Jan. 2, 1860
JAMES E. HOWE, Green Bay.. from Jan. 2, 1860, to Oct. 7, 1862
WINIFIELD SMITH, Milwaukee ..... from Oct. 7, 1862, to Jan. 1, 1866
CHARLES R. GILL, Watertown from Jan. 1, 1866, to Jan. 3, 1870
STEPHEN S. BARLOW, Dellona ..... from Jan. 3, 1870, to Jan. 5, 1874
A. SCOTT SLOAN, Beaver Dam from Jan. 5, 1874, to Jan. 7, 1878
ALEXANDER WILSON, Mineral Point ..... from Jan. 7, 1878, to Jan. 2, 1882
LEANDER F. FRISBY, West Bend ..... from Jan. 2, 1882, to Jan. 3, 1887
CHARLES E. ESTABROOK, Manitowoc ..... from Jan. 3, 1887, to Jan. 5, 1891
JAMES L. O'CONNOR, Madison ..... from Jan. 5, 1891, to Jan. 7, 1895
WILLIAM H. MYLREA, Wausau ..... from Jan. 7, 1895, to Jan. 2, 1899
EMMET R. HICKS, Oshkosh .. from Jan. 2, 1899, to Jan. 5, 1903
LAFAYETTE M. STURDEVANT, Neillsville ..... from Jan. 5, 1903, to Jan. 7, 1907
FRANK L. GILBERT, Madison from Jan. 7, 1907, to Jan. 2, 1911
LEVI H. BANCROFT, Richland Center ..... from Jan. 2, 1911, to Jan. 6, 1913
WALTER C. OWEN, Maiden Rock ..... from Jan. 6, 1913, to Jan. 7, 1918
SPENCER HAVEN, Hudson .... from Jan. 7, 1918, to Jan. 6, 1919
JOHN J. BLAINE, Boscobel .... from Jan. 6, 1919, to Jan. 3, 1921
WILLIAM J. MORGAN, Milwaukee ..... from Jan. 3, 1921, to Jan. 1, 1923
HERMAN L. EKERN, Madison from Jan. 1, 1923, to Jan. 3, 1927
JOHN W. REYNOLDS, Green Bay ..... from Jan. 3, 1927, to Jan. 2, 1933
JAMES E. FINNEGAN, Milwaukee ..... from Jan. 2, 1933, to Jan. 4, 1937
ORLAND S. LOOMIS, Mauston from Jan. 4, 1937, to Jan. 2, 1939
JOHN E. MARTIN, Milwaukee from Jan. 2, 1939, to June 5, 1948
GROVER L. BROADFOOT, Mondovi ..... from June 5, 1948, to Nov. 15, 1948
THOMAS E. FAIRCHILD, Milwaukee ..... from Nov. 15, 1948, to Jan. 1, 1951
VERNON W. THOMSON, Richland Center ..... from Jan. 1, 1951, to Jan. 7, 1957
STEWART G. HONECK, Madison ..... from Jan. 7, 1957, to Jan. 5, 1959
JOHN W. REYNOLDS, Green Bay ..... from Jan. 5, 1959, to Jan. 7, 1963
GEORGE THOMPSON, La Crosse ..... from Jan. 7, 1963, to Jan. 5, 1965
BRONSON C. La FOLLETTE, Madison ..... from Jan. 5, 1965, to

ATTORNEY GENERAL'S OFFICE

BRONSON C. LA FOLLETTE	Attorney General
WILLIAM F. EICH[1]	Deputy Attorney General
ARLEN C. CHRISTENSON[2]	Executive Assistant
JOHN WM. CALHOUN	Director of Legal Services
JAMES R. WEDLAKE[3]	Assistant Attorney General
WILLIAM A. PLATZ	Assistant Attorney General
ROY G. TULANE[4]	Assistant Attorney General
RICHARD E. BARRETT	Assistant Attorney General
GEORGE F. SIEKER	Assistant Attorney General
E. WESTON WOOD	Assistant Attorney General
ROBERT J. VERGERONT	Assistant Attorney General
JOHN E. ARMSTRONG	Assistant Attorney General
JAMES H. McDERMOTT[5]	Assistant Attorney General
LEROY L. DALTON	Assistant Attorney General
ALBERT O. HARRIMAN	Assistant Attorney General
ROY G. MITA	Assistant Attorney General
WILLIAM H. WILKER	Assistant Attorney General
GEORGE B. SCHWAHN	Assistant Attorney General
GORDON SAMUELSEN	Assistant Attorney General
JAMES P. ALTMAN	Assistant Attorney General
ROBERT D. MARTINSON	Assistant Attorney General
WARREN M. SCHMIDT	Assistant Attorney General
DAVID G. McMILLAN	Assistant Attorney General
BETTY R. BROWN	Assistant Attorney General
CHARLES A. BLECK	Assistant Attorney General
JAMES D. JEFFRIES	Assistant Attorney General
ROBERT B. McCONNELL	Assistant Attorney General
E. GORDON YOUNG	Assistant Attorney General
DONALD P. JOHNS	Assistant Attorney General
THOMAS A. LOCKYEAR[6]	Assistant Attorney General
JOHN P. ANDERSEN[7]	Assistant Attorney General
THEODORE L. PRIEBE	Assistant Attorney General
STEVEN M. SCHUR	Assistant Attorney General
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MARK ROSENHEIMER	Assistant Attorney General
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DAVID J. HANSON[14]	Assistant Attorney General
JOHN C. MURPHY[15]	Assistant Attorney General
LOWELL E. NASS[16]	Assistant Attorney General
MILO W. OTTOW	Chief Investigator
EDWARD E. RYCZEK	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 June 1, 1968
2. Appointed June 1, 1968
3. Deceased January 9, 1968
4. Terminated May 31, 1968
5. Terminated August 1, 1968
6. Terminated March 3, 1968
7. Deceased December 19, 1968
8. Terminated December 28, 1968
9. Appointed February 19, 1968
10. Appointed March 6, 1968
11. Appointed April 14, 1968
12. Appointed June 10, 1968
13. Appointed June 12, 1968
14. Appointed June 17, 1968
15. Appointed July 15, 1968
16. Appointed December 30, 1968

OPINIONS

OF THE

ATTORNEY GENERAL

VOLUME 57

County Children's Home—Reimbursement Formula—The amendment of sec. 48.55 by ch. 604, Laws 1965, did not operate to change the reimbursement formula applied to the Milwaukee County Children's Home by sec. 48.58 (2).

January 10, 1968.

WILBUR J. SCHMIDT, *Secretary*
Department of Health and Social Services

You ask whether the amendment of sec. 48.55, Stats., by ch. 604, Laws 1965, operates to change the reimbursement formula applied to the Milwaukee County Children's Home by sec. 48.58 (2).

In 1955, an institutional cost study committee was appointed, pursuant to ch. 176, Laws 1955, to study the methods of financing the costs of state and county institutions, including possible reimbursement to Milwaukee county for children placed at the Milwaukee County Children's Home. This committee rejected the suggestion that the state reimburse Milwaukee county for one-half of the cost of the care of children in the children's home. After some discussion, the committee agreed on a formula which was enacted under ch. 616, Laws 1957, amending sec. 48.55 and creating sec. 48.58 (2). Under ch. 578, Laws 1959, sec. 48.58 (2) was amended to read:

"A county shall be reimbursed by the state for 50 per cent of the average cost of the care of the children who are in the children's home under sub. (1) (a) and (b). The cost shall be computed as provided in s. 48.55. When any child is temporarily transferred from a children's home to a hospital for surgical or medical care or both, the charges or aid as provided for in this subsection shall continue during the period of such transfer. The claim shall be in such form and contain such information as prescribed by the department. If the department is satisfied as to the correctness of the claim it shall certify the same for payment from the appropriation made by s. 20.670 (22). Payments shall be made annually for the fiscal year ending June 30, the first payment to be for the fiscal year ending June 30, 1958."

This provision has remained unchanged in all material respects since its enactment in 1957 and its amendment in 1959.

Sec. 48.55, as amended by ch. 616, Laws 1957, provided:

"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 payment. 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."

Through the reference to sec. 48.55 within sec. 48.58 (2), the legislature intended that Milwaukee county's reimbursement for care of children at the children's home should be computed at one-half of the average board payments for children placed in foster homes by the department of public welfare. This procedure has been followed without any dispute between your department and Milwaukee county since 1957.

This technique of keying a reimbursement formula to another statute is used frequently by legislative bodies. In view of the apparently smooth operation of this reimbursement formula for approximately 10 years, the administrative construction placed upon these provisions by your

department, and apparently acquiesced in by Milwaukee county, is deserving of great weight. *State ex rel. City Bank & Trust Co. v. Marshall & Ilsley Bank,* (1959) 8 Wis. 2d 301, 307, 99 N. W. 2d 105; *Frankenthal v. Wisconsin Real Estate Brokers' Board,* (1958) 3 Wis. 2d 249, 255, 88 N. W. 2d 352. I find no reason to disagree with the construction placed upon these statutes by your department and by Milwaukee.

The present problem arises as a result of the enactment of ch. 604, Laws 1965, which amended sec. 48.55 to read:

"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 for children placed in licensed child-caring institutions by the department for which payments are made shall be one-half of the average licensed child-caring institution costs excluding administration. The charge for all other children in legal custody of the department shall be one-half of the average costs, 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."

The continued reference within sec. 48.58 (2) to sec. 48.55 constitutes the basis for your asking whether ch. 604 operates to change the formula applied to the Milwaukee County Children's Home. Whereas before the 1965 amendment the cost was computed on the basis of one-half of the average cost for chidren placed in foster homes by the department and for which board payments were made, the amended portion of sec. 48.55, as emphasized above, creates two separate categories.

Notwithstanding this change, however, it is my opinion that the formula remains the same as applied to the Milwaukee County Children's Home. The charge for all children in legal custody of the department is established at one-half of the average costs, excluding administration, for children placed in foster homes by the department and for which board payments are made, except in the case of chil-

dren placed in "licensed child-caring institutions." The charge for children placed in licensed child-caring institutions by the department is estabished at one-half of the average licensed child-caring institution costs excluding administration.

These changes do not affect the reimbursement to which Milwaukee county is entitled because the Milwaukee County Children's Home is not a licensed child-caring institution. Lacking standing as a licensed child-caring institution, the Milwaukee County Children's Home costs are to be computed on the basis of one-half of the average costs for children placed in foster homes by the department and for which board payments are made.

BCL:DPJ

Welfare—Computation of Cost of Services to Exclude General Relief—In determining the costs for any county relative to the administration of certain welfare services, the state aid to which any county is entitled under sec. 49.52 (2) (a) should be computed without consideration of general relief costs for 1966-67 or for the 1964-65 base year.

January 18, 1968.

LAWRENCE R. NASH
Corporation Counsel, Wood County

You seek my interpretation of sec. 49.52 (2), Stats., pertaining to the reimbursement formula for state aid under various welfare programs. You contend that this provision, which was enacted under ch. 590, Laws 1965, has been improperly applied by the department of health and social services in computing the reimbursement to which the several counties are entitled.

Sec. 49.52 (1), Stats., provides for distribution of available federal funds received by the state for grants of aid. Sec. 49.52 (2) provides in part as follows:

"49.52 (2) State aid. (a) The state aid to which any county shall be entitled shall be determined according to the

amount expended by the county for aid to the blind, aid to dependent children, old-age assistance and aid to totally and permanently disabled persons including services and medical administration and child welfare services, mental hygiene services and other welfare services performed by the county agency administering such aids in co-operation with or at the request of the state department, pursuant to express authorization, *but excluding general relief*, after deducting the reimbursement received from federal funds pursuant to sub. (1) and paid as follows:

"* * *

"4. If the cost for any county as determined under this section for 1966-67 exceeds the cost of the 1964-65 base year the county shall be reimbursed for the full amount of that excess. In fiscal years after 1966-67 such counties shall receive additional reimbursement only to the extent that the state's total participation is less than the state's total participation in 1966-67, but never more than necessary to reduce the county's participation to the 1964-65 level. At the point where the state's reimbursement to the county equals the state's percentage of the nonfederal share under the formula, no additional reimbursement shall be provided."

Under sec. 49.52 (2) (a), it is apparent that the county is entitled to state aid determined according to the amount expended for the enumerated programs but not for general relief. Your specific question relates to the interpretation of subs. (2) (a) 4., which apparently was intended to relieve the counties from the burden of increasingly high costs in these areas.

The department of health and social services has computed the reimbursement for your county and other counties on a formula which credits against the reimbursement due the county under sec. 49.52 (2) (a) 4., a sum equal to the sum by which the county's 1964-65 general relief costs exceeded the 1966-67 general relief costs. I agree with your conclusion that the department of health and social services has misinterpreted these forumla provisions by including general relief in its computations.

In referring to the cost for any county as determined under sec. 49.52, subs. (2) (a) 4. is dependent upon the

basic introductory language of subs. (2) (a). The cost for any county is to be determined under this subsection by excluding general relief from all consideration. If general relief is excluded from consideration in determining the cost for 1966-67, general relief also should be excluded from consideration in the base year of 1964-65. At the same time, of course, the department would be entitled to deduct the costs of administration of general relief if these costs are included in the county's claim for reimbursement.

In view of my conclusion that general relief is expressly excluded by the clear language of the statute, I find it unnecessary to discuss the relative merit of equitable considerations raised by several counties and by the department of health and social services. The clear and unambiguous language is controlling. Statutes must be construed from their own language, uninfluenced by what the persons introducing the bill actually intended to accomplish. *Estate of Matzke,* (1947) 250 Wis. 204, 208, 26 N. W. 2d 659.

It is my opinion that the language contained in sec. 49.52 (2) (a) requires that the department of health and social services exclude general relief from all consideration.

BCL:DPJ

Elections—Nomination of Independent Candidates—Declarations of Acceptance—Independent nominations for president and vice president may be made by securing the signatures of not less than 3,000 nor more than 5,000 electors on nomination papers containing the names of the two candidates and 12 electors, at least ten of whom reside in the ten congressional districts.

January 19, 1968.

ROBERT C. ZIMMERMAN
Secretary of State

You request an interpretation of sec. 8.20, Stats., relating to the procedure for nominating independent candidates. This section constitutes a part of the revised election laws which became effective on July 1, 1967.

Your questions specifically relate to nominations of independent candidates for president and vice president. Sec. 8.20 (2) (b) requires that nomination papers for presidential electors list one presidential elector from each congressional district and two electors from the state at large and the candidate for whom they intend to vote, if elected. It is clear, therefore, that the candidates for president and vice president and the 12 presidential electors must be named on each nomination paper. This procedure constitutes a recognition of the fact that the 12 independent presidential electors constitute one composite candidate. *State ex rel. Boulton v. Zimmerman,* (1964) 25 Wis. 2d 457, 464, 130 N. W. 2d 753.

Notwithstanding this recognition of the 12 presidential electors as one composite candidate, it is apparent that the nomination papers must contain a designated elector from each of the congressional districts in addition to the two electors at large. It is equally apparent, however, that a voter's signature on the nomination paper supports the nomination of each of the 12 electors. For this reason, securing a place on the ballot is dependent upon presentation of the signatures of not less than 3,000 nor more than 5,000 electors. Sec. 8.20 (4) (f), Stats.

You specifically ask whether all of these signatures may be secured from one or more counties in the state. Sec. 8.20 (5) provides:

"Only one signature per person for the same office is valid. In addition to his signature, each signer shall list his residence, including the street and number, if any, and the date of signing. *Signers of each separate nomination paper shall reside in the same county and in the district which the candidate named therein will represent, if elected.*"

Neither subs. (5) nor any other provision requires that the nomination signatures be secured in any stated number of counties. Conceivably, the minimum of 3,000 signatures could be gained in one county. The emphasized text above, however, makes it clear that all of the signers of any one nomination paper must reside in the same county and, therefore, that voters residing in separate counties cannot sign the same nomination paper.

Finally, you ask which candidates must sign and file a

declaration of acceptance. Each independent candidate must file with his nomination papers a declaration that he will qualify for office, if elected, pursuant to sec. 8.20 (6). Presidential electors have been recognized as "candidates" under our election laws. See *State ex rel. Boulton v. Zimmerman,* (1964) 25 Wis. 2d 457, 460-461, 130 N. W. 2d 753.

Moreover, the position of presidential elector constitutes an office within the meaning of sec. 8.20 (6). This conclusion is based, in part, upon sec. 7.75 which provides:

"Presidential electors meeting. The electors for president and vice president shall meet at the state capitol following the presidential election at 12:00 noon the first Monday after the 2nd Wednesday in December. If there is a vacancy in the *office of an elector* due to death, refusal to act, failure to attend or other cause, the electors present shall immediately proceed to fill by ballot, by a plurality of votes, the electoral college vacancy. When all electors are present, or the vacancies filled, they shall perform their required duties under the constitution and laws of the United States."

I conclude, therefore, that a separate declaration that he will qualify for the office, if elected, must be filed pursuant to sec. 8.20 (6) by each presidential elector and by the candidates for president and vice president.

BCL:DPJ

Engineers—Registration for Witness Purposes—A nonregistered person who testifies before a court or administrative agency as an expert witness on a subject within the field of professional engineering does not thereby violate the provisions of sec. 101.31, Stats.

January 25, 1968.

C. F. HURC, *Secretary*
Registration Board of Architects and
Professional Engineers

You have asked whether it is a violation of sec. 101.31, Stats., for a nonregistered person to testify before a court

or administrative agency in Wisconsin as an expert witness in the field of professional engineering. Presumably, the nonregistered person who so testifies does not misrepresent himself to be a registered professional engineer.

Sec. 101.31 (2) (d), Stats., defines the practice of professional engineering to include any professional service wherein the public welfare or the safeguarding of life, health or property is concerned and involved, such as consultation, investigation, evaluation, planning, design, or responsible supervision of construction, alteration, or operation, in connection with enumerated structures, machines, processes, etc. This definition does not purport to include the giving of expert testimony as within the scope of professional engineering practice.

In my opinion, any nonregistered person including a person registered as a professional engineer in another state who presents testimony as an expert witness in the field of professional engineering, whether he does so voluntarily or under subpoena, is not thereby engaged in the practice of professional engineering in violation of sec. 101.31, Stats. Had the legislature intended such testimony to constitute the practice of professional engineering, it would have been a simple matter to so state. Compare sec. 147.14, Stats., which provides in substance that, except as permitted by the court, no unregistered person shall have the right to testify in a professional capacity on a subject relating to medical treatment. See *Landrath v. Allstate Ins. Co.*, (1951) 259 Wis. 248, 257-258, 48 N.W. 2d 485. Further, since sec. 101.31 (14), Stats., imposes criminal penalties for the unauthorized practice of professional engineering, a strict construction of the statute is required.

In general, it is within the sound discretion of the court (or tribunal) whether expert testimony may properly be received and whether the expert witness is qualified to testify on a particular subject. *Jacobson v. Greyhound Corp.*, (1965) 29 Wis. 2d 55, 63, 138 Wis. 2d 133, and *Shaurette v. Capitol Erecting Co.*, (1964) 23 Wis. 2d 538, 549, 128 Wis. 2d 34. In the case last cited, the court upheld the right of a witness experienced in monorail construction (who was not a registered professional engineer) to give expert testimony as to the cause of a break in a support for an over-

head monorail track. The qualification of an expert witness is not a matter of licensure, but of experience. *Casimere v. Herman,* (1965) 28 Wis. 2d 437, 442, 137 N.W. 2d 73. Thus, a nonregistered person, who by reason of his education, training or experience in some field of engineering, testifies as an expert on a subject which may involve a part of the expansive realm of professional engineering does not, in my view, infringe unlawfully upon the practice of the profession within the purview of sec. 101.31, Stats.

BCL:GS

Self-Defense Spray Devices—All Forms Prohibited—The sale, possession, use or transportation within Wisconsin by unauthorized persons of aerosol or nonpressurized spray devices intended for personal self-protection which achieve their effectiveness by causing sufficient bodily discomfort to render a potential assailant harmless is prohibited.

February 6, 1968.

HUGH R. O'CONNELL
District Attorney, Milwaukee County

You have asked for my opinion concerning the sale, possession and use in the state of Wisconsin of aerosol or nonpressurized spray devices containing an irritating or immobilizing solution and intended to be used for personal self-defense.

You refer specifically to a device known as "Bodyguard", which is advertised as:

"Not a tear gas but a handy aerosol spray that is neither poisonous nor permanently harmful. It is temporarily blinding and causes sneezing and coughing for about 1 half hour."

Sec. 164.20 (1), Stats., provides as follows:

"(1) No person shall sell, possess, use or transport any machine gun or other full automatic firearm, nor shall any person sell, possess, use, or transport any bomb, hand gre-

nade, projectile, shell or other container of any kind or character *into which tear gas or any similar substance is used or placed for use to cause bodily discomfort, panic or damage to property."*

Sec. 164.20 (1) prohibits the sale, possession, use and transportation in the state of not only tear gas devices, but also of devices containing a similar substance which is intended to cause bodily discomfort. Aerosol and nonpressurized spray self-protection devices, and certainly "Bodyguard", if the advertising claims for this product may be believed, achieve their effectiveness by causing sufficient bodily discomfort to render an assailant harmless. While the chemical content of these devices is not tear gas, it is my opinion that the substance used is sufficiently similar to tear gas in both character and effect to fall within the prohibition of sec. 164.20 (1).

Your attention is directed to the provisions of sec. 164.20 (3), Stats., which provide in essence that the prohibition provided for in sec. 164.20 (1) shall not apply to civil enforcement officers of any city or county or any other duly authorized personnel.

The sale, possession, use or transportation within the state by unauthorized persons of aerosol or nonpressurized spray devices intended for personal self-protection which achieve their effectiveness by causing sufficient bodily discomfort to render a potential assailant harmless is prohibited in Wisconsin.

BCL:TAL

Municipal Courts—Jurisdiction—Municipal courts created pursuant to provisions of ch. 276, Laws 1967, have only such jurisdiction as is expressly granted by sec. 300.05, 1967 Stats.

February 14, 1968.

JAMES J. BURKE
Revisor of Statutes

You have requested an opinion with respect to the effect of S. Amend. 1 to S. B. 75 (now ch. 276, Laws 1967) relat-

ing to jurisdiction of municipal courts created by the new CH. 254, Stats.

By way of background you state that after the office of justice of the peace was abolished by amendment to Art. VII, sec. 2, Wis. Const., the 1965 legislature directed you to prepare a bill implementing this change. Pursuant to that directive you prepared S. B. 75, which as originally drafted made as few substantive changes as possible, granting to the municipal court justices substantially the same jurisdiction as had previously been exercised by justices of the peace.

When the 1967 legislative session was near adjournment you discussed S. B. 75 with the judicial council, and that body instructed its secretary to prepare a bill reducing jurisdiction of municipal justices to jurisdiction over ordinary violation of municipal ordinances of his municipality, crime punishable by forfeitures of not more than $200 or 6 months in jail, and certain guilty pleas.

Because of shortage of time, in lieu of redrafting the entire S. B. 75, S. Amend. 1 was submitted to accomplish these objectives.

S. Amend. 1 deleted the following jurisdictional provisions from S. B. 75:

1. Of actions arising out of contract wherein the amount claimed does not exceed $200;

2. Of actions on instalments as they become due on any written instrument when the amount claimed does not exceed $200;

3. Of actions on any surety bond or undertaking taken by a justice, though the penalty or amount claimed exceeds $200;

4. Of actions on any official bond when the damages claimed do not exceed $200;

5. Of actions for injuries to persons or to property wherein the damages claimed do not exceed $200;

6. Of actions to enforce a lien upon personal property where the amount claimed does not exceed $200;

7. Of actions to recover a tax, for the full amount thereof plus interest and charges;

8. Of actions to recover the possession of personal property, with damages for the unlawful taking or detention

thereof, wherein the value of the property claimed does not exceed $200;

9. Of actions for forcible entry and unlawful detainer;

10. To cause the laws for the preservation of peace to be kept, to cause persons who break or attempt to break the peace to come before him and commit such persons to jail or bail; to cause the keepers of houses of ill fame and frequenters of the same or common prostitutes to come before him and compel them to give security for good behavior, to cause persons who are charged with committing any crime to come before him and commit them to jail or bail;

11. Of garnishment actions and actions commenced by warrant of attachment against the property of a debtor, as provided by and subject to the limitations set forth in ch. 304.

The jurisdiction specifically granted to municipal courts by ch. 276 (S. B. 75) is accordingly limited by virtue of the repeal and recreation of sec. 300.05. The new sec. 300.05 provides as follows:

"300.05 Jurisdiction. Every justice has exclusive jurisdiction over offenses against ordinances of his city, town or village and in addition has jurisdiction:

"(1) Of actions for a penalty or forfeiture, not exceeding $200, given by statute;

"(2) Of crimes arising within the county, the penalty for which is not more than $200 or 6 months or both;

"(3) To accept pleas of guilty if the defendant upon arraignment requests to enter a plea of guilty and the offense is one punishable by not more than $500 or 6 months, or both, or is for violation of s. 348.15, 348.16 or 348.17 regardless of the monetary penalty involved."

Since the original draft of S. B. 75 contemplated retention of essentially all of the jurisdiction of the previous offices of justices of the peace and municipal justices, secs. 39 and 40 of S. B. 75 attempted to change references to justices of the peace, municipal justice of the peace, justice court, justices of the peace court and municipal justice court to municipal justice and municipal court respectively in some 177 sections (or subsections) of the Wis. Stats. In order to remain

consistent with the original S. B. 75, S. Amend. 1 should have deleted references to all statutes referring to proceedings of which municipal courts no longer have jurisdiction, and the sections themselves should have been repealed or amended. Many of the statutes amended by reference relate to procedures in the commencement of an action, and to trial or record keeping on matters which are no longer within municipal court jurisdiction.

It was determined early in the history of the state that justice courts are vested only with the jurisdiction expressly conferred upon them by statute and have no common law powers. *Cox v. Groshong,* 1 Pin. 307 (1843). The *Cox* case is cited with approval in the more recent case of *State v. Kriegbaum,* (1927) 194 Wis. 229 where the court said:

"Art. VII, sec. 15, of the constitution of Wisconsin provides that justices of the peace 'shall have such civil and criminal jurisdiction as shall be prescribed by law.' It was the law of Wisconsin before this provision of the constitution was adopted and it has uniformly been held under this constitutional provision that 'justices' courts are not courts of record, and do not proceed accordingly to the course of the common law, and so far as their powers are concerned, they are confined strictly to the authority given them by the statute. They can take nothing by implication, but must show the power which they exercise to be expressly given them in every instance.' *Cox v. Groshong,* 1 Pin. 307, 311, 312; *De Laval S. Co. v. Hofberger,* 161 Wis. 344, 346, 154 N. W. 387."

The municipal court created by the legislature is analogous to the justice court in that it has jurisdiction limited to that specifically granted by the legislature. Thus such courts can assume no power or jurisdiction by implication nor can any jurisdictional significance be attached to the reference to specific sections amended in secs. 39 and 40.

It is therefore my opinion that the newly created municipal court has jurisdiction only in those matters which come within the provisions of ch. 276 or in other sections of the statutes which specifically grant jurisdiction to justices of the peace or municipal justices and reference thereto is made in secs. 39 and 40. It necessarily follows that many

of those statutes wherein the words "justice of the peace" or "justice court" are changed by secs. 39 and 40 of S. B. 75 to "municipal justice" or "municipal court" are superfluous, and since the enactment of ch. 276 have become meaningless.

You have inquired specifically whether, in view of the legislature's failure to repeal ch. 304 (relating to attachment and garnishment) and the specific reference to a number of its provisions in secs. 39 and 40 (changing "justices" to "municipal justices"), a municipal justice now has jurisdiction to try garnishment actions.

It is my opinion that he does not. Such jurisdiction existed in the original draft of S. B. 75, but was deleted. Although secs. 39 and 40 contain several amendments to ch. 304, none of the provisions of ch. 276 or ch. 304 purport to grant jurisdiction of garnishment or attachment actions to the municipal court. The provisions amended in ch. 304 by secs. 39 and 40 relate to procedure in trying garnishment actions over which the municipal court has no jurisdiction. The same principle applies to the provisions relating to unlawful detainers, or any other actions for which jurisdiction is not specifically granted. To interpret mere reference to sections of ch. 304, secs. 39 and 40 of ch. 276 as granting jurisdiction by inference in garnishment actions would be incongruous since there are no similar provisions for jurisdiction in a principal action. Such an interpretation would further result in having no monetary limit on jurisdiction of municipal courts, whereas the previous limit on jurisdiction of justices of the peace was limited to civil cases involving less than $200. Such a result would be the exact opposite of the result sought to be accomplished.

Accordingly, municipal courts may exercise only the jurisdiction specifically conferred by statute.

BCL:TLP

Architects and Engineers—Determining Competency—Department of industry, labor and human relations only has authority under secs. 101.09 and 101.10, Stats., to in-

spect building plans submitted to determine whether certain safety and construction standards have been met. Competency of architects submitting plans is determined by the board of architects and engineers as provided by sec. 101.31, Stats.

February 19, 1968.

JOSEPH C. FAGAN, *Chairman*
Department of Industry, Labor and Human Relations

By letter dated January 24, 1968 you asked whether the department of industry, labor and human relations can determine the competency of architects and engineers who submit plans to the department for approval and reject those plans submitted by persons considered not competent by the department. The answer is in the negative.

Under secs. 101.09 and 101.10, Stats., the department of industry, labor and human relations only has authority to inspect the individual plans and specifications submitted for proposed buildings to determine whether the plans and specifications meet certain safety and construction standards. The determination of competency of architects and engineers is for the board of architects and engineers as provided by sec. 101.31, Stats. To advise otherwise might result in the following dialogue:

DEPARTMENT PLAN EXAMINER: I see here that you have submitted plans for the construction of a building.
DESIGNER: Yes.
EXAMINER: What kind of building is it?
DESIGNER: A barn.
EXAMINER: A barn! It doesn't look like a barn.
DESIGNER: It's a new concept of a barn.
EXAMINER: I guess so! What architectural school did you graduate from, anyway?
DESIGNER: I never graduated.
EXAMINER: What? How did you learn how to design like this then?
DESIGNER: Through experience, independent study and, most important, imagination.
EXAMINER: Imaginaiton? Hmm. How can I approve

these plans when you tell me that this is a barn, that you never graduated from an accredited architectural school and that your competency to design this "barn" depends only on "independent" study, experience and "imagination"!

DESIGNER: I don't know.
EXAMINER: Where do you propose to build this barn?
DESIGNER: Spring Green.
EXAMINER: What's your name, anyway?
DESIGNER: Frank Lloyd Wright.

BCL:JPA

Airport Zoning—Sec. 114.136, Stats., authorizes any county, city, village or town that is an airport owner to enact an ordinance regulating, restricting or determining the use of land within three (3) miles from the boundaries of the airport for the purpose of airport approach protection.

February 26, 1968.

G. H. BAKKE, *Secretary*
State Department of Transportation

You have asked my opinion as to whether sec. 114.136, Stats., authorizes land use zoning in the vicinity of publicly owned airports as a protective measure for such airports.

You further inquire, whether the public airport owner's right to so regulate is without limitation and whether it supersedes the rights of other governing bodies to regulate land use within their boundaries.

The applicable provisions of sec. 114.136, Stats., read in part as follows:

"Airport approach protection. (1) POWERS OF MUNICIPALITIES. (a) Any county, city, village or town that is the owner of a site for an airport which has been approved for such purpose by the appropriate agencies of the state and the federal government may protect the aerial

approaches to such site by ordinance regulating, restricting and determining the *use,* location, height, number of stories and size of buildings and structures and objects of natural growth in the vicinity of such site and may divide the territory to be protected into several areas and impose different regulations and restrictions with respect to each area. * * * Such regulations, restrictions and determinations are declared to be for the purpose of promoting the public safety, welfare and convenience, and may be adopted, enforced and administered without the consent of any other governing body. * * * The authority granted in this section shall be independent and exclusive of any other authority granted in the statutes.

"(2) * * *

"(b) The regulations, restrictions and determinations shall include, among other things, provisions for the limitations of the height of buildings, structures and objects of natural growth located not more than 3 miles from the boundaries of the airport site. * * *

"* * *

"(3) NONCONFORMING USES. The lawful use of land, buildings and structures existing at the time of the adoption or amendment of any ordinance under the authority of this section may be continued, although such use does not conform with the provisions of the ordinance. The expansion or enlargement of a nonconforming use shall be in conformity with the ordinance. The governing body of the owner of the airport site may remove such nonconforming use or acquire the necessary air right over the same by purchase or exercise of the right of eminent domain in the manner provided by chapter 32."

Sec. 114.136 (1), Stats., specifically authorizes any county, city, village or town, that is an airport owner, to enact an ordinance regulating, restricting or determining the use of land within three (3) miles from the boundaries of the airport for the purpose of airport approach protection. Sec. 114.136 (3), Stats., permits the continuance of a lawful use existing at the time of the adoption or amendment of an ordinance, but authorizes the governing body of the owner of the airport site to remove nonconforming uses

or acquire the necessary air right over the same by purchase or exercise of the right of eminent domain. Thus, it is clear that sec. 114. 136, Stats., authorizes land use zoning in the vicinity of publicly owned airports. This authority is expressly limited, however, to zoning for the purpose of airport approach protection.

You further inquire whether the public airport owner's right to so regulate be without limitation and whether it supersedes the rights of other governing bodies to regulate land use within their boundaries.

Sec. 114.136 (1), Stats., provides that such ordinances are declared to be for the purpose of promoting the public safety, welfare and convenience, that they may be adopted, enforced and administered without the consent of any other governing body and that this authority shall be independent and exclusive of any other authority granted in the statutes. This clearly manifests a legislative intent that airport zoning ordinances shall be placed in a predominant position with respect to other zoning ordinances, and constitutes a recognition by the legislature of the need to protect the safety and welfare of the air traveler.

However, this does not mean that the public airport owner's right to so regulate be without limitation.

"* * * 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, either directly or through subordinate agencies to whom the exercise of such prerogative may be intrusted. * * *" *David Jeffrey Co. v. Milwaukee,* (1954) 267 Wis. 559, 578, 66 N.W. 2d 362.

In *Caledonia v. Racine Limestone Co.,* (1954) 266 Wis. 475, 63 N.W. 2d 697, the Wisconsin supreme court, at pages 479, 480, stated:

"An owner's right in property extends not only downward under the surface to an unlimited extent but also upward, but all private property is held subject to a reasonable exercise of the police power. *Piper v. Ekern,* 180 Wis. 586, 194 N.W. 159. Stated in another way, the privilege of every citizen to use his property according to his own wishes

and in a manner that will yield him the best economic return is a property right. This property right should be invaded only when it is necessary to secure the common welfare. It is often difficult to determine whether the invasion of property rights is necessary for the public good, or whether it is unreasonable or confiscatory. An ordinance restricting the use of property beyond what is necessary to provide for the welfare and general security of the public is not a valid exercise of the police power. The rights of the public must be weighed against the rights of the individual. If the gain to the public by the ordinance is small when compared with the hardship imposed upon the individual property owner by the restrictions of the ordinance, no valid basis for the exercise of the police power exists. In weighing the respective rights certain rules have been formulated. One of the principles is that all persons are entitled to equal protection of the law, and any ordinance limiting or restricting the right of a person to engage in a legitimate business must apply equally to all persons engaged in a like business where circumstances and conditions are similar, and that classifications of persons to be regulated must be reasonable and substantial. * * *"

Thus, airport zoning ordinances must be reasonable, they must not restrict the use of property beyond what is necessary to provide for the welfare and general security of the public and must apply equally to all.

It is my opinion that the public airport owner's right to so regulate supersedes the rights of other governing bodies to regulate land use within their boundaries, but this right is not without limitation.

BCL:GBS

Counties—Medical Assistance—Each county is legally obligated to make an appropriation for its prorata share of medical expenses paid by the state under secs. 49.46 and 49.47 based upon the mandates contained in sec. 49.52 (3) (b) and Title XIX, sec. 1902 of the Social Security Act.

March 5, 1968.

WILLIS J. ZICK
Corporation Counsel
Waukesha County

You ask whether a county is legally obligated to make an appropriation for medical assistance under sec. 49.47, Stats.

As a result of certain changes in the federal social security laws, the legisature revised our state public assistance laws under ch. 590, Laws 1965. Among other things, ch. 590 created secs. 49.45, 49.46 and 49.47, Stats., dealing with the new medical assistance programs and sec. 49.52 relating to reimbursement to counties under these programs.

Sec. 49.46 provides, in effect, that medical assistance benefits shall be furnished to persons eligible to receive social security aids of old-age assistance, aid to dependent children, aid to the blind and aid to the totally and permanently disabled. Under each of these programs, the county board is specifically directed by statute to annually appropriate a sum of money sufficient to carry out the social security provisions including the medical assistance program established under sec. 49.46. See secs. 49.18 (9), 49.19 (7), 49.37 (1) and 49.61 (8), Stats.

It is clear, therefore, that the county is required to provide funds for medical assistance benefits under sec. 49.46 to all recipients of these social security aids. You ask, however, whether the county board is under the same obligation to appropriate a sum of money sufficient to carry out the provisions of sec. 49.47 which extends medical assistance benefits to persons who are medically indigent but who do not qualify for the above mentioned social security aids.

There is no language in sec. 49.47 which exactly parallels the categorical aid provisions requiring the county board to appropriate a sufficient sum to carry out the categorical aid provisions. It is my opinion, however, that all counties have the same legal obligation under sec. 49.47 based upon certain provisions in sec. 49.52.

Sec. 49.52 sets forth the method of distribution of federal and state aids under the medical assistance programs. Your question is specifically answered by sec. 49.52 (3) (b) which provides:

"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)."

This conclusion is not affected in any way by sec. 49.47 (7) which provides:

"Reduction of benefits. If the funds appropriated become or are estimated to be insufficient to make full payment of benefits provided under this section, all charges for service so authorized shall be prorated on the basis of funds available or by limiting the benefits provided."

The proration to which reference is made in the quoted material above is to be performed by the department of health and social services after considering the availability of federal and state funds under this program. This emergency measure does not relieve any county from its liability for a prorata share of the medical expenses paid by the state under secs. 49.46 and 49.47 as set forth in sec. 49.52 (3) (b).

In 24 OAG 453, the attorney general considered a similar question concerning the power of the county board to reduce or discontinue entirely the assistance granted to any old-age assistance beneficiary. Under the statute there in question, the county board was authorized to reduce or discontinue such assistance granted to any beneficiary. 24 OAG 453 concluded, however, that the legislature did not intend that the county board was to have the power to arbitrarily and capriciously reduce or discontinue this type of assistance.

The basic proposition set forth in this prior opinion is equally applicable here. It is the plain legal duty of the county board to estimate reasonably the amount that will be required for the county's prorata share under the medical assistance programs and then to make an appropriation sufficient to meet this obligation.

It also should be noted, in passing, that certain measures have been taken to protect any county which might adversely be affected by the current public assistance demands in that county. Under sec. 49.52 (5), any county which is financially unable to fully perform its duties under secs. 49.18 to 49.37 and under sec. 49.61 after receiving its share of federal and state aids may apply to the department of health and social services for financial assistance to enable it to perform such duties. Although this does not directly affect the county's liability under sec. 49.47, this provision might provide relief to a particular county experiencing for a time a heavy financial burden as a result of the public assistance programs generally.

You also ask whether the county's failure to meet its obligation under sec. 49.47 would affect the availability of state and federal funds ordinarily provided to finance these benefits. Under Title XIX, sec. 1902 of the Social Security Act, federal funds are available only if the state plan for medical assistance provides that the program shall be in effect in all political subdivisions of the state and, if administered by such subdivisions, be mandatory upon them. See 42 U.S.C.A. § 1396a (a) (1). Any failure by the state of Wisconsin to enforce this provision would effectively eliminate this type of program altogether or would necessitate the establishment of a new program financed solely by state and possibly county funds.

BCL:DPJ

Insurance—Reorganization of Mutual Insurance Company—Under sec. 201.14, Stats., insurance commissioner cannot disapprove proposed reorganization of mutual insurance corporation into stock corporation solely on basis of perpetuating interlocking directorates and intercorporate connections, but commissioner has broad power and has duty to disapprove or modify reorganization whenever necessary to protect interests of policyholders. Also, sec. 201.24 (4) (b) discussed.

March 11, 1968.

ROBERT D. HAASE
Commissioner of Insurance

A domestic mutual fire insurance corporation has recently stated a desire to reorganize into a stock insurance corporation. Because of the unusual circumstances surrounding this company's status and the reorganization as tentatively proposed, you ask whether there would be any legal basis for your not approving any such reorganization.

You have furnished me with a chart showing the intercorporate relationships between the mutual fire insurance company and other corporations with which it has business connections. This chart is attached to, made a part of this opinion, and hereafter referred to as exhibit A.

Referring to exhibit A, mutual fire insurance company B, which seeks to reorganize into a stock corporation, has common offices and common management with mutual casualty insurance company A, which is of considerably greater size. Both companies A and B have nine-member boards of directors and the same nine persons serve on these boards; both companies have the same president, secretary, treasurer and the same thirteen vice-presidents. Together, companies A and B hold all of the stock of companies WW and XX. Companies A and B also own the premium finance company which serves as a finance company for policy premiums written by companies A and B and they own the charitable and educational foundation company. By a written agreement, companies A and B are affiliated with company C, a foreign mutual insurance company not doing business in Wisconsin. Company B owns all the shares of the corporate subsidiary holding company which in turn owns all the shares of the investment company. Exhibit A shows other subsidiary corporations that likewise are a part of the corporate structure of companies A and B.

The proposed reorganization contemplates that after company B is transformed into a stock company, the owners of the shares of the reorganized company B would exchange their stock for stock of the holding company subsidiary and it is assumed that the intercompany affiliations and inter-

locking directorates would be continued respecting company A and reorganized company B. The asserted purpose of this resulting relationship with the holding company is to give the entire intercorporate structure greater flexibility and freedom of action in many areas of financial and non-financial endeavor.

In the past, the insurance commissioner has approved the reorganization of mutual companies into stock companies but none of these has presented the circumstance of interlocking management and affiliation found here.

The authority for such reorganization is sec. 201.14, Stats. The purpose, as stated in 201.14 (1), is:

"* * * to provide an orderly method for the reorganization of a mutual insurance corporation into a stock insurance corporation, in those cases where there is such a desire by the policyholders and where the reorganization is subject to the full and complete review and approval by the commissioner. It is the intent of the legislature that any mutual insurance corporation organized under ch. 201 may be reorganized into a domestic stock insurance corporation by action of the board of directors and members of the corporation as hereinafter provided."

The extent of the commissioner's discretion in approving or disapproving such a proposed reorganization is found in the broad language of sec. 201.14 (7) which provides, in part:

"* * * The commissioner, if satisfied that the interests of the policyholders are properly protected and that no reasonable objection exists thereto, may approve such reorganization or may modify the terms and conditions of such reorganization as shall be just and equitable to the policyholders. * * *"

Sec. 201.14 was created by ch. 382, Laws 1963, which evolved from Bill No. 463, S. A source of some light on the legislative intent is found in part of the legislative history of the bill, i.e., a memorandum filed by the then insurance commissioner, under date of April 30, 1963, which stated, in part:

"Bill No. 463, S. provides an orderly method for reorganizing a domestic mutual insurance company into a domestic stock insurance company. In our opinion, this is an extremely important bill. It is vital to the survival and continued growth of the Wisconsin insurance industry.

* * *

"There are two separate statutes (s. 201.02 (4), s. 201.13 (4)) now existing that specifically prohibit the reorganization of a mutual company into a stock company. SECTION 1 of the bill makes the appropriate modification of s. 201.02 (4) of the statutes and SECTION 2 of the bill repeals s. 201.13 (4). The history of the origin of such prohibitions is of interest.

"Chapter 229 of the Laws of 1903 established a procedure for reorganization of a mutual fire insurance company into a stock company. One of the domestic mutuals followed the procedure and effected reorganization. A policyholder of the mutual company brought an action against the officers. This was decided in the Wisconsin Supreme Court (Huber v. Martin, 127 Wis 412) in favor of the plaintiff policyholder. The court held that the enabling statute was unconstitutional.

"In our opinion, the defects in the 1903 statute have been clearly remedied in the proposed bill. The effect of the 1903 statute was to permit all past and present policyholders to receive only a proportionate share based on all premiums received by the company since its organization which, in the above case, was some 49 years earlier than the reorganization. Any unclaimed shares of surplus, and this was substantial because no direct attempt was made to contact all previous members, were transferred to the new stock company which was substantially owned by the former officers and directors of the mutual. The court held that the statute which authorized the appropriation of the equitable interests of the mutual company members to the stock company was unconstitutional. The prohibitions contained in ss. 201.02 (4) and 201.13 (4) were enacted after this decision in order to prevent such reorganizations.

"Adequate and appropriate safeguards to prevent any such conditions are contained in this bill.

"This bill is reasonable and is essential to the strength

and growth of the insurance industry in Wisconsin. It is in the public interest."

The present statute casts the commissioner in the role of protector of the policyholders; further he must be satisfied "that no reasonable objection exists." The policyholders whose interests are to be safeguarded here are the policyholders of company B, the mutual fire insurance company whose reorganization into a stock company is sought.

Your question implicitly asks whether the circumstances of interlocking directorates and interrelated corporate structure found here are such as to be so clearly or potentially detrimental to the interests of the policyholders that you, as insurance commissioner, would be left no discretion but to disapprove any such proposed reorganization. On the facts available, I cannot so conclude.

In my opinion to you, dated April 10, 1967, I emphasized the inherent evils of corporate directors occupying dual fiduciary positions; I pointed out that such dual directors of insurance corporations are in peril of violating sec. 201.24 (4) (b), Stats., which, I stated, was representative of a legislative concern over inherent evils likely to appear in transactions between certain interrelated corporations.

You have not inquired about, and I have not here considered, the validity of the existing corporate ownerships and intercorporate relationships, for example, within the scope of my April 10, 1967, opinion to you. Assuming their validity and notwithstanding the potential that these intercorporate and interlocking arrangements provide for corporate and individual mischief, their existence and proposed perpetuation in my opinion would not, of itself, constitute grounds for your disapproving a proposed scheme of reorganization in the absence of a showing of detriment to the interests of the policyholders concerned.

As insurance commissioner, your decision to approve or disapprove a proposed reorganization under sec. 201.14 will be based on a detailed set of facts. The board of directors (of company B) must pass a resolution to the effect such reorganization is advisable, why it is advisable, and prescribing the terms and conditions of the proposed reorganization. A petition on behalf of the company must be filed

with you, along with copies of the resolution, and the petition also must set forth the terms and conditions of the proposed reorganization. The members (policyholders) of company B, after notice, meet to approve and ratify the action of the directors. As commissioner, you make an examination of the company to determine its assets and liabilities, appoint an appraisal committee to determine and report to you the value of the company. At this point, I would emphasize a duty upon you, as commissioner, and the appraisal committee to examine most thoroughly not only the condition and operations of company B, but also those of all the other companies comprising this intercorporate structure. Then you order a hearing, notice of which you give to each policyholder. Any policyholder may appear at the hearing and be heard. In order for a policyholder to be in a position to intelligently exercise his rights, he must be an informed policyholder. So, if you considered that the notice given the policyholder by the company with respect to the meeting whereat the directors' action was ratified was not entirely adequate, you could, in your notice to policyholders for your hearing, amplify on any details you deemed appropriate, for example, with respect to the intercorporate structure and interlocking directorates. And, of course, no policyholder who happened to vote in favor of the ratification at the company's meeting would be foreclosed from taking an opposite view at the hearing. Thereupon, you, as commissioner, upon all this evidence, if you are satisfied that the interests of the policyholders are properly protected and no reasonable objection exists, may approve the reorganization, or if you conclude that in order to be just and equitable to the policyholders, some modification of the terms and conditions of the reorganization is indicated, you may make an appropriate modification of those terms and conditions, consistent, of course, with sec. 201.14 (8), Stats.

Notwithstanding the considerable arguments that can be made against the desirability of allowing insurance corporations to operate through interlocking directorates and intercorporate connections and controls, this is fundamentally a question of public policy for the legislature, which, except for the limited area herein referred to, has not spoken in language prohibiting these practices and techniques. There-

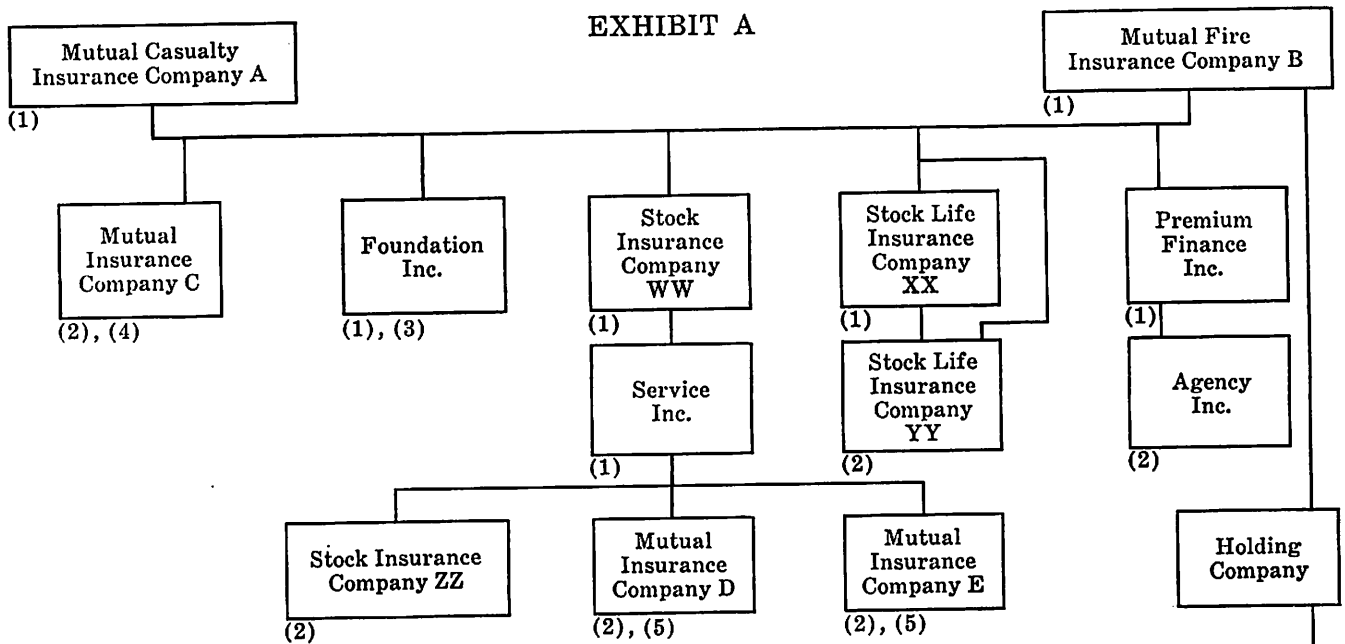
fore, I conclude that as commissioner you could not disapprove such a reorganization as outlined above solely on the basis that it would perpetuate a system of interlocking directorates and intercorporate connections. This is not to minimize, however, the extremely broad discretion the legislature has vested in the insurance commissioner in this area. You could find, for example, after considering all the evidence, that the effectuation of the proposed reorganization would produce a situation where violation of sec. 201.24 (4) (b), Stats., would be almost inevitable and base disapproval on this alone.

And I heartily share your concern, as your request for this opinion indicates, that any such proposed reorganization accompanied by the peculiar interlocking and interrelated features described here deserves the most intensive scrutiny to the end that the interests of the policyholders are protected. However, in the absence of more definitive statutory guidance, such proposed reorganizations cannot, in my opinion, be preliminarily judged hostile to the policyholders' interests.

Should you, as insurance commissioner, after viewing, hearing and considering all the evidence adduced through the procedures mentioned above, conclude that, within the particular proposed reorganization submitted to you, certain circumstances exist or would exist either independent of or because of or in relation to the interlocking directorate and intercorporate connection circumstance and that these circumstances were such that the interests of the policyholders (of company B) would not be properly protected if the proposed reorganization were effected, then it is not only within your authority but your duty either to disapprove the proposed reorganization or to make modifications in the reorganization so that the result will be just and equitable to the policyholders.

BCL:JEA

EXHIBIT A



Notes:

(1) A Wisconsin corporation.
(2) A corporation organized in another state and not doing business in Wisconsin.
(3) Charitable and educational foundation.
(4) Related through an affiliation agreement.
(5) Service Inc. maintains an interest by virtue of surplus notes.

Conservation—Limit Hunters and Fishermen—The conservation commission and natural resources board lack the authority to adopt rules providing for "controlled hunting" through restrictions on the number of hunters and fishermen allowed in limited areas during open seasons. Discussion of secs. 23.09 and 29.174, Stats.

March 12, 1968.

L. P. VOIGT
Secretary
Department of Natural Resources

You have requested my opinion as to the present powers of the Wisconsin conservation commission (and the natural resources board) to control and limit the number of hunters and fishermen in prescribed areas for a variety of reasons. You indicate several past instances of such commission-imposed limits which have been based on specific statutory authority. You also state, however, that the commission often has need to regulate the number of sportsmen in given areas for various other purposes.

By way of preface, you indicate that, at the present time, significant crop damage problems exist in the central portions of the state as a result of the large deer herd, and you feel that the establishment of an "any-deer season" in these areas might result in overharvest and dangerously high concentrations of hunters. You would prefer to select by drawing a limited number of hunters, allowing each to take a deer of either sex in the damage area.

The purposes for which you wish to control hunting by area and number restrictions are stated as follows in your letter:

"a. To control or limit crop or other private property damage by either wild animals or by hunters and fishermen.
b. To protect a species from overharvest.
c. To limit the harvest of Canada geese to the number defined in the waterfowl regulations promulgated by the Secretary of the Interior, through limited issuance of goose tags.

d. To limit the harvest of a species to a predetermined number.
e. To reduce hunter concentrations for the purpose of promoting the public safety.
f. To reduce hunter concentrations on public hunting grounds for the purpose of promoting public safety and improving the quality of the hunting."

The basic principle underlying all fish and game regulation is the concept that the state holds title to all wildlife within its borders, in trust for the people. See *Krenz v. Nichols,* (1928) 197 Wis. 394, 400, 222 N.W. 300; sec. 29.02, Stats. It is equally well settled that hunting and fishing are privileges which the state may grant, deny or regulate. *State v. Herning,* (1962) 17 Wis. 2d 442, 446, 117 N.W. 2d 335; 35 Am. Jur. 2d, *Fish and Game,* p. 670, sec. 29.

These principles cannot be denied—nor can anyone dispute the necessity for conserving our wildlife resources through regulation of, and restrictions upon, the licensee's privilege of reducing fish and game—which he does not own—to possession and ownership. Indeed, the conservation commission was created to provide an adequate, effective and flexible system for the protection, development and use of our outdoor resources—including fish and game—and is given very broad and comprehensive powers in this regard.

It is generally recognized that our wildlife resource would soon be depleted if the state should fail to conserve it and aid in its reproduction; and whenever the state has done so without injury to protected private rights, such acts have generally been upheld. See *Krenz v. Nichols, supra,* p. 401.

We are not here concerned, however, with the validity of statutory fish and game regulations—but rather with the permitted scope of regulation by an administrative agency.

The source of all powers of an administrative agency must be found in the statutes. Such agencies are, after all, creatures of the legislature and must have a statutory warrant for the exercise of any authority they may claim. A legislatively delegated power to make rules and regulations is only the power to adopt regulations which will carry into effect the will of the legislature. An agency may not, under the guise of its rule-making authority, create its own "legis-

lation" by issuing a rule or regulation which is inconsistent or out of harmony with, or which alters, adds to, extends or enlarges, the act being administered. See 1 Am. Jur. 2d, *Administrative Law,* p. 944, sec. 132.

The Wisconsin supreme court has followed these general rules in a long line of cases. *Plain v. Harder,* (1955) 268 Wis. 507, 68 N.W. 2d 47, involved a statute providing that, for purposes of taxation, income from a "mercantile or manufacturing business" was to follow the situs of the business from which derived, and that all other income (with some exceptions) would follow the residence of the recipient. The department of taxation interpreted the statutory phrase "mercantile or manufacturing business" to include construction contracts, and adopted a rule providing that income from such contracts was taxable in the district in which the work was performed. The court held this rule invalid as extending beyond the statutory powers of the department, stating (p. 511):

"* * * The trial court ruled that the provisions in Rule 116 could be made possible only by substantive law and enactment of the legislature. Rule 116 is not a rule of procedure; it is not implementing a statute. We agree with the trial court that it is so out of harmony with the statutes controlling the situs of taxation of income as to be beyond the rule-making power of an administrative agency. The legislature, of course, cannot delegate unqualified rule-making authority to such an agency or board which may amount to legislation. It can have no force against the plain language of the statute. The rule-making power does not extend beyond the power to carry into effect the purpose as expressed in the enactment of the legislature. 'A rule out of harmony with the statute is a mere nullity.' *Manhattan General Equipment Co. v. Commissioner,* 297 U.S. 129, 134, 56 Sup. Ct. 397, 80 L. Ed. 528. Citing *Lynch v. Tilden Product Co.* 265 U.S. 315, 44 Sup. Ct. 488, 68 L. Ed. 1034; see also *Kelso & Co. v. Ellis,* 224 N.Y. 528, 121 N. E. 364."

See also *State ex rel. Adams v. Burdge,* (1897) 95 Wis. 390, 70 N.W. 347; *State ex rel. Buell v. Frear,* (1911) 146 Wis. 291, 131 N.W. 832; *State ex rel. Baranowski v. Koszenski,* (1947) 251 Wis. 383, 29 N.W. 2d 764; *Clintonville Transfer*

Line v. Public Service Commission, (1951) 258 Wis. 570, 573, 576, 46 N.W. 2d 741; *Joam Mfg. Co. v. State Board of Health,* (1965) 26 Wis. 2d 587, 133 N.W. 2d 301.

The basic powers of the conservation commission are found in the following statutes:

"23.09 CONSERVATION ACT. (1) PURPOSES. The purpose of this section is to provide an adequate and flexible system for the protection, development and use of forests, fish and game, lakes, streams, plant life, flowers and other outdoor resources in this state.

"* * *

"(7) COMMISSION RULES; STUDIES; SURVEYS; SERVICES; PENALTIES; POWERS; LONG-RANGE PLANNING. The commission may make such rules, inaugurate such studies, investigations and surveys, and establish such services as it deems necessary to carry out the provisions and purposes of this act, * * *"

"* * *

"29.174 CONSERVATION OF FISH AND GAME; POWERS OF COMMISSION. (1) There shall be established and maintained, as hereinafter provided, such open and close seasons for the several species of fish and game, and such bag limits, size limits, rest days and conditions governing the taking of fish and game as will conserve the fish and game supply and insure the citizens of this state continued opportunities for good fishing, hunting and trapping. * * *"

It is apparent that the commission's statutory powers to set open and close seasons, bag and size limits, and rest days, would not authorize controlled-area hunting regulations. Authority for such regulations would have to be found in the power to set "such conditions for the taking of fish and game" as will: (1) conserve the fish and game supply; and (2) insure the citizens of the state continued opportunities for good hunting, fishing and trapping. This, coupled with the broad rule-making powers granted by sec. 23.09, Stats., would appear to give the commission power to enact reasonable controlled hunting regulations, such as area and number limitations, insofar as they might be nec-

essary to conserve the fish and game supply and provide continued good hunting to the citizens of the state.

It should be noted, however, that subparagraphs (a), (e) and (f) of your letter contemplate the adoption of controlled hunting regulations based upon the need for controlling crop damage and insuring hunter safety. It is my opinion that these purposes are outside the scope of the statutory standards described above, and that rules based upon such considerations would be improper.

As will be seen below, the adoption of controlled hunting regulations is forbidden to the commission for other reasons, but the above situations carry the added burden of lying in fields completely outside the scope of secs. 23.09 and 29.174, Stats.

All of the other situations described in your letter relate to controlled hunting as a means of alleviating possible specie overharvest.

At first glance, protection from overharvest—a fundamental conservation objective—would appear to be well within the regulatory powers of the commission. However, the administrative and legislative history of past controlled hunting proposals indicates rather clearly that both the conservation commission and the legislature have long regarded area and hunter number restrictions as being solely within the realm of legislative enactment, rather than agency order.

In the 1949 session of the legislature, S. B. 225 was introduced at the request of the conservation commission. The bill authorized the commission to restrict the issuance of deer hunting licenses to designated areas and limited numbers of hunters. It did not pass. In 1951, A. B. 16 was introduced at the request of the legislative council. This bill was very similar to S. B. 225 (1949) in that it authorized the commission to regulate and restrict the issuance of deer hunting licenses by areas and numbers of hunters. This, too, failed passage. In 1959, the senate considered and rejected Bill No. 459-S, which would have given the commission authority to set up special restrictions—including area and number limitations—on the hunting of deer and bear.

In 1965—again at the commission's request—Bill No.

266-S was introduced in the senate. This bill authorized the commission to "regulate and limit the number of hunters and the maximum harvest of any game species in any area in order to provide reasonably safe hunting conditions and to protect any species from overharvest." The bill failed.

The 1967 legislature was again requested by the conservation commission to consider a bill (381-S) which would give the commission power to restrict, by rule, the number of hunters and the maximum harvest of Canada geese in any area. The legislature adjourned without passing the bill.

The fact that the legislature has seen fit to specifically authorize controlled hunting in several instances (i.e., secs. 29.107, 29.174 (2) (b), 29.571, Stats.) is inconsistent with the view that secs. 23.09 and 29.174, Stats., repose this power in the commission. The legislature is, after all, presumed to have full knowledge of the existing condition of the law when it acts. *Town of Madison v. City of Madison,* (1955) 269 Wis. 609, 70 N.W. 2d 249. The commission, too, has never considered that it was possessed of such power, since it routinely has sought the introduction and passage of laws which would have given it rule-making authority in this area.

In 1949 the then director of the conservation department requested the opinion of this office on the question of whether the conservation commission could establish a season for controlled deer hunting through limits on the number of hunters in various areas of state-owned land, in order to protect state forest reproduction from deer damage and to maintain the balance between wild animals and the available food supply. After pointing out the broad regulatory powers of the commission over open and close seasons, weapon restrictions, restrictions on the type of deer which may be taken in any given area, etc., the attorney general stated as follows (38 O.A.G. 148, 149, 150 (1949)):

"However, the commission under the present statutes has no power whatsoever to restrict the sales of hunting licenses. Every resident of this state may purchase a hunting license as a matter of right under the provisions of sec. 29.09, and once he has purchased that license he must have

an equal right with all other hunters to use the license during any open season.

"* * * The state in its capacity as sovereign is, in effect, in the nature of a trustee of all state assets which must be administered equally for the benefit of all the people. If selection of hunters on state owned lands is permitted, it must be on some fair and equitable basis and to carry out some proper public purpose. There is presently no statute which would direct the commission as to the manner in which such selection should be made or as to the public purpose which would be carried out. * * *

"* * * if the commission attempts to accomplish the same objective by establishing a limited hunting season in such area, it is confronted by the fact that there is no present statutory right to deny a hunting license and the privileges thereof to any resident, and there is no statutory direction as to the manner in which a limited group of hunters might be selected to engage in such hunt."

See also 33 O.A.G. 174 (1944) for a discussion of the lack of agency discretion to impose conditions on the issuance of hunting licenses beyond those provided by statute.

It is my opinion, therefore, that in view of the long-standing administrative and legislative practice, and in view of the principles discussed in 38 O.A.G. 148, the conservation commission cannot, without statutory authorization, limit the number of hunters in any given area for any of the reasons you have suggested.

Since the natural resources board and the department of natural resources will operate under secs. 23.09 and 29.174, Stats., what is said above applies with equal force to these bodies. See Laws 1967, ch. 75, sec. 25.

BCL:WFE

State Employment Labor Relations Act—Grievance Procedures—Effect of ch. 612, Laws 1965, the State Employment Labor Relations Act, upon the administration of ch. 16 discussed.

March 13, 1968.

JOHN H. SHIELS, *Chairman*
State Personnel Board
WAYNE F. MCGOWN, *Secretary*
Department of Administration

Subch. V[1] of CH. 111, Stats., created by ch. 612, Laws 1965, became effective January 1, 1967, and is the new State Employment Labor Relations Act.

You have asked a number of questions concerning the effect of subch. V on the grievance procedures established pursuant to Wis. Adm. Code sec. Pers. 25 and upon the administration of CH. 16, Stats.

In 1962 the state personnel board adopted Wis. Adm. Code sec. Pers. 25 (hereinafter referred to as Pers. 25) requiring all state departments to establish a written grievance procedure and requiring that the procedure be in conformity with standards established by the director of personnel and approved by the state personnel board. Pers. 25 also provides that the grievance procedures thus established "will not be used in lieu of procedures established elsewhere for actions described in subsecs. 16.05 (1) or 16.24 (1), Wis. Stats."

Sometime during August, 1966, the department of administration issued a model grievance procedure conforming to the standards established by the state personnel board and also issued, on August 24, 1966, an informational bulletin concerning the statewide employe grievance procedure. The standards and model provided, among other things, for a several step or level grievance procedure, including a final level which "shall be [before] the State Personnel Board." Procedural details were also spelled out in the standards and model grievance procedure.

Since that time, most, if not all, state departments have adopted the model grievance procedure or one substantially in conformity with it and the standards established by the state personnel board.

This opinion will assume, without deciding, the validity of Pers. 25 and the grievance procedures established under it.

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1. Secs. 111.80 through 111.94, Stats.

Sec. 111.91 (1) (a) of the State Employment Labor Relations Act makes grievance procedures a mandatory bargaining subject:

"(1) Matters subject to collective bargaining are the following conditions of employment for which the appointing officer has discretionary authority:
"(a) Grievance procedures;"

Sec. 111.89 establishes the procedures for reducing the results of collective bargaining to a written binding agreement between the state employer and the collective bargaining unit.

You have asked that, in rendering this opinion, the personnel board's definition of a grievance be used. It is:

"A grievance is defined as a personnel problem involving an employe's expressed feeling of unfair treatment or dissatisfaction with aspects of his working conditions in the agency which are outside of his control."

You have posed a number of questions concerning the current status of the law concerning the handling of grievances.

Question 1 reads:

"1. Is the Chapter Pers. 25 Grievance Procedure suspended for all employes in a certified bargaining unit on matters bargainable under sec. 111.91 (1), Wis. Stats., pending negotiation of a contract?"

Under the above definition, a grievance may be either an employe's expressed dissatisfaction with a condition of employment itself, or it may be his expressed dissatisfaction with the interpretation or application of a condition of employment to him.

The state employer[2] and collective bargaining unit[3] rep-

2. Sec. 111.81 (13) provides:
"'State employer' means the state of Wisconsin and any department thereof, or appointing officer, as defined in s. 16.02 (3), and includes any person acting on behalf of the state and any of its departments or agencies within the scope of his authority, express or implied."
3. See sec. 111.81 (3), Stats.

resentative[4] are not governed by the grievance procedures set forth in a collective bargaining agreement until the agreement has been adopted by the parties pursuant to sec. 111.89, Stats. Therefore, the mere existence of a certified collective bargaining unit and an employe representative does not automatically suspend prior valid grievance procedures.

However, once a collective bargaining unit has been certified, or even once a question of representation exists (a question of representation usually arises as a result of a demand for recognition by a labor organization or the filing of an election petition with the Wisconsin employment relations commission): if the state employer unilaterally changes a condition of employment that is subject to collective bargaining during negotiations, it may be open to a charge that it has committed a prohibited practice under the provisions of sec. 111.84 (1), Stats.

A hypothetical example will help illustrate. Assume that the majority of the employes in a certified collective bargaining unit desire a certain work rule which is a mandatory subject of collective bargaining enumerated in sec. 111.91 (1), Stats.,[5] and that the appointing officer, not renowned for his favorable disposition towards the "union movement," is not in favor of the desired work rule. Then assume that one individual in the collective bargaining unit desires a work rule different than that desired by the majority of the collective bargaining unit, and brings a grievance in an attempt to alter the work rule to his liking. If

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4. See sec. 111.81 (11), Stats.
5. "(1) Matters subject to collective bargaining are the following conditions of employment for which the appointing officer has discretionary authority:
   (a) Grievance procedures;
   (b) Application of seniority rights as affecting the matters contained herein;
   (c) Work schedules relating to assigned hours and days of the week and shift assignments;
   (d) Scheduling of vacations and other time off;
   (e) Use of sick leave;
   (f) Application and interpretation of established work rules;
   (g) Health and safety practices;
   (h) Intradepartmental transfers; and
   (i) Such other matters consistent with this section and the statutes, rules and regulations of the state and its various agencies."

this grievance is disposed of by the appointing officer unfavorably as far as the majority of the collective bargaining unit is concerned, or is settled so as to put the collective bargaining unit in a more unfavorable bargaining position, such settlement of the grievance could result in a charge against the state employer of committing a prohibited practice within the meaning of sec. 111.84 (1), Stats.[6] Even a "favorable" unilateral change in conditions of employment might, under certain circumstances, be considered a prohibited practice under sec. 111.84, Stats.

However, until the collective bargaining agreement which contains a contractual grievance procedure is executed, the state employer may hear and consider the employe's grievance concerning the interpretation or application of an existing condition of employment to him.

In summary, the answer to your first question is that Pers. 25 grievance procedure is not suspended by the certification of a bargaining representative or by the existence of a question of representation until a collective bargaining agreement embracing a new grievance procedure has been adopted. But if a grievant seeks as his goal the alteration of an existing condition of employment, the state employer should not consider the grievance.

Your question No. 2 reads:

"2. If Chapter Pers. 25 grievance procedure is suspended, does such suspension apply to employes who are not members of the representative labor organization but are included in the collective bargaining unit?"

The answer to question 1 applies to all grievants, whether or not they are members of the representative labor organization. An employe does not gain (or lose) any rights under subch. V by virtue of his not being a member of the labor organization which has been certified as the collective bargaining representative.

Your third question reads:

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6. By virtue of 111.85, Stats., the Wisconsin employment relations commission has the jurisdiction to determine whether a prohibited practice has been committed.

"3. If a negotiated contract does not in fact cover some bargainable item, can an employe in the bargaining unit grieve over such item by way of the Chapter Pers. 25 route?"

This question cannot be answered precisely without considering the actual provisions of a collective bargaining agreement. It would be reasonable to assume, however, that collective bargaining agreements would provide that the grievance procedures established therein are the exclusive[7] means (other than other agreed procedures) of settling grievances on matters covered in the collective bargaining agreement, since such a provision would be to the benefit of both the state employer and employes within the collective bargaining unit. The mere fact that the bargainable matter is not covered in the agreement does not obviate the state employer's duty to bargain exclusively with the certified employe representative on those matters in the absence of a provision in the agreement in that respect. Thus, an employe in the bargaining unit could not grieve over such bargainable items by way of Pers. 25 procedures.

Your fourth question is:

"4. Can a matter not bargained under a negotiated contract be grieved of by the grievance procedure established in the contract?"

(The answer to this question assumes that the word "matter" is synonymous with "bargainable item" which appears in your question numbered 3.)

Normally, the grievance procedure established in a collective bargaining agreement relates to grievances arising over the interpretation or application of the provisions of the agreement. Thus, conditions of employment not embraced or reflected in the agreement would not be subject to the contractual grievance procedure unless specific provision therefor appeared in the agreement. An example: Assume that during the existence of a collective bargaining agreement, the state employer desires to change a condition of employment in an area subject to bargaining, which con-

7. Subject to the provisions of sec 111.83 (1), Stats.

dition of employment is not specifically affected or regulated by the agreement. While the employe representative would have the right to bargain with the state employer on this matter, the contractual grievance procedure could not be used to accomplish this bargaining nor could it be utilized except as specifically provided in the agreement.

The answer to your question numbered 5, which reads:

"5. Does an employe in a bargaining unit with a certified representative have any ability to prosecute grievances on matters negotiated in a contract by the route of Chapter Pers. 25?"

is answered by the answer to your question numbered 3.

The two parts to your question numbered 6 will be treated together. They read:

"A. Does the Personnel Board have the authority to either expand or diminish the scope of bargainable subjects set forth in s.s. 111.91 (1), Wis. Stats., by promulgating new rules or changing existing rules, which would expand or reduce the discretionary authority of appointing officers under its rulemaking authority set forth in s.s. 16.05 (2), Wis. Stats.

"B. Do the appointing officers and the Employment Relations Division of the Bureau of Personnel have the authority to negotiate contracts with the unions on bargainable subjects set forth in s.s. 111.91 (1), Wis. Stats. when such contracts may be either contrary to or inconsistent with Rules of the Personnel Board promulgated under the provisions of Chapter 227 and s.s. 16.05 (2), Wis. Stats."

These questions, as all the questions in your request, were submitted without specific facts or actual contract language to consider. The application of law to specific facts will usually produce more definitive answers, and in this respect, final resolution of the issues implicit in these questions is best left to determination by the Wisconsin employment relations commission in actual proceedings before it.

This opinion, therefore, is general in nature, and is given to afford general guidelines to you in carrying out your administrative duties.

Subch. V of CH. 111 was enacted subsequent to CH. 16.

If a conflict exists between two statutes that cannot be harmonized, the later enacted statute will prevail over the earlier one[8] since the legislature is presumed to have enacted statutes with knowledge of the existence of earlier enactments[9] and with knowledge of existing facts[10] which would include agency rules promulgated under prior existing statutes. Furthermore, the presumption is that the legislature, in passing legislation, does not act in vain but has in mind a purpose or goal.[11]

By virtue of subch. V of CH. 111 and specifically sec. 111.91 (1), Stats., state employes have the right to collectively bargain on enumerated subjects within the discretionary authority of the appointing authority. Therefore, if CH. 16 gives the personnel board the authority to extend or reduce the discretionary authority of appointing officers, to the extent that this grant of power is in conflict with the later enacted State Employment Labor Relations Act, it is abrogated insofar as the rights of employes in a certified collective bargaining unit are concerned. In other words, the personnel board cannot defeat or diminish the rights granted to the state employes in the State Employment Labor Relations Act by diminishing the discretionary powers of appointing officers with respect to those matters subject to collective bargaining under sec. 111.91 (1), Stats.

This is not to say that CH. 16 is automatically voided by ch. 612, Laws 1965. Subch. V of CH. 111 supersedes CH. 16 (and lawful rules promulgated thereunder) only when CH. 16 (and rules) operate to defeat the rights granted to state employes under subch. V. For example, CH. 16 and lawful rules thereunder are still operative for state personnel who do not fall within the definition of state employe as defined in sec. 111.81 (12), Stats.[12] However, once those eligible

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8. *State ex rel. Mitchell v. Superior Court of Dane County*, (1961) 14 Wis. 2d 77, 109 N.W. 2d 522.
9. *Muskego-Norway C.S.J.S.D. v. W.E.R.B.*, (1967) 35 Wis. 2d 540, 151 N.W. 2d 617.
10. *State ex rel. City of Madison v. Industrial Comm.*, (1932) 207 Wis. 652, 242 N.W. 321.
11. *Haas v. Welch*, (1932) 207 Wis. 84, 240 N.W. 789.
12. " 'State employe' includes any employe in the classified service of the state, as defined in s. 16.08, except employes who are performing in a supervisory capacity, and individuals having privy to confidential matters affecting the employer-employe relationship, as well as all employes of the board."

state employes who, as a group, wish to exercise their right granted by subch. V and elect to organize or affiliate and bargain pursuant to the right granted in sec. 111.82, Stats.,[13] insofar as CH. 16 and rules thereunder operate to defeat or diminish that right, CH. 16 and rules are abrogated.

And, if the rules, past or future, of the personnel board promulgated under sec. 16.05 (2), Stats., are inconsistent with the rights granted by subch. V of CH. 111, Stats., appointing officers and the employment relations division of the bureau of personnel have the authority and duty to negotiate contracts in accordance with sec. 111.91, Stats., and disregard the rules of the personnel board insofar as they are inconsistent.

BCL:WHW

Schools—Fees and Incidental Expenses—Art. X, sec. 3, Wis. Const., guarantees the right to an education in a public school without payment of tuition, but not free of payment for books and incidental fees. A school district may charge only such incidental fees as are authorized by the statutes. Specific fees and expenses discussed.

March 20, 1968.

WILLIAM C. KAHL
Superintendent
Department of Public Instruction

You have asked my opinion on whether public schools may charge certain fees or incidental expenses in light of Art X, sec. 3, Wis. Const. Specifically you have inquired about the charging of fees or incidental expenses in the following instances:

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13. "State employes shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employes shall also have the right to refrain from any or all of such activities."

1. Compulsory fees or charges for incidental expenses in connection with required courses. Such courses are required in the sense that the school requires the specific course for graduation or are required in the sense that children are subject to the compulsory attendance law and required to attend some class. Examples of these fees or expenses are:

"(a) Fees for use of towels and physical education uniforms (or required purchase of individual gym clothing and towels) to be used in the physical education course;

"(b) Laboratory fees and locker fees where the fee is not refunded upon return of lock or upon completion of laboratory course with no laboratory material or supplies having been damaged by the student;

"(c) Charges for workbooks, expendables and newspapers;

"(d) Charges for book rental and in the same category the requirement that the student purchase his own books."

2. Fees or charges related to elective courses as for example a fee for Driver Education; charges for art supplies and expendables in special art courses; rental or required purchase of musical instruments for band or orchestra instruction.
3. Fees and charges for school sponsored activities not related to courses of instruction such as an activity ticket for admission to interscholastic events and school plays; purchase of the school annual or other school publications; purchase of WIAA insurance by participants in athletic events; purchase of health and accident insurance to protect against student risks related to school activities; class dues and charges for assembly programs to defray the cost of speakers.
4. Charges and fees, as set forth in paragraphs 1 through 3 above, imposed during summer school sessions.

Art. X, sec. 3, Wisc. Const. states:

"DISTRICT SCHOOLS; TUITION; SECTARIAN INSTRUCTION. Sec. 3. 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."

"One of the major functions of all government is to promote an efficient educational system." *State ex rel. Dudgeon v. Levitan,* (1923) 181 Wis. 326, 329, 193 N.W. 499. The state constitution is not a grant of but a limitation upon legislative power, therefore, the language of Art. X, sec. 3 "such schools shall be free and without charge for tuition" establishes the minimum which the legislature must provide. The purpose of Art. X, sec. 3 was not to grant the power to establish schools to the legislature, a power which exists without such section, but to compel the exercise of the legislature's power to the extent indicated. *State ex rel. Dudgeon v. Levitan, supra; Manitowoc v. Manitowoc Rapids,* (1939) 231 Wis. 94, 98, 285 N.W. 403.

What then is the minimum established in Art. X, sec. 3 by the words "such schools shall be free and without charge for tuition." It is presumed that words used in a constitution are to be given the natural and popular meaning in which they were usually understood by the people at the time of adoption. *Payne v. Racine,* (1935) 217 Wis. 550, 555, 259 N.W. 437; *B. F. Sturtevant Co. v. Industrial Comm.,* (1925) 186 Wis. 10, 19, 202 N.W. 324. In order to discover the intent of the framers of the constitution, reference may be had to other constitutional provisions, history of the times, state of the contemporary society, and prior well-known practices. *State ex rel. Zimmerman v. Dammann,* (1930) 201 Wis. 84, 89, 228 N.W. 593. However, such constitutional language is to be construed in the light, not only of the conditions prevailing at the time of the adoption of the constitution, but also with reference to the changed social, economic, and governmental conditions and ideals of the present time. *Borgnis v. Falk Co.,* (1911) 147 Wis. 327, 349, 133 N.W. 209.

The Wisconsin Territory, when created in 1836, was subject to the existing laws of the Territory of Michigan to such time as the laws were amended or repealed by the Wisconsin Territorial Legislature. The basic school law of Michigan provided that the cost of erecting schoolhouses

was to be met by general property taxes. Costs of instruction, however, were paid through a tax levied upon parents in proportion to the number of children they had in school. Parents were also required to contribute wood for fuel in an amount based upon the number of children they had in school. *The Founding of Public Education in Wisconsin,* (1956) Lloyd P. Jorgenson, pp. 17-18; *Educational History of Wisconsin,* (1912) Charles McKenney, p. 22. The Wisconsin Territorial Legislature at an early date departed from the Michigan practice of charging parents for teachers' salaries and provided that the costs of both the construction of the schoolhouses and teachers' salaries were to be met from the general property tax. Statutes of the Territory of Wisconsin-1839, p. 137, secs. 1, 6, 7. Although the cost of schoolhouse construction and teachers' salaries were paid by the general property tax, incidental expenses were still paid by the students' parents. Most school districts, both before and after statehood, required patrons to contribute a certain amount of firewood for each child attending the school. *The Founding of Public Education in Wisconsin, supra,* p. 44. Textbooks were furnished by the student himself both before and long after statehood. The general practice was for each child to bring to school whatever book the family happened to have at home. Classes were organized on the basis of the textbooks the pupils brought with them. *The Founding of Public Education in Wisconsin, supra,* p. 140; *Educational History of Wisconsin, supra,* p. 23. It is clear under Wisconsin Statutes 1849, CH. 19, secs. 36 and 38, the first statutes passed after achievement of statehood, that furnishing books was ordinarily the responsibility of the parents. Sec. 38 specifically provided that "The district board may purchase, at the expense of the district, *when families or guardians may not be able to furnish the same,* such school books as in their judgment may be necessary for the use of any children attending school in their district, * * *."

With this background it appears that the word "free" as used in Art. X, sec. 3, Wis. Const. was not intended by the framers of the constitution to mean an education free without any charge whatsoever. If the word "free" is considered to mean "without any charge whatsoever," then the further language of sec. 3 "and without charge for tuition" is sur-

plus and unnecessary. In *Segar v. Board of Education of the School District of the City of Rockford,* (1925) 317 Ill. 418, 148 N.E. 289, 290, the Illinois supreme court when faced with the definition of the word "free," concluded that a school was "free" even though children were required to furnish their own textbooks, writing materials and other supplies.

The word "free" as used in Art. X, sec. 3, Wis. Const. was, in my opinion, intended by the framers of the constitution to mean "open to all" rather than "without cost". The proposed 1846 Wisconsin Constitution which failed to pass, contained the following provision in Art. IX, sec. 4:

"The legislature shall provide for a system of common schools which shall be as nearly uniform as may be throughout the state, and the common schools shall be *equally free* to all children, * * *."

The committee on education and school funds of the 1847 Constitutional Convention proposed the following language to replace the above quoted section of the 1846 Constitution:

"Sec. 4. The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as may be, throughout the state; and such schools shall be *equally free* to all children between the ages of four and sixteen years, *to whom the tuition shall be gratis.* * * *"

See *Journal and Debates Constitutional Convention* 1847-1848, p. 264. The debates during the 1847 convention further indicate that there was discussion of whether the schools should be open to all children or restricted to the white race. On page 335 of *Journal and Debates Constitutional Convention* 1847-1848, the following discussion is printed:

"Mr. WARDEN moved to amend section 4, by inserting before the word 'children' the word 'white.'

"Mr. KING suggested that it would be as well to amend further, by inserting the word 'free,' before 'white.'

"Mr. EASTABROOK proposed that while he was about it, the gentleman from LaFayette, (Mr. WARDEN,) had

better propose to amend by requiring that all the children should have blue eyes.

"Mr. LAKIN did not consider the amendment of the gentleman from LaFayette to be necessary. The matter was one which public opinion would regulate. If in any particular district, the people chose to admit colored children to the benefit of the schools, it was perfectly right they should have that privilege.

"And the question having been put upon the adoption of the same,

"It was decided in the negative."

It is therefore my opinion that Art. X, sec. 3 guarantees to a child the right to an education in the public school within his district without payment of any tuition, but not necessarily free of all payment for books and incidental fees.

Contemporaneous legislative construction of a constitution is entitled to great deference. *Payne v. Racine,* (1935) 217 Wis. 550, 259 N.W. 437; *State ex rel. Pluntz v. Johnson,* (1922) 176 Wis. 107, 184 N.W. 683, 186 N.W. 729. It is therefore important to note that under CH. 19, sec. 38, 1849 Rev. Stat., the district boards were permitted to purchase school books only where the pupil's family could not purchase the books. Under the present statutes school districts are *required* to provide books and school supplies for indigent children, but *permitted* to furnish textbooks free to all students. See secs. 120.10 (15), 120.12 (11), 120.49 (7) (b) and 120.75 of ch. 92, Laws 1967. School boards are further empowered by sec. 118.03 (b) of ch. 92, Laws 1967 to sell textbooks to students, and by sec. 120.13 (10) of ch. 92, Laws 1967, may charge students for the cost of school lunches. It is therefore apparent that the legislature has long construed the word "free" in Art. X, sec. 3, not to mean free of any cost to a student.

Art. X, sec. 3, Const., prohibits the charging of tuition in public schools. Webster's Third *New International Dictionary* defines "tuition" as "the price of or payment for instruction." In *The State ex rel. Priest vs. The Regents of the University of Wisconsin,* (1882) 54 Wis. 159, the question was whether the word "tuition" as used in the statutes included incidental expenses. The court held at page 165

that "the statutory prohibition against exacting "fees for tuition," does not include or reach the incidental expenses for heating and lighting public halls, etc., complained of." Tuition is a charge for instruction and does not include a construction assessment, the rental or use of a building, cost of fuel or light, janitor's salary or other incidental expenses. *Linton v. Lucy Cobb Institute,* (1903) 117 Ga. 678, 45 S.E. 53; *Norristown Borough School District v. Upper Merion Township School District,* (1912) 49 Pa. Super. 561; *Rheam, et al. v. Board of Regents of University of Oklahoma,* (1933) 161 Okla. 268, 18 P 2d 535; *State v. State Board of Education, et al.,* (1934) 97 Mont. 121, 33 P 2d 516.

Art. X, sec. 3, does not prohibit a school from charging for books and incidental fees. The officers charged with the administration of schools, however, have only such authority as is given by statute, and a statutory enumeration of their powers implies a denial of all powers not enumerated. *Costigan v. Hall,* (1946) 249 Wis. 94, 99, 23 N.W. 2d 495; *State ex rel. Van Straten v. Milquet,* (1923) 180 Wis. 109, 113, 192 N.W. 392. This does not mean, however, that school authorities can do no acts except those specifically described since each specific authorization carries with it the authority to do the incidental acts necessary to carry it out. *The State ex rel. Priest v. The Regents of the University of Wisconsin, supra.*

It is my opinion that schools have the authority to require students to furnish textbooks and other supplies at their own expense. As previously stated in this opinion, school districts may provide free books or rent or sell books to students. School boards are required to provide *books and school supplies* only for indigent children residing in the school district. It necessarily appears that the school board has the corresponding power to refuse to purchase books and school supplies and require the student, unless he is indigent, to furnish his own as a prerequisite to taking a course of instruction.

Art. X, sec. 3, does not prevent imposing reasonable fees or charges for such expenses not included within the definition of tuition, consequently, if the statutes provide authority for schools to charge such reasonable fees they are proper.

School boards are given broad power over the management of schools by the following sections of ch. 92, Laws 1967:

"120.12 SCHOOL BOARD DUTIES. The school board of a common or union high school district shall:

"(1) MANAGEMENT OF SCHOOL DISTRICT. Subject to the authority vested in the annual meeting and to the authority and possession specifically given to other school district officers, have the possession, care, control and management of the property and affairs of the school district.

"(2) General supervision. Visit and examine the schools of the school district, advise the school teachers and administrative staff regarding the instruction, government and progress of the pupils and exercise general supervision over such schools.

"* * *."

"120.13 SCHOOL BOARD POWERS. The school board of a common or union high school district may:

"(1) SCHOOL GOVERNMENT RULES; SUSPENSION; EXPULSION. (a) Make rules for the organization, gradation and government of the schools of the school district which shall take effect when signed by a majority of the school board and filed with the school district clerk."

See also the application of the above sections to city school districts under sec. 120.49 and unified school districts under sec. 120.75 of ch. 92, Laws 1967. These broad powers provide sufficient basis for the school to require students to furnish themselves with books, school supplies or apparatus necessary in taking a specific course.

School districts are specifically authorized to charge students fees in certain instances in the statutes. The district may charge for textbooks under sec. 120.10 (15) of ch. 92, Laws 1967; may charge for lunches under sec. 120.13 (10) of ch. 92, may allow an admission fee to be charged for lectures, entertainments and school exercises under sec. 120.13 (18) of ch. 92 and may charge fees for operation of a school conservation camp under sec. 118.05 (2) of ch. 92. Under the rule of statutory construction "expressio unius est ex-

clusio alterius," since the legislature has specified certain situations in the statutes in which school boards may charge fees, any other basis for charging fees or incidental costs is excluded. *Chain Belt Co. v. City of Milwaukee,* (1912) 151 Wis. 188, 193, 138 N.W. 621.

In answer to part (a) of your first question, it is my opinion that the school board may require a student to equip himself with specified clothing and a towel to be used in the physical education course. I find no authority in the statutes, however, empowering school boards to furnish and charge fees for use of towels and gym uniforms, and do not consider such rental to be a permitted incidental act necessary to carry out the physical education program.

In answer to parts (c) and (d) of question 1, it is my opinion for reasons previously stated that a student may be required to furnish his own books and other supplies such as paper, pencils, and other reasonable tools required for use in a specific course.

I find no authority in the statutes authorizing schools to charge fees for driver education, art supplies or require the rental or purchase of band instruments and am of the opinion that payment of such fees may not be required under the general authority of secs. 120.12 (1) (2) and 120.13 of ch. 92, Laws 1967. This is not to say that schools may not furnish the supplies, gym suits, towels, apparatus or band instruments free of charge to the students or in the alternative require the student to furnish the necessary supplies or band instrument as a requirement of taking the course.

Fees and charges for school sponsored activities, not related to courses of instruction, as enumerated in question No. 3 are not, in my opinion, proper compulsory charges to students. Sec. 120.13 (18) of ch. 92, Laws 1967, provides:

"120.13 SCHOOL BOARD POWERS. The school board of a common or union high school district may:

"(18) SPECIAL ACTIVITIES. Grant the use of a schoolhouse in the school district for lectures, entertainments and school exercises held under the auspices of and for the benefit of the school and permit an admission fee to be charged."

This does not, however, mean that the board may require attendance of students if an admission fee is charged. I,

therefore, do not believe that the board is empowered under the statutes to impose compulsory fees for many of the extra curricular items listed in the opinion request such as activity ticket, yearbook, class dues, school newspapers, etc.

School districts have no power or authority to require a student to purchase insurance to protect him against risks related to school activities. I refer to you with approval, a decision of Circuit Judge Helmuth P. Arps, dated April 27, 1960, in the case entitled *Woodrow v. Menasha Board of Education.* In this decision, Judge Arps declared unreasonable and beyond the power of the board a rule requiring a student to purchase accident insurance from a specified company as a condition of being permitted to engage in competitive athletics.

Sec. 120.13 (2) of ch. 92, Laws 1967, empowers the board to provide for accident insurance in the following language:

"120.13 SCHOOL BOARD POWERS. The school board of a common or union high school district may:

"(2) ACCIDENT INSURANCE. Provide for accident insurance covering pupils in the school district. Such insurance shall not be paid from school district funds unless the expenditure is authorized by an annual meeting."

See also sec. 120.49 (6) of ch. 92, Laws 1967, relating to city schools. If payment for such insurance is not made from school funds, payment could, however, be made by the individual students on a voluntary basis.

In answer to question No. 4 regarding charging of incidental fees during summer sessions. It is my opinion that mandatory incidental fees and charges may be imposed in the same situations as are discussed above in relation to the regular school year. Sec. 118.04 (4) of ch. 92, Laws 1967, precludes the charging of tuition to residents during summer sessions, but has no effect on charging of incidental expenses.

BCL:WMS

Elections—Special—Cities and Villages—Notwithstanding the failure of the legislature to reenact secs. 10.40 (1)

and 10.54 under the election laws revision, cities and villages still have the authority pursuant to secs. 5.01 (2) and 7.15 (2) (d) to call special elections.

April 2, 1968.

ROBERT C. ZIMMERMAN
Secretary of State

Based upon the revision of the Wisconsin election laws which became effective July 1, 1967, you ask whether cities and villages have the authority to call special elections.

Under the 1965 statutes, the power to call special elections was specifically granted to various municipalities under different provisions. Sec. 10.40 (1) (cities), sec. 10.45 (villages), sec. 10.54 (towns). Under the recent revision, CH. 5 through 10 were repealed and recreated. Ch. 666, Laws 1965.

Sec. 8.06 now specifically provides for the calling of special town elections. The provisions dealing with special city and village elections were not recreated in the same form as they appeared earlier. It is my opinion, however, that the failure to reenact secs. 10.40 (1) and 10.45 does not eliminate the power of cities and villages to call special elections.

The presumption in construing statutes is against any radical change of legislative policy, and it must be presumed that there was no intention to depart from any established policy or to innovate upon fundamental principles. *In re Johnson's Will,* (1921) 175 Wis. 1, 8-9, 183 N. W. 888. Moreover, before deciding that there has been a statutory change in a well-established policy, it is necessary to find such legislative intent expressed in the act which is alleged to make such change. *Pabst Corp. v. City of Milwaukee,* (1926) 190 Wis. 349, 356, 208 N. W. 493. See also, *State v. Halverson,* (1966) 32 Wis. 2d 503, 512-514, 145 N. W. 2d 739.

The specific provisions relating to special elections in cities and villages were found in substantially the same form in statutes published during the last century. See Annot. Stats., 1889, sec. 925g (32) (cities) and Rev. Stats., 1878, sec. 871 (villages). Even before that time, provisions were made for special village meetings as opposed to special

elections, and these meetings were called in substantially the same manner as a special election is now called. See Rev. Stats., 1858, c. 70, sec. 21.

In light of this background, I am unable to find any legislative intent to eliminate this power to call special elections expressed in the recent election laws revision. On the contrary, a legislative intent is shown to simplify our election provisions by combining previously separated provisions. This is apparent from the legislative council notes which accompany the laws as enacted and which can be considered in ascertaining the legislative intent. *George Williams College v. Village of Williams Bay,* (1943) 242 Wis. 311, 7 N. W. 2d 891; *Pellett v. Industrial Comm.,* (1916) 162 Wis. 596, 156 N. W. 956.

The legislative council note following sec. 5.01 states that subs. (2) includes former sec. 10.40 (1). Subs. (2) of sec. 5.01 provides that the general provisions of Title II apply to all elections. The note following sec. 10.06 states that this new section is based upon several former sections including sec. 10.45 "(second sentence through end of section)". Although former sec. 10.45 specifically authorized special elections in villages, new sec. 10.06 relates to the publication of basic election notices and does not grant such specific authority

Former sec. 10.51 provided:

"Special elections in villages. Section 10.40 respecting special and referendum elections, and the functions and duties of common councils of cities and city clerks, shall apply to the conduct of similar village elections and to the functions and duties of village boards and village clerks."

Former sec. 10.51 is now contained in sec. 8.50 and sec. 7.15 (2) (d). Sec. 8.50 primarily deals with special elections to fill vacancies in the United States Senate and House of Representatives, executive and legislative state offices and county offices. In this respect, the portion of former sec. 10.51 which is herein relevant has been transferred to sec. 7.15 (2) (d).

Sec. 7.15 (2) (d) provides:

"Whenever by ordinance or resolution the governing body of any municipality submits any question, ordinance or pro-

posed recall from office to a vote of the electors, the municipal clerk shall issue a call for the election and prepare and distribute ballots as required in the authorization of submission. The ballot shall conform to s. 5.64 (2). If there is already an official ballot for the election, the question, ordinance or recall may be printed at the bottom of the ballot."

Former sec. 10.40 applied only to cities, which also is recognized in the legislative council note. New sec. 7.15 (2) (d) applies to all municipalities and is not restricted to special elections as was the case under sec. 10.40 (2). Under Title II dealing with elections, "election" includes all primaries and elections while "special election" means any election to fill vacancies or for other designated purposes which are not specifically described elsewhere in the definitions. Sec. 5.02 (1) (a) and (6) (b), Stats. In this respect, it is important to recall that sec. 5.01 (2) provides that the general provisions of Title II apply to all elections.

It is my opinion that the legislature intended to retain and include all authority for special elections in secs. 5.01 (2) and 7.15 (2) (d). Rather than having separate provisions for each type of municipality, the legislature included the general statement in sec. 5.01 (2) and made sec. 7.15 (2) (d) applicable to all municipalities rather than merely to cities. No intent can be imputed to the legislature to change any law under a revision when, by examining the remaining provisions, it is apparent that the legislature only sought to eliminate redundant matter. *Muldowney v. McCoy Hotel Co.*, (1936) 223 Wis. 62, 68, 269 N. W. 655.

Although resort to the doctrine of implied powers is subject to obvious abuses, a power clearly implied is just as effective as grant of power expressly declared. *Somo Lumber Co. v. Lincoln County*, (1901) 10 Wis. 286, 294, 85 N. W. 1023. Reading sec. 7.15 (2) (d) and sec. 5.01 (2) and all relevant legislative council notes in combination, it is clearly implied that all municipalities still possess the authority to call special elections by submitting any question to a vote of the electors through an ordinance or resolution.

The legislative intent in reenacting the provisions of former sec. 10.54 in new sec. 8.06 is not inconsistent with this position. Sec. 8.06 and the former statute set forth a special procedure which applies only to towns. Special elections

may be called in the same manner that special town meetings are called under sec. 60.12. The intent here was to retain the authority as it existed under this special provision while, at the same time, not disturbing the power of *all* municipalities, including towns, to call special elections under the above cited statutes.

BCL:DPJ

Butterine Products—Taxable—Forty percent dairy-margarine blend products, legally salable under secs. 97.46, Stats., and 97.39, Stats., as amended by chs. 42 and 100, Laws 1967, are oleomargarine products as that term is defined in sec. 139.60, Stats., as amended by ch. 42, Laws 1967, and are subject to regulation and taxation under that section as amended.

April 8, 1968.

JAMES R. MORGAN
Secretary of Revenue

You have requested my opinion as to whether a butter-margarine blend product manufactured in accordance with the provisions of ch. 100, Laws 1967, is taxable as oleomargarine under ch. 42, Laws 1967.

Ch. 100, Laws 1967, amended subs. 97.46 (1), Stats. Sec. 97.46 is entitled "Frauds; substitute for butter; advertisement." As its title implies, sec. 97.46, Stats., was and is a definition and control of frauds related to the sale or advertisement of substitutes for butter. From its enactment in 1923 (ch. 147, Laws 1923; sec. 4607d-4, Stats., 1923) until the changes effected by ch. 100, Laws 1967, subs. 97.46 (1) had undergone relatively few and minor changes. Subs. (1) of sec. 97.46 now reads, with the recent changes indicated, as follows:

"97.46 (1) No person shall use in any way in connection or association with the sale or exposure for sale or advertisement of any substance designed to be used as a substi-

tute for butter, the word 'butter'. *Terms such as* 'cream,' 'creamery' or 'dairy,' either alone or in combination with other words, except as required by s. 97.45, or the name or representation of any breed of dairy cattle, or any combination of such words and representation, or any other words or symbols or combinations thereof commonly used in the sale of butter *shall not be used unless at least 40% of the substitute is butterfat. If the term 'butter' is used in connection with the name of any such product, it shall be qualified so as to distinguish it from butter as defined in s. 97.02 (8).*"

Sec. 97.39 (1), Stats., prohibits the sale of "any food which purports to be or is represented as [16 named dairy products including milk and butter] or any of the fluid derivatives thereof which contains any fat or oil other than milk fat, either under the name of said food or the derivatives thereof or any fictitious or trade name."

Prior to July 1, 1967, subs. 97.39 (3) exempted from the prohibition of subs. 97.39 (1) the sale of oleomargarine under the condition, among others, that it be "free from coloration or other ingredient that causes it to look like butter." Ch. 42, Laws 1967, removed these conditions placed on the sale of oleomargarine, thus permitting the sale of colored oleomargarine. Ignoring the effect on other dairy products, sec. 97.39, as amended, prohibits the sale of substances containing fat other than milk fat which purport to be or are represented as butter, specifically excepting oleomargarine and margarine.

Ch. 42, Laws 1967, amended the definition of oleomargarine and margarine contained in subs. 139.60 (1) (a) as follows:

"139.60 OLEOMARGARINE REGULATIONS. (1) (a) *For the purposes of this section 'oleomargarine' or 'margarine' includes* oleomargarine, *margarine,* butterine and *other* similar substances, fats and fat compounds sufficiently adaptable to the ordinary uses of butter, to lead readily to use as an alternative to butter, but this section shall not apply to lard as defined in s. 97.02 (4), cream cheese, cheese food compounds as defined in s. 97.50, nor to any other dairy product made exclusively of *milk or* milk solids with or

without added vitamins, if such product is sold or distributed in such manner and form as will clearly distinguish it from butter. Nor shall this section apply to shortenings not churned or emulsified in milk or cream or having a melting point of 112 degrees Fahrenheit or more as determined by the capillary tube method unless there is sold or given away with such shortening any compound which, when mixed with such shortening, makes oleomargarine, butterine, or similar substances. *Colored oleomargarine or margarine shall be made of domestic fats or oils and shall not be made of imported oils which include, without restriction because of enumeration, whale oil, coconut oil and palm oil.*"

Whatever definition of oleomargarine and margarine is used, whether that in sec. 139.60 (1) (a), as amended by ch. 42, Laws 1967, or that found in 26 USCA §4592 (a) [import tax on oleomargarine] or 15 USCA §55 (f) [FTC and false advertising of oleomargarine], it seems that a substance designed to be used as a substitute for butter containing at least 40% butterfat must be included within the class of substances classified as oleomargarine or margarine since a contrary conclusion would lead to the contradictory result of regulating by sub. 97.46 (1) the advertising and sale of a substance whose sale was prohibited by sec. 97.39.

Since no other definition of "oleomargarine" or "margarine" appears in the Wisconsin Statutes and since the present definition of oleomargarine and margarine contained in 139.60 (1) (a), Stats., as amended, was that contained in the same bill as the provision amending 97.39 (3), the tendency to read these two statutes together and to regard the scope of the terms oleomargarine and margarine in the one section as being coextensive with that in the other section is compellingly strong. Thus, having subsumed the dairy margarine blend mentioned in subs. 97.46 (1), Stats., as amended, under the class of substances permitted to be sold under the exemption of 97.39 (3), Stats., as amended, and having equated the definition of oleomargarine and margarine implicit in sub. 97.39 (3), Stats., as amended, to that definition explicitly stated in subs. 139.60 (1) (a), Stats., as amended, we arrive at the result that the dairy margarine blend of subs. 97.46 (1), Stats., as amended, is subject to the tax of sec. 139.60, Stats., as amended.

The clear language of the statutes compels the above conclusion. Moreover, the legislative history also dictates the conclusion that the 40% butterfat product is taxable. The main arguments in this respect follow:

I

A. B. 165, which eventually became ch. 100, Laws 1967, was introduced by 27 assemblymen on February 9, 1967. The bill as introduced was in exactly the same form as sec. 4 of A. B. 359. Sec. 4 was vetoed by the governor on May 24, 1967, when he otherwise approved A.B. 359 which thereupon became ch. 42, Laws 1967. Sec. 4 of A. B. 359 as vetoed by the governor and A. B. 165 as introduced provided:

"No person shall use in any way in connection or association with the sale or exposure for sale or advertisement of any substance designed to be used as a substitute for butter, the word 'butter,' 'cream,' 'creamery' or 'dairy,' either alone or in combination with other words, except as required by s. 97.45, or the name or representation of any breed of dairy cattle, or any combination of such words and representation, or any other words or symbols or combinations thereof commonly used in the sale of butter *unless 40% of the fat used in the substance is butterfat. If the term 'butter' is used in connection with the name of any such product, it shall be qualified so as to distinguish it from butter as defined in s. 97.02 (8).*"

The governor's message accompanying the veto of sec. 4 stated:

"Assembly Bill 359 concludes many years of legislative wrestling with the colored margarine issue. I have signed the bill, vetoing Section 4 which legislators agree was erroneous, and did not express the purpose intended.

"Section 4 of the bill proposes to amend the existing law to authorize a low fat butter or dairy spread in which at least 40 per cent of the total fat content is butter fat. The amendment would, in effect, prevent the sale of a competitive low fat spread and would permit the sale of products which might be misleading to the consumers and unfair to the dairy industry. I recommend that the Legislature promptly consider Bill 165 A, or other bills now pending to

clarify their intent and permit the manufacture and sale of low fat butter or dairy spread."

Eight weeks after the introduction of A. B. 165 and seven weeks before the governor's veto of its twin provision in A. B. 359, Assemblyman Hephner offered on April 5, 1967, A. Sub. Amend. 1 to A. B. 165. Sub. Amend. 1 would have provided for a low fat all-dairy butter containing at least 35% milk fat (as opposed to the 80% milk fat required of statutorily-defined butter, sec. 97.02 (8), Stats.) and no other fats or oils. Assemblyman Hephner's substitute amendment also contained an explicit exemption for this product from the tax imposed by sec. 139.60 (1) (a), Stats., 1965. A. Sub. Amend. 1 was rejected on April 6, 1967. On the same day, Assemblymen Heinzen and L. H. Johnson introduced A. Amend. 2 which amended A. B. 165 to read as follows:

"No person shall use in any way in connection or association with the sale or exposure for sale or advertisement of any substance designed to be used as a substitute for butter, the word 'butter,' *or any word or term containing the word butter*. 'Cream,' 'creamery' or 'dairy,' either alone or in combination with other words, except as required by s. 97.45, or the name or representation of any breed of dairy cattle, or any combination of such words and representation, or any other words or symbols or combinations thereof commonly used in the sale of butter *may not be used unless 40% of the fat used in the substitute is butterfat.*"

Amend. 2 was adopted on the same day as introduced and, one week later, on April 13, 1967, the assembly passed Bill 165 as amended. The senate deleted the last nine words of the first sentence of the bill as passed by the assembly and added the sentence which appears as the last sentence in ch. 100. In this form the senate approved the bill on June 21, 1967, and the assembly concurred in the senate's amendment on June 27, 1967, just 3 days before the new oleomargarine regulations and tax were to become effective under the provisions of ch. 42. Thus, during the time when the regulation and taxation of oleomargarine was of great concern to the Wisconsin legislature, there were four cir-

cumstantial indications of the intent of the legislature to include the dairy-margarine blend within the scope of the definition and tax of sec. 139.60 as amended.

1. The inclusion as sec. 4 of A. B. 165 (as introduced) in the A. B. 359 presented to the governor, which bill contained the amendment of the definition of oleomargarine and margarine.

2. The governor's veto of sec. 4 on May 24, 1967, and his recommendation at that time of A. B. 165 which was then pending before the senate, having been passed by the assembly on April 13, 1967.

3. The assembly's rejection of A. Sub. Amend. 1 to A. B. 165 on April 6, 1967, which amendment contained an explicit exemption of the low fat all dairy butter there defined from the tax imposed by subs. 139.60 (1) (a), Stats., 1965.

4. Final passage by both the senate and the assembly of A. B. 165 in late June just prior to the effective date of ch. 42, which imposed the 5¼% tax under discussion, without inclusion of an explicit exemption as was embodied in the rejected A. Sub. Amend. 1.

II

The second additional argument in support of the position taken in this opinion comes from the history of subs. 139.60 (1) (a) and the generally broad scope given to its application. Subs. 139.60 (1) (a) as amended by ch. 42, Laws 1967, provides in part:

"For the purposes of this section 'oleomargarine' or 'margarine' includes oleomargarine, margarine, butterine and other similar substances, fats and fat compounds sufficiently adaptable to the ordinary uses of butter, to lead readily to use as an alternative to butter, but this section shall not apply to. . . ."

Applying the ordinary meaning of the terms above quoted to the dairy-margarine blend of sec. 97.46 leads to the result that the dairy-margarine blend is comprehended within the class of substances designated as "oleomargarine" or "margarine." Being a compound of butterfat and non-dairy fats intended to be adaptable to the ordinary uses of butter, the dairy-margarine blend comes within "fats and fat com-

pounds sufficiently adaptable to the ordinary uses of butter." Furthermore, Webster's *International Dictionary*, 2nd Ed., defines butterine as "artificial butter, or oleomargarine, especially when made with the addition of butter."

An explicit definition of oleomargarine was, for the first time, introduced into the state oleomargarine regulations nearly 30 years ago (ch. 432, Laws 1939; sec. 97.42, Stats., 1939). During the intervening time, that definition has been modified only three times, twice in 1943 (chs. 61 and 174, Laws 1943) and finally by ch. 42, Laws 1967. The definition has been characterized by broadness of language along with the inclusion of specific exceptions. Ten weeks prior to the enactment of ch. 432, Laws 1939, Attorney General John E. Martin issued an opinion, 28 OAG 436 (1939), construing the scope of the word "oleomargarine" in the then current statute, sec. 97.42 (1) (a), Stats., 1937. The opinion treated the combined sale of Jelke's Good Luck Vegetable Shortening and Jelke's Good Luck Vitamin Fortifier where the circumstances of the sale led to the inference that the two products would be physically combined and subsequently used as a butter substitute. The attorney general held that under these conditions the product should be taxed under sec. 97.42, Stats. (1937). A major factor in taxing the product as oleomargarine was its use as a butter substitute.

In conclusion, it is my opinion that the dairy-margarine blend of sec. 97.46, Stats., as amended by ch. 100, Laws 1967, should be classified as "oleomargarine" or "margarine" as those terms are defined in subs. 139.60 (1) (a) as amended by ch. 42, Laws 1967. Therefore, if this product meets the color test described in subs. 139.60 (1) (b) as amended by ch. 42, then it should be taxed as colored oleomargarine as provided in subs. 139.60 (2) (a) as amended by ch. 42.

BCL:JPA

Suit Tax—Municipal Courts—Additional $2 suit tax provided for in ch. 325, Laws 1967, does not apply under present legislation at the municipal court level. Ch. 276, Laws 1967, secs. 59.42 (1) (e), 271.21.

April 9, 1968.

ROBERT A. KENNEDY
District Attorney
Forest County

You have requested my opinion whether the additional $2.00 suit tax provided for in ch. 325, Laws 1967, the so-called "district attorneys' salary act", is to be assessed at the municipal court level in criminal cases or actions for the violation of traffic regulations enacted under sec. 349.06, Stats.

The answer to your question is in the negative.

Sec. 2, Art. VII, Wis. Const., formerly vested the judicial power of the state in "supreme court, circuit courts, courts of probate, and in justices of the peace", and granted the legislature power to establish municipal courts and inferior courts.

The statutes did not provide for a suit tax at the justice court level at the time the constitution was amended in 1966 to eliminate the constitutional office of justice of the peace, and one reason that they did not is that the constitution did not require it.

Sec. 18, Art. VII, Wis. Const., provides:

"Suit tax. SECTION 18. The legislature shall impose a tax on all civil suits commenced or prosecuted in the municipal, inferior or circuit courts, which shall constitute a fund to be applied toward the payment of the salary of judges."

The requirement of imposition of a suit tax to constitute a fund to be applied toward the payment of judges must be complied with by the legislature; however, it would not, in my opinion, prohibit the legislature from establishing an additional suit tax for other purposes. The additional suit tax provided for in ch. 325, Laws 1967, is not, in any event, earmarked for payment of state aids for district attorneys' salaries.

The legislature has not provided for the imposition of a suit tax at the municipal court level at least in cases where a municipal court is not a court of record. See 42 OAG 269

as to applicability of suit tax to municipal courts created by special act with power as a court of record.

We no longer have municipal justice courts or municipal justices of the peace. By reason of ch. 276, Laws 1967, effective January 13, 1968, such courts became municipal courts and the presiding officer, municipal justice. It is a court which may be created at the option of a city, town or village. Newly created sec. 254.01 (1), expressly provides that it is not a court of record. Sec. 254.04, Stats., provides that the municipality shall pay the municipal justice a salary and that fees and taxable costs shall be paid into the municipal treasury. Sec. 38 of ch. 276 amended sec. 960.34 to provide that fines collected shall be paid to the county treasurer within 30 days after receipt. Ch. 276, Laws 1967, also made it clear that fees in municipal courts are to be governed by the provisions of sec. 307.01, however, the statute does not make it clear that the other provisions of ch. 307, as to costs and the taxation thereof, with the exception of sec. 307.10 which is expressly referred to, are applicable to municipal courts.

It is my opinion that they are, although further legislative clarification is desirable. See 51 OAG 17 which states that taxable costs in municipal justice of the peace courts are the same as in justice courts. However, that opinion was based in part on the express language of secs. 62.24 (3) (e), 60.595, 61.305 which were repealed by ch. 276, Laws 1967. Also see 54 OAG 28.

The intent of ch. 276 was to substitute the terms municipal court and municipal justice for municipal justice of the peace, justice of the peace and justice and it appears to have been a drafters' error, or a determination of lack of need that all sections using the outmoded language were not referred to.

The drafters may have been of the opinion that since secs. 307.02, 307.03, 307.05, 307.06 and 307.08, used the word "justice" and not "justice of the peace" that the former was broad enough to include municipal justice. See secs. 39 and 40 of ch. 276, Laws 1967.

In any event municipal courts are not courts of record.

Ch. 325, Laws 1967, created sec. 59.42 (1) (e) to provide:

"An additional fee of $2 shall be assessed against the defendant and when paid by him shall be paid into the state treasury."

This adds an additional fee to be taxed in criminal actions, however the introductory language of sec. 59.42 provided:

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

Ch. 276, Laws 1967, substituted the words "municipal court" for "justice court" in the introduction and in sec. 59.42 (3) which as amended refers to suit tax to be paid on appeal from a municipal court.

Ch. 325, Laws 1967, also amended sec. 271.21, Stats., to provide that:

"An additional suit tax of $2 shall be collected from defendants in all actions for violations of traffic regulations enacted under s. 349.06, and shall be paid into the state treasury."

A reading of the preliminary portion of sec. 271.21, Stats., not quoted here, discloses that the section is concerned with the suit tax to be charged in circuit and county courts, both of which are courts of record. The title to the section is merely "suit tax" and does not indicate any legislative intent, however the section appears in ch. 271 which is entitled "Costs and Fees In Courts of Records."

In statutory construction "reference may be made to the headings of portions of statutes, such as titles, articles, chapters and sections * * *" 82 C.J.S., Statutes § 350, 734. *Wisconsin Valley Imp. Co. v. Public Service Comm.*, (1960) 9 Wis. 2d 606, 618, 100 N.W. 2d 798.

It is my opinion that the suit tax provided in sec. 271.21, Stats., is applicable only in courts of record, absent a specific

statute which may make the tax applicable to some other court, and that neither ch. 276, Laws 1967, nor ch. 325, Laws 1967, make sec. 271.21, Stats., applicable to municipal courts created or existing pursuant to ch. 276, Laws of 1967.

The legislative oversight occurred apparently because municipal justice of the peace courts were not considered municipal or inferior courts and substantial dependence was made on statutes governing justice courts with respect to practice and costs and the legislature had not required a suit tax in such courts. In the enactment of ch. 276, Laws 1967, the legislature tried to remodel justice court statutes to fit the needs of the newly authorized municipal courts. A suit tax should not be charged in such courts which are not courts of record until the legislature fills the void. The additional suit tax of $2 specified in sec. 271.21, Stats., is applicable where a case is transferred to county court or appealed to circuit court.

BCL:RJV

Lotteries—Referral Sales Transactions—Discussion of the applicability and effect of sec. 945.01 (2) on five types of referral sales transactions and the authority of the department of agriculture to prohibit such transactions as unfair methods of competition or unfair trade practices under sec. 100.20 (2), Stats.

April 24, 1968.

D. N. MCDOWELL
Secretary of Agriculture

You have requested my opinion as to whether certain referral sales transactions set forth in fact situations one to five below constitute a lottery under sec. 945.01 (2), Stats., and whether the department of agriculture has the authority under sec. 100.20 (2), Stats., to prohibit such transactions as unfair methods of competition or unfair trade practices.

Referral selling plans are devices used primarily by door-

to-door sales companies to obtain sales leads. Although individual referral plans differ in many respects, they all contain as a common ingredient the offer of some type of reward to the buyer in return for the submission of names of potential customers to the seller. As you point out, many of these plans have in recent years become more intricate in operation and have fallen into disrepute.

I.

Sec. 945.01 (2) (a), Stats., reads as follows:

"(2) LOTTERY. (a). A lottery is an enterprise wherein for a consideration the participants are given an opportunity to win a prize, the award of which is determined by chance, even though accompanied by some skill."

The three essential elements of a lottery as set forth in sec. 945.01 (2) (a), Stats., are "a prize, chance, and a consideration." *State ex rel. Cowie v. La Crosse Theaters Co.*, (1939) 232 Wis. 153, 158, 286 N.W. 707. "Prize" is often defined as anything of value offered as an inducement to participate in a scheme. 34 Am. Jr., Lotteries, sec. 5. The generally accepted definition of "chance" is Justice Holmes' succinct statement that "What a man does not know and cannot find out is chance as to him, and is recognized as chance by the law." *Dillingham v. McLaughlin*, (1924) 264 U.S. 370, 373, 44 S. Ct. 362, 68 L. Ed. 742. "Consideration" is defined in subs. (2) (b) of sec. 945.01, Stats., as "* * * anything which is a commercial or financial advantage to the promoter or a disadvantage to any participant * * *." In order to constitute a lottery, each of these three elements of prize, chance and consideration must be present in any given scheme.

With this background your five cases will be separately considered.

FACT SITUATION ONE

"Seller (S) offers to pay buyer (B) a certain sum of money for each name of a prospective buyer (P) that B submits to S within a specified period of time:

"B is not required to do anything else. There is no condition that S make a sale to P."

There is no question but that the elements of prize and consideration are present in this situation. The prize consists of the money which the buyer receives upon submitting names and the consideration consists of the purchase money the buyer must pay to entitle him to participate in the referral plan. In my opinion, however, the element of chance is absent in this type of transaction. The buyer is assured that he will receive a certain sum of money for each name submitted within a specified period of time. Under such circumstances, the buyer maintains effective control over the amount of money he receives, thus negating the element of chance.

It is therefore my opinion that this transaction does not constitute a lottery under sec. 945.01 (2), Stats.

FACT SITUATION TWO

"Seller (S) offers to pay buyer (B) a certain sum of money for each name of a prospective buyer (P) that B submits to S within a specified period of time:

"The offer is conditioned on whether S makes a sale to P."

This is the most common type of referral sales plan. It operates in much the same manner as the familiar chain letter in that success or failure is contingent upon a future event, namely the purchase of the seller's product by one or more of the persons referred by the buyer. Moreover, as with the chain letter, the list of prospects increases in geometrical progression, ultimately exhausting the potential market. For these reasons, this type of transaction is sometimes called a "chain" referral sale.

Although there have been no court decisions in Wisconsin involving the question whether chain letter type schemes constitute lotteries, such schemes have been held to be contrary to public policy and void. In *Twentieth Century Company v. Quilling,* (1906) 130 Wis. 318, 110 N.W. 174, the Wisconsin supreme court refused to enforce a scheme in which territorial rights to sell a product were sold to persons who would in turn sell similar territorial rights to

others, and so on ad infinitum. The court condemned the endless chain aspect of the arrangement as follows [130 Wis. at page 324]:

"We are unable to regard such a project as a legitimate business enterprise. How large would be the number of purchasers who would be induced by the prospect of large returns for little labor to join the scheme it is impossible to say or even speculate. Each purchaser would be desirous to get back at least as much as he had invested. In order to do this, the first purchaser under the most favorable circumstances would have to sell rights aggregating $1,000, the second purchaser would have to sell rights aggregating $2,000, and thus the necessity of finding victims would increase in geometrical progression until the purchasers who are in the tenth place from the original purchasers must, in order merely to reimburse themselves, find others who would pay more than half a million dollars. Of course, it is not likely that the scheme would last so long as this, but, however long it lasts, it will infallibly leave a greater or less crowd of dupes at the end with no opportunity to recoup their losses because the bubble has at last burst. It contemplates an endless chain of purchasers, or rather, a series of constantly multiplying endless chains, with nothing but fading rainbows as the reward of those who are unfortunate enough to become purchasers the moment before the collapse of the scheme. While contemplating large gains to the original promoters and early purchasers, it necessarily contemplates losses to the later purchasers; losses increasing in number with the greater success of the scheme. * * *"

This office subsequently concluded in 38 OAG 152 that a chain letter type scheme known as the pyramid club was illegal as a lottery. The element of chance was found to be present since financial success or failure was dependent upon a number of unpredictable future contingencies such as whether additional members would be recruited and whether the supply of new recruits would give out before the player earned any money. Various chain letter type schemes have also been declared illegal as lotteries under the mail lottery statute, 18 USC sec. 1302. See, for example,

Public Clearing House v. Coyne, (1904) 194 U.S. 497, 24 S. Ct. 789, 48 L. Ed. 1092; *New v. Tribond Sales Corp.,* (1927) 19 F. 2d 671. In addition, chain letter schemes have been held to be lotteries in the states of Illinois and California. *Kent v. City of Chicago,* (1939) 301 Ill. App. 312, 22 N.E. 2d 799; *Niccoli v. McClelland,* (1937), 21 Cal. App. 2d Supp. 759, 65 P. 2d 853.

In recent years there has been extensive litigation involving the question whether referral sales plans substantially identical to the plan set forth in fact situation two constitute lotteries. In two states, Ohio and Oklahoma, such plans were held not to constitute a lottery. *Yoder v. So–Soft of Ohio, Inc.,* (1963) 30 Ohio 2d 566, 202 N.E. 2d 329; *Krehbiel v. State,* (1963, Okla.) 378 P. 2d 768. Thereafter the courts of three states, Kentucky, New York and Washington, held such plans to be in violation of their respective lottery laws. *Commonwealth v. Allen,* (1966, Ky.) 404 S.W. 2d 464; *State of New York v. ITM, Inc.,* (1966) 52 Misc. 2d 39, 275 N.Y.S. 2d 303; *Sherwood & Roberts-Yakima, Inc. v. Leach,* (1965) 67 Wash. 2d 630, 409 P. 2d 160, 14 ALR 3d 1411. The attorneys general of at least three other states, Delaware, Massachusetts and Missouri, have also recently concluded that such plans violate the lottery laws of their states.

It appears from the foregoing that there is a discernable trend throughout the country toward declaring this type of referral selling to be illegal as a lottery. This seems to be in part a recognition of the inherent nature of such referral sales plans as chain letter type schemes that will eventually exhaust themselves by running out of potential purchasers. Nowhere is this concept more clearly enunciated than in the following statement in *Sherwood & Roberts-Yakima, Inc. v. Leach, supra,* 409 P 2d at pages 163-164:

"* * * the trial court properly held that chance permeates the entire scheme. The court found that respondents took a chance that the referrals might not be interested; that the salesman might not adequately make his presentation; that the referral might have already been referred by someone else; that the market might be saturated; and that the salesman might not even contact the referral. In addition, the trial court noted that respondents have no control over the

general operation after they have the names of referrals. In fact, respondents were told not to contact the referrals before the Lifetone salesman made his presentation, and respondents were told to emphasize the money-making program in case the referrals contacted them. Appellant argues that the want of control is not a legitimate factor to consider. This argument is tenuous.

"The lack of control feature in referral selling is much broader than that designated by the trial court. It is inherent in referral selling that purchasers such as respondents be without control. Sooner or later, the market, unknowingly to the purchasers, will become saturated. This principle is the same as in the chain letter scheme. The case at hand is a classic example.

"The Lifetone salesman told respondents that they could get something for nothing through the referral selling scheme. Respondents are obligated to pay $1,187.28 for equipment costing $225.32. For ease of demonstration, respondents must earn 12 commissions of $100 each in order to get, as promised, something for nothing. This means that 12 of respondents' referrals must purchase as respondents did; they, in turn, to get something for nothing, must find 12 more people to purchase, and so forth, as follows:

	Number of Purchasers
	1
1st round	12
2nd round	144
3rd round	1,728
4th round	20,736
5th round	248,832

"Soon the scheme will run itself out; the market will become saturated. Here, Lifetone made its first sale in May, 1963, and its last sale in October, 1963. The respondents entered the picture in September. They gave the Lifetone salesman approximately 60 names at that time, and they never received a commission. In fact, only $14,900 in commissions were paid in the Yakima area, while the total number of sales was 137, totalling $129,947.04 (without finance charges).

"Respondents took a chance on whether they could get

something for nothing. This chance permeates the entire scheme of referral selling. This court holds that the referral selling scheme is a lottery."

The Sherwood & Roberts case is persuasive and compeling authority for the proposition that this type of referral sales plan is illegal as a lottery. This is particularly so in Wisconsin where the "legislature, the courts, and the attorney general * * * have traditionally taken a restrictive view of games, schemes, and plans involving a prize, chance, and consideration, condemning them as lotteries prohibited by the Constitution." *Kayden Industries, Inc. v. Murphy,* (1967) 34 Wis. 2d 718, 724, 150 N.W. 2d 447.

It is therefore my opinion that the transaction set forth in fact situation two constitutes a lottery as defined by sec. 945.01 (2), Stats.

FACT SITUATION THREE

"Seller (S) offers to pay buyer (B) a certain sum of money for each name of a prospective buyer (P) that B submits to S within a specified period of time:

"B also is required to contact P and inform him that S will be calling on P, or to arrange an appointment with P for S. There is no condition that S make a sale to P."

This transaction is substantially similar to fact situation one except that the buyer must expend more effort to obtain the money offered for referring names of prospective customers. The buyer, however, maintains effective control over the amount of money he receives so that chance plays at most a negligible role in the transaction.

It is therefore my opinion that this transaction does not constitute a lottery under sec. 945.01 (2), Stats.

FACT SITUATION FOUR

"Seller (S) offers to pay buyer (B) a certain sum of money for each name of a prospective buyer (P) that B submits to S within a specified period of time:

"B also is required to contact P and inform him that S will be calling on P, or to arrange an appointment with P

for S. The offer is conditioned on whether S makes a sale to P."

This transaction possesses certain characteristics of both fact situations two and three in that the buyer must play an active role in arranging the appointment for the seller and the prospective customer must purchase the product involved to entitle the buyer to any earnings.

One might contend that an industrious and persuasive buyer could virtually eliminate the element of chance through his contact with the prospective customer. However, such cases would be rare indeed. The buyer must still rely upon the seller to consummate the sale with the prospective customer and chance still predominates in the operation of the scheme. In fact, all of the elements of chance set forth in the following quotation from *State of New York v. ITM, supra,* 275 N.Y.S. 2d at page 327, would still be applicable in this transaction:

"Whether the respondents would use the given names, whether the 'salesman' sent to visit the referrals would be a good one or mediocre, whether he would even get there (in the light of so much testimony as to broken dates), whether he would be enthusiastic or deliberately 'spike the deal', whether he would make side deals, whether the persons referred would enroll, whether both husband and wife would agree to enroll, whether the market was already saturated, whether the product offered to prospects would be the same already possessed by them—these and many other considerations were all factors which would influence the enrollment of prospects, and all were outside the control or influence of the consumers, particularly under the factual situations disclosed at the trial of this case. There were no rules or established standards that could be depended upon by the victims."

It is therefore my opinion that this transaction constitutes a lottery under sec. 945.01 (2), Stats.

FACT SITUATION FIVE

"Same fact situations as in 1 through 4 above, except that in each case S also offers to pay B an additional sum of

money; for each name of other prospective buyers (X) that P submits to S; or for each appointment that P makes with X for S; or for each sale that S makes to X resulting from some participation by P as described above."

This type of transaction is commonly called a two-level referral sale since the buyer is offered the opportunity to earn money not only for the names of prospective customers that he submits but also for the names submitted by the prospective customers in the event they make a purchase. Consequently, the element of chance becomes even more pervasive under a two-level referral plan.

You first set forth the situation where the seller offers to pay the buyer an additional sum of money for each name submitted by the second level buyer. The first level of the plan, of course, is identical to fact situation one and, thus, does not constitute a lottery. However, in order to set the second level of the plan into operation, one or more of the prospective customers referred by the buyer must in turn make a purchase and submit names. As a result, the applicability of the second level of the plan is contingent upon a subsequent sale in exactly the same manner as was fact situation two. It is further contingent upon the number of names submitted if and when the second level is reached.

The identical contingency also exists under plans in which the seller offers to pay the buyer an additional sum of money for each appointment that the second level buyer makes with other prospective customers. Since level two of the plan remains inoperative unless and until one or more of the prospective customers referred by the buyer actually makes a purchase, chance permeates the plan as it did in fact situation two. The buyer also takes the chance that appointments will be made if and when the second level is reached.

The most common type of two-level referral plan is the situation in which the seller offers to pay the buyer an additional sum of money for each sale made to the second level of prospective customers. The buyer under this type of referral plan takes all the chances described in fact situation two under the first level of the plan. Assuming the second level is reached, the original buyer must rely upon blind chance with respect to the number of names that are then

referred to the seller and the number of sales that result from such referrals. At that point, he most likely has no knowledge as to who, if anyone, is being referred and thus any remaining influence over his ultimate earnings is dissipated. Such a two-level referral plan was held to be a lottery in violation of 18 USC sec. 1302 in *Zebelmen v. U.S.*, (10th Cir., 1964) 339 F2d 484.

It is therefore my opinion that each of the transactions set forth in fact situation five is a lottery under sec. 945.01 (2), Stats.

II.

You next ask whether, assuming there are facts to substantiate that one or more of the referral plans described in question one have resulted in unfair methods of competition or unfair trade practices in business, the department has the authority under sec. 100.20 (2), Stats., to prohibit referral selling per se, as contrasted to regulating deceptive or misleading advertising and sales presentations involving referral selling.

Sec. 100.20 (2), Stats., reads as follows:

"(2) The department, after public hearing, may issue general orders forbidding methods of competition in business or trade practices in business which are determined by the department to be unfair. The department, after public hearing, may issue general orders prescribing methods of competition in business or trade practices in business which are determined by the department to be fair."

Sec. 100.20, Stats., is generally based upon sec. 5 of the Federal Trade Commission Act of 1914, 15 USC sec. 45. However, the rule-making power delegated to the department of agriculture under subs. (2) is far greater than that of the federal trade commission since orders adopted by the department have the force and effect of statutory law. *State v. Texaco,* (1961) 14 Wis. 2d 625, 629, 111 N.W. 2d 918. Indeed, it appears that the department's rule-making authority under subs. (2) exceeds that of any other state administrative agency operating in this area in the nation. See Note, Developments in the Law, Deceptive Advertising, 80 Harv. L. Rev. 1005, 1119-1134 (1967).

Sec. 100.20, Stats., has been upheld as a valid delegation

of legislative power. *Ritholz v. Ammon,* (1942) 240 Wis. 578, 586, 4 N.W. 2d 173. This decision was based upon an earlier opinion, *In re Petition of State ex rel Attorney General,* (1936) 220 Wis. 25, 264 N.W. 633, which upheld the power of the legislature under the second Wisconsin Recovery Act to delegate to the governor the authority to promulgate codes or standards of unfair methods of competition and unfair trade practices in business. In that opinion the court delimited the power to promulgate codes of unfair methods of competition and unfair trade practices as follows [220 Wis. at pages 40-41]:

"* * * The conclusion at which we have arrived is not an unreasonable one if we analyze the effect of an exercise of the power which we hold to be conferred. Methods of competition in business and trade practices are divided by the act into two classes—those which are fair and those which are unfair. If from the whole body of methods of competition in business and trade practices we eliminate those which are unfair, those which remain are fair methods of competition and fair trade practices. There is a vast fundamental difference between the power to make a rule and regulation which will eliminate an unfair trade practice or unfair method of competition in business, discovered upon investigation, and the power to prescribe a code of fair competition. * * * A rule or regulation whether in the affirmative or negative may eliminate such a practice. However, there may be many parallel fair trade practices. Suppose in a particular respect there are a dozen. The power to choose one among these fair trade practices and fair methods of competition and require conformity to that practice or method and so denounce all others as unfair is to exercise the kind of legislative power that may not be delegated because there is no standard which governs the action of the administrative agency in making its choice. When it picks out one method or practice from a group of fair methods and fair practices, it exercises pure legislative discretion. That particular method or practice so chosen cannot be discovered by any process of fact-finding. * * *"

It is clear from the above quotation that the department of agriculture cannot arbitrarily single out one fair practice

from a number of other fair practices and make it the sole standard of business conduct. The department does possess the authority, however, to adopt codes which either prohibit or regulate practices determined to be unfair. And, absent any conflicting statutory provisions, this authority would appear to extend to the practice of referral selling.

An examination of the Wisconsin Statutes fails to disclose any provision which would conflict with a code prohibiting the referral sales transactions set forth in fact situations one to five. On the contrary, the case of *FTC v. R. F. Keppel & Bros., Inc.*, (1934) 291 U.S. 304, 54 S. Ct. 423, 78 L. Ed. 814, indicates that those referral transactions which are a lottery under sec. 945.01 (2), Stats., are unfair methods of competition under sec. 100.20, Stats. In that case, the United States supreme court held that the use of a lottery to promote business constitutes an unfair method of competition in violation of sec. 5 of the Federal Trade Commission Act. The court stated its rationale as follows [291 U.S. at page 313]:

"* * * here the competitive method is shown to exploit consumers, children, who are unable to protect themselves. It employs a device whereby the amount of the return they receive from the expenditure of money is made to depend upon chance. Such devices have met with condemnation throughout the community. Without inquiring whether, as respondent contends, the criminal statutes imposing penalties on gambling, lotteries and the like, fail to reach this particular practice in most or any of the states, it is clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy. For these reasons a large share of the industry holds out against the device, despite ensuing loss in trade, or bows reluctantly to what it brands unscrupulous. It would seem a gross perversion of the normal meaning of the word, which is the first criterion of statutory construction, to hold that the method is not 'unfair.' * * *"

In accord are three state court decisions which enjoined businesses employing lotteries because they were unfair methods of competition. *Jones v. Smith Oil & Refining Co.*, (1938) 295 Ill. App. 519, 15 N.E. 2d 42; *Glover v. Mallosha,*

(1927) 238 Mich. 216, 213 N.W. 107; *Featherstone v. Independent Service Station Association,* (1928, Texas Civ. App.) 10 S. W. 2d 124.

Referral sales transactions have also been attacked on other grounds. The United States post office department has taken the position that the use of the mail to further a referral scheme violates the postal fraud statute, 18 USC 1341. A number of federal district court decisions and at least two court of appeals decisions have sustained this position. *Blachly v. U.S.,* (5th Cir., 1967) 380 F2d 665; *Fabian v. U.S.,* (8th Cir., 1966) 358 F2d 187. Numerous state court decisions have also struck down referral plans as fraudulent schemes. See 14 ALR 3d 1420, "Enforceability of Transaction Entered Into Pursuant to Referral Sales Arrangement." In *State of New York v. ITM, Inc., supra,* a referral sales scheme was held to be unconscionable under the provisions of sec. 2-302 of the Uniform Commercial Code, and in *Sentinel Acceptance Corporation v. Colgate,* (1967, Colo) 424 P2d 380, a referral sales agreement was declared to be an illusory contract. In other states referral selling has been regulated or abolished by other means. See generally Dodge, Referral Sales Contracts: To Alter or Abolish?, 15 Buffalo L. Rev. 669 (1966).

Each of the above attacks on referral selling has been directed at those referral transactions in which the earning of money by the purchaser is contingent upon future sales of the seller's product. These are the same transactions, namely fact situations two, four and five above, which in my opinion constitute a lottery under sec. 945.01 (2), Stats. There is no question but that these transactions amount to unfair methods of competition or unfair trade practices under sec. 100.20 (2), Stats. Not only does there exist an interrelationship between the lottery and trade practice laws as suggested by the United States supreme court in *FTC v. R. F. Keppel & Bros., Inc., supra,* but there is extensive authority to the effect that these types of transactions are inherently abusive and contrary to public policy.

It is therefore my opinion that the department of agriculture has the authority under sec. 100.20 (2), Stats., to prohibit the referral selling transactions set forth in fact situations two, four and five above.

With respect to fact situations one and three, there is little or no authority to the effect that these types of transactions have been abusive. However, assuming there is substantial evidence to support a finding that these types of transactions have resulted in unfair methods of competition or unfair trade practices, it is my opinion that the department would have the authority to prohibit such transactions under sec. 100.20 (2), Stats.

BCL:JDJ

Public Officials—District Attorney Now Judge—Under the provisions of sec. 256.19, Stats., a judge of a court of record, in the absence of consent of the parties, is disqualified from hearing or determining or issuing any order in any criminal action in which the information was signed by him as district attorney or by a deputy in his behalf.

April 28, 1968.

HUGH R. O'CONNELL
Milwaukee County District Attorney

Your letter points out that you have recently been elected as judge of the newly created branch 17 of the circuit court of the Second Judicial Circuit. That court, which is designated to specialize in the handling of criminal cases, will become operative on June 3, 1968 and on that date you will be installed as judge.

Your inquiry is whether you can or should determine cases which are assigned to you on and after June 3, which cases were initiated and processed through the district attorney's office while you were district attorney and in which the informations were issued over your signature or that of a deputy on your behalf. The answer to your inquiry is that you are disqualified and have no power to hear or determine or make any orders in such cases unless the parties thereto have consented.

Sec. 256.19, Stats., provides.

"Judges disqualified, when. In case any judge of any court of record shall be interested in any action or proceeding in such court or shall have acted as attorney or counsel for either of the parties thereto such judge shall not have power to hear and determine such action or proceeding or to make any order therein, except with the consent of the parties thereto."

In the case of *James v. State,* (1964) 24 Wis. 2d 467, 129 N. W. 2d 227, our supreme court interpreted sec. 256.19, Stats. It concluded that a judge, who in the past had been an assistant district attorney and, as such, had signed an information against a defendant, was disqualified from later imposing sentence on the defendant on that charge. It held that the judge had represented a party to the action. The court, further, p. 473, pointed out that even if sec. 256.19, Stats., did not disqualify the judge, he should have disqualified himself because "Such disqualification would seem to be a part of procedural due process embodied in the Fourteenth amendment of the United States constitution." Disqualification, of course, occurred only in the case where the judge had acted as attorney for the state and not in the subsequent and other cases involving the same defendant.

Your letter anticipates this conclusion and you then suggest that in the interests of expeditious handling of the very heavy Milwaukee county criminal calendar you resign as district attorney so that prior to June 3, 1968 a number of cases will accumulate in which you are not disqualified to act. This is an excellent suggestion and consistent with the best tradition of the Wisconsin judiciary.

BCL:BRB

State Building Code—University of Wisconsin—Wisconsin state building code applies to public buildings constructed for state, through building corporations, at university of Wisconsin. Compliance with code may be secured upon request by department of industry, labor and human relations to the regents of the university of Wisconsin.

May 10, 1968.

JOSEPH C. FAGAN, *Chairman*
Department of Industry, Labor and Human Relations

You inquire as to the procedure to be used by your department to secure compliance with the Wisconsin state building code in respect to buildings owned by the state at the university of Wisconsin. Some of these buildings already have been constructed for the state through so-called dummy building corporations, others are in the process of design and construction. All are public buildings, as defined by sec. 101.01 (12), Stats., located on land owned by the state.

By sec. 13.48 (13), Stats., the building corporation must comply with the Wisconsin state building code:

"Where any building, structure or facility is constructed for the benefit of or use of the state or any state agency, board, commission or department, by any nonprofit corporation pursuant to the terms of any lease, sublease or other arrangement, such construction shall be in compliance with all applicable state laws, codes and regulations * * * This subsection applies to any construction heretofore or hereafter commenced."

As an "owner" of such buildings within the definition of that term in sec. 101.01 (13), Stats., the state also is obligated to comply with the applicable provisions of the code. Although the state could not be subject to the penalty provisions of sec. 101.28, Stats., that section further provides:

"* * * It shall be the duty of all officers of the state, the counties and municipalities, upon request of the industrial commission, to enforce in their respective departments, all lawful orders of the industrial commission, insofar as the same may be applicable and consistent with the general duties of such officers."

Upon request to the board of regents of the university of Wisconsin, which governs the university and has custody and control of its property, appropriate steps will be taken to secure compliance with the Wisconsin state building code.

The building corporation, not being an agency or instrumentality of the state (*State ex rel. Thomson v. Giesel,* (1955) 271 Wis. 15, 37, 72 N.W. 2d 577), might be held liable for forfeitures under sec. 101.28, Stats., for failure to comply with code requirements. In practice, however, the state itself completely controls the design and construction of university buildings through the governor, regents, state building commission, and department of administration. See secs. 13.48, 16.85, and 36.06 (6), Stats.

BCL:GS

Highways—Rumble Strip—A highway having a strip of rough pavement between opposing lanes of traffic, known as a "rumble strip", chatter bar median or corrugated median, is not a "divided highway" within the meaning of secs. 340.01 (15) and 346.48 (1), Stats.

May 13, 1968.

EDWARD A. KRENZKE
Corporation Counsel
Racine County

You have requested my opinion as to whether a highway, so constructed that the opposing lanes of traffic are separated by a so-called "rumble strip", can be considered a "divided highway." If it cannot be considered a "divided highway", then the law requiring vehicles to be stopped for school buses would apply. This section reads as follows:

"346.48 Vehicles to stop for school busses loading or unloading children. (1) The operator of a vehicle which approaches from the front or rear any school bus which has stopped on a street or highway when the bus is equipped according to s. 347.25 (2) and when it is displaying flashing red warning lights, shall stop the vehicle not less than 20 feet from the bus and shall remain stopped until the bus resumes motion or the operator extinguishes the flashing red warning lights. This subsection does not apply to

operators of vehicles proceeding in the opposite direction on a divided highway."

A "rumble strip" is also known in highway engineering vernacular as a "chatter bar median" or "corrugated median." It is a strip of rough or corrugated pavement several feet wide, constructed between opposing lanes of traffic on a single roadbed. I am informed that the purpose of this type of construction is to stress a line of demarkation between opposing lanes of traffic without *preventing* left turns into driveways and is used in rural type construction where the volume of traffic does not warrant whole or partial access control.

Our statutes define a divided highway as follows:

" 'Divided highway' means a highway with 2 or more roadways separated by spaces not intended for the use of vehicular traffic." (See sec. 340.01 (15), Stats.)

The American Association of State Highway Officials' publication, "A Policy on Geometric Design of Rural Highways" (1965), a recognized national construction guide, makes this statement, in part, on divided highways:

"A divided highway is one with separated roadways for traffic in opposite directions. It may be located on a single roadbed or the two roadways may be widely separated. The width of median may vary and is governed largely by the type of area, character of terrain, intersection treatment, and economics. A highway is not normally considered to be a divided highway unless two full lanes are provided in each direction of travel and the median is 4 feet or more wide and constructed or marked in a manner to preclude its use by moving vehicles except in emergencies."

I am informed by the director of law enforcement of the division of motor vehicles that they have, by administrative interpretation, taken the position that highways with a corrugated type center division are not "divided highways" within the meaning of sec. 346.48 (1), Stats.

Upon consideration of the material above set forth, it is my opinion that the type of highways here discussed are not divided highways as far as interpretation of sec. 346.48

(1), Stats., is concerned, and that, therefore, traffic on both sides of the center division must stop on signal by school busses. It makes no difference as to the number of traffic lanes involved, since the law makes no exceptions in this regard.

BCL:REB

State Building Code—Foster Homes—A foster home which is licensed under the provisions of CH. 48, Stats., does not thereby become a public building within the meaning of CH. 101, Stats. The department of industry, labor and human relations cannot, by its rule-making powers, include a foster home by defining it as part of "children's homes".

May 14, 1968.

JOSEPH C. FAGAN, *Chairman*
Department of Industry, Labor and Human Relations

You ask whether your department now has jurisdiction over a foster home, licensed by the state department of health and social services, which you believe to be a public building subject to the state building code. You give no other facts other than that the home is licensed as a foster home for eight children and that such a facility was not a public building in 1949.

As stated in a previous opinion, the authority and jurisdiction of the department of industry, labor and human relations is limited to buildings defined in CH. 101 as places of employment and public buildings for the safety of employees, frequenters or tenants (See secs. 101.09, 101.10, 101.11; 38 OAG 31, and 55 OAG 77).

I find no changes in the statutes or case law which would authorize the department of industry, labor and human relations to extend the definition of places of employment and public buildings to include foster homes licensed under CH. 48, Stats.

By definition, Ch. Ind. 57, Wis. Adm. Code, is made ap-

plicable to "* * * children's home * * * and other places of abode * * *". (Ind. 57.001) Although administrative interpretation is given considerable weight (*State v. Grayson,* (1958) 5 Wis. 2d 203, 210-211, 92 N. W. 2d 272) and regulatory agencies may make practical determinations (*State v. Fischer,* (1962) 17 Wis. 2d 141, 145, 115 N. W. 2d 533), rules are not valid if they exceed the bounds of correct interpretation. Sec. 227.014 (2) (a), Stats.; 55 OAG 120; *State ex rel. Baranowski v. Koszewski,* (1947) 251 Wis. 383, 29 N. W. 2d 764; *Basic Products Corporation v. Dept. of Taxation,* (1963) 19 Wis. 2d 183, 186, 120 N. W. 2d 161.

Interpretations by the attorney general have important bearing upon statutory meaning, and particularly when such interpretation has been of long standing. The legislature has acquiesced with the contemporaneous interpretation of the statute. *State ex rel. West Allis v. Dieringer,* (1957) 275 Wis. 208, 220, 81 N. W. 2d 533.

It is therefore my opinion that there is no need to change the former ruling in 38 OAG 31 to the effect that the placing of children in a licensed foster home does not change the status of a private home to a public building.

BCL:RGM

Insurance for Attorney Fees—Workmen's Compensation Claim—Proposed insurance which would indemnify an employee for his attorney fees upon his prosecution of workmen's compensation claim is permissible under sec. 201.04 (4), Stats. Also secs. 102.26, 102.28, 102.29, 102.30, 102.31, 204.04 (16), 204.04 (17), 204.31, and 204.31 (3) (b) 6 discussed.

June 4, 1968.

ROBERT D. HAASE
Office of Commissioner of Insurance

You have written me that a licensed insurance company has submitted a policy form for your approval which contains the following:

"Insuring Agreement

"The Company agrees to pay on behalf of the Insured the legal fees awarded by the Workmen's Compensation Division of the Department of Industry and Human Relations or Courts in respect to questions of legal liability resulting from a Workmen's Compensation claim, under the Workmen's Compensation law, seeking benefits or alleging injury and seeking damages on account thereof from the Insured's employer."

"Definition

"Workmen's Compensation Law is the law as defined in Chapter 102 of Wisconsin State Statutes."

You ask whether this insurance coverage may lawfully be written in Wisconsin and, if so, which subsection of sec. 201.04, Stats., constitutes authority for such kind of insurance.

Notwithstanding a certain lack of clarity in the language of the above quoted insuring agreement, it is my understanding that the coverage which the insurer would seek to provide amounts to a reimbursement to the insured for attorney fees which he has paid or for which he is liable where the insured has made a claim under the Wisconsin workmen's compensation act (CH. 102, Stats.). These attorney fees are regulated by law. Sec. 102.26 (2), et seq., provides:

"(2) Unless previously authorized by the commission, no fee shall be charged or received for the enforcement or collection of any claim for compensation, nor shall any contract therefor be enforcible, where such fee, inclusive of all taxable attorney's fees paid or agreed to be paid for such enforcement or collection, exceeds 20 per cent of the amount at which said claim shall be comprised or of the amount awarded, adjudged or collected, except that in cases of admitted liability where there is no dispute as to amount of compensation due and in which no hearing or appeal is necessary, the fee charged shall not exceed 10 per cent but not to exceed $100, of the amount at which such claim shall be comprised or of the amount awarded, adjudged or collected.

The limitation as to fees shall apply to the combined charges of attorneys, solicitors, representatives and adjusters who knowingly combine their efforts toward the enforcement or collection of any compensation claim.

"(2m) In any action for the recovery of costs of hospitalization in a tuberculosis sanatorium, where such cost was incurred by a patient whose tuberculosis entitled him to workmen's compensation, no attorney fee for the recovery of such cost shall be allowed to the attorney for such patient in such workmen's compensation action, unless, by express agreement with the governing board of such institution he has been retained by such governing board to also act as its attorney.

"(3) Compensation in favor of any claimant, which exceeds $100, shall be made payable to such claimant in person; however, in any award the commission shall upon application of any interested party and subject to the provisions of sub. (2) fix the fee of his attorney or representative and provide in the award for payment of such fee direct to the person entitled thereto. At the request of the claimant medical expense, witness fees and other charges associated with the claim may be ordered paid out of the amount awarded. Payment according to the directions of the award shall protect the employer and his insurer from any claim of attorney's lien."

Sec. 102.26 (4) prohibits the charging or receiving of an excess fee and provides a penalty therefor.

As the language of the above quoted statute indicates, the department of industry, labor and human relations (ILHR) does not really "award" any attorney fees. ILHR department may authorize attorney's fees in excess of 20%. In all other cases the attorney's fees may not exceed 20% of the amount awarded, and in the case of undisputed claims the fee may not exceed 10% or $100, whichever is less. As a matter of administrative practice, ILHR department ordinarily inquires and assures itself that the attorney's fees conform to statutory requirement. And, upon request, ILHR department may provide in the award of benefits that a specified amount for attorney fees (within the limits mentioned) be paid directly to the attorney entitled thereto.

In this respect, at least, the language of the insuring agreement merits clarification.

A contract of insurance is in its nature aleatory, voluntary, executory, conditional, and personal, and except as to life and accident, it is one of indemnity. Volume I, Couch on Insurance, 2d, 1959, §1:5, page 30. The proposed insuring agreement comes within this definition.

In order for a type of insurance to be authorized in this state it must come within one of the subdivisions of sec. 201.04, Stats. If such insurance is to come within sec. 201.04 (17), which deals with other casualty insurance, for which no other provision is made by law, then such type of insurance must be *specified* in the articles of organiation of the company. See 7 OAG 543, 544.

With respect to which subdivision of sec. 201.04, Stats., may authorize this type of insurance, a reasonably anticipated first inquiry is whether subs. (16) dealing with workmen's compensation insurance is applicable. This type of insurance insures "against loss, damage or liability for or under workmen's compensation and including employers' liability insurance when written in the same policy in connection with workmen's compensation insurance." But the proposed insurance is not only in conflict with established principles of workmen's compensation insurance (which insures the employer against his liability for compensation to the employee) but could not be made to fit under other statutes regulating or dealing with workmen's compensation insurance. See secs. 102.28, 102.29, 102.30 and 102.31, Stats. Further, attorney fees have been held not to be "compensation" as used in the Act. *Cranston v. Industrial Comm.*, (1944) 246 Wis. 287.

It is my opinion, however, that this proposed type of insurance is authorized under sec. 201.04 (4), Disability Insurance. This subdivision permits insurance "against bodily injury or death by accident, and upon the health of persons". There are numerous other provisions dealing with disability insurance found in sec. 204.31, Stats., and I find nothing in that statute which would prohibit or be inconsistent with this proposed type of insurance.

Disability insurance is frequently called accident and sickness insurance (as it is in sec. 204.31, Stats.) and is also called health or sickness insurance. It has been said

that health insurance is closely related to accident insurance in that it is written to reimburse the insured personally *for financial loss* arising out of illness caused by specified diseases, or as more frequently written, from any except specified diseases. Insurance Law and Practice, Appleman, 1941, §17, page 46.

I am not unaware that the classifying of this proposed type of insurance (which is essentially an indemnification of the insured of a loss he may suffer by reason of paying or becoming liable to pay attorney fees in connection with his prosecuting a workmen's compensation claim arising out of the insured's industrial accident or illness) as disability insurance may run counter to traditional concepts of disability insurance, health and accident insurance, sickness insurance, etc. Established practices in this area of insurance leads one to think of it in terms of indemnifying the insured for doctor's expense, hospital expense, nursing expense, and other expenses generally related to the medical area. I note, however, that these types of insurance do include benefits for loss of earnings or loss of time. Sec. 204.31 (3) (b) 6., Stats. It is fairly analogous to regard attorney fees, incurred by the insured in the legitimate pursuit of his rights under the workmen's compensation act, as a financial or economic loss clearly related to the aleatory event, i.e., the accident or illness.

It is, therefore, my opinion that this proposed type of insurance which would indemnify an employee for his attorney fees upon his prosecution of a workmen's compensation claim, is permissible under sec. 201.04 (4), Stats. Although there are other aspects of the language in the insuring agreement which could be improved in the interests of clarity, I consider these matters such as can be administratively dealt with by your office and outside the scope of this opinion.

BCL:JEA

Division on Aging—Health and Social Services—The attempt of the state board of health and social services to establish a division on aging within the department is in

conflict with secs. 15.03, 15.191 (1) and 15.193, Stats., as created by Laws 1967, ch. 327, which grant independent program functions to the division and provide for its attachment to the department for limited purposes only.

June 25, 1968

MILO SWANTON,
Chairman,
Council on Aging

You have requested my opinion: "Whether the action of the Board of Health and Social Services creating a Division on Aging within the Department of Health and Social Services is in conformity with Chapter 327, Laws of 1967?"

The minutes of the board disclose the following resolution having been adopted on February 28, 1968:

"*Motion:* It was moved and seconded that the Health and Social Services Board approve the establishment of a Division on Aging within the Department of Health and Social Services as required by Chapter 327, Laws of 1967; that the division consist of a division administrator and such supporting staff as the secretary is able to assign; that the division have the responsibility, until changed, to carry out, under the direction of the secretary, the duties enumerated in II., G. of the format presented * * *"

Format II, G., contained a resume of the statutory duties of the former commission on aging as outlined in sec. 14.95, Stats.

Ch. 75, Laws 1967, renamed the commission on aging and provided in sec. 16m (5):

"(5) AGING, STATE COMMISSION ON. The agency known as the state commission on aging, under section 14.95 of the statutes, is renamed the council on aging and by a type 1 transfer attached to the department of health and social services."

Ch. 327, Laws 1967, continued the reorganization process begun by ch. 75. Ch. 327 had as its purpose the codification and formalization of the general organizational scheme

which ch. 75 had outlined. Ch. 327 also reflected the organizational patterns proposed by ch. 75. Ch. 327 provided the following organizational scheme for the program for aging in Wisconsin.

Ch. 327, Laws 1967:

"15.19 DEPARTMENT OF HEALTH AND SOCIAL SERVICES; CREATION.

* * *

"15.191 SAME; PROGRAM RESPONSIBILITIES.

* * *

"(1) DIVISION ON AGING. The division on aging shall have the program responsibilities specified for the division under s. 14.95.

"15.193 SAME; SPECIFIED DIVISIONS.

"(1) DIVISION ON AGING. There is created a division on aging which is attached to the department of health and social services under s. 15.03. * * *

* * *

"15.197 SAME; COUNCILS.

"(1) COUNCIL ON AGING. There is created in the department of health and social services a council on aging. * * * *"

The legislature, in replacing the old commission on aging, determined that there should be a division within the department of health and social services advised by a citizens council. The division was to have the program responsibilities formerly exercised by the commission on aging. The division was also a specialized division attached to the department under sec. 15.03.

"15.03 Attachment for limited purposes.

Any division, * * * attached under this section to a department * * * shall be a distinct unit of that department * * *. Any division, * * * attached shall exercise its powers, duties and functions prescribed by law, including rule-making, licensing and regulation, and operational planning within the area of program responsibility of the division, * * * independently of the head of the department * * * but budgeting, program co-ordination and related manage-

ment functions shall be performed under the direction and supervision of the head of the department * * *."

It follows from this statutory language that the actions of the board of health and social services should have been to recognize the attached division and its affiliation with the department for limited purposes. It is possible to view the question you raise as merely one of semantics. The board has in its resolution used the word "establish" where it may have been more appropriate to have used the word "attach." In my opinion, the board's action gave no effect to the limited-purpose attachment specified in sec. 15.03. The enabling action of the board recited that "the division have the responsibility, until changed, to carry out, under the direction of the secretary, the duties enumerated. * * *" The natural import of the resolution is that the secretary of the department is to have direction over the program responsibilities as they are administered by the divisional administrator. Yet, sec. 15.03 contemplates that divisions attached for limited purposes would have independent program responsibilities. The program responsibilities, having been delegated by the legislature to a specific unit, cannot be redistributed by the department. Again, note that the board's resolution stated, "that the division have the responsibility, until changed." Only the legislature can change the program responsibilities of the division on aging.

An analysis of the organization scheme of ch. 327 discloses two types of divisions within a department.

Ch. 327, Laws 1967:

"15.02 OFFICES, DEPARTMENTS AND INDEPENDENT AGENCIES.

* * *

"(4) INTERNAL ORGANIZATION AND ALLOCATION OF FUNCTIONS. The head of each department * * * shall, subject to the approval of the governor or, where applicable, the coordinating council for higher education, establish the internal organization of the department or independent agency and *allocate and reallocate duties and functions not assigned by law* to an officer or any subunit of the department or independent agency to promote economic and efficient administration and operation of the department or independent agency."

The two types of divisions alluded to above may be characterized as an administrative division and statutory division. An administrative division is the type of division wherein the departmental secretary, pursuant to sec. 15.02 (4), is given authority to allocate and reallocate divisional duties and functions. The secretary may combine, dissolve or create such administrative divisions. A statutory division on the other hand is that unit to which the legislature has assigned a specific program function or responsibility. This division may not have its duties and functions allocated and reallocated by the secretary, but is attached for limited purposes to the department.

I conclude, therefore, that the division on aging is a statutory division. It has been attached by the legislature to the department of health and social services for limited purposes only. The secretary of the department has authority to work with the division in budgeting, program co-ordination and related management functions. The resolution of the board of health and social services should recognize this limited attachment and the secretary's responsibilities. In my opinion, the resolution of the board of health and social services does not conform with ch. 327, Laws 1967.

BCL:DRZ

Retirement—State Employes—Under sec. 66.901 (5m), Stats., a former member of the judiciary, legislature, or a state constitutional officer who accepts general state employment, has the right to have his retirement annuity computed in the same manner as if he were still a member of that class, provided he meets certain conditions prescribed in the statute.

June 25, 1968.

C. M. SULLIVAN
Executive Director
Wisconsin Retirement Fund

You have requested my opinion as to what effect may be given to the provisions of sec. 66.901 (5m), Stats., as cre-

ated by ch. 316, Laws 1967, in light of the provisions of sec. 66.906 (2) (c) 3. b.

Sec. 66.901 (5m) reads as follows:

"Any participating employe who originally obtained membership in the Wisconsin retirement fund under provisions of the statutes relating to supreme court justices, circuit judges, county judges, members of the state legislature or state constitutional officers who later accepts employment in a state position subject to ss. 66.90 to 66.918 without the occurrence of a break in service, will continue to have his retirement annuity computed in accordance with s. 66.906 (2) (c) 3. b providing said employe pays into the retirement fund a sum equal to the difference between the contributions required under s. 66.903 (2) (f) 2 and the actual contributions said member made under s. 66.903 (2) (f) 1 for all service rendered under s. 66.903 (2) (f) 1, and makes all future contributions to the fund pursuant to s. 66.903 (2) (f) 2."

Under the above quoted provisions, a member of the particular named class who immediately upon termination as a member of that class accepts state employment may have his retirement annuity computed pursuant to the provisions of sec. 66. 906 (2) (c) 3. b, Stats. In other words, the effect of sec. 66.901 (5m), Stats., is that the retirement annuity will be computed for the now general state employe in the same manner as if he were still a member of the legislature or judiciary, etc., provided however that he make the additional payments of that class.

The annuity for the members of this class is established by the previously referred to sec., 66.906 (2) (c) 3. b, Stats., which reads as follows:

"b. For each participant for creditable service as a supreme court justice, circuit judge, county judge, member of the legislature or state constitutional officer elected by vote of the people, 1⅕ of one per cent of his formula final rate of earnings, plus three-fifths of one per cent of his final excess OASDI earnings, if any;"

You are particularly concerned in your administration of these two statutes by the restrictive language in sec.

66.906 (2) (c) 3. b, which limits the annuity to "creditable service" as a member of the described class.

Specifically, you have asked whether a member of this class who upon termination accepts general state employment may have the computation advantage of sec. 66.906 (2) (c) 3. b, which he previously enjoyed as a member of the class only to the extent of his actual "creditable service" as a member of that class.

The answer to this question is "no."

Such a result would frustrate the clear language of sec. 66.901 (5m) and ignore the optional payment provisions of the section.

When there are several statutes relating to the same subject matter they should be read together and harmonized, if possible. *City of Milwaukee v. Milwaukee County,* (1965) 27 Wis. 2d 53, 133 N. W. 2d 393. Conflicts between statutes are not favored and will not be held to exist if they may otherwise be reasonably construed. *Raisanen v. Milwaukee,* (1966) 35 Wis. 2d 504, 151 N. W. 2d 129. In interpreting statutes, if at all possible, inconsistency and conflicts should be avoided and effect given to every part of the statute. *Associated Hospital Service v. Milwaukee,* (1961) 13 Wis. 2d 447, 109 N. W. 2d 271.

In applying these basic principles of statutory construction to the two sections involved, I am of the opinion that an eligible employe as defined in sec. 66.901 (5m) would, upon paying to the retirement fund the difference between the established rates for the two classes for that period of time between when he first became a general state employe and when he elected to come under the provisions of sec. 66.901 (5m) and upon agreeing to have future contributions to the fund based on the rate established by sec. 66.903 (2) (f) 2., have the right to have his retirement annuity based upon sec. 66.906 (2) (c) 3. b, Stats.

Hereinafter an eligible employe under sec. 66.901 (5m), Stats., may immediately elect to continue under the provisions of secs. 66.903 (2) (f) 2. and 66.906 (2) (c) 3. b, Stats., and in such case there would not be any difference payable to the fund.

It would do violence to the basic principles of statutory construction as outlined above, to say that the phrase "cred-

itable service" is a limitation on the annuity of an employe who falls within the purview of and elects to come under sec. 66.901 (5m), for such an interpretation would make this statute a nullity.

The phrase "creditable service" is applicable to those members of the named class who never became a general state employe and it is applicable to those eligible state employes who do not elect to come under the provisions of sec. 66.901 (5m), Stats.

As you indicate in your letter, the amendment to S. B. 537 which eventually became sec. 66.901 (5m), was introduced in the closing hours of the final day of the last session, and was not referred to any standing legislative committee, nor to the joint survey committee on retirement systems as required by sec. 13.50, Stats. The bill apparently was designed to extend to one or more former legislators, judges or constitutional officers now serving in other state positions, certain benefit advantages which, under prior law, were available only to persons actually serving as legislators, judges or constitutional officers. The higher retirement benefits accorded to this group were initially justified by the fact that such officers, on the average, assume office comparatively late in life, without the opportunity to accrue as many years of service as the average state employee, so that each year of service in this capacity must produce a greater return if an adequate level of retirement income is to be provided. Especially important, however, was the basic notion that such officers are subject to the whim of the electorate and therefore should be granted special retirement advantages for exposing themselves to the uncertainties of elective office.

The effect of sec. 66.901 (5m) in permitting such persons to retain these special advantages after leaving elective office for other state employment, is to create a retirement benefit privilege for a certain class of state employes who have served for a time as legislators, judges or constitutional officers. Sec. 66.901 (5m) was tacked on as an amendment to an otherwise laudable bill, and was not subjected to the legislative and public scrutiny of committee referral and public hearing—in disregard, I might add, of express legislative policy.

I point this out as reason for my reluctance in granting legal approval of sec. 66.901 (5m) ; for although the section is effective, it has all the earmarks of legislative back-patting at a time when the average public employe receives only token consideration in his demand for a respectable wage.

The Wisconsin retirement fund has been established for the benefit of governmental employes. Public policy dictates that all participants be treated equally, for the more special privileges are extended to certain members, the greater the discrepancy between all members sharing their legitimate benefits from the fund.

Despite these objections, I am constrained to conclude that sec. 66.901 (5m) is effective as outlined above.

You have also asked how sec. 66.9045 (6), as amended, will appear in the 1967 statutes.

You state in your letter that in the rush to introduce the amendment it was inadvertently redrafted on the basis of the section as it appeared in the 1963 statutes rather than as it subsequently appeared in the 1965 statutes.

Actually, it appears that sec. 66.9045 (6), Stats., was first created in 1965 by ch. 251, Laws 1965. The section was subsequently amended during this same session of the legislature by ch. 581, Laws 1965. Consequently, the section appeared in the 1965 statutes as originally created by ch. 251, and it also appeared in the supplement to the statutes as amended by ch. 581.

While the 1967 amendment might have been mistakenly based on a redraft of the statute as created by ch. 251 rather than as subsequently amended by ch. 281, such fact is immaterial.

Regardless of what might have been the intent of the drafters, sec. 66.9045 (6) as it now appears in ch. 316, Laws 1967, is the law and it will so appear in the 1967 statutes.

BCL:CAB

Taverns—Adjacent to Churches—Tavern premises located within 300 feet of a church, school or hospital, may

not be enlarged to extend upon an adjacent lot under the "grandfather rights" conferred by sec. 176.05 (9m) (b), Stats.

July 5, 1968.

PAUL LEO KELLY
District Attorney, Eau Claire County

You request an opinion with respect to whether the owner of a tavern licensed prior to June 30, 1947, located less than 300 feet from an established church may expand the tavern premises without violating sec. 176.05 (9m).

Sec. 176.05 (9m) provides that:

"(a) No retail 'Class A' or 'Class B' license shall be issued for premises less than 300 feet from any established public school, parochial school, hospital or church. Such distance shall be measured via the shortest route long the highway from the closest point of the boundary of such school, church or hospital to the closest entrance to such premises.

"(b) This subsection shall not apply to premises licensed as such on June 30, 1947, * * *."

Your request does not contain a detailed statement of facts, but it appears that the premises were originally licensed by street address only. The owner of the tavern has expressed a desire to enlarge the tavern by construction of an addition which would extend onto an adjacent lot which he presumably owns or expects to acquire.

It has been noted in an earlier opinion from this office that:

"Statutes of the kind here involved are always liberally construed in favor of the schools, churches and other institutions benefitted thereby and against the tavern keeper." *Morse v. Liquor Control Commission,* 319 Mich. 52, 29 N.W. 2d 316, 322; *Re Place* 27 App. Div. 561, 50 N.Y.S. 640, affirmed 156 N.Y. 691, 50 N.E. 1121; *People ex rel. Clausen v. Murray,* 16 Misc. 398, 38 N.Y.S. 609, affirmed 39 N.Y.S. 1130; XXXVI Op. Atty. Gen. 104, 106. 37 OAG 194-195.

The premises above referred to apparently remain as they were at the time sec. 176.05 (9m) was enacted. Although

the word "premises" was construed in 38 OAG 10 to mean not only the barroom but the entire business space, it appears that the tavern owner now desires to increase the size of the premises and extend the boundary of the parcel on which the premises are situated.

There is no basis in the statutory language for enlarging the "grandfather rights" granted in 176.05 (9m) (b) to do anything more than maintain the status quo. The exemption granted avoids deprivation of any property rights existing at the time of enactment, but it does not confer the right to expand upon the nonconforming use.

It is therefore my opinion that the expansion of existing building beyond the boundary of the parcel on which the tavern was located on June 30, 1947, is not permissible, and would constitute a violation of 176.05 (9m) (a), Stats.

BCL:TLP

Real Estate Board—Per Diems—Members of the real estate examining board appointed prior to the passage of ch. 327, Laws 1967, may not receive during their present terms the increased per diem provided for by that enactment. Per diem means services rendered in one calendar day. Art. IV, sec. 26, Wis. Const., and sec. 15.08 (7), Stats., discussed.

August 2, 1968.

ROY E. HAYS
Wisconsin Real Estate Examining Board

You have requested my formal opinion as to whether sec. 15.08 (7), Stats., created by ch. 327, Laws 1967, has increased the compensation of the present members of your board from $10 per diem to $25 per diem. The present board members were all appointed prior to the enactment of ch. 327. You have also inquired as to what constitutes services sufficient to justify the per diem allowance.

Sec. 15.08, Stats., provides in part:

"Examining Boards.
"* * *

"(7) COMPENSATION AND REIMBURSEMENT FOR EXPENSES. Each member of an examining board shall, unless he is a full-time salaried employe of this state, be paid a per diem of $25 for each day on which he was actually and necessarily engaged in the performance of his duties. Each member of an examining board shall be reimbursed for his actual and necessary expenses incurred in the performance of his duties."

Art. IV, sec. 26, Wis. Const., reads as follows:

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

The issue is whether Art. IV, sec. 26, precludes any member of your board holding office prior to the passage of sec. 15.08 (7), Stats., from receiving the increased per diem allowance during a present term.

Art. IV, sec. 26 has three elements. The first element is that it applies to public officers. The second element is that compensation must not be increased or diminished. The third element is that the increasing or diminishing of compensation may not take place during his term of office.

The first inquiry is whether the board members are public officers. Ch. 75, Laws 1967, by sec. 27 (k), renamed the former Wisconsin real estate commission, the real estate examining board. The Wisconsin real estate commission was, by a type 1 transfer, attached to the department of regulation and licensing. Ch. 75 had the effect of making the existing commissioners members of the examining board. Board members exercise the same powers and duties and continue in the terms of office to which they were named as real estate commissioners. Sec. 136.03, Stats., states:

"136.03 Real estate commission. The Wisconsin real estate commission consists of 3 persons, at least 2 of whom shall be real estate brokers in this state. The governor, by and with the advice and consent of the senate, shall appoint

the members of said commission. The terms of members shall be 6 years and until their successors are appointed and qualify. Each member shall, before entering upon his duties, take and file the official oath."

Art. IV, sec. 28, Wis. Const., requires an official oath be taken by "members of the legislature, and all officers."

State ex rel. Martin v. Smith, (1941) 239 Wis. 314, defined public officers as those who exercise a part of the sovereign power of the state and are paid from the state treasury. The members of the real estate examining board exercise part of the sovereign power of the state. They are paid from the state treasury. Members of the real estate examining board are public officers.

Our next question is whether a per diem allowance constitutes compensation. In 67 C.J.S., Officers, § 95, p. 350, it is stated with respect to a constitutional prohibition:

"* * * that where the term 'emoluments' or 'compensation' is used, the limitation is wider in its effect * * * likewise embracing compensation such as per diem allowances * * *."

In *Gorbrecht v. Concinnati,* (1894) 51 Ohio St. 68, it was held that per diem constituted compensation in a constitutional provision which stated that salary could not be changed but that compensation might. In *Peay v. Nolan,* (1928) 157 Tenn. 222, it is stated:

"The term 'per diem' as used in the Constitution [of Tennessee, Art. 2, sec. 3] is synonymous with 'salary.' The term salary imports the idea of compensation for personal service, and not the repayment of money expended in the discharge of the duties of the office."

In *Gallarno v. Long,* (1932) 214 Iowa 895, the court held that per diem was compensation paid by day and that it was unnecessary to decide whether it was synonymous with salary. As recently as 1967 our court was concerned with the statutory prohibitions against increases in salary. In *Geyso v. Cudahy,* (1967) 34 Wis. 2d 476, the court held that the words *salary* and *expense* are distinct terms which represent entirely different concepts. The court recognized that reimbursement of expenses is not compensation. It should

be noted that sec. 15.08 (7) provides both for the payment of a per diem as well as expenses.

The members of the real estate examining board are public officers. A per diem allowance is compensation. Our final inquiry must be whether the increase comes during "his term of office." The members of the real estate examining board are serving appointed terms which commenced before the passage of ch. 327, Laws 1967. It necessarily follows that these public officers and others similarly situated cannot receive an increase in compensation during their term of office. This is consistent with opinions, formal and informal, issued by this office on similar questions for over fifty years. As recently as 1955, in 44 OAG 242, the members of the barbers examining committee were advised they could not receive an increase in their per diems during their terms of office.

Turning now to your other question concerning what are services sufficient to justify a per diem, the general law on the subject is discussed in 43 Am. Jur., Public Officers, § 358, at p. 148:

"A 'day' means a calendar day in all cases where the statute merely provides for an officer's compensation at a certain or reasonable sum per day. No length of time of occupation on a day is necessary to entitle an officer to his per diem, for in fixing salaries and fees for the performance of public services at so much per day, the law does not consider fractions of a day. On the other hand, an officer cannot be entitled to recover more than one per diem, no matter how many hours of the calendar day he works."

In *Northern Trust Co. v. Snyder,* (1902) 113 Wis. 516, our courts took a similar position stating at page 549:

"* * * A day means a calendar day in all cases where the statute merely provides for compensation at a certain or a reasonable sum per day."

The court did, however, go on to say:

"* * * That does not militate against the right of a municipality to consider any fractional part of a day, which is greater than the time ordinarily devoted to labor in one-half

of a day, a day; but one calendar day cannot be legitimately called two days for the purpose of basing *per diem* pay thereon, unless the legislature so provides."

Sec. 15.08 (7) provides per diem for a board member each day "on which he was actually and necessarily engaged in the performance of his duties." Within these rather broad guide lines, it is up to the individual board member to determine whether the services he has rendered justifies a per diem claim.

In summary, a member of the real estate examining board appointed prior to the passage of ch. 327, Laws 1967, may receive only a $10 per diem during the term for which he was appointed. A per diem claim may be based only upon a single calendar day's service.

BCL:DRZ

Aeronautics Agency—Organization and Existence—Since ch. 75 expressly created a division of aeronautics within the department of transportation and the purpose of ch. 327 was to implement the governmental reorganization law which created the division, I cannot conclude that the omission or failure to provide for the division in ch. 327 manifests a legislative intent to abolish same.

August 5, 1968.

G. H. BAKKE, *Secretary*
Department of Transportation

You have requested my opinion as to how chs. 75 and 327, Laws 1967, affected the organization and existence of the state aeronautics agency.

Prior to the passage of ch. 75, the state aeronautics commission was vested with the authority to operate and control this branch of the administrative government. The general powers and duties of the commission are set forth in CH. 114, Stats.

Ch. 75 contains the following language:

"SECTION 33. TRANSPORTATION. There is created a department of transportation under the direction and supervision of the secretary of transportation.

"* * *

"(4) AERONAUTICS. The agency known as the state aeronautics commission, under chapter 114 of the statutes, is renamed the division of aeronautics and assigned a type 2 transfer to the department of transportation, except that the state aeronautics commission is continued as an advisory body to the department of transportation under the name 'council on aeronautics'.

"SECTION 6. METHOD OF CONSOLIDATION. The provisions set out in SECTION 29 (1) apply to all agencies of the executive branch, including those enumerated in sub. (1). The provisions set out in SECTION 7 (4) apply to all agencies of the executive branch including the department of regulation and licensing. The types of transfers used to consolidate the existing agencies into the departments created or continued by this act, and independent agencies continued by this act, are described in subs. (3) to (8).

"* * *

"(5) TYPE 2 TRANSFER. A type 2 transfer is the administrative merging of an existing agency or of an existing agency with certain programs, activities or identifiable subunits transferred out, into a department established or continued by this act, or into a subdivision thereof. If an agency assigned a type 2 transfer was headed by a board or commission, such board or commission is abolished; the powers and duties previously vested specifically in such board or commission are vested in the head of the department, created or continued by this act, to which the agency is assigned. Any agency assigned a type 2 transfer shall have all its statutory powers including operational planning, duties and functions, records, personnel, property, unexpended balances of appropriations, allocations or other funds transferred to the department to which it is assigned. The transfer of funds shall include all segregated funds in such manner that the relation between program and revenue source as provided by law is retained and so that appropriations for programs and subprograms are not altered.

"* * *"

It is the expressed intent of the law to create a division of aeronautics within the department of transportation. The language is clear and unequivocal. However, all the statutory powers, duties and functions of the commission were transferred to and vested in the secretary of transportation. Ch. 327, Laws 1967, was enacted to implement ch. 75. Although ch. 327 failed to provide for the division of aeronautics, it is my opinion that a division of aeronautics within the department of transportation still exists. I cannot conclude that the legislature, by mere omission, intended to abolish a division it had just created. Such a legislative intention is particularly unlikely since the purpose of ch. 327 was to implement the governmental reorganization law (ch. 75) which created the division.

You have also requested my opinion as to whether you may delegate or allocate to the administrator of the division of aeronautics those powers and duties which you acquired by virtue of chs. 75 and 327, Laws 1967, and which were formerly vested in the Wisconsin state aeronautics commission.

Sec. 15.02 (4), Stats., created by ch. 327, authorizes the head of each department or independent agency, subject to the approval of the governor, to establish the internal organization of the department or independent agency and *allocate and reallocate duties and functions not assigned by law* to an officer or any subunit of the department or independent agency.

It is clear that the head of a department or independent agency may allocate and reallocate duties and functions providing they are *not assigned by law,* but ch. 327 is silent with respect to the delegation of power and duties. The words "allocate" and "delegate" have separate but related meanings. The former means to distribute or assign. *Central Eureka Min. Co. v. U. S.,* (1956) 138 F. Supp. 281, 295. The latter means entrusting power to another to act for the good of one who authorizes him. *Mouledoux v. Maestri,* (1941) 197 La. 525, 2 So. 2d 11, 15.

A public officer or body to whom a power involving the exercise of discretion or judgment has been given, may not redelegate the power to a subordinate or to anyone else in the absence of a statute so providing. *State ex rel. Crawford*

v. Hastings, (1860) 10 Wis. *525; *Joint School Dist. No. 7 v. Wolfe,* (1860) 12 Wis. *685; *Lauenstein v. Fond du Lac,* (1871) 28 Wis. 336; *Shipman v. State,* (1877) 42 Wis. 377; *School Dist. No. 3 v. Callahan,* (1941) 237 Wis. 560, at pp. 576, 577, the latter case holding that the officer may utilize the aid of subordinates to investigate facts, report them, make recommendations, and draft orders in the first instance.

The decisions or determinations of the former Wisconsin state aeronautics commission concerning the erection of high structures and airport development projects, pursuant to secs. 114.135 and 114.33, Stats., clearly required the exercise of discretion or judgment of the commission. Thus, these matters and others which require the exercise of discretion or judgment are vested in the secretary of transportation and may not be delegated or allocated to another.

BCL:REB:GBS

Insurance—Health Policies—A mutual life insurance company may issue nonparticipating health insurance policies in Wisconsin, although the matter is not at all free from doubt. The following statutes discussed: Secs. 201.02 (3), 201.13, 201.14, 201.32, 201.34(1), (2) and (3), 206.15, 206.36 and 206.48 (1).

August 6, 1968.

ROBERT D. HAASE
Commissioner of Insurance

You state that the Pacific Mutual Life Insurance Company, a foreign insurance corporation, licensed to do business in Wisconsin, has filed with you for your approval a rider to its individual health insurance policies. This rider would cause such policies to be nonparticipating, which is to say, the policyholders would not share in the divisible surplus of the company. Pacific Mutual Life Insurance Company is a mutual insurance corporation organized and existing under the laws of California. It is the successor to

Pacific Mutual Life Insurance Company, a stock corporation. In 1936, this latter corporation entered into a rehabilitation and reinsurance agreement with the insurance commissioner of California as conservator. In 1952, the old Pacific Mutual Life Insurance Company accomplished a "partial mutualization" under sec. 11526, California insurance code. This section of the California Statutes makes it possible for a solvent domestic stock insurer issuing policies on a nonassessable basis to convert itself to an incorporated mutual life insurer or life and disability insurer. Such a conversion may be accomplished, by the above mentioned section of the California code, by acquisition by the company of the outstanding shares of its own capital stock for the benefit of its policyholders, or for the benefit of any class or classes of its policyholders. In apparent conformity with the rehabilitation and reinsurance agreement and California law, the life policyholders of the old Pacific Mutual Company voted to mutualize the company for the benefit of the life departments, i.e., the life policyholders. When this scheme was accomplished, the new mutual company was owned by its life policyholders. Since the accident and health policyholders were not members of the reorganized corporation, they were not entitled to share in the earnings and surplus of the new company. In 1967, an order was obtained from the superior court of the state of California for the county of Los Angeles confirming the final completion and discharge of all obligations under the rehabilitation and reinsurance agreement. This order prompted the filing by Pacific Mutual of the previously mentioned rider to its individual health insurance policies. The California insurance department has permitted this company to issue nonparticipating insurance to policyholders who are not members of the corporation.

You ask whether a foreign life insurance company, mutualized for the benefit of its life policyholders under California law, can issue in Wisconsin nonparticipating individual health insurance policies.

The new Pacific Mutual Life Insurance Company is a mutual insurance company. Appleman, *Insurance Law and Practice,* Volume 18, pages 79 and 80, defines a mutual insurance company as follows:

"A mutual insurance company is one in which the members are both insurers and insured * * *. An insurance company is 'mutual' when there is no group but its policyholders who have an interest in it or power over it, or where the policyholders have a vote in its meetings and share in its profits as determined by the directors.

"* * * The distinguishing feature is mutuality, evidenced by the cooperation of members, uniting for that purpose, each taking a proportionate part in the management of its affairs and being at once insurer and insured, contributing to a fund from which all losses are paid, and wherein the profits are divided among themselves in proportion to their interest. Democratic ownership and control is a fundamental characteristic of a mutual insurance company."

Appleman, *Insurance Law and Practice*, Volume 18, 1968 Supp., page 19, defines mutualization as "the transfer of ownership of an insurance company from stockholders to policyholders, brought about by stockholders surrendering to insurance company their stock for an agreed price, and upon surrender the company then belongs to the policyholders."

The principle which lies at the foundation of mutual insurance, and gives it its name, is mutuality; in other words, the intervention of each person insured in the management of the affairs of the company, and the participation of each member in the profits and losses of the business, in proportion to his interest. Each person insured becomes a member of the body corporate, clothed with the rights and subject to the liabilities of a stockholder. Although the members of a mutual company are not usually denominated stockholders and are not stockholders in the usual sense of the word, they are in point of fact stockholders. A mutual insurance company is based on the idea that each of the assureds becomes one of the insurers, thereby becoming interested in the profits and liable for the losses. *Huber v. Martin*, (1906) 127 Wis. 412, 431, 432, 433, 105 N. W. 1031. In a mutual company, membership and insurance are contemporary and coexistent. *Duel v. State Farm Mutual Automobile Insurance Company*, (1942) 240 Wis. 161, 178, 1 N. W.

2d 887; *State Farm Mutual Auto Insurance Co. v. U.S.*, (1963) CCA 7, 314 F. 2d 363, 367.

It is significant, however, that these maxims can be regarded essentially in the nature of obiter dictum and not pronounced in context with a fact or statutory situation similar to the instant one.

The essential question is whether a mutual life insurance company can issue, under Wisconsin law, nonparticipating health insurance policies. It is my conclusion that such action is permissible under Wisconsin law.

Sec. 201.34, Stats., provides in part:

"(1) The commissioner shall upon being satisfied by investigation that any insurance company applying for license or relicense has fully complied with all provisions of law, and that its methods and practices in the conduct of its business and the character and value of its assets are such as to safeguard the interest of its policyholders and the people of the state, issue to such company a license to transact business in this state, and shall renew the same from year to year so long as such company meets all requirements of law. * * *

"(2) The commissioner shall have the same supervision * * * of the business and affairs of every licensed foreign insurance corporation as of domestic corporations doing the same kind of business, * * *.

"(3) A licensed foreign insurance corporation may transact in this state only such kinds of business as, under the laws of this state, a like domestic insurance corporation is authorized to transact."

Thus, as to licensing and supervision of foreign insurance corporations, the commissioner has literally the same power as he has with respect to domestic insurance corporations.

Sec. 201.02 (3), Stats., provides:

"(3) Persons associating to form a mutual insurance company shall subscribe articles of incorporation which shall contain:

"* * *

"(d) The condition of membership which shall provide that each policyholder have one vote and shall be liable for a pro rata share of losses and expenses incurred during the time the member has been a policyholder of the company, unless the liability of all members is limited according to law;

"* * *"

A good argument may be made that this language effectively prohibits nonparticipating policies in a mutual insurance company. This statute, however, relates only to the *condition of membership* in a domestic mutual insurance company. The purpose of this provision may plausibly be said to be that of guaranteeing equal treatment, as to rights and liabilities, of *participating* policyholders, as distinguished from holders of nonparticipating policies on the face of which it is evident that no such rights or liabilities exist. The life policyholders are members of the new Pacific Mutual Life Insurance Company and this section of the statutes is satisfied in relation to them. This section need not be construed as a prohibition against any issuance of a nonparticipating policy by a mutual life insurer.

Sec. 206.13, Stats., on the other hand, appears to suggest that mutual life insurance companies may issue nonparticipating policies. Sec. 206.13 (1) states:

"No mutual life insurance company and no stock life insurance company issuing any participating policies, shall issue any participating policies in this state which do not, by their terms, give to the holders thereof full right to participate annually in the surplus accumulations from the participating business of such company, as provided by law of this state."

This section must be read: "No mutual life insurance company * * * shall issue any participating policies in this state which do not, by their terms, give to the holders thereof full right to participate * * *." Sec. 206.13 (3), Stats., confirms this meaning. This section reads as follows:

"(3) *Any* company which issues both participating and nonparticipating policies, and keeps separate accounts between the two classes, may be licensed; provided, it shall,

before being licensed, file with the commissioner an agreement that, in consideration of being permitted to issue both participating and nonparticipating policies, the accounts of each class will be kept separate, and that no part of the funds accumulated or belonging to the participating class shall ever be voluntarily transferred to the nonparticipating class, except such as the existing charter of the company may require."

This construction is clearly supported by the legislative history of 206.13.

Sec. 206.13, before renumbering, was sec. 1947o. When created by ch. 146, Laws 1907, it prohibited foreign and domestic mutual life insurance companies and stock life insurance companies from issuing *any* policies, except annuities, which did not, by their terms, give the policyholders thereof the full right to participate in the accumulations of such companies. In other words, all life insurance companies, over which the state had jurisdiction, were prohibited from issuing nonparticipating policies, except annuities. However, ch. 449, Laws 1909 added a new subsection to section 1947o which, in effect, provided that these companies could issue both participating and nonparticipating policies if they kept and transacted their participating and nonparticipating business in separate departments, kept separate accounts, maintained a complete separation between the two departments and otherwise protected the participating policyholders by filing with the commissioner of insurance an agreement that no part of the funds belonging to the participating department shall ever be transferred to the nonparticipating department. This is the obvious forerunner of sec. 206.13 (3).

Thus, the ultimate thrust of the statutory regulation was not to prohibit the coexistence of participating and nonparticipating policies in a life insurance company but to permit it under conditions where the interests of the participating policyholders were adequately protected.

This is not to say, however, that this matter is free from doubt. Substantial and cogent reasons appear from considering language of other statutes related to this area which support the conclusion that the legislature intended that in

mutual companies the words "policyholder" and "member" should be synonomous. For example: sec. 206.02 (9) specifies that articles of organization of a mutual life insurance corporation may be amended by a vote of ¾ths of the *policyholders;* sec. 206.04 (1) specifies that *every policyholder* whose insurance shall have been in force one year shall be entitled to one vote for each director or trustee to be elected in any domestic mutual life insurance company; sec. 206.06, dealing with validity of votes in mutual companies, mentions "policyholder" four times; sec. 206.07, dealing with elections, ticket, instructions and voting in mutual companies, mentions "policyholder" five times; sec. 201.14, dealing with the reorganization of mutual insurance corporations into stock insurance corporations, uses the terms "members" and "policyholders" with no apparent distinction. A different approach, however, appears in sec. 201.13, dealing with dissolution of domestic mutual insurance companies, where the reference is only to "members".

On the other hand, sec. 206.48 (1) refers indiscriminately to "every life insurance company" and requires such company to include in its annual statement an exhibit of the gains and losses for its participating and nonparticipating business. It can readily be argued from this language that the legislature purposely made it broad enough to cover mutual companies which may write both participating and nonparticipating business. Of more obscure significance is sec. 206.15 restricting salaries of officers and directors of domestic life insurance companies transacting a "mutual or participating" business. Of similar significance is sec. 206.36 dealing with apportionment and return of surplus to policyholders entitled to share therein.

Also, the administrative interpretation given the question being considered in this opinion must be given considerable weight. In your letter you relate instances in which former insurance commissioners have allowed the issuance of nonparticipating health insurance policies by mutual life insurance companies. Considerable weight must be given the administrative interpretation. In fact, it has been said that contemporaneous construction of the statutes should not be overruled except for weighty reasons. *Com'r. v. South Texas*

Lumber Co., (1948) 333 U. S. 496. I find no such weighty reasons here.

Notwithstanding the arguments to the contrary, it is my opinion that a mutual life insurance company may issue in Wisconsin nonparticipating health insurance policies. I would point out that this is a matter raising issues of public policy which is the domain of the legislature and respectfully invite your consideration to the advisability of presenting this matter in the form of proposed legislation to the next session of the legislature.

BCL:JEA

Constitutional Revision—Explanatory Notes—Where electors approved amendment to the constitution after joint resolution to amend non-conflicting provision of same section had been introduced, such resolution after passage can be enrolled to include such new material if explanatory note is given so that the electors and legislature to be next elected can consider proposed changes in proper light.

August 12, 1968.

H. RUPERT THEOBALD
Chief, Legislative Reference Bureau

You have requested my opinion whether there would be compliance with the amending provisions of the Wisconsin Constitution if S. J. R. 41, 1967, were enrolled in the following manner:

"To amend article IV, section 26 of the constitution, relating to retirement benefits of public officers and employes. (1st consideration)

"Resolved by the senate, the assembly concurring, That article IV, section 26 of the constitution is amended to read:

"(Article IV) Section 26. The legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered

or the contract entered into; nor shall the compensation of any public officer be increased or diminished during his term of office [except that when any increase or decrease provided by the legislature in the compensation of the justices of the supreme court, or judges of the circuit court shall become effective as to any such justice or judge, it shall become effective from such date as to each of such justices or judges]*. This section shall not apply to increased benefits for teachers *persons who have been or shall be granted benefits of any kind* under a teachers' retirement system when such increased benefits are provided by a legislative act passed on a call of yeas and nays *ayes and noes* by a three-fourths vote of all the members elected to both houses of the legislature.

"Be it further

"Resolved, That this proposed amendment be referred to the legislature to be chosen at the next general election and that it be published for three months previous to the time of holding such election."

It is my opinion that the form would be sufficient if the note following the asterisk were to read:

"Bracketed material not part of joint resolution as originally introduced as it was not approved as part of the Constitution until the April 1967 election."

The joint resolution was introduced on March 10, 1967. No vote on its substance was taken until after the April 1967 election and the resolution was thereafter amended. It is unfortunate that the sponsors did not amend it to include the new language approved by the voters in April 1967, however the failure to do so does not in my opinion cast doubt on the procedures followed. The April 1967 constitutional amendment added new language to the text of the section which in no ways conflicts with the amendment proposed by S. J. R. 41, 1967.

The legislative reference bureau's duty to enroll a resolution was formerly set forth in sec. 35.09 (1), Stats., which

* "Bracketed material not included in the resolution adopted by the 1967 legislature because it was not approved as part of the constitution until the April 1967 election." (Formal parts omitted.)

was repealed by ch. 107, Laws 1967. The duty is now set forth in Assembly Rule 34 (2), Senate Rule 43 and Joint Rule 10a. However, the duty of authentication under the rules and under sec. 1, Art. XII, Wis. Const., must be considered in view of the requirements and purpose of the amendatory process. The primary concern is with the *amendatory language,* specifically those words to be added and those words to be deleted.

Sec. 1, Art. XII, Wis. Const. provides:

"Constitutional amendments. SECTION 1. Any amendment or amendments to this constitution may be proposed in either house of the legislature, and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon, and referred to the legislature to be chosen at the next general election, and shall be published for three months previous to the time of holding such election; and if, in the legislature so next chosen, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit such proposed amendment or amendments to the people in such manner and at such time as the legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon, such amendment or amendments shall become part of the constitution; provided, that if more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against such amendments separately."

It is the proposed amendment we are concerned with. It is true that joint resolutions making such proposals do usually include the full text of the constitutional section, with italics used to show language to be added and dashes through words which are to be deleted.

As stated in 49 OAG 199, 202:

"The legislators know when they are voting on a joint resolution to amend the constitution that the proposed amend-

ment is in italics and that the remainder of the section which is printed merely provides an appropriate frame of reference so that the proposed amendment may be read and understood in proper context."

That opinion dealt with a somewhat similar problem and suggested mechanics in amending procedures and the wording of a joint resolution for the next legislature where there had been an interim change in the constitutional provision being amended.

In *State ex rel Postel v. Marcus,* (1915) 160 Wis. 354, 152 N.W. 419, it was held that the power granted to the legislature to propose, agree to and submit amendments to the people is not strictly legislative, but is ministerial in nature and must be exercised in accordance with the constitutional provision. It was held, further, that the purposes of the procedure prescribed are that there should be no amendment which was not the result of deliberate reflection on the part of two legislatures and the people, and that there should be no possibility of an amendment being adopted without accurate knowledge of its contents.

The 1967 legislature is presumed to have known of the constitutional amendment approved by the electors in the April 1967 election with respect to change of compensation of circuit judges and justices. *State ex rel McKeever v. Cameron,* (1923) 179 Wis. 405, 410, 192 N.W. 374.

The proposed amendatory language can and should be included in its proper frame. It will be published prior to the next election.

The use of brackets and explanatory material will permit the voters and the next legislature to be fully informed as to the proposed amendment in its proper frame.

BCL:RJV

Fur Dealers—Penalty Provision—The definition of felony in sec. 939.60, Stats., applies to sec. 29.134 (11) insofar as the latter statute provides for imprisonment of not more than one year without designating the place of imprisonment, since such offenses are punishable in the state prisons pursuant to sec. 959.044, Stats.

August 13, 1968.

L. P. VOIGT, *Secretary*
Department of Natural Resources

You have requested an opinion whether violation of sec. 29.134, Stats., is a misdemeanor or a felony. That section, relating to regulation of fur dealers, contains the following penalty provision in sub. (11):

"(11) Any person who violates this section shall be fined not more than $1,000, or imprisoned not more than one year, or both, except that any person violating sub. (6m) shall be fined not less than $10 nor more than $100 or imprisoned not less than 30 days nor more than 6 months or both."

With reference to sub. (6m), which requires the keeping of certain records, it is clear that the violation is a misdemeanor since the maximum penalty is 6 months imprisonment, which must be in the county jail. However, the penalty for violating the other provisions is a maximum of one year imprisonment with no place of imprisonment expressed, and is therefore punishable in the Wisconsin state prisons pursuant to 959.044, which provides in part:

"959.044 Place of imprisonment when none expressed. When a statute authorizes imprisonment for its violation but does not prescribe the place of imprisonment, (a) a sentence of less than one year shall be to the county jail, (b) a sentence of more than one year shall be to the Wisconsin state prisons and the minimum under the indeterminate sentence law shall be one year, and (c) a sentence of one year may be to either the Wisconsin state prisons or the county jail. * * *"

You point out in your letter that ch. 127, Laws 1947, deleted the words "in the county jail" from 29.134 (11). At that time, sec. 959.044 (then numbered 353.27 (2)) was in force and effect, having been enacted in 1945.

The legal presumption is that the legislature was aware of existing statutory provisions, was familiar with its own prior enactments, and did not intend to enact conflicting

provisions. The presumption is one of universal application. *State ex rel. Sloans v. Reidy,* (Conn. 1965) 209 A. 2d 674; *Aultman v. Spellmeyer,* (Ga. 1965) 143 S.E. 2d 403; *Petition of Keogh-Dwyer,* (N.J. 1965) 211 A. 2d 778; *State v. Berry,* (1965) 2 Ohio Misc. 80, 207 N.E. 2d 63; *Ropo Inc. v. City of Seattle,* (Wash. 1965) 409 P. 2d 148; *Cook v. Ward,* (Ky. 1964) 381 S.W. 2d 168; *King v. State,* (Del. 1964) 203 A. 2d 74; *Collins v. Metropolitan, Dade County,* (Fla. 1964) 164 So. 2d 806; *State v. Garoutte,* (Ariz. 1964) 388 P. 2d 809.

In Wisconsin the principle was clearly recited in *Town of Madison v. City of Madison,* (1955) 269 Wis. 609, 614, 70 N.W. 2d 249. The court held:

"The language of the statute is plain and unambiguous. The cardinal principle of statutory construction is to save and not to destroy. As said in 82 C.J.S., Statutes, p. 794, sec. 362, 'All statutes are presumed to be enacted by the legislature with full knowledge of the existing condition of the law and with reference to it; * * * they are therefore to be construed in connection with and in harmony with the existing law, and as part of a general and uniform system of jurisprudence, that is, they are to be construed with reference to the whole system of law of which they form a part. So the meaning and effect of statutes are to be determined in connection, not only with the common law, * * * and the constitution, but also with reference to other statutes * * * .'"

It follows that the striking out of the words "in the county jail" from sec. 29.134 (11) by the 1947 legislature, as mentioned above, must be construed as making the violation punishable by imprisonment in the state prisons except as to subs. (6m). See *Pruitt v. State,* (1962) 16 Wis. 2d 169, 114 N.W. 2d 148.

Moreover, the Criminal Code adopted in 1955 now contains the definition of felonies and misdemeanors in CH. 939, Stats.:

"939.60 Felony and misdemeanor defined. A crime punishable by imprisonment in the state prison is a felony. Every other crime is a misdemeanor."

Sec. 939.20, Stats., provides:

"939.20 Provisions which apply only to the criminal code. Sections 939.22 and 939.23 apply only to crimes defined in the criminal code. *Other sections in ch. 939 apply to crimes defined in other chapters of the statutes as well as to those defined in the criminal code.*"

The equivalent provision (339.20) in the 1953 Criminal Code Bill No. 100, A., p. 11, was accompanied by the following comment:

"COMMENT: Sections 339.21 to 339.25 [339.21, 339.24 and 339.25 were dropped in the 1955 bill] deal with rules of construction applicable to the criminal code, including the meaning to be given to certain words and phrases used in the code. Definitions cannot apply to sections outside the criminal code, for those sections were not drafted with those definitions in mind. Sections in chapter 339, other than sections 339.21 to 339.25, codify general principles of criminal law *which are applicable equally to crimes defined in sections outside the criminal code and to crimes defined in the criminal code.*"

A provision similar to present sec. 939.60 contained in the 1953 Criminal Code, Bill No. 100, A., p. 48, was accompanied by the following comment:

"COMMENT: *This definition applies to all crimes, not only to those in the criminal code.* Whether or not a crime is punishable by imprisonment in the state prison depends in general on the maximum penalty prescribed for that crime. Section 353.27 (2), Stats. 1951 (renumbered 359.044 by this bill) provides that when the section defining a crime does not prescribe the place of imprisonment for its violation, a sentence of more than one year shall be to state prison and a sentence of one year may be to state prison; a sentence of less than one year cannot be to state prison. *The result is that a crime having a prescribed maximum penalty of imprisonment for one year or more is a felony, since such a crime is punishable by imprisonment in state prison;* a crime having a prescribed maximum penalty of imprisonment for less than one year is a misdemeanor, since

such a crime is not punishable by imprisonment in state prison. It is immaterial that because of age, sex, or any other reason, the penalty could not have been imposed in a particular case.

"In the unusual case *where a crime is specifically denominated either 'felony' or 'misdemeanor'*, familiar rules of statutory construction make this general definition inapplicable."

You refer in your letter to *State ex rel. Gaynon v. Krueger*, (1966) 31 Wis. 2d 609, 143 N.W. 2d 437, construing the penal provision of the income tax law, sec. 71.11 (42), as creating a misdemeanor even though it provides for imprisonment for one year and does not specify the place of imprisonment. That case went off largely on the history of 71.11 (42) which never did contain a reference to a place of imprisonment, and when originally enacted was a misdemeanor prior to adoption of what is now sec. 959.044 under the rule of *Veley v. State*, (1927) 194 Wis. 408, 216 N.W. 522, and *Grimes v. State*, (1940) 236 Wis. 31, 293 N.W. 925. The *Gaynon* case is clearly distinguishable from the problem involved in this opinion, because reference to the county jail was originally in sec. 29.134 (11) and was stricken out after the enactment of sec. 959.044, thereby authorizing imprisonment in the state prison for its violation and thereby making it a felony under the definition of felony then in effect—namely, sec. 353.31, Stats. 1947—which is a predecessor of sec. 939.60:

"353.31 Felony. Any offense punishable by imprisonment in the state prison is a felony."

I am therefore of the opinion that violation of penal provisions of sec. 29.134 except sub. (6m) is a felony.

BCL:WAP

District Attorneys—Commitment Applicants—The duties imposed upon the district attorney by sec. 51.02 (3) do not include the ministerial or clerical functions referred to in CH. 51.

August 14, 1968.

ROBERT J. RUTH
District Attorney, Rock County

You have requested my opinion relative to the duties of the district attorney's office with respect to whether:

(1) Sec. 51.02 (3), Stats., imposes upon the district attorney's office the duty to interview private citizen applicants for voluntary or involuntary commitment, and to prepare and submit the application and process referred to in sec. 51.01, Stats., to the court.

(2) Sec. 51.01, Stats., when read in conjunction with CH. 51 as a whole imposes upon the county court the duty to cause commitment proceedings to be instituted.

(3) The county court may direct the district attorney to prepare, submit and procure service of all applications under CH. 51 pursuant to sec. 51.02 (1) or 51.02 (3).

(4) The county court may direct the district attorney to prepare necessary post-hearing findings and order for discharge or commitment.

CH. 51, Stats. clearly provides that the judicial inquiry to determine whether citizens of the state are mentally ill shall be instituted before and determined by the county court, or if the judge of the county court is not available, any court of record.

The application for mental examination must be made to the county court pursuant to sec. 51.01 and subsequent sections impose certain specific duties upon the court in order to protect the rights of the alleged incompetent. The forms to be utilized in such proceedings are prepared by the department of public welfare (now health and social services) and furnished to the county courts.

No specific duties with respect to either the initial petition, investigation or hearing are imposed upon the district attorney directly or by inference. The only reference to the duties of the district attorney in CH. 51 is found in sec. 51.02 (3), which provides as follows:

"(3) DISTRICT ATTORNEY TO HELP. If requested by the judge, the district attorney shall assist in conducting proceedings under this chapter."

In my opinion "assistance" in conducting the proceedings does not contemplate transfer of the duties imposed on the court to the district attorney. Assistance in conducting the proceedings indicates that in some instances the court may desire that the district attorney examine witnesses, verify documents or other exhibits or have the benefit of the district attorney's observations on the evidence. The clerical and ministerial duties remain where the statutes impose them.

In answer to questions (1) and (2), it is accordingly my opinion that sec. 51.02 (3), Stats., does not impose upon the district attorney the duty to interview citizen applicants for voluntary or involuntary commitment, nor to prepare and submit the application or process referred to in sec. 51.01, Stats., but that such duties are imposed upon the county court.

The answer to question (3) above will vary with the circumstances in the individual case. The district attorney's duties include, among others, those specified in sec. 59.47 (1), which provides:

"(1) Prosecute or defend all actions, applications or motions, civil or criminal, in the courts of his county in which the state or county is interested or a party; and when the place of trial is changed in any such action or proceeding to another county, prosecute or defend the same in such other county."

As has been noted in an earlier opinion:

"(12) The question is often raised whether, under sec. 59.47, subsec. (1), Stats., it is the duty of the district attorney to appear at various hearings, such as hearings for the determination of insanity, sec. 51.02, appointments of guardians for the mentally incompetent or aged, sec. 49.31 (2), juvenile delinquency hearings, sec. 48.06, matters concerning indigents, sec. 49.11, and similar proceedings.

"(13) In proceedings of this sort the county or state, and often both, are interested. In many of these matters they are interested directly since the financial burden for support may fall on either or both of these governments. Aside from the financial interest there is also the general

public interest to insure proper and fair treatment of those persons who have become or may become public charges in whole or in part. And often it is important that the state and county be represented in proceedings which may not be criminal to show why certain persons should be confined to institutions or otherwise cared for as a protection to the rest of the citizens."

After pointing out that this statute imposes broad advisory duties upon the district attorney, the opinion continues:

"(16) From these general statements the following rule is set forth regarding such proceedings: It is the duty of the district attorney to attend to, and represent the state and county in these matters where he is so requested by some officer or official body of the state or county; or if he has no notice that such a proceeding is to take place, and he is of the opinion that the interests of the state or county, whether financial or the broader interests of the public welfare, require his attention to the matter, it is his duty to attend thereto even though there has been no request by state or county officers.

"(17) In accordance with this rule it is our opinion that it is the duty of the district attorney, upon request of the county court, to appear at hearings for the determination of insanity, sec. 51.02. XXV Op. Atty. Gen. 614. The county is directly interested, since a finding of insanity may result in a financial burden upon the county. Further, it is of public interest that all the facts in the case be presented and considered by someone who is not prejudiced. If the district attorney, after investigation into the matter, believes that it would be error to find the individual insane, he should present these facts to the court. On the other hand, if he believes from the facts that commitment of the individual is better for the general public it is his duty to so inform the court." 25 OAG 549.

These statements have been quoted with approval in *In re Terrill*, 240 Wis. 53 and in subsequent opinions from this office, 34 OAG 337, 35 OAG 282.

One can readily conceive of circumstances where the district attorney would become an advocate of the position he

believes to be in the best interest of the county or the state, and which may be contrary to that of the alleged incompetent or other interested persons. As indicated in the opinion cited above, 34 OAG 337, "It is therefore the duty of the district attorney to participate in such proceedings if he has notice that they are pending. *The extent of his participation may be left to his good judgment, depending on the circumstances of each case.*"

There may be other occasions when the sheriff, a police officer or welfare or health officer will request assistance from the district attorney in preparing an application. Under such circumstances the district attorney may undertake to prepare the necessary forms, interview witnesses and participate in all phases of the proceedings representing what he conceives to be the state's or county's interest. In certain instances the district attorney may find that his duty lies in making an independent investigation into the circumstances of the application for examination or activity of the alleged incompetent. His independence of judgment and discretion might be compromised, or at least have that appearance if he could be directed to prepare the application, or discuss the matter with those who wish to sign the application. He should be free to do so, if in his judgment, such activities are necessary and in the best interest of the state or county governments, but should not be compelled to do so by direction of the court under the "request for assistance" provided for by sec. 51.02 (3).

Accordingly, questions (3) and (4) are answered in the negative, subject to the qualifications expressed above.

The district attorney's participation in the proceedings may vary from providing requested assistance to the court in conducting the proceedings to advocacy and representation of interests adverse to other interested persons. This is particularly true in view of the fact that the court also had the discretion under sec. 51.02 (4), Stats., to appoint a guardian ad litem "[a]t any stage of the proceedings * * * if it determines that the best interest of the patient requires it * * *."

Therefore, it is my opinion that the district attorney should not routinely be directed to prepare findings of fact or hearing orders. This is not to suggest that in the event

the district attorney prevails in whatever view he espouses that he would not be directed to prepare findings of fact and appropriate orders as in other litigation.

BCL:TLP

Marriage Licenses—Nonresidents—Under sec. 245.05, Stats., a marriage license may be issued to bona fide nonresidents of Wisconsin without requiring one of them to establish residency in the county of application for 30 days next preceding application.

August 15, 1968.

NORMAN L. SARACOFF
District Attorney, Clark County

Your request for my opinion requires an answer to the following question:

May a marriage license be issued by a county clerk if neither of the applicants has resided in said county for a period of 30 days prior to application?

The answer to your question is "yes" provided that both of the parties are nonresidents of the state and are otherwise qualified.

If one or both of the parties are residents of the state, application must be made in the county in which one of the parties has resided for at least 30 days immediately prior to application.

Wisconsin has the right to control and regulate by reasonable laws the marriage relationship of its citizens and persons seeking to enter into the relationship in this state must comply with its laws. 55 OAG 241, 243, 244.

Sec. 245.05, Stats., provides in part:

"No person shall be joined in marriage within this state until a license has been obtained for that purpose from the county clerk of the county in which one of the parties has resided for at least 30 days immediately prior to making

application therefor. If both parties be nonresidents of the state, such license may be obtained from the county clerk of the county where the marriage ceremony is to be performed. If one of such persons is a nonresident of the county where such license is to issue, his part of the application may be completed and sworn to (or affirmed) before the person authorized to accept such applications in the county and state in which he resides. At the time of application for such license, the clerk shall give to each of the applicants (or mail to an applicant who completes his part of the application outside of the state) a card with the language of s. 245.001 (2) printed thereon. * * *"

The legislative council note to this section, which was created by ch. 595, Laws 1959, states:

"This is a restatement of Wis. Stats. 1957, §245.13 which requires that a marriage license be obtained in the county where one of the parties resides. Since residence can be established in a single day this requirement is easily circumvented. A new provision requires the distribution of a marital information card by the county clerk to marriage applicants. The card emphasizes the importance of stability in marriage, its seriousness, and urges premarital counseling."

Sec. 245.13, 1957 Stats., provided:

"No persons shall be joined in marriage within this state until a license shall have been obtained for that purpose from the county clerk of the county in which one of the parties resides; provided that if both parties be nonresidents of the state, such license may be obtained from the county clerk of the county where the marriage ceremony is to be performed; and provided further that if one of such persons be a nonresident that his part of the application may be completed before the county clerk in the state in which he resided."

It is clear that the requirement of 30 days residency in county of application was intended to apply only where one or both of the applicants were Wisconsin residents. Former sec. 245.13, and present sec. 245.05, Stats., recognize that an application to marry in Wisconsin may be granted when

both parties are nonresidents. In such case, application must be made in the county where the marriage is to be performed under sec. 245.12 (2), which provides in part:

"The license shall authorize the marriage ceremony to be performed in any county of this state, excepting that where both parties are nonresidents of the state, the ceremony shall be perforced only in the county in which the license is issued. * * *"

A person could not have resided in the county of application for more than 30 days immediately prior to application and at the same time be a nonresident of the state.

The legislature could not have intended to act in vain. The law clearly intends that nonresidents be authorized to enter into marriage contracts in Wisconsin on substantially the same terms as Wisconsin residents. They are subject to the antenuptial physical examination and tests. Sec. 245.06. There is a five-day waiting period between the application and issuance of the license which may be waived only where the person applying for judicial dispensation under sec. 245.08, has been a resident of the state for 30 days immediately prior to making such application. Waiver could be possible where both parties were nonresidents, provided application for dispensation were made by the parent or guardian, who was a Wisconsin resident, of one of the parties.

Sec. 245.08, Stats., provides in part:

"The applicant shall retain residence in one county until he has established residence in another for thirty days."

In domestic relations cases "residence" has been held to mean actual habitation in fact and intent. *Hall v. Hall,* (1870) 25 Wis. 600.

In a recent insurance case the court has said that "resident" is an elastic term and while often connoting domicile, could refer to a temporary sojourner. *Natl. Farmers' Union Property and Casualty Co. v Maca,* (1965) 26 Wis. 399, 132 N.W. 2d 517.

We are concerned with residency for marriage purposes. To reside is to live or dwell at a place. A resident is one who lives or resides at a given place. To be a resident one must

intend to reside at the given place for some period of time, if even for a day. The legislature, having used "resident" and "non-resident" in the same section, could not have intended that a nonresident of Wisconsin must establish a 30 day residency in the county of marriage application before he could qualify for a license.

BCL:RJV

Per Diems—County Board Supervisors—County board supervisor is not entitled to *per diem* for appearing before committee of which he is not a member unless he is directed by county board to appear or unless he is appearing for another county board committee with its consent on a matter within the authorized concern of the committee of which he is a member. Sec. 59.06, Stats.

August 16, 1968.

GLENN L. HENRY
Corporation Counsel, Dane County

You have requested my opinion on several questions relating to the right of a county board supervisor to be paid *per diem* compensation for an appearance before a county board committee of which he is not a member.

You state that the county board has established a *per diem* rate of $20 for committee members who also receive mileage for committee services.

You give the following examples of instances in which supervisors have claimed *per diem* for services before a committee of which they were not members:

1. A supervisor introduces a resolution which is referred to a county board committee for consideration. The committee invites the supervisor to appear before the committee and explain the resolution.

2. A supervisor at his own invitation appears before a county board committee to express an opinion on a matter

pending before the committee. The supervisor appears in his own interest or on behalf of a constituent.

3. A member of committee A, with approval of committee A, appears before committee B on a matter which is also within the area of concern of committee A by reason of the resolution of the county board establishing the purposes and duties of committee A.

4. The county board by specific resolution directs a supervisor to appear before a committee on a specific matter.

It is my opinion that no *per diem* or mileage allowance is payable in examples 1 and 2, and that both *per diem* and mileage should be paid in example 3 and should be charged to services for committee A, the committee of which the supervisor was a member rather than to committee B. It is my further opinion that a *per diem* at the committee service rate and mileage should be paid in example 4. The supervisor is acting as a member of a special committee at the direction of the county board and the *per diem* should be charged to the special committee, not to the committee he appears before. It is my opinion that the meeting referred to is not the type of meeting referred to in the phrase "school, institute or meeting" used in sec. 59.06 (2) for which a different compensation could be allowed.

The problem of *per diem* payment of county board members has been treated in 42 OAG 326, 50 OAG 187 and 54 OAG 191.

We are concerned with members of county board committees appointed under sec. 59.06, Stats. All such committeemen must be county board supervisors. Every supervisor need not be, but generally is, a member of some committee. The problem of *per diem* is complicated by the fact that supervisors may earn *per diem* in a number of capacities and the statutes permit payment at the same or different rates.

As a supervisor, a member in Dane county, is entitled to *per diem* at the established *board rate* for a limited number of board meetings under sec. 59.03 (2) (f), (g) and (h) which provide:

"(f) *Compensation.* Each supervisor shall be paid a per diem by the county for each day he attends a meeting of

the board. Any board may, at its annual meeting, by a two-thirds vote of all the members, fix the compensation of the board members to be next elected. Any board may also provide additional compensation for the chairman.

"(g) *Mileage.* Each supervisor shall, for each day he attends a meeting of the board, receive mileage for each mile traveled in going to and returning from the meetings by the most usual traveled route at the rate established by the board pursuant to s. 59.15 as the standard mileage allowance for all county employes and officers.

"(h) *Limitation on compensation.* Except for services as a member of a committee as provided in s. 59.06 no supervisor shall be paid for more days' attendance on the board in any year than is set out in this schedule: In counties having a population of less than 25,000, 20 days; at least 25,000 but less than 100,000, 25 days; more than 100,000 but less than 500,000, 30 days."

Any *per diem* payable under sec. 59.06, Stats., must be earned *as a committee member* of some authorized committee. The *per diem* for regular committee service cannot be higher than that authorized for board meetings, however it is a separate and distinct rate and may be the same or lower for regular committee services and the same or lower for additional meetings authorized.

Sec. 59.06 (1) and (2) provide:

"(1) The board may, by resolution designating the purposes and prescribing the duties thereof and manner of reporting, authorize their chairman to appoint before June 1 in any year committees from the members of the board, and the committees so appointed shall perform the duties and report as prescribed in such resolution.

"(2) Committeemen shall receive such compensation for their services as the board allows, not exceeding the per diem and mileage allowed to members of the board and such committee members shall receive such compensation, mileage and reimbursement for other expenses as the board allows for their attendance at any school, institute or meeting which the board directs them to attend. No supervisor shall be allowed pay for committee service while the board is in session, nor for mileage except in connection with

services performed within the time herein limited. The number of days for which compensation and mileage may be paid a committee member in any year, except members of committees appointed to have charge of the erection of any county building, and except as otherwise provided by law, are limited as follows:

"(a) In counties containing less than 25,000 population, to 20 days, not more than 10 of which shall be for services on any one committee, except that the board may increase the number of committee meetings as provided in par. (b) and similarly fix the compensation of the members for the additional meetings.

"(b) In other counties, to 30 days for services on committees, except that the board may, by a two-thirds vote of the members present, increase the number of days for which compensation and mileage may be paid in any year and fix the compensation for each additional day."

Although the words "meetings" and "additional meetings" are used, committee members can earn a *per diem* for committee services even though a committee meeting is not held. The service must however be authorized by the committee of which the supervisor is a member and must be within the purposes and duties of the committee as prescribed by the resolution of the county board establishing the committee. Sec. 59.06 (1). When committees are established, the powers and duties belong to the committee and cannot be exercised by individual members absent consent.

I am of the opinion that the June 1st date referred to in sec. 59.06 (1), Stats., is directory and does not prevent the county board from establishing special committees at other times during the year if the need should arise. Sec. 59.04 (1) (e), Stats., requires that boards in counties of under 500,000 population meet on the third Tuesday of April in each year to organize and appointment of regular committees should generally take place at this meeting, or if not accomplished then, should be completed by June 1st.

BCL:RJV

Counties—Transfer of Funds—Budget—Transfer of funds from contingent fund in excess of that permitted under sec. 65.90 (5) (b) requires a two-thirds vote of the entire membership of the county board. Publication of class 1 notice for changes in budget can be combined with board proceedings publication if 10 day period is complied with.

August 26, 1968.

WILLIS J. ZICK
Corporation Counsel, Waukesha County

You request my opinion on the following questions involving a county of under 500,000 population:

1. Under sec. 65.90 (5), Stats.; does the transfer of funds from the contingent fund require a two-thirds vote of the elected members of the county board?
2. Must the county publish a separate legal notice in connection with all "alterations" of the budget under sec. 65.90 (5) (a), or will inclusion in the proceedings of the county board suffice?

You state that:

"Waukesha County has historically included an item entitled 'Contingent Fund' in its annual budget. In the 1968 budget, a sum of $275,000.00 was appropriated to the contingent fund. Our Rules of Order have always authorized our Finance Committee to make appropriations from this contingent fund as authorized by Section 65.90 (5) (b). In addition, the County Board has always understood that it could by resolution make appropriations from this contingent fund for any purpose desired during the course of the budget year. The Board has also historically made appropriations during the course of the year for various unbudgeted expenses from the general residue of County funds, commonly referred to as the 'General Fund.'

"It has been the practice of Waukesha County to require a two-thirds vote of the Board pursuant to Section 65.90 (5) (a) in connection with any transfer from the 'General Fund'. However, it has been the practice to require merely a simple majority vote for transfers from the 'Contingent

Fund'. This latter practice has been based on the premise that the contingent fund was specifically set up in the budget for unanticipated expenditures and that therefore any transfer from the fund for an unanticipated purpose during the year did not constitute an 'alteration' of the budget, within the meaning of Section 65.90 (5) (a). It has been felt that this was a proper interpretation of this section, even though the particular item or activity for which the funds are used was admittedly not set forth in the budget."

In 30 OAG 304, 309 it was stated that under then sec. 65.90 (5), a two-thirds vote was required to transfer funds from one county department to another, to transfer funds within a department from one purpose to another, or for expenditures from the contingent fund. At page 309 it is stated:

"As the contingent fund appears in the budget, it may be urged that residents and taxpayers have had an opportunity to express themselves in relation to that fund and that hence the legislature did not intend that a two-thirds vote would be necessary in augmenting appropriations from that fund. We do not think the argument sound. Transfer from a contingent fund to any other appropriation obviously does augment the appropriation to which the transfer is made and thus increase the amount of money or purpose for which any budgeted amount is expendable as per the original budget. It is a change of the 'amounts of various appropriations and the purposes for such appropriations' within the meaning of that language in subsection (5) of the act. Furthermore, a contingent fund in a budget does not mean that there has been any determination either by taxpayers, residents or county board members that it is necessary or desirable to expend the amount of that fund in addition to appropriations for specific purposes. Such an item in a budget simply means that the governing body deems it desirable that it levy taxes for the purpose of having funds on hand to meet unforeseen circumstances or to meet situations where time has proved estimates to be inadequate. Certainly if there is any reason for requiring a two-thirds vote to transfer funds appropriated for one

purpose to another purpose in the same department, which transfer does not augment a departmental appropriation, there is every reason for requiring a two-thirds vote to augment a departmental appropriation by transfer to it from the contingent fund."

The opinion also concluded that a county board could not delegate authority to its finance committee to make transfers.

In 32 OAG 301, 302 (1932) construing the same section, the writer stated:

"* * * Accordingly, the expenditure of the funds in the contingent account for a purpose which is not one that is within any of the other budget accounts would not constitute any change in the budget but be in furtherance of the very purpose for which the amount included in the contingent fund was provided. However, the expenditure of the moneys in the contingent fund for any of the purposes included in any of the other budget accounts or the use thereof to supplement expenditures from other budget accounts for the purposes covered by such other budget accounts, or the transfer of all or any portion of the moneys in the contingent fund to any other budget account to augment the amount in the other budget account, would constitute a budget change and all of the requirements of sec. 65.90 (5), Stats. 1943, would have to be complied with. * * *"

The writer agreed in part with the opinion in 30 OAG 304, but concluded that the expenditure of moneys from a contingent fund for a purpose which is not one within any of the other budget accounts would not constitute a change requiring compliance with the publication and two-thirds requirements of sec. 65.90 (5), Stats. The writer did conclude that a two-thirds vote was required because of sec. 59.84 (5), Stats., 1943. This statute only applied at that time to counties of over 300,000 population and could not have applied to Outgamie county.

I am of the opinion that the reasoning in 30 OAG 304, 309 is sound.

Sec. 65.90 (5) (a) (b) presently provides:

"(5) (a) Except as provided in par. (b), the amount of tax to be levied or certified, the amounts of the various appropriations and the purposes for such appropriations stated in such budget, after any alterations therein made pursuant to the hearing required by this section, shall not be changed thereafter unless authorized by a vote of two-thirds of the entire membership of the governing body of such municipality, except that in the case of city boards of education transfers may be authorized by a two-thirds vote of such boards for funds under their control. Any municipality, excepting towns and one-room school districts, which makes such changes shall publish a class 1 notice thereof, under ch. 985, within 10 days thereafter. Failure to give such notice shall preclude any changes in the proposed budget and alterations thereto made pursuant to sub. (4).

"(b) A county board may authorize its standing finance committee to transfer funds between budgeted items of an individual county office or department, if such budgeted items have been separately appropriated, and to supplement the appropriations for a particular office, department or activity by transfers from the contingent fund. Such committee transfers shall not exceed the amount set up in the contingent fund as adopted in the annual budget, nor aggregate in the case of an individual office, department or activity in excess of 10 per cent of the funds originally provided for such office, department or activity in such annual budget. The publication provisions of paragraph (a) shall apply to all committee transfers from the contingent fund."

Par. (b) became law by reason of ch. 220, Laws 1951. The power granted is limited and does not authorize a finance committee to transfer funds from the contingent fund to individual offices, departments or activities which were not referred to in the annual budget adopted.

Sec. 59.84, Stats., applies to counties of over 500,000 population. Subs. (8) and (9) deal with transfers of appropriations, and supplemental and emergency appropriations. Sub. (9) requires a two-thirds vote of the members-elect of the county board for "transfer from the contingency appropriation into any other appropriation or create a new appropriation for any legal county purpose" and for "supplemen-

tal appropriations" when funds are available. While not controlling, the section is persuasive.

I am of the opinion that a county board could by majority vote authorize and direct its finance committee to act to transfer funds from the contingent fund within the limits of sec. 65.90 (5) (b).

If the county board intends to transfer funds above the limits set forth in sec. 65.90 (5) (b), or to an office, department or activity not referred to in the annual budget, a two-thirds vote of the entire membership of the county board is required.

I am of the opinion that a separate legal notice need not be published for the transfers made by the county board under sec. 65.90 (5) (a), Stats.; however since that provision requires a class 1 notice within 10 days after change and sec. 59.09 (2), Stats., requires that county board proceedings be published by a class 1 notice within 10 days *after* the *adjournment* of each session, the shorter time period would have to be complied with. This may not be feasible in many cases. In case of joint publication the heading should refer to both "Proceedings of the County Board" and "Transfer of Funds from Contingent Fund" or "Notice of Alteration of County Budget" as the case may be.

BCL:RJV

Public Records—Department of Transportation—It is improper to subpoena public records, as defined in sec. 18.01, Stats., for use in legal proceedings, where certified copies of such records can be obtained under sec. 889.18, Stats.

September 3, 1968.

G. H. BAKKE, *Secretary*
Department of Transportation

You have informed us that a subpoena duces tecum is often served upon an officer or employe of the department

of transportation requiring that he appear and produce public records of that department before a court or court commissioner to be used as evidence in a legal proceeding. You ask whether it is proper for original public records to be so subpoenaed, or whether the persons desiring to use such records in legal proceedings should be required to obtain certified copies for such purpose. The answer is that wherever certified copies of public records are available, the originals should not be subpoenaed for use in legal proceedings.

There is no question whether the documents involved are, in fact, public records. They are clearly public records of the department of transportation. They are available for inspection and copying by any person during normal business hours, as prescribed by sec. 18.01 (1) and (2), Stats., which reads:

"(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)."

Such records will be made available to any person who asks to see them. Employes of the department of transportation will make searches of the records and furnish certified copies upon the payment of the fees prescribed for such service.

The supreme court has held that inspection may be denied where the harm done to the public interest would outweigh the right of the public to have access to particular public records. *State ex rel. Youmans v. Owens,* (1965) 28 Wis. 2d 672, 137 N.W. 2d 470; *Beckon v. Emery,* (1967) 36 Wis.

2d 510, 153 N.W. 2d 501. However, this question is not involved here. You raise no objection to public inspection and copying of such records. What you do object to is having original public records subpoenaed for use in legal proceedings.

With certain exceptions, public records are admissible in legal proceedings as evidence of the facts therein stated. At the present time, this rule is statutory. Sec. 889.18 (1), Stats, reads:

"(1) As evidence. Every official record, report or certificate made by any public officer, pursuant to law, is evidence of the facts which are therein stated and which are required or permitted to be by such officer recorded, reported or certified, except that the record by the county clerk of license or certificate under s. 147.23 or 153.05 [Stats., 1941] shall not be evidence on behalf of the licensee or certificate holder without production of the license or certificate or competent evidence from the board or body that issued the same."

This rule was developed at common law, as a recognized exception to the hearsay rule. The reason given for the rule is that to require the official who made or recorded the document to appear in court would unduly interrupt public business. The rule obviates the constant attendance of public officers in court to prove routine matters. *Gilbert v. Gulf Oil Corp.*, (1949) 175 F. 2d 705, 710; *Vanadium Corp. v. Fidelity and Deposit Co.*, (1947) 159 F. 2d 105, 109; Conrad, Modern Trial Evidence, Vol. 2, §856; McCormick on Evidence, Ch. 33, §291.

Certified copies of such public records are admissible in evidence to the same extent that the originals would be admissible, and public officers have the duty to make such copies when tendered their fees for such service. Sec. 889.18 (2) and (3), Stats., reads:

"(2) Copies as evidence. A certified copy of any written or printed matter preserved pursuant to law in any public office or with any public officer in this state, or of the United States, is admissible in evidence whenever and wherever the original is admissible, and with like effect.

"(3) Copies, duty to make. Any such officer of this state who, when tendered the legal fee therefor and requested to

furnish such certified copy, shall unreasonably refuse to comply with such request, shall forfeit not less than $20 nor more than $100, one-half to the person prosecuting therefore."

This rule constitutes a well-defined exception to the best evidence rule. 20 Am. Jur., Evidence, §§430, 984.

The reason for this rule is that public records should be kept in a safe place, as required by law, where they may be at all times open to public inspection and available for the use of the public agencies involved. Public records subpoenaed and taken from their proper place of filing or from the custody of the proper custodian may be lost or become a part of a court file and may not be returned to the proper custodian for months or years. For this reason, the courts will refuse to subpoena original public records where certified copies are available. *Ridgway v. Farmers' Bank,* (1825) 12 Serg. and R. (Pa.) 256, 14 Am. Dec. 681; *Corbett v. Gibson,* (1879) 6 Fed. Cas. 530; *City of Atlanta v. Georgia Ry. & Power Co.,* (1919) 149 Ga. 411, 100 S.E. 442, 446; *Masten v. New York,* (1958) 179 N.Y.S. 2d 93.

In *Wigmore on Evidence,* Vol. 8, §2373, the rule is stated as follows:

"On the general principle of the public inconvenience and the risk of loss or injury or alteration involved in removing official records from their usual place of custody (§2182 *supra*), the court may refuse to compel the production of the originals in evidence. This rule of the common law has been supplemented in some jurisdictions by express statutes."

In the same volume, the rule is further stated in §2182, as follows:

"The removal of public records from their proper place of custody, to be used as evidence in court, is attended with danger of loss and mutilation of the records and with delay and annoyance to those who are entitled to consult them and those who are charged with preparing them. For these reasons, and especially since the purpose of proof can usually be as well served by a copy, courts have often laid down a rule forbidding the use as evidence of the originals of public records. * * *"

See also, 32 C.J.S., Evidence, §649; 20 Am. Jur., Evidence, §430.

I conclude that there are a number of good reasons why public records should not be subpoenaed from their proper depository for use in legal proceedings. They may be lost or destroyed. Until such time as they are returned they are not available for public inspection. Lack of such public records may disrupt the orderly flow of business of the public agency involved. Any person may inspect the public records and obtain certified copies. Any attorney who desires to prove the contents of a public record may do so by obtaining a certified copy in advance of the trial date. It is not proper for an attorney, who fails to prepare his case in advance by obtaining such copies, to attempt to obtain original public records at the last minute by subpoena duces tecum. This is an unwarranted imposition upon the public officer involved. The courts refuse to allow this where certified copies could be obtained instead.

Whenever you are served with such subpoenas duces tecum, they should be promptly brought to our attention. We will move to quash such subpoenas and ask for costs where appropriate.

BCL:AH

Motor Vehicles—Snowmobiles—Secs. 346.57 and 346.62, Stats., relating to speeding and reckless driving by motor vehicles, are not applicable on the frozen surface of lakes. Applicability of secs. 941.01 (1), 350.10 and 30.81, Stats., is discussed.

September 10, 1968.

THOMAS J. FINK
District Attorney
Winnebago County

You have informed me that many persons drive automobiles and snowmobiles on the ice of Lake Winnebago in the

winter time in a reckless and careless manner. In some cases, only one vehicle is involved and the only injury likely to occur would be to the individual vehicle and its passengers. In other cases, several vehicles are involved in a game which approximates "tag", where the vehicles come as close to each other as possible without actually colliding. You ask whether such conduct violates any state law.

Similar conduct by the operator of a motor vehicle would involve elements of reckless driving, failure to have the vehicle under control, imprudent speed, and traveling too fast for the conditions involved. Such conduct upon a highway would clearly violate secs. 346.57 and 346.62, Stats. The question arises whether these rules of the road apply on the frozen surface of a lake.

Sec. 340.01, Stats., provides, in part:

"340.01 Words and phrases defined: In chs. 340 to 349, the following words and phrases have the designated meanings unless a different meaning is expressly provided or the context clearly indicates a different meaning:

"* * *

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

"* * *"

Chs. 340 to 349, Stats., constitute the motor vehicle code. I conclude that the above statutory definition of "highway" applies to public ways on land only. I am aware that Art. IX, sec. 1, Wis. Const., declares that navigable waters in this state "shall be common highways", but it does not appear that the legislature intended to include such highways within the definition of highways given in the above quoted statute. Sec. 346.02 (1), Stats., reads:

"(1) APPLIES PRIMARILY UPON HIGHWAYS. Chapter 346 applies exclusively upon highways except as otherwise expressly provided in this chapter."

Reading these two statutes together, it is clear that the rules of the road provided in CH. 346, Stats., are intended to apply only to highways on land, with certain exceptions.

One exception is found in sec. 346.61, Stats., which reads:

"Applicability of sections relating to reckless and drunken driving. In addition to being applicable upon highways, ss. 346.62 to 346.64 are applicable upon all premises held out to the public for use of their motor vehicles, whether such premises are publicly or privately owned and whether or not a fee is charged for the use thereof."

Sec. 346.62, Stats., defines and prohibits reckless driving. Thus, it is clear that the reckless driving statute is applicable both on highways and on premises held out to the public for the use of their motor vehicles, such as driveways, parking lots, unloading areas, and other places designed for motor vehicle traffic, but not strictly a part of a highway itself. Since the legislature was here dealing with the conventional use of land vehicles, I conclude that the word "premises", as used in the above quoted statute, was never intended to include lakes or the frozen surface thereof. There is no general statute making the rules of the road, contained in CH. 346, Stats., applicable on such lakes.

You have also called my attention to sec. 941.01 (1), Stats., which reads:

"(1) Whoever endangers another's safety by a high degree of negligence in the operation of a vehicle, not upon a highway as defined in s. 340.01, may be fined not more than $200 or imprisoned not more than 6 months or both."

This statute punishes negligent operators of a vehicle not upon a highway. It is my opinion that this would apply to the operation of a motor vehicle on a frozen lake. Also, sec. 941.03, Stats., punishes the placing of an obstacle in or upon a highway or otherwise interfering with the orderly flow of traffic. Here, highway is defined to include a navigable waterway. Obstructing such waterway in either summer or winter would be prohibited.

A part of your question is directed at the reckless use of snowmobiles. Such vehicles are not allowed to operate upon the highways, with certain exceptions. Secs. 350.10 (1) and (2), Stats., 1967, read as follows:

"350.10 MISCELLANEOUS PROVISIONS FOR SNOWMOBILE OPERATION. No person shall operate a snowmobile in the following manner:

"(1) At a rate of speed that is unreasonable or improper under the circumstances.

"(2) In any careless way so as to endanger the person or property of another."

There is no reason why such regulations should not be enforced against snowmobiles upon frozen lakes.

Your attention is also directed to sec. 30.81, Stats., which authorizes local municipalities to adopt local regulations as to the use of motor vehicles on icebound inland lakes. In the absence of such local ordinances, counties can so regulate motor vehicles on such frozen lakes.

BCL:AH

Certificate-Card—Nonresidents—The register of deeds need not issue a certificate-card to out-of-state residents unless they come within the exceptions provided for in sec. 66.054 (22), Stats.

September 19, 1968.

DANIEL J. MIRON
District Attorney
Marinette County

You have asked for my opinion as to whether the register of deeds of a county must, on request, issue a certificate-card as provided for by sec. 66.057, Stats., to a person who is not a resident of Wisconsin.

Sec. 66.057 (2) and (3) provide:

"(2) Any person at least 18 years of age desiring such certificate-card shall make application therefor to the regis-

ter of deeds of any county or the clerk of the city, village or town of his residence or election commission thereof. The applicant shall pay a fee of $1 and in cities of the first class $1.25 and furnish his individual photograph and such proof of the date of his birth as the register of deeds or such clerk or commission may require. If the register of deeds or such clerk or commission is satisfied with the proof he shall issue his certificate-card which shall show the applicant's name, description, residence, date of birth, photograph and signature and shall cause said certificate-card to be enclosed in a hermetically sealed, transparent, tamper-proof cover. * * *"

"(3) It is unlawful for any person to misrepresent or misstate his age or the age of any other person or to misrepresent his age through the presentation of any document purporting to show such person to be of legal age to purchase fermented malt beverages."

Subs. (5) of 66.057, enacted by the 1965 legislature, establishes certain absolute defenses to prosecution of tavernkeepers for sale of fermented malt beverages to minors, one of which is proof "That the purchaser falsely represented in writing and supported with other documentary proof that he was of legal age to purchase fermented malt beverages." (66.057 (5) (a))

The foregoing statutory provisions must be considered in conjunction with sec. 66.054 (22) which provides:

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

In sec. 66.054 (22) the legislature has expressly forbidden the sale of fermented malt beverages to residents of bordering states which have a 21-year-old beer statute. It is unreasonable to assume, therefore, that the legislature intended in sec. 66.057 (2) to require the register of deeds of any county in Wisconsin to issue certificate-cards to such nonresident minors which might readily be used by them to purchase beer, and by Wisconsin tavernkeepers as a defense to prosecution for sales in violation of sec. 66.054 (22). The provision permitting application for certificate-cards to be made of the county register of deeds of any county is undoubtedly legislative acknowledgment of the fact that frequently town and village clerks are part-time officials who are not equipped to either take the application or issue the card.

It, therefore, appears that the legislature intended to permit residents (bona fide or spurious as in sec. 66.054 (22)) to make application of either the local clerk of the approprite municipality or the register of deeds of the county of residence. If the legislature had intended to require the register of deeds of any county to issue certificate-cards to non-Wisconsin residents, it could clearly have so provided, together with appropriate restrictions which would avoid misuse by those nonresidents to whom sale of fermented beverages is forbidden by sec. 66.054 (22), Stats.

It is, therefore, my opinion that, with the exception of students attending schools within Wisconsin and armed forces personnel stationed within Wisconsin and as provided for in sec. 66.054 (22), proof of age certificate-cards authorized by sec. 66.057 need not be issued to nonresidents of Wisconsin.

BCL:TLP

Garnishment—Small Claims Court—Garnishee summons form specified in sec. 267.04, Stats., which includes 20 days during which garnishee defendant may answer must be used in garnishment actions commenced in small claims branch of county court. Sec. 299.05 is also discussed.

October 2, 1968.

RUSSELL FALKENBERG
District Attorney
Chippewa County

Your inquiry of August 27, 1968, requires an answer to the following question:

In a garnishment action in county court in small claims type action, should the 20 day garnishee summons specified in sec. 267.04, Stats., be used?

The answer to this question is in the affirmative.

I am aware that some county courts are continuing to employ a garnishee summons with a fixed return date. A copy of that used in Dane county is enclosed. The question was neither argued nor decided in *Family Finance v. Sniadach,* (1967) 37 Wis. 2d 163. A review of the briefs and appendix does disclose that the garnishee summons used therein was returnable on a fixed date. It was served on the garnishee and defendant on the same day. The amount involved was less than $500. The court pointed out that sec. 267.07 (1) affords ten days time to plaintiff to serve the garnishee summons and complaint on the defendant after service of the same on the garnishee and that sec. 267.16 (1) provides that no trial shall be had of the garnishment action until the plaintiff has judgment in the principal action. The court makes it clear that the provisions of CH. 267 generally control as to the procedures to be used in the garnishment action. CH. 267, Stats., was substantially revised by ch. 507, Laws 1965. The legislative drafting record makes it clear that:

"* * * a garnishment action is a separate action with separate fees * * *"

There has been a practice of attempting to enter judgment in both the principal action and the garnishee action on the same date. The import of revised CH. 267, Stats., however, was to give the defendant whose property was garnisheed a greater opportunity to contest the garnishment action. While scheduling on separate days may work

an inconvenience on the court and plaintiff, such procedure may be necessary to protect the rights of the principal defendant and garnishee defendant.

Sec. 299.01 (4) (b) provides in part that the procedure in CH. 299 shall be used in county court in the following actions:

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

"* * *

"(b) For attachment or garnishment *under* chs. 266 and 267, except that ss. 266.09 and 267.01 (2) shall not apply to proceedings *under* this chapter; or

"* * *"

Sec. 299.04 provides:

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

(2) FORMS. Except as otherwise provided in this chapter, or where inconsistent with the provisions of ch. 291, the forms specified in Title XXV shall be used."

CH. 267, Stats., is in Title XXV.

Sec. 299.05, Stats., sets forth the form of a summons to be used in the principal action and provides that there shall be a specific return date and time which shall not be less than 8 days nor more than 17 days from the issue date.

There is no provision for a specific form for garnishee summons, nor is there a form of notice of garnishment to the principal defendant, such as is contained in sec. 267.07, Stats. In addition, sec. 267.11 provides that the garnishee shall have twenty days in which to answer.

The only notice set forth in CH. 299 with respect to garnishment is in sec. 299.16, which includes a set return date, but is only to be used where personal service has not been made pursuant to sec. 299.13 (2) and there has been no general appearance. The court is required to adjourn the proceeding to a day certain pending publication, providing the court has jurisdiction over the *res*.

The summons in the principal action may be signed by the clerk or an attorney. Sec. 299.05 (2). A garnishee summons may only be signed by the clerk of court. Sec. 267.04. The summons contains a form of order to preserve the status quo pending determination of the principal action.

Whether the garnishee summons should contain a specific return date, of less than 20 days, so as to conform with the return date permissible under sec. 299.05, Stats., which would permit the trial of the garnishment action on the same day, but after the principal action, is a matter for the legislature.

Until the statutes are so revised or until the supreme court rules that a specific return date of less than 20 days can be used in a garnishee summons, you are advised that there must be substantial conformity with the form set forth in sec. 267.04, Stats.

BCL:RJV

Veterinarians—Service Corporations—Veterinarians licensed under the provisions of CH. 150, Stats., may form a service corporation under sec. 180.99, Stats.

October 3, 1968.

RODERICK S. STENZEL, D.V.M.
Chairman
Veterinary Examining Board

You have requested my opinion as to the applicability of sec. 180.99, Stats., to the practice of veterinary medicine under ch. 150, Stats.

Sec. 180.99 (2), Stats., reads as follows:

"(2) FORMATION OF CORPORATION. One or more natural persons licensed, certified or registered pursuant to any provisions of the statutes, provided all have the same license, certificate or registration, may organize and own stock in a service corporation under this section. Such corporation may own, operate and maintain an establishment

and otherwise serve the convenience of its shareholders in carrying on the particular profession, calling or trade for which the licensure, certification or registration of its organizers is required; provided that professional or other personal services, consultation or advice in any form may be rendered only by officers, agents, or employes (as defined in sub (9)) of such corporation who are themselves licensed, certified or registered pursuant to statute in the field of endeavor designated in the articles of such corporation."

There is nothing in sub. 2 or in the whole of sec. 180.99, Stats., that would in any way prohibit those licensed under CH. 150, Stats., Veterinary Practice Act, from forming a corporation pursuant to this section.

The advantages of professional service corporations were previously summarized by this office in 51 O.A.G. 157 at page 160 as:

" '1. Permits fiscal year choice
2. Provides for continuity of practice by successor
3. Establishes a cash value for practice with a "market" to qualified, eligible successors
4. Provides for withdrawal, retirement, or addition of associates without dissolutions
5. Comes under the lower corporate tax ceilings
6. Provides additional flexibility for estate planning
7. Provides for centralized and more effective management and "pooling" of skills
8. Makes fringe benefit programs available (Professional associates now would have employee status and could be included in these programs)
   a. Qualified pension plans
   b. Non qualified pension plans
   c. Profit sharing plans
   d. Deferred compensation plans
   e. Stock option plans
   f. Various group life insurance, health, medical and disability insurance plans.' "

In order to maintain the professional relationship, the legislature enacted sec. 180.99 (8), which reads in part as follows:

"This section shall not alter any contract, tort or other legal relationship between a person receiving professional services and one or more persons who are licensed, certified or registered to render such services and who are shareholders in the same service corporation; and any legal liability which may arise out of such service shall be joint and several among the shareholders of the same service corporation. * * *"

In passing, it should be noted that in the enactment of sub. 8 as quoted above, the legislature has provided for joint and several liability among the shareholders for acts arising out of professional services.

BCL:CAB

Cryogenic Interment—Funeral Directors—In connection with a cryogenic interment in Wisconsin, where the body involved is also prepared for such interment in this state, a person who in connection therewith performs the ordinary embalming or effects the perfusion of the D.N.S.O. solution must be an embalmer but need not be a funeral director licensed under CH. 156, Stats. Secs. 156.125 and 157.125 also discussed.

October 15, 1968.

E. H. JORRIS
State Health Officer

In an opinion issued by me on November 1, 1967, you were advised that neither sec. 69.44, Stats., nor any other Wisconsin statute, expressly or by implication, prohibits cryogenic interment.

You state that additional legal questions have now arisen as to cryogenic interment and you ask my opinion thereon.

A.

You ask: Must any person who prepares or supervises the preparation of a dead human body for interment by the

cryogenic method in Wisconsin be a funeral director licensed under Chapter 156, Wis. Stats.? I take the liberty herein of rephrasing such question, merely for the purpose of presenting a clearer and more precise answer thereto. As rephrased, it would read: In connection with a cryogenic interment in Wisconsin, where the body involved is also prepared for such interment in this state, must the following persons be funeral directors licensed under CH. 156, Stats., in order to perform lawfully their roles in connection with such interment: (a) a person who in connection therewith performs the ordinary embalming or effects the perfusion of the D.N.S.O. solution; or (b) a person who not only performs the above-described task, but also directs and supervises the cryogenic interment by managing all the details involved in putting the body into a state of cryogenic interment, i.e., its transportation from the site of embalming or perfusion to the interment site, proper wrapping of the corpse, its insertion into the tube, the encapsulation of the tube, etc.; or (c) a person who does the directing and supervising job above-described, but does not perform the embalming or effect the perfusion?

The answer to the above-stated question is, in my judgment, to be found in the definition of "funeral director" which constitutes sec. 156.01 (3), Stats., construed in the manner hereinafter shown.

Sec. 156.01 (3), Stats., prior to an important change made therein in 1943, read as follows:

"(3) A 'funeral director' is a person engaged in or conducting, or holding himself out, in whole or in part, as being engaged in:

"(a) Preparing, other than by embalming, for the burial or disposal, or directing and supervising the burial or disposal of dead human bodies;

"(b) Maintaining a funeral establishment for the preparation and the disposition, or for the care of dead human bodies; or

"(c) Who shall, in connection with his name or funeral establishment, use the words, 'funeral director', 'undertaker', 'mortician' or any other title implying that he is engaged as a funeral director as defined in this subsection."

Ch. 433, Laws 1943, repealed (b) of sec. 156.01 (3), Stats., so that it now reads:

"(3) A 'funeral director' is a person engaged in or conducting, or holding himself out, in whole or in part, as being engaged in:

"(a) Preparing, other than by embalming, for the burial or disposal, or directing and supervising the burial or disposal of dead human bodies;

"(c) Who shall, in connection with his name or funeral establishment, use the words, 'funeral director', 'mortician' or any other title implying that he is engaged as a funeral director as defined in this subsection."

You will note that the disjunctive "or", previously present in subs. (b), is no longer present in the statute. However, in my judgment, the repeal of sec. 156.01 (3) (b), Stats., produced a statute which must be construed as if the disjunctive "or" appears between subs. (a) and (b).

In construing remedial statutes the plain intent of the legislature should be determined, and it is permissible to construe a statute as if a missing word is present if necessary to effectuate the legislative will. 50 Am. Jur., Statutes, §393.

I am satisfied that the legislature intended (c) to remain a cause independently descriptive of activity which, if engaged in in Wisconsin, would make the person engaging therein a "funeral director" under CH. 156, Stats.; and I am also satisfied that when it repealed (b) of sec. 156.01 (3), Stats., the legislature intended that (a) thereof, in lieu of (a) and (b) together, should remain independently descriptive of activity of the above-described kind.

So construing sec. 156.01 (3), Stats., and in answer to the first part of your question as above restated, it is my opinion that the person who, in connection with a cryogenic interment, performs the ordinary embalming or effects the above-described perfusion, but does no more, must be a licensed embalmer but need not be a licensed funeral director unless he is a person who conducts himself in the manner described in (c) of sec. 156.01 (3), Stats. If he does not so conduct himself, and also does not direct and supervise the cryogenic interment in connection with which he per-

forms the embalming, then he clearly is not a "funeral director" under the above-described construction of sec. 156.01 (3), Stats., and is, therefore, not subject to the requirements of sec. 156.04 (2), Stats.

Under the above-mentioned construction of sec. 156.01 (3), Stats., it is my further opinion that if the person referred to in your question not only does the embalming in connection with the cryogenic interment, but also directs and supervises it (or does merely the latter, leaving the embalming to someone else), he is then required to be a licensed funeral director under CH. 156.

B.

Your second question reads: Is the building or part of a building used for the preparation of a dead human body by the cryogenic method required to have a funeral establishment permit?

Sec. 156.01 (5), Stats., reads:

"A 'funeral establishment' is any building or part of a building used and held out to the public as being used in the care and preparation for burial or transportation of dead human bodies or for holding or conducting of funeral services. A funeral establishment must contain a preparation room equipped with tile, cement or composition floor, necessary drainage and ventilation and contain necessary instruments and supplies for the preparation and embalming of dead human bodies for burial, transportation or other disposition."

Sec. 156.105, Stats., reads in part:

"(1) No person shall conduct, maintain, manage or operate a funeral establishment unless a permit for each such establishment has been issued by the state board of health and is conspicuously displayed in such funeral establishment. * * *

"(2) No permit to operate a funeral establishment shall be issued by the state board of health unless each such funeral establishment has in charge, full time therein, a licensed funeral director."

In answering your second question, I shall assume that the building or part of a building referred to therein is "used and held out to the public" as a facility wherein preparation for cryogenic interment takes place.

In my judgment, a cryogenic interment is a "burial" within the meaning of that term as used in sec. 156.01 (5), Stats., defining the term "funeral establishment", and it follows that a facility "used and held out to the public" as a place where cryogenic interment takes place must be licensed as a funeral establishment.

Sec. 156.01 (5), Stats., is a public health statute, entitled to liberal construction (50 Am. Jur., Statutes, §395), and under such construction I view the term "burial" therein as embracing cryogenic interment, despite the fact that such interment is made by persons who believe it to be merely temporary, pending scientific developments permitting restoration of life to the body interred, or by persons who, cryogenically interring a body which has received only ordinary embalming, intend to keep it so interred for a time only so that members of the family or other interested persons may on occasion view it in the excellent state of preservation assured by such interment.

It is true that when sec. 156.01 (5), Stats., was created by sec. 4, ch. 93, Laws 1939, the term "cryogenic interment" and the concept it describes were, it would appear, unknown. However:

"* * * The fact that a situation is new, or that a particular thing was not in existence, or was not invented, at the time of the enactment of a law, does not preclude the application of the law thereto. The language of a statute may be so broad, and its object so general, as to reach conditions not coming into existence until a long time after its enactment. Indeed, it is a general rule of statutory construction that, in the absence of a contrary indication, legislative enactments, which are prospective in operation and which are couched in general and comprehensive terms broad enough to include unknown things that might spring into existence in the future, even though they are words of the present tense, apply alike to new situations, cases, conditions, things, subjects, methods, inventions, or persons or entities coming

into existence subsequent to their passage, where such situations, cases, conditions, things, subjects, methods, inventions, persons, or entities are of the same class as those specified, and can reasonably be said to come within the general purview, scope, purpose, and policy of the statute, the mischief sought to be prevented, and the evident meaning of the terms used." 50 Am. Jur., Statutes, §237.

See also *Philadelphia Retail Liquor Dealers Assoc. vs. Pennsylvania Liquor Control Board,* 360 Pa. 269, 62 A. 2d 53.

C.

Your third question reads: Is the structure to be used for storage of dead human bodies which have been prepared by the cryogenic method required to be located in a cemetery?

Sec. 157.12, Stats., reads in pertinent part:

"* * * No public or community mausoleum or columbarium shall after June 15, 1933, be constructed or used for the disposition of the remains of the human dead *unless the same shall be erected within the confines of an established cemetery, containing 20 acres or more, and which has been in existence for a period of 10 years.* * * *"

Assuming that the structure referred to in your question was available for "public" or "community" use, is it a columbarium or mausoleum to which the above-quoted statute would be applicable? A columbarium is a facility for housing ashes of cremated human corpses in so-called "cinerary urns". A mausoleum is a magnificant tomb, usually ornate, deriving its name from Mausolus, a ruler of Caria in Asia Minor, whose magnificent tomb at Halicarnassus was one of the wonders of the ancient world. Such a structure was usually built for one man or his family. However, by the use of the words "public or community mausoleum", the legislature has intended to include a greatly expanded definition of the term "mausoleum". In short, the term obviously means a tomb where dead bodies are interred. Therefore, I must conclude that a structure used for the storage of dead bodies, whether prepared by the cryogenic method or any other method, is a mausoleum within the meaning of

sec. 157.12, Stats., and must be located in a cemetery. Further, if the structure is even partly above ground, it will be necessary for your division to approve the plans and specifications.

D.

Your fourth question is: Does sec. 156.125, Stats., pertaining to burial agreements and trust funds, apply to cryogenic interment of dead human bodies?

It is my opinion that this question must be answered yes. Sec. 156.125, Stats., reads in part:

"(1) Whenever any person, referred to in this section as the depositor, makes an agreement with a funeral director, cemetery organization or any other person referred to in this section as the beneficiary, for the *final* disposition of the body of a person referred to in this section as the potential decedent, wherein the use of personal property under a prearranged funeral plan or the furnishing of services of a funeral director or embalmer in connection therewith is not immediately required, all payments made under the agreement shall be and remain trust funds, including interest and dividends if any, until occurrence of the death of the potential decedent, unless the funds are sooner released upon demand to the depositor, after written notice to the beneficiary. Nothing in this section shall prevent the sale and delivery of cemetery lots, graves, crypts, niches, columbaria or grave or lot markers or monuments before their use is required."

This statute is operative as to an agreement of the kind described therein which relates to the "final" disposition of the body of the potential decedent. Since cryogenic interment, for all practical purposes, is a "final" disposition, I think that sec. 156.125, Stats., is clearly applicable to it. The intent of the statute is to protect depositors who make advance arrangement for disposition of a body after death with a funeral director or other person. We have already concluded in answer to your first question that the supervision of cryogenic interment requires the services of a licensed funeral director.

E.

Your fifth question reads: Does Sec. 157.125, Stats., pertaining to trusts created for perpetual care of their burial place, apply to structures used for cryogenic interment?

It is my opinion that this question must be answered yes.

Sec. 157.125, Stats., reads:

"Where a trust is created for the perpetual care of a *burial place or grave* but no trustee is named in the will to administer the trust, the county court having jurisdiction thereof may name the county treasurer of the county in which the burial place or grave is situated as such trustee. If not contrary to the terms of the trust the county treasurer may contract with the person in charge of the burial place or grave for its care and pay to such person the income from the trust property or such part of the income that may be necessary for such purpose, and if there is no person in charge of the burial place or grave then such income shall be paid to the city, village or town, in which the burial place or grave is situated, and for the purposes of this section the governing body of such municipality shall have the duty of such care to the extent of money received for such purpose. The county treasurer shall annually render an account to the county court as provided in chapter 323 and the person or municipality receiving money for such care shall also render an annual accounting to the county court showing the amount received and in detail the purposes for which expended."

This statute applies to a situation "where a trust is created for the perpetual care of a *burial place or grave* but no trustee is named in the will to administer the trust * * *." A place of cryogenic interment must be properly regarded as a burial place or grave in view of the present state of scientific and medical knowledge concerning death. *Webster's Third New International Dictionary,* Unabridged, defines "grave" to mean "broadly: a place of interment". In construing a statute we may not indulge in fanciful speculation but must recognize realities. Therefore, a place of cryogenic interment is, in my opinion, a burial place or a grave,

and sec. 157.125, Stats., is applicable to a trust created for perpetual care of a place of cryogenic interment within this state.

BCL:LLD

Architects and Engineers—Registration Revocation— The minimum requirement for the revocation of the registration of an architect, professional engineer, or land surveyor, is that at least 3 members of the interested section of Examining Board of Architects and Professional Engineers must be present and must vote for the revocation. Discussion of sec. 18, ch. 327, Laws 1967.

October 16, 1968.

CASS F. HURC, *Secretary*
Examining Board of Architects and Professional Engineers

You have asked my opinion as to the number of votes of members of the Examining Board of Architects and Professional Engineers which are necessary in order to revoke the registration of an architect, professional engineer, or land surveyor.

It is important to note, in order of enactment, recent legislation affecting the Examining Board of Architects and Professional Engineers:

1. *1965 Statutes.* Sec. 101.31 (3) (a), 1965 Stats., stated that:

"(a) The board shall consist of *9* members: The state architect, who shall be the highest ranking registered architect under the classified service in the department of administration, the state engineer, who shall be the highest ranking registered engineer under the classified service in the department of administration, the dean of the college of engineering of the state university, or their representatives, 3 architects and 3 professional engineers. * * *"

2. *Ch. 75.* Sec. 27 (1) (b), ch. 75, Laws 1967, attached the Examining Board of Architects and Professional Engineers to the department of regulation and licensing. This chapter went into effect on August 1, 1967.

3. *Ch. 249.* Sec. 101.31 (3) (a), Stats., as recreated by ch. 249, Laws 1967, states that:

"The board shall consist of *8* members: the dean of the college of engineering of the university of Wisconsin at Madison, the dean of the college of architecture of the university of Wisconsin, or the highest ranking professor in the field of architecture in the university, designated by the president of the university, if there is no dean of architecture, 3 architects and 3 professional engineers. * * *"

This chapter went into effect on December 29, 1967.

4. *Ch. 327.* Sec. 15.405 (2), Stats., as created by ch. 327, Laws 1967, states that:

"* * * The examining board shall consist of *9* members: the state architect, who shall be the highest ranking registered architect under the classified service in the department of administration, the state engineer, who shall be the highest ranking registered engineer under the classified service in the department of administration, the dean of the college of engineering of the university of Wisconsin, or their representatives, 3 architects, and 3 professional engineers. * * *"

This chapter went into effect on February 18, 1968.

5. *Supplement to ch. 327.* Acting under the authority of sec. 18 (3) of ch. 327, the joint committee on finance of the Wisconsin legislature, on March 8, 1968, promulgated a supplement to ch. 327, Laws 1967. In Directive H of this supplement, the joint committee sought to incorporate ch. 249 into ch. 327. Directive H, sec. 2, of this supplement states.

"15.405 (2) of the statutes is repealed and recreated to read:

"15.405 (2) EXAMINING BOARD OF ARCHITECTS AND PROFESSIONAL ENGINEERS. There is created an examining board of architects and professional engineers in the department of regulation and licensing. Any member

appointed to the examining board shall have engaged in the practice of the profession of architecture or professional engineering for at least 10 years and shall have been in responsible charge of architectural or professional engineering work for at least 5 years. The examining board shall consist of *8* members: the dean of the college of engineering of the university of Wisconsin at Madison; the dean of the college of architecture of the university of Wisconsin or, if there is no such dean, the highest ranking professor in the field of architecture in the university, designated by the president of the university; 3 architects and 3 professional engineers. * * *"

A well-established, common law rule of statutory construction states that when two statutes deal with a subject in specific terms and the two statutes are repugnant and irreconcilable, the later-enacted statute prevails over and supersedes the earlier statute. *Donovan v. Theo. Otjen Co.*, (1941) 238 Wis. 47, 298 N.W. 168; *Abdella v. Abdella*, (1954) 7 Wis. 2d 173, 177, 96 N.W. 2d 612. It is clear that chs. 249 and 327 both deal specifically with the number of members of the Examining Board of Architects and Professional Engineers and that the two statutes are repugnant and irreconcilable. It is irrevelant that ch. 327 is a general statute dealing with the composition of the executive branch of the state government, because it deals specifically with the question of the number of members of the board. Applying the rule that the later-enacted statute prevails, the provisions of ch. 327 declaring that the board shall consist of 9 members would be effective, and ch. 249 would be repealed by implication.

It is necessary to note carefully the sequence of events in the legislative history of the organizational structure of the board. Ch. 249 was enacted to amend the board's structure as set forth in the 1965 Statutes. Ch. 327 was then enacted and it repeated the organizational structure of the board from ch. 75, which continued the structure existing under the 1965 Statutes.

The legislature was obviously faced with a problem. Ch. 327, a general statute implementing ch. 75 (Kellett bill), was in the drafting stage for a long time. It did not change the organizational structure of the board from the 1965 Statutes. During this drafting period, bills were enacted to

amend the 1965 Statutes. Some of these bills were drafted specifically to amend the organizational details of various boards. Ch. 249 is typical of such amendatory legislation. The legislature did not want any of this intervening legislation which amended the 1965 Statutes to be repealed by implication, according to the rule that the later-enacted statute prevails. In order to abrogate this rule and to salvage the intervening legislation, the legislature included sec. 18 (1) in ch. 327. This section provides:

"Any act which affects a statute setting forth the organizational detail for an agency shall, if that organizational detail is continued by a provision of subchapter II or III of chapter 15 of the statutes, created by this act, be deemed to affect in like manner that portion of chapter 15 containing such provision."

The legislature provided further, in sec. 18 (3), that:

"Any unresolved conflicts under this section shall be reconciled by the legislature's joint committee on finance. The decision of the joint committee on finance is final."

After the enactment of sec. 18 of ch. 327, the joint committee on finance promulgated a supplement to ch. 327, Laws 1967. This supplement contained the following preamble:

"Directives by the Committee in Implementation of its Responsibilities under Section 18 of Chapter 327, Laws of 1967, Adopted on March 8, 1968

"The Joint Committee on Finance hereby declares that it finds that Chapters * * * 249 * * *, Laws of 1967, affect the organizational detail for various agencies and that such acts are therefore, under the terms of SECTION 18 of Chapter 327, Laws of 1967, 'deemed to affect in like manner' chapter 15 of the statutes as created by Chapter 327, Laws of 1967. Accordingly, the Joint Committee on Finance acting under the authority granted by SECTION 18 of Chapter 327, Laws of 1967, and the directive therein contained directs that said acts be incorporated into Chapter 15 of the statutes as created by Chapter 327, Laws of 1967, in the following wording:"

The joint committee then promulgated Directive H, sec. 2 of the supplement, which, as quoted previously, repeated virtually verbatim the organizational structure of the board as set forth in ch. 249.

It is evident from sec. 18 (1) of ch. 327 that this section should be applied to the board in the following manner:

"Any act [Chapter 249] which affects a statute setting forth the organizational detail for an agency [sec. 101.31 (3) (a), 1965 Wis. Stats.] shall, if that organizational detail is continued by a provision of subchapter II or III of chapter 15 of the statutes, created by this act [sec. 15.405 (2), Chapter 327, Laws of 1967], be deemed to affect in like manner that portion of chapter 15 containing such provision."

Since sec. 15.405 (2) of ch. 327 repeats nearly verbatim sec. 101.31 (3) (a), 1965 Stats., there is no doubt that the organizational detail of the examining board set forth in the later section is "continued" in the former section. There exist, therefore, no "unresolved conflicts" between these two sections, according to the provisions of sec. 18 (3) of ch. 327.

Sec. 18 (1) of ch. 327 effectively incorporates ch. 249 into ch. 327. It was not necessary for the joint committee on finance to have promulgated Directive H of the supplement in order to accomplish this result. The only aspect of sec. 18 (1) which would give the joint committee on finance any discretion is found in the words "if that organizational detail is continued by * * * this act." The committee derives no power from sec. 18 (1) to make a determination as to whether an intervening act affects ch. 15 "in like manner that" it affects the 1965 Statutes.

It is not necessary to reach in this opinion the more difficult question of the constitutional validity of sec. 18 (3) in the case where it is less obvious whether the organiational detail of an agency is "continued" by ch. 327 from the 1965 Statutes setting forth the organizational detail for that agency.

According to the above reasoning, ch. 249 is determinative of the organizational detail of the Examining Board of Architects and Professional Engineers. According to this

ch., "the board shall consist of *8* members." According to other sections of ch. 249, the board shall be divided into 2 divisions. The architectural division of the board shall consist of the dean of the college of architecture of the university of Wisconsin or, if none, the highest ranking professor in the field of architecture in the university, and 3 architect members of the board. The engineering division shall consist of the dean of the college of engineering of the university of Wisconsin and 3 engineer members of the board.

Ch. 249 also states that "all matters pertaining to passing upon the qualifications of applicants for and the granting or revocation of registration and all the matters of interest to either the architectural or engineering division shall be acted upon solely by the interested division."

It is clear that the engineering section of the board would be the "interested division" in the case of revocation proceedings against a land surveyor. Sec. 101.315 (8) (a) and (d), 1965 Stats., placed the power to revoke the certificate of registration of any land surveyor within the jurisdiction of the engineering division of the board. Furthermore, ch. 249 states that "one professional engineer member of the board shall be a registered land surveyor."

Sec. 15.08 (4) of ch. 327 states that "* * * no certificate or license which entitles the person certified or licensed to practice a trade or profession shall be suspended or revoked without the affirmative vote of two-thirds of the membership of the Examining Board." This section applies expressly notwithstanding the provisions of sec. 15.08 (4) (a) of ch. 327 which states that the majority of members of any board shall constitute a quorum capable of acting on "any matter within the jurisdiction of the Examining Board."

In conclusion, it is my opinion that the minimum requirement for the revocation of the registration of an architect, professional engineer, or land surveyor is that at least 3 members of the interested section of the Examining Board of Architects and Professional Engineers must be present and must vote for revocation.

BCL:BS

Municipal Justices—County Traffic Violations—If within monetary limits set by statute, municipal justices have jurisdiction to try actions for forfeitures imposed by county ordinance.

October 17, 1968.

DANIEL J. MIRON
District Attorney
Marinette County

You have inquired whether municipal courts established under CH. 254, Stats., have jurisdiction to try actions for violations of county traffic ordinances enacted pursuant to sec. 349.06, Stats. The latter section empowers local authorities to enact traffic regulations in conformity with state traffic statutes, and to provide for forfeitures as penalties for their violation.

Jurisdiction of justices of municipal courts is conferred by sec. 300.05 (as re-enacted by ch. 276, Laws 1967) which provides:

"300.05 Jurisdiction. Every justice has exclusive jurisdiction over offenses against ordinances of his city, town or village and in addition has jurisdiction:

(1) Of actions for a penalty or fortfeiture, not exceeding $200, given by statute; * * *."

Similar language is found in the statutes throughout the history of the state, beginning with the Rev. Stats. of 1849, CH. 88, sec. 5, which conferred jurisdiction upon justices of the peace over "Actions for a penalty not exceeding $100, gived (sic) by any statute of this state."

The words "given by statute" refer to either "penalty or forfeiture," or to "*actions* for a penalty or forfeiture". The former interpretation is unlikely, since reference to penalties and forfeitures as being "given" is semantically unnatural and is inconsistent with the terminology used elsewhere in the statutes, wherein forfeitures are termed "imposed". See, for example, secs. 288.01, 288.06, 288.10, 288.105, Stats.

The more reasonable interpretation of the statute is that

the words "given by statute" refer to the word "actions". This interpretation puts no strain on ordinary legal usage, and is consistent with a legislative recognition of the necessity for a legislatively created cause of action for the recovery of penalties and forfeitures unknown to the common law. 37 C.J.S., "Forfeitures", ss. 1, 2.

Under this interpretation, jurisdictional questions are resolved if a statute can be found authorizing ("giving") an action for the recovery of the forfeiture provision relied upon by the plaintiff. Sec. 288.10, Stats., authorizes such actions by counties, providing in part:

"288.10 Municipal forfeitures, how recovered. All forfeitures imposed by any ordinance or regulation of any county, town, city or village, or of any other domestic corporation may be sued for and recovered, pursuant to this chapter, in the name of such county, town, city, village or corporation. * * *"

It is my opinion, therefore, that any action commenced by a county pursuant to sec. 288.10, Stats., for the recovery of a forfeiture imposed by its ordinance or regulation would be an "action for a penalty or forfeiture * * * given by statute" within the meaning of sec. 300.05 (1), Stats. If within the monetary limits set by the statute, a municipal justice would have jurisdiction to try the matter.

BCL:SOT

Banking—Branch Teller Machines—Employment of teller machines at locations other than the main office or authorized branch of a bank constitutes branch banking and use of such machines at off-premises locations is subject to the provisions of sec. 221.04 (1) (j), Stats.

October 18, 1968.

ROGER L. HEIRONIMUS
Commissioner of Banking

You have requested my opinion as "to whether it is permissible for our state-chartered banks to operate teller

machines at outside locations [not within the main office or at an authorized branch], and whether such operations would be a conflict in any way with the branch banking laws."

The most comprehensive description of the services or performance of the teller machine is advanced by one of the manufacturers who states:

"* * * is the first major innovation for customer convenience since drive-in banking. It offers a unique opportunity to extend banking services. Your bank can now be open for business around the clock . . . even weekends and holidays. * * * will serve, 24 hours a day, as your automatic deposit stations in public buildings, shopping centers, office buildings, and industrial plants. Each * * * stands ready to receive payments on loans, Christmas savings, and deposits for savings and checking accounts. It accepts combinations of bills, coins and checks, and provides a validated receipt for the bank and the customer. * * * offers advantages inside the bank as well as off premises. Customers appreciate the convenience of handling routine deposits automatically rather than waiting in line at teller windows during rush hours. They readily get the * * * habit, and enjoy the simplicity of automatic depositing. * * * offers a new, modern way to increase deposits and extend the services of your bank. We welcome the opportunity to discuss how it can serve you and your customers.

"* * * are at work as off-premises depositories in a wide variety of locations. The photographs above show typical installations in (top, l to r) a bank entrance, serving both as a teller and night depository; and in a large regional shopping center. Other installations shown include (bottom, l to r) the employee entrance of a hospital; an industrial cafeteria; and the checkout area of a chain supermarket. In each location, * * * serves as a reminder to customers to make deposits and payments this new, convenient way. It gains acceptance quickly, because it's providing a unique service to both the bank and the customer. * * * puts the bank on location, right where the money is."

Sec. 224.02, Stats., defines banking as:

"The soliciting, receiving, or accepting of money or its equivalent on deposit as a regular business by any person, copartnership, association, or corporation, shall be deemed to be doing a banking business, whether such deposit is made subject to check or is evidenced by a certificate of deposit, pass book, a note, a receipt, or other writing, provided that nothing herein shall apply to or include money left with an agent, pending investment in real estate or securities for or on account of his principal. Provided, however, that if money so left with an agent for investment shall not be kept in a separate trust fund or if the agent receiving such money shall mingle same with his own property, whether with or without the consent of the principal, or shall make an agreement to pay any certain rate of interest thereon or any agreement to pay interest thereon other than an agreement to account for the actual income which may be derived from such money while held pending investment, the person receiving such money shall be deemed to be in the banking business."

In comparing the statutory definition of banking with the manufacturer's representations, there can be no argument that the services offered by the teller machine are to complement or extend the banking business or particular facet of the banking business to areas or locations beyond the present business offices of the bank.

In *MacLaren v. State,* (1910) 141 Wis. 577, our court held that banking business is being conducted within the purview of the statutory definition even though the business is engaged in but one of the defined functions.

In 51 OAG 145, this office stated:

"Neither the Wisconsin statutes nor Wisconsin case law offers a definition of the terms branch bank, branch office or bank station, but the terms must mean a branch, office or station located at least some distance away from the main office of the bank, at which some banking functions or services are carried on which a banking corporation is permitted to carry on at its main office. *MacLaren v. State,* (1910) 141 Wis. 577, 124 N.W. 667. Also see 49 OAG 9, 12-14, *Commercial State Bank of Roseville v. Gidney,* (D.C., 1959) 174 F. Supp. 770 Affd., C.A. 278 F. 2d 871, 108 U.S. App.

D.C. 37. *Marvin v. Kentucky Title Trust Co.*, (1927) 218 Ky. 135, 291 S.W. 17, 50 A.L.R. 1337.

"If a facility is a part and parcel of the main office, it cannot be a branch office or branch bank."

In a somewhat earlier opinion of this office, it was stated:

"It is pointed out that this is not an isolated case where a bank might send a messenger or even an officer over to some customer with the papers to fill out to complete a loan application. Such service rendered in isolated cases as a matter of courtesy could not properly be charged to be a violation of the branch banking law or of the statutory policy that banking must be conducted at the bank office. However, when by prior arrangement such conduct is carried on as a continual course of business, a violation of the policy against doing business away from the office of the bank may result. When such activity is carried on at a stated place, such as the office of the insurance agent or insurance company, it clearly is a violation of the branch banking law." 49 OAG 9

I am of the opinion that employment of the teller machines at locations other than at the main banking office or authorized branch constitutes branch banking.

Since the above authorities and opinions referred to, the legislature has authorized branch banking by the enactment of sec. 221.04 (1) (j) [ch. 253, Laws 1967], which reads:

"221.04 (1) (j) To establish and maintain a branch bank, upon approval by the commissioner and the banking review board, in a municipality other than that in which the home bank is located, if such municipality has no bank or branch bank at the time of application and if no bank or branch bank is located within a radius of 3 miles from the proposed site of the branch; however, such 3-mile limitation shall be computed by measuring the street or road mileage of that route which the commissioner and board find would be ordinarily and customarily traveled as the shortest distance between such bank or branch bank and the proposed site of the branch. A branch bank established under this paragraph shall be located in the same county in which the home bank is located or in a contiguous county if the

location of such branch bank is no more than 25 miles from the home bank. Such branch banks shall be subject to all laws, rules and regulations applicable to banks generally. Application for the establishment of a branch bank under this paragraph shall be made to the commissioner on a form furnished by him."

Consequently, as the services performed by the teller machine constitute banking within the statutory definition, the installation and location of a teller machine off the premises of the business offices of the bank or authorized branch, falls within the purview of our branch banking law or sec. 221.04 (1) (j), Stats. As a branch bank, the off-premises location or installation of the teller machine is subject to the approval of the banking commissioner and the banking review board and the location restrictions of sec. 221.04 (1) (j), Stats.

Further, as a branch bank, the teller machine is, by virtue of sec. 221.04 (1) (j), Stats., "* * * subject to all laws, rules, and regulations applicable to banks generally. * * *" In this regard, it is difficult to see how the teller machine will comply with these general regulations. For example, the teller machine will have to observe the provisions of sec. 220.29, Stats., pertaining to legal holidays. On the other hand, one of the attributes of the teller machine, as advanced by the manufacturer, is that it will be in service on such days. Moreover, as a branch bank, it will be subject to Wis. Admin. Code, Ch. Banking 8. I am without sufficient information or knowledge as to the working of the teller machine upon which to base an opinion as to whether it would or could comply with the regulations of Ch. 8 but in any event, as a branch bank, it must.

In conclusion, it may be stated that a teller machine may be authorized as a branch bank by the commissioner and banking review board provided it meets the locational requirements of sec. 221.04 (1) (j), Stats., and further provided that it is capable of meeting all the laws, rules and regulations applicable to banks generally and to branch banks specifically.

BCL:CAB

Pension Funds—Police and Firemen—The provisions of sec. 62.135 do not prohibit legislation which would add retirement benefits or reduce the age required to qualify for such benefits for police and firemen as set forth in sec. 62.13, Stats.

October 25, 1968.

EARL SACHSE
Executive Secretary
Legislative Council

You have informed me that the legislative council interim committee on governmental and state affairs is studying proposals to make certain changes in sec. 62.13, Stats. In particular these changes would affect sec. 62.13 (9), Stats., which provides for a police pension fund in cities of the second and third class, sec. 62.13 (9a) which provides for pensions of police officers in cities of the fourth class, and 62.13 (10) which provides for a firemen's pension fund in cities of the second and third class. The effect of the proposals which are being considered would be to change the benefits provided for in the foregoing sections and to reduce the age at which the individual would be qualified to receive those benefits.

You point out that sec. 62.135, Stats., contains certain provisions which raise questions as to the power of the legislature to effect the aforementioned changes. The pertinent subsections of sec. 62.135 are as follows:

"(1) All pensions and other benefits of firemen and policemen, whether in service or retired and of beneficiaries, including widows and children of deceased firemen and policemen, by or for whom contributions shall have been made to the firemen's and policemen's pension fund established pursuant to sections 61.65 and 62.13 shall be assured by benefit contracts.

"(2) Every fireman and policeman and beneficiary shall be deemed to have accepted the provisions hereof and shall by such acceptance have a benefit contract as of July 20, 1951, unless, within 30 days thereafter, he files with the board of trustees a written notice electing to have no such

contract. The pensions and all other benefits in the amounts and on the terms and conditions and in all other respects as provided in sections 61.65 and 62.13 and then in effect in such city or village shall be obligations of such benefit contracts on the part of the city or village and the board of trustees and each fireman and policeman and beneficiary having such a benefit contract shall have a vested right to such pensions and other benefits and they shall not be diminished, impaired or increased by subsequent legislation nor by any other means.

"(3) The board of trustees may issue to each fireman and policeman and beneficiary who shall have such a benefit contract a written or printed contract or may supplement any certificate or other evidence of participation issued to him by indorsement stating that the fireman or policeman or beneficiary has a benefit contract according to the terms of this subsection, but the contract shall be in full force and effect whether or not any written or printed evidence thereof shall be so issued."

The questions you present for my opinion are:

1. Under §62.135, Stats., 1967, may the legislature (1) increase retirement benefits or (2) reduce the years of service or age to qualify for benefits or (3) add new benefits not now provided for?

2. What effect would legislative enactments which change benefits have on the contracts referred to in §62.135 (2) and (3)?

3. Would increasing the costs to city and village treasuries by improving the benefits under §62.13 be an illegal expenditure of public funds for a private purpose if such improvements to the system would neither (1) attract persons to the employment of municipalities or (2) encourage present employes to remain in service, or in any other way accrue to the benefit of anyone except the employes covered by the plan.

4. Who are the parties to the contract in §62.135? If the city or village is a party may the state authorize the city or village to consent to such changes as enumerated in question one?

5. May the legislature repeal or amend §62.135 and then

make such changes as enumerated in question one? May the legislature authorize such changes in the contract without the consent of the city or village and the employee?

In order to better understand the provisions of 62.135, Stats., it will be helpful to review some of the general propositions of law affecting statutory pension plans. First is the proposition that our laws are subject to change at the will of the legislature.

"* * * There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal * * *. There is no constitutional right to have all general propositions of law once adopted remain unchanged. The Fourteenth Amendment was not intended to curtail the powers of the states to amend their laws so as to make them conform to the wishes of their citizens, to changed views of administration, or to the exigencies of their social life." 16 Am. Jur. 2d Constitutional Law, sec. 423.

Specifically with respect to police pension plans the Wisconsin supreme court stated in *State ex rel. McCarty v. Gantter,* (1942) 240 Wis. 548, 4 N.W. 2d 153.

"In the absence of contractual relations or a specific declaration by the legislative body creating a vested right in the police pension fund, the officer has no vested right therein; and the legislative body may repeal or amend an ordinance relating to pension rights and the pension fund. This court so held in *State ex rel. Risch v. Trustees,* 121 Wis. 44, 48, 98 N.W. 954. In that case, at page 48, the court said:

" 'The idea advanced by counsel is that, by the continuance of appellant's husband in the service of the city as a policeman after the act of 1891 took effect, *contractual relations* with reference to the pension fund were created between him and the city or the pension board which could not be disturbed by any legislative enactment without violating his constitutional rights. We do not understand that there are any such relations between a municipality and its officers. In the absence of some constitutional limitation upon the right of the legislature to change such relations—and there is none in this state—they are wholly under legislative control.' "

As indicated in the above quoted statement of the court in *McCarty v. Gantter,* the exception to the proposition that the legislature is free to amend or repeal the laws of the state is the constitutional restraint imposed by Art. I, sec. 12, Wis. Const. That provision prohibits the passage of any law impairing the obligation of contracts.

The draftsmen of sec. 62.135, Stats., were clearly aware of the proposition of the law first set forth above that statutory pension systems are subject to change at the will of the legislature and they made every effort to bring the pension system provided for in sec. 62.13, Stats., within the protection of Art. I, sec. 12. They attempted to achieve this by providing for a vesting of rights and the execution of "benefit contracts" and further provided that such "benefit contracts" should be deemed to be in force whether or not printed evidence of such contracts were issued.

There is no question but that the legislature could by this means create a contractual relationship and thereby prevent future legislatures from enacting laws which would impair the obligations of the underlying contracts.

In *Morrison v. Board of Education,* 237 Wis. 483, 487, 297 N.W. 383, quoting from *Dodge v. Board of Education,* 302 U.S. 74, 78, 58 Sup. Ct. 98, 82 L. Ed. 57, affirming 364 Ill. 547, 5 N.E. 2d 84, the court said:

" 'The parties agree that a state may enter into contracts with citizens, the obligation of which the legislature cannot impair by subsequent enactment. They agree that legislation which merely declares a state policy, and directs a subordinate body to carry it into effect, is subject to revision or repeal in the discretion of the legislature . . .

" 'In determining whether a law tenders a contract to a citizen it is of first importance to examine the language of the statute. If it provides for the execution of a written contract on behalf of the state the case for an obligation binding upon the state is clear. Equally clear is the case where a statute confirms a settlement of disputed rights and defines its terms. On the other hand, an act merely fixing salaries creates no contract in their favor and the compensation named may be altered at the will of the legislature. This is true also of an act fixing the term or tenure of a

public officer or an employee of a state agency. *The presumption is that such a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'* "

The language of sec. 62.135 clearly overcomes the presumption mentioned above and does provide for a form of contract which is to be afforded the protection of Art. I, sec. 12, Wis. Const. The nature of this "contract" and the degree of protection afforded will be examined in the light of the questions which you have posed.

As to your first question, the legislature may increase benefits, add new benefits, or reduce years of service or age required to qualify for benefits without producing a conflict with the provisions of sec. 62.135 (2) which attempt to grant to firemen, policemen and their beneficiaries "vested rights" to the "pensions and other benefits" set forth in sec. 62.13, Stats.

Any vesting of rights in the participants to the pensions and other benefits set forth in sec. 62.13, Stats., must necessarily occur at the time such participant qualifies for those benefits. Until that time the pensions and other benefits remain an expectancy contingent upon his continuing his present employment as a policeman or fireman of the municipality.

"* * * Rights are said to be vested in contradistinction to being contingent or expectant. A right is 'vested' when there is an ascertained person with a present right to present or future enjoyment; it is 'expectant' when it depends on the continuation of existing circumstances, such as the right of an heir to inherit, provided he survives his ancestor and the ancestor dies seized and intestate; and finally, is 'contingent' when it depends on the performance of some condition or the happening of some event before some other event or conditions happens or is performed. * * *" 16 Am. Jur. 2d Constitutional Law, sec. 421.

Further, legislative action to increase or add benefits or reduce years of service or age to qualify for such benefits would not necessarily impair obligations contrary to Art. I, sec. 12, Wis. Const., as you suggest in your second question.

Without attempting to examine precisely what the above "benefit contracts" may provide or which if any obligations of those contracts would be impaired by the proposed legislative action it must be seen that the terms of any contract may be amended by mutual agreement to the parties to the contract.

The parties to the contracts here in question (answering your fourth question) are the firemen or policemen, as the case may be, on the one hand and the municipality as agent for the state on the other hand. Sec. 62.13 (12) makes the provisions of sec. 62.13 matters of state-wide concern and the state by the enactment of legislation in sec. 62.13 (9), (10) and (11) to provide pension benefits for firemen and policemen preempted the field in this matter. The Wisconsin supreme court has held that matters relating to compensation of police and firemen are of state-wide concern and therefore not within the purview of sec. 3, Art. XI, Const. (the "home rule amendment"). In *Van Guilder v. Madison,* (1936) 222 Wis. 58, 267 N.W. 25, the court stated:

"So far as we have been able to discover in all jurisdictions where the question has arisen because of a conflict between a charter ordinance adopted under a home-rule provision of a constitution and an act of the legislature, the matter of police and fire protection has been held to be a 'matter of state-wide concern' for the following reasons stated briefly and without exposition: (1) The legislature exercises a sovereign power of the people with respect to legislation, its action in that regard being limited only by the state and federal constitutions; (2) the preservation of order, the protection of life and property, and the suppression of crime are primary functions of all civilized states; (3) municipal subdivisions of the state are merely agencies of the state in respect to the performance of these primary obligations of the state; (4) the legislature unless limited by constitutional provisions has the power to rearrange the laws by which this primary duty is discharged as the needs of the state may require; (5) while a considerable part of the state's duty in these several respects has been delegated to municipalities, towns, villages, and counties, 'enforcement of the law, the preservation of order, the protection

of persons and property, and the suppression of crime' must always be matters of state-wide concern; (6) because for a long time these duties have been delegated to and performed by the various municipal subdivisions of the state, these functions are ordinarily thought of as being in part the primary duties of cities and other municipalities. However, it would be within the competency of the legislature if it so desired to entirely rearrange the law of the state with respect to these matters. It might make the police officers of the various municipalities if it so chose subject to the commands of the chief executive of the state instead of leaving that control as it now does with the chief executive officers of the various municipalities. What shall be done in these respects is wholly a matter of policy to be determined by the legislature with constitutional limitations."

The court concluded:

"* * * The entire matter of the regulation of police being primarily a matter of state-wide concern, the charter ordinance adopted by the city of Madison was ineffectual for any purpose. * * *" P. 84

The legislature may therefore amend sec. 62.13 thereby effectively amending the provisions of the "contracts" referred to in sec. 62.135 without obtaining the "consent" of the municipality (Question 5) and such action by the legislature would be sufficient authorization for the municipalities as agents of the state to make such changes in benefits as the legislature might decree (Question 4).

Your third question is: Would increasing benefits be illegal as an expenditure of public funds for a private purpose if such increased benefits neither attracted persons to the employment of municipalities nor encouraged present employes to remain in service? I do not concede that the latter assumption can be made categorically, but, even granting your assumption, the answer is simply that retirement benefits are regarded as deferred compensation for services rendered. Therefore, as long as a municipal officer or employe is performing public services, his compensation may be increased in this manner without such

increase being regarded as an expenditure of public funds for a private purpose.

BCL:DGM

Industrial Commission—Discrimination in Employment—Under sec. 111.36 (3), Stats., as construed in *Murphy v. Industrial Comm.*, (1968) 37 Wis. 2d 704, 155 N.W. 2d 545, 157 N.W. 2d 568, the commission is without authority in cases of discrimination in employment to award back pay, but may order a person who violates the statute to cease and desist from such discrimination, and to hire, reinstate, or upgrade employment. Discussion of secs. 101.24 (2) and 101.28, Stats.

November 7, 1968.

JOSEPH C. FAGAN, *Chairman*
Department of Industry, Labor and Human Relations

In view of the decision in *Murphy v. Industrial Comm.*, (1968) 37 Wis. 2d 704, 155 N.W. 2d 545, 157 N.W. 2d 568, you have inquired as to the remedies available to the commission when it has made findings of discrimination in employment in proceedings under sec. 111.36, Stats.

In *Murphy*, the mandate of the supreme court affirmed a judgment of the circuit court, which in turn (1) upheld a commission order requiring an employer to cease and desist from discriminating against three women complainants on the basis of sex in respect to payment of wages, and (2) set aside the commission award of back pay. The core of the supreme court decision is the ruling that a back pay award would not effectuate the purposes of the law, but would frustrate the prime legislative objective of eliminating discrimination through conference, conciliation and persuasion. 37 Wis. 2d, at pp. 710-712.

On motion for rehearing, the supreme court did not change its mandate, but gave pellucid expression to its conclusion that at no stage of the proceedings does the com-

mission have authority under the statute "to award back pay to parties discriminated against on account of their sex in the wages paid them." 37 Wis. 2d, at p. 712a. Further, the court was at pains to point out that on rehearing it was too late to raise any question as to the authority of the commission to issue a cease and desist order. Thus, the following statements by the court were *obiter dicta*—not binding as precedent:

"The difficulty with [employer] Miller's argument is that it would classify as invalid an order having affirmative characteristics beyond those of a general order to cease and desist discrimination, such as an order to hire, reinstate, or upgrade employment, which, after all, would do little more than end discrimination in the individual case brought before the commission. Clearly, the purpose of the act is not effectuated if the Industrial Commission can do no more than enter an order to cease and desist. (37 Wis. 2d, at p. 711)

"* * *

"* * * The same infirmity [as to back pay] would not be present if the remedy sought by the commission was the cessation of discrimination in the case as presented, by an order to hire, reinstate, or whatever is appropriate to eliminate the discrimination in the future, which kind of remedy, we would suggest, is within the commission's power." (37 Wis. 2d, at p. 712)

Although unnecessary to the result reached by the court, it would be a mistake to assume that this language is without persuasive weight. Courts often accord deferential respect to the language of their own prior opinions, even when such pronouncements were collateral to the issues decided. See *Milwaukee v. Boynton Cab Co.*, (1930) 201 Wis. 581, 590, 229 N.W. 28, 231 N.W. 597, and *Chase v. American Cartage Co.*, (1922) 176 Wis. 235, 237-238, 186 N.W. 598. On occasion, the persuasive worth of previous dictum has led the court to give weight to statements appearing in dissenting opinions. See *Tews Lime & Cement Co. v. ILHR Department*, (1968) 38 Wis. 2d 665, 674, 158 N.W. 2d 377, and *Chase v. American Cartage Co., supra.*

From the dictum of the court and the terms of the statute,

it is my opinion that the commission has authority, in a proper case, to require a person who violates the statute to hire, to reinstate, or to take other measures necessary to remedy and repair the damaging effects of discriminatory acts. For example, the department can order the defendant to pay prospectively accretions to base pay accumulated from the time of the discriminatory act on to the date of the order and to cease any discriminatory act with respect to further raises in wage or pay. This would then require the defendant to pay the same wage as is being paid to other persons doing similar work. It would not be ordering back pay but bringing the base pay of the plaintiff up to the level of others doing the same type of work. The same reasoning applies to seniority rights accumulated between the discriminatory act and the date of the order.

These examples are not intended to be exclusive. The order of the commission may, in my opinion, provide in general that all rights connected with the plaintiff's employment, including raises granted, seniority rights or any fringe benefits accumulated, be equalized by the order and be, henceforth from the date of the order, nondiscriminatory. To attribute any other construction to the statute would convict the legislature of absurdity. Sec. 111.36 (3), Stats., provides in part

"* * * If, after hearing, the commission finds that the respondent has engaged in discrimination, the commission shall make written findings and recommend such action by the respondent as will effectuate the purpose of this subchapter and shall serve a certified copy of the findings and recommendations on the respondent together with an order requiring the respondent to comply with the recommendations, the order to have the same force as other orders of the commission and be enforced as provided in ch. 101. Any person aggrieved by noncompliance with the order shall be entitled to have the same enforced specifically by suit in equity. * * *"

In plain terms, the statute gives a person aggrieved a judicial remedy through specific performance in equity. Under CH. 101, Stats., the attorney general or the district

attorney of the appropriate county, at your request, may bring "all necessary actions or proceedings" for enforcement, sec. 101.24 (2), Stats., or may prosecute an action to collect a forfeiture ranging from ten to one hundred dollars for each day of violation, sec. 101.28, Stats.

If administrative experience suggests that the means necessary to effectuate the purposes of the statute should include the awarding of back pay, amendment of the law may be sought under sec. 111.35 (5), Stats., which provides that the commission shall transmit to the legislature recommendations as to desirable legislation concerning discrimination.

BCL:JWC:GS

Public Instruction—School Suspension—Under sec. 115.28 (1), (3) and (5), Stats., a state superintendent has power to require the reinstatement of an expelled student pending appeal to him under sec. 120.13 (1) (c), Stats.

November 18, 1968.

WILLIAM C. KAHL
State Superintendent
Department of Public Instruction

You ask whether you have authority to require the board of a high school district to admit to the high school a student expelled therefrom under sec. 120.13 (1) (c), Stats., as a reinstated student pending your decision of an appeal of the expulsion made to you pursuant to that statute. It provides:

"(1) SCHOOL GOVERNMENT RULES; SUSPENSION; EXPULSION.

"* * *

"(c) The school board may expel a pupil from school whenever it finds him guilty of persistent refusal or neglect to obey the rules and is satisfied that the interest of the school demands his expulsion. Upon the ordering by the

school board of the expulsion of a pupil the school district clerk shall file a notice of such order with the parent or guardian of the pupil. A parent or guardian of an expelled pupil may appeal the expulsion to the state superintendent. An appeal from the decision of the state superintendent may be taken within 30 days to the circuit court of the county in which the school is located."

In my opinion, you do have such authority where a finding is made by you that failure to reinstate the expelled student would cause him irreparable harm.

There is no specific Wisconsin case in point answering your question. However, sec. 115.28 (1), Stats., relating to the powers and duties of the state superintendent, provides as follows:

"(1) GENERAL SUPERVISION. Ascertain the condition of the public schools, stimulate interest in education and spread as widely as possible a knowledge of the means and methods which may be employed to improve the schools."

In addition, sec. 115.28 (3), Stats., gives you additional supervisory power as follows:

"(3) SUPERVISION OF SCHOOLS. Supervise and inspect the public schools, county teachers colleges and day schools for handicapped children, advise the principals and local authorities thereof and give assistance in organizing such schools."

Generally speaking, after administrative remedies have been exhausted, most courts recognize that the effective remedy available to a parent on behalf of an expelled child is by way of injunctive relief or a writ of mandamus to compel his reinstatement rather than a suit for damages. See *Leonard v. School Committee,* (1965) 359 Mass. 704, 212 N.E. 2d 468, 14 ALR 3d 1192. This case involves the expulsion of a student because of his violation of a school regulation prohibiting "extreme haircuts".

The Wisconsin legislature, however, has seen fit to provide an additional remedy, namely the administrative appeal to your office.

The supervisory power vested in your office together with the duty to hear all appeals as provided in sec. 115.28 (5), Stats., form the basis for your authority to stay an order of expulsion from which an appeal has been taken.

Since the legislature has manifested its intent to grant to the superintendent of public instruction broad supervisory powers and power to determine all appeals, it would appear that you should also have the power to grant temporary equitable relief by reinstating the expelled student where continued enforcement of the expulsion order would result in irreparable harm to the student.

Because time is to a greater or lesser degree essential in this situation, lack of power to stay an order of expulsion might well render the appeal moot leaving an ineffectual suit for damages as the only possible remedy. See *Leonard v. School Committee, supra.*

In support of this proposition, see *Kasik v. Janssen,* (1914) 158 Wis. 606, 609-610:

"In addition to powers expressly conferred upon him by statute, an officer has by implication such additional powers as are necessary for the due and efficient exercise of the powers expressly granted or such as may be fairly implied from the statute granting express powers. * * *"

Therefore, where irreparable harm would result if the order could not be stayed between the time it is initially issued and the time the appeal is finally determined by the state superintendent of public instruction, the superintendent would not have the powers "necessary for the due and efficient exercise of the powers expressly granted" to him.

BCL:JWC:RDM

Foreign Corporations—Fee Payments—The previous fee payments made by a foreign corporation on its capital employed in Wisconsin may be credited to another foreign corporation into which it merges under sec. 180.87 (1) (j), Stats.

November 21, 1968.

ROBERT C. ZIMMERMAN
Secretary of State

You have requested my opinion as to whether the previous fee payments made by a foreign corporation on its capital employed in Wisconsin may be credited to another foreign corporation into which it merges under sec. 180.87 (1) (j), Stats.

You state that you refused to accept a filing fee submitted by Brunswick Corporation in the amount of $1,805.00, and assessed a fee of $23,811.00. The difference between these two amounts is due to the fact that Brunswick Corporation is claiming a credit for the amount paid in fees prior to 1967 by Kiekhaefer Corporation. On January 6, 1967, the two corporations merged with Brunswick Corporation as the survivor. Prior to the merger, both corporations were Delaware Corporations authorized to transact business in Wisconsin.

You denied the credit and assessed the additional fee in reliance upon 53 OAG 146 (1964) and 39 OAG 449 (1950), in which it was concluded that the fee paid by a foreign corporation in Wisconsin cannot be credited to another foreign corporation into which it merges. Brunswick has nevertheless protested the denial of the credit on the basis that the 1964 opinion did not fully consider certain changes in sec. 180.87, Stats.

Sec. 180.87 (1) (j), Stats., sets forth the fees to be paid by a foreign corporation for filing its annual report, and reads as follows:

"(j) Filing an annual report of a foreign corporation, $10, and in case said annual report shows that the corporation employs in this state capital in excess of the amount of capital on which a fee has previously been paid, computed as provided in s. 180.813, an additional fee which with previous payments made on account of capital employed in this state, will amount to $1 for each $1,000 of such excess."

At the time of the 1950 opinion of the attorney general,

the applicable statute governing annual report fees of a foreign corporation was sec. 226.04 (1) (f), Stats. 1949, which provided:

"(f) The corporation shall pay a fee of two dollars for filing such report, and, in case said report shows that it employs in this state capital in excess of twenty-five thousand dollars, it shall pay an additional fee which with previous payments will amount to one dollar for each one thousand dollars of such excess."

An examination of the above-quoted statutes reveals significant differences in the basis for computing fees. These differences are a result of statutory revisions in 1951 and 1963. In 1951 the legislature added the words "made on account of capital employed in this state" to the provision relating to previous payments. Ch. 731, Laws 1951. Prior to that change, the filing corporation received a credit for "previous payments" in computing its fees, but it was unclear under the statute whether such previous payments only referred to payments by the filing corporation or whether they also referred to payments by another foreign corporation that had merged with the filing corporation. The 1951 revision, by focusing attention upon whether or not the previous payments were made on account of capital employed within the state rather than upon the entity making the previous payments, cast substantial doubt upon the interpretation that the previous fee payments had to be made by the filing corporation.

The 1963 revision further refuted such an interpretation of sec. 180.87 (1) (j), Stats. By ch. 224, Laws 1963, the legislature changed the phrase "in case said annual report shows that the corporation employs in this state capital in excess of $25,000" to "in case said annual report shows that the corporation employs in this state capital in excess of the amount of capital on which a fee has previously been paid." It is significant that the filing corporation, in computing its credit under the revised statute, is not limited to "the amount of capital on which *it* has previously paid a fee" but may include any capital on which a fee has previously been paid. The clear import of this language is that

the filing corporation may include all of its capital upon which fees have previously been paid without regard to who actually paid such fees.

It is, therefore, my opinion that under sec. 180.87 (1) (j), Stats., previous fee payments made by a foreign corporation on its capital employed within Wisconsin may be credited to another foreign corporation into which it merges. A contrary conclusion would not only ignore the open-ended language of sec. 180.87 (1) (j), Stats., but would result in uneven treatment of merging corporations since a credit is granted domestic corporations upon their merger under sec. 180.87 (1) (c), Stats.

It should be noted that 53 OAG 146 reached a different conclusion on the narrow ground that sec. 180.67, Stats., which relates to the effect of corporate mergers or consolidations, only applied to domestic mergers or consolidations under secs. 180.62 and 180.63, Stats. Sec. 180.67, Stats., was subsequently broadened by ch. 53, Laws 1965, to cover all mergers effected in accordance with CH. 180 so that the reasoning of that opinion is no longer apposite to the question here involved.

BCL:JDJ

Blood Alcohol Tests—Motor Vehicle Department—The state health officer may make available reports of tests for blood alcohol content on persons who have died as a result of automobile accidents to the director of the bureau of highway safety promotion, division of motor vehicles, department of transportation, for that bureau's use for statistical purposes.

November 22, 1968.

E. H. JORRIS
State Health Officer

Sec. 51, ch. 292, Laws 1967, which chapter deals with traffic enforcement problems, sets up the office of state highway safety coordination and provides for uniform traffic

citations and other matters relating to a program of highway safety, including driver education. Under this section you acquire certain responsbilities in maintaining records of the alcoholic content of blood specimens taken from persons who have died as a result of automobile accidents. Other provisions direct the coroner to have blood of at least 10 cc. withdrawn from the body of the decedent and examined at a laboratory approved by the state board of health for analysis of the alcoholic content. The coroner must then forward the results of each analysis to your office, and you are to keep a record of such examinations to be used for statistical purposes only.

You point out that Dan Schutz, director of the bureau of highway promotion, division of motor vehicles of the department of transportation, has requested that you furnish him copies of all records of blood analyzed and its alcoholic content so that he may, in furtherance of his responsibilities, tie in the name of the deceased person having alcohol in his blood with the accident reports obtained from the highway patrol officers in order to make studies in depth relating to alcohol as a cause of motor vehicle accidents.

You pose two questions in regard to the request from Mr. Schutz:

1. Can you make available the reports referred to in Section 51, Chapter 292 of the Laws of 1967, to the Director of the Bureau of Highway Safety Promotion, Division of Motor Vehicles, Department of Transportation, notwithstanding the restriction in the law pertaining to the use of such records of examinations for statistical purposes only?

2. If the answer is in the affirmative, does the responsibility for maintaining the confidentiality of the records then transfer from the State Health Officer to the Director of the Bureau of Highway Safety Promotion?

The portion of sec. 51, ch. 292, Laws 1967, sec. 346.71 (2), Stats., dealing with your specific question reads as follows:

"* * * The state board of health shall keep a record of all such examinations to be used for statistical purposes only. The cumulative results of the examinations, without identi-

fying the individuals involved, shall be disseminated and made public by the state board of health."

It is obvious the legislature intended that the record concerning the alcoholic content of blood taken from persons deceased as a result of automobile accidents in this state would not be made public, but would be used only for "statistical purposes". The language used in the statute is sufficient to deny public access to such records. However, your question does not deal with public access to such records, but rather whether a coordinate officer of government may consult such records for the lawful purposes of his office and for the more efficient discharge of the duties assigned to him.

Secrecy or confidentiality of public records applies to the availability of such records to the general public. However, secrecy and confidentiality are only relative, and it is obvious that such records cannot exist in a vacuum. For instance, staff people must work on such records in order to prepare the records for "statistical purposes". How many people see or work with such records, so long as their secret and confidential nature is preserved, is immaterial, the purpose being to protect such records so that, in this case, the individuals involved are not identified to the general public.

In addition to denying public access to your records, the statute protects them from subpoena or testimonial divulgence in court or administrative proceedings. However, it does not mean that such records may not be made available for proper purposes to other officers of government. The courts have recognized that records protected by the cloak of secrecy and confidentiality may still be made available for a proper function. See *Wigmore on Evidence,* McNaughton Revision, Par. 2363, Sub. 8:

"Where a coordinate officer, judicial or administrative, of the government seeks to consult the minutes of testimony for lawful purposes of his office, this inspection may, of course, be granted."

In *Matter of the Attorney General of the United States,* (1937) 291 N.Y.S. 5, the attorney general of the United States applied to the Kings County Court of the state of

New York for permission to obtain and examine minutes taken before the grand jury of that county into the affairs of a large business organization. Of course such minutes are protected under the state law making grand jury proceedings secret. However, the court allowed the attorney general to inspect the grand jury minutes, saying:

"* * * It would be a sad commentary upon the administration of justice if a court of criminal jurisdiction should thwart, or attempt to hinder, a co-ordinate department of government in the administration of justice. There should be cooperation between the federal and state governments to the utmost limit possible. Neither state lines nor alien agencies should be utilized to deprive those charged under federal or state laws with the duty of enforcing penal laws of every opportunity and facility to discharge their obligations to the fullest extent possible.

"* * *

"Reasons which might well preclude an examination of such minutes by private individuals may well be abortive when raised against an inspection by public officials to enable them more efficiently to discharge the obligations of their office."

Our supreme court has also recognized the need to lift the veil of secrecy, even in transcripts of John Doe proceedings, in the case of *State ex rel. Alford V. Thorson,* (1930) 202 Wis. 31, 36, where the court said:

"* * * disclosure may be made whenever it becomes necessary in the course of justice."

Applying the reasoning of the above cases to the questions submitted, I must conclude that the exchange of information obtained under sec. 346.71 (2), Stats., between your division and the director of the bureau of highway safety promotion, would not violate the spirit of the law which restricts the use of such records for statistical purposes only.

Your second question raises the issue of the responsibility of the director of the bureau of highway safety promotion, once the information contained in your records is made available to him and his bureau. The confidentiality afforded to individual records maintained by your division would be

meaningless if the same records in the files of the bureau of highway safety promotion were open to public inspection. The law seems clear that information of a confidential nature gained by one administrative branch of the government from another may be used in preparation for proper internal matters, but should not be disclosed to the public. 42 Am. Jur., Public Administrative Law, § 92; *Bank of American National Trust and Savings Assn. v. Douglas,* 105 F. 2d 100.

Accordingly, it is my opinion that if you make available to the director of the bureau of highway safety promotion of the division of motor vehicles of the department of transportation blood alcohol tests for statistical purposes only, which are retained by your division in accordance with sec. 346.71 (2), Stats., the responsibility for maintaining the confidential nature of such records passes to the director of the bureau of highway safety promotion and those persons in that bureau who work with the records which you have provided from your files.

BCL:LLD

Sterilization—Voluntary Consent—A doctor performing a sterilization operation, such as salpingectomy or vasectomy, at the voluntary rational consent of a patient, is not committing a crime under Wisconsin law.

November 25, 1968.

THOMAS W. TORMEY, JR.
Secretary
Medical Examining Board

You have asked whether a voluntary non-therapeutic sterilization operation performed by a doctor in Wisconsin is legal.

I shall limit this opinion to the common sterilization operation known as salpingectomy for the female patient and vasectomy for the male patient. As distinguished from more serious sterilization operations such as castration, the only physiological change in the patient from these operations is removal of the ability to procreate.

I shall further limit my discussion of the question as it relates to the criminal law of Wisconsin and refrain from discussing any aspects of civil law.

There is no applicable statute or common law principle in Wisconsin which would make a physician performing a non-therapeutic sterilization operation requested by the patient guilty of a crime.

I have searched extensively for a case holding that such an operation constituted a crime at common law and have found none.

However, earlier legal writers have suggested that a court might construe the battery or the mayhem statute to include such an operation.[1]

Wisconsin's mayhem statute, sec. 940.21, Stats., provides:

"Whoever, with intent to disable or disfigure another, cuts or mutilates the tongue, eye, ear, nose, lip, limb or other bodily member of another, may be fined not more than $5,000 or imprisoned not more than 15 years or both."

It is readily apparent that this statute may not be literally construed. For instance, it makes no exception for the surgeon performing life-saving but very disabling operations such as the severing of a gangrenous hand or the removal of a cancerous eye, for the dentist pulling an infected tooth, for the plastic surgeon performing cosmetic surgery, or for a host of other surgical operations which disable or disfigure the patient. Yet no one could seriously contend that the legislature meant to include such operations performed by surgeons or dentists within the literal language of this statute.

In considering whether the Wisconsin mayhem statute applies to non-therapeutic sterilization operations requested by the patient, it is helpful briefly to discuss the history of the law of mayhem.

In early English common-law mayhem was the procurement of a physical disablement with the intent to render oneself unfit to fight for the King, such as the severing of one's bow fingers. Under such circumstances, both the patient and the surgeon or other contributing party were

1. Herzog, *Medical Jurisprudence*, sec. 1020 et seq.

guilty of committing a crime against the King, that of mayhem.

In the famous Wright's case, Coke, §194 (127b), the defendant persuaded another to sever his hand so as to pass more convincingly as a beggar rather than to be a productive worker in the King's realm. This, under the early common law, was indictable mayhem.

The common law of mayhem was expanded to include any severe malicious disfigurement or mutilation of a bodily member by one person upon another.

Through this short discussion of the early history of the law of mayhem, two legal concepts emerge:

(1) Under the common law development of mayhem, consent did not excuse the actual performer of the operation. As stated in *Bishop's Criminal Law,* (9th Ed.), sec. 259 (2):

"It being the gist of the crime in mayhem that the injured person is rendered less able in fighting, one may not innocently maim himself; therefore if at his request another maims him, both are guilty."

(2) The act was done maliciously, that is, done with wicked or mischievous motives or intentions, the malicious aspect being to do harm or injury either to the maimed individual or to the state.

It is important to keep in mind that mayhem was never an indictable crime unless it has been perpetrated with malice as just defined. 36 Am. Jur., Mayhem §3. And it should be noted also that throughout the history of the law of mayhem, legal operations performed by physicians were not considered to be mayhem. This was not because the patient consented, but because, lacking the element of malice, the "maiming" resulting from a legal operation never approached the threshold of legal mayhem.

Until 1955, Wisconsin's mayhem statute required an element of *malicious* intent.[2] This conformed to the common

2. See R.S. 1849 c. 133 §31; R.S. 1858 c. 164 §31; R.S. 1878 §4372; St. 1925 §340.35.

R.S. 1849 c. 133 §31 reads, in part: "If any person, with malicious intent to maim or disfigure, shall cut * * *."

law and it is obvious that physicians performing legal operations would not be violating the mayhem statute prior to 1955 as long as the operation was not performed with malicious intent.

In 1955, the legislature, in adopting new revised criminal code (ch. 696, Laws 1955), passed the current version of the mayhem statute which omitted the element of malice. However, this legislature also adopted a new section, sec. 939.10:

"Common-law crimes are abolished. The common-law rules of criminal law not in conflict with the criminal code are preserved."

Sec. 940.21, Stats. (1965), Wisconsin's current mayhem law, must be construed in light of this last-cited section. It follows that indictable mayhem in Wisconsin still requires the element of malice. Any other construction would, in my opinion, render sec. 940.21, Stats., invalid on its face since it makes no exception for the physician performing a legal, although disabling or disfiguring, operation. If a statute is capable of two constructions, one of which renders it invalid and another which renders it valid, the later construction will prevail.[3]

Since we are considering an essentially non-therapeutic operation, we must consider whether the operation is "malicious" within the scope of that term as previously discussed. In short, we must ask: Is the end result—the incapacitation of procreation—a malicious act against either the person receiving the operation or against the state?

It is my opinion that, insofar as individual maliciousness is concerned, the "intent to disable or disfigure another" is lacking in a voluntary sterilization operation. Not only is the element of malice lacking, but it is highly questionable whether the disabling element is present when the "disabling" is the very end result rationally desired by the patient.

It is also my opinion that under these circumstances, a voluntary, rationally requested, surgical incapacitation of procreation is not the commission of an act against the state. In fact, the federal government, through legislative

3. *Ed. Schuster & Co. v. Steffes*, (1941) 237 Wis. 41, 295 N.W. 737.

and administrative programs, has overtly and positively moved to make family planning information available to married people and birth control measures information available to certain classes of unmarried individuals as well as married couples. Similar steps are now being considered by committees of the legislature.

Furthermore, there appears to be no statutory or common law in this state indicating that the rendering of a person incapable of procreation, on a voluntary basis, is an act against the state.

State v. Arnold, (1935) 217 Wis. 340, 258 N.W. 843, recited that sec. 151.15, Stats., which restricts the sale or dispensing of birth control *articles* or *devices* to married persons by a registered pharmacist or licensed physician, originally was introduced in the legislature as a prohibition against birth control, and, as such, failed to pass.

Griswold v. Connecticut, (1965) 381 U.S. 479, 14 L. ed. 2d 510, 85 S. Ct. 1678, is current and significant. In this case the Planned Parenthood League of Connecticut and its physician, who had offered information and medical advice on birth control to Connecticut citizens, were charged with a violation of a state statute prohibiting the use, possession, and sale of contraceptive devices. The supreme court held that this statute was violative of the Fourteenth Amendment to the U.S. Constitution. The majority concurring opinions emphasized individual rights and the essentially private nature of marriage, and held that a state statute interfering with or disrupting these rights or relationships was unconstitutional. Mr. Justice Douglas, speaking for the majority, stated (p. 485) :

"The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by

means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' * * *"

Justice Goldberg stated in a concurring opinion that (pp. 495-496):

"Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family—a relation as old and as fundamental as our entire civilization—surely does not show that the Government was meant to have the power to do so. Rather, as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgment by the Government though not specifically mentioned in the Constitution."

In conclusion, it is my opinion that a doctor performing a sterilization operation, as defined, at the voluntary rational request of a patient is not committing a crime under Wisconsin law.

BCL:WHW

Physical Therapists—Registration Certificate—The annual certificate of registration of physical therapists under sec. 147.185, Stats., is in effect the annual licensing of that occupation.

November 26, 1968.

THOMAS W. TORMEY, JR., *Secretary*
Medical Examining Board

You have requested my formal opinion on whether sec. 147.185, Stats., requires an annual certificate of registration for physical therapists who have successfully met all requirements of the medical examining board.

Sec. 147.185 (4) provides as follows:

"(4) Certificate. If the board finds the applicant qualified it shall issue a certificate of registration which shall expire on February 1 of each year and shall be renewed only upon application to the board. Each registrant shall pay for such registration a fee to be fixed by the board for each given year, which fee shall not exceed $5 in any year; provided that those who register after January 31 of a given year shall likewise pay whatever fee has been fixed for that year. If the applicant has failed to renew his certificate for a period of at least 5 years, the board shall require the applicant to take a refresher course approved by the board before issuing a renewal certificate if, after oral examination, the committee recommends to the board that such refresher course is necessary. If the applicant for reregistration has been guilty of conduct that would afford a ground for revocation under s. 147.20 the board may so find and refuse to reregister such applicant. Every registration made as provided in this section shall be presumptive evidence in all courts and other places that the person named therein is legally registered for the year covered by such registration."

It is to be noted that the statute refers to "a certificate of registration" which obviously refers to the license privilege. *Black's Law Dictionary,* Third Edition, defines a license to include in part:

"A permission, accorded by a competent authority, conferring the right to do some act which without such authorization would be illegal * * *.

"A permit, granted by the sovereign, generally for a consideration * * * to a person, firm, or corporation to pursue some occupation or to carry on some business subject to regulation under the police power."

See also 33 Am. Jur., Licenses, § 2.

Since sec. 147.185 (1) (b) requires registration of physical therapists prior to authorized practice of the profession, I must conclude that the "certificate of registration" referred to in the above statute is the equivalent of and grants the same privileges as a license. I conclude so, being aware of the last sentence of sec. 147.17 (1).

It is well settled that the state under its police power has the right to regulate any occupation, trade or calling in order to protect the public health, morals and welfare, and that the state can in the exercise of this power require the licensing of an occupation, trade or calling, and exact a fee for annual registration. 33 Am. Jur., Licenses, § 7; *Wisconsin Tel. Co. v. Milwaukee,* (1905) 126 Wis. 1, 104 N.W. 1009.

It is to be noted that the above-quoted statute provides for renewal only upon application to the board, and that if the applicant has failed to renew his certificate for a period of five years, a refresher course may be required before licensing is approved. Also, renewal may be denied where the applicant has been guilty of conduct which would be grounds for revocation under sec. 147.20.

Accordingly, I conclude that it is the duty of the board to issue annual certificates of registration to physical therapists under sec. 147.185, and that the board should adopt and use application forms which should be submitted by the licensee annually and should include questions designed to determine the eligibility of the person to be licensed or reregistered for the ensuing year.

BCL:LLD

District Attorneys—Town Ordinances—A district attorney in a county which has no municipal justice in any of its towns, cities or villages, has a duty to commence and conduct actions for recovery of a forfeiture imposed by a town ordinance when requested by the town chairman.

November 27, 1968.

WALTER J. SWIETLIK
District Attorney
Ozaukee County

You have requested my formal opinion on the following question:

Does a district attorney, in a county which has no municipal justice in any of its towns, cities or villages, have a duty under sec. 288.12, Stats., to commence and conduct actions for recovery of a forfeiture imposed by a town zoning ordinance when requested by the town chairman?

I am of the opinion that he does. It is however an alternate method of enforcement of a town ordinance and the duty of the district attorney would be limited to an attempt to collect the forfeiture. Under sec. 60.29 (3) (4) (5) the town board has authority to employ legal counsel, to have charge of all actions to which the town is a party and to bring and prosecute actions for penalties and forfeitures. Proper enforcement of town ordinances in many instances would require more than mere pursuit of a forfeiture and in highly populated towns having ordinances in areas of zoning, traffic, sanitation, it would be desirable to consider employment of an attorney whose sole responsibility would be to the town rather than to rely on the district attorney. In addition to the press of many other statutory duties, the district attorney may be faced with some degree of conflict in that the conduct alleged to be in violation of the town ordinance may also be in violation of a state statute or county ordinance which he also has a duty to enforce.

Secs. 288.11, 288.12, Stats., as amended by ch. 276, Laws 1967, provide:

"288.11 Duty of town officers. The chairman of the town shall cause an action to be commenced under this chapter for the recovery of any forfeiture which he shall know or have reason to believe has been incurred in his town, if the same is recoverable before a *municipal justice,* and every other town officer knowing or having reason to believe that any forfeiture has been incurred shall forthwith notify such chairman thereof."

"288.12 Duty of district attorney. Such chairman shall forthwith notify the district attorney of his county of every forfeiture which he knows, has reason to believe or which he has been so informed has been incurred in his town, which cannot be recovered before a *municipal justice,* who shall forthwith cause an action to be commenced for the recovery thereof as well as for the recovery of every

forfeiture which he shall otherwise know or have reason to believe has been incurred; and such district attorney shall attend to and conduct any action so commenced by such chairman, when requested by him so to do."

District attorneys have seldom been called upon to act under sec. 288.12, Stats., for the recovery of forfeitures for violations of town ordinances. This was largely because a majority of such forfeitures formerly could be collected before a justice of the peace, a constitutional officer having statutory duties. Every county had more than one justice and his jurisdiction was countywide.

In 20 OAG, 256, 258 it was stated:

"***The district attorney has no duty to perform in regard to those forfeitures except in cases where the action cannot be brought before a justice of the peace. See sec. 288.12. In case a village has no justice or police court, the action may be brought before any justice in the county, as the civil jurisdiction of a justice extends throughout the county."

After the Constitution was amended to omit references to justice of the peace, ch. 276, Laws 1967, *created* municipal justice courts "in and for each city, town, and village" provided that such courts "shall become operative and function when the city council, town board or village board adopts an ordinance or by law * * *" Sec. 254.01 (1).

Ch. 276, Laws 1967, also provided that statutory references to "justice of the peace" should be replaced by the words "municipal justice" and specifically referred to secs. 288.11, 288.12, which therefore referred to "a justice of the peace."

In many counties there will be at least one municipal justice. Since his jurisdiction is countywide (sec. 254.05 (1)), and since a municipal justice has exclusive jurisdiction of offenses against the ordinances of his city, village or town, and in addition has statutory jurisdiction over actions for a forfeiture not exceeding $200, requests to the various district attorneys for collection of forfeitures under town ordinances will be limited. A validly enacted town ordinance may include a forfeiture which may be collected

in an action given by statute. Sec. 288.10, Stats., provides for such action.

You state that no town, city or village in Ozaukee county has implemented a municipal justice court. If none has been implemented and made operative, it can hardly be said that there is a municipal justice before whom a town forfeiture may be recovered.

Sec. 288.11 uses the words "any forfeiture" and sec. 288.12, "every forfeiture." One might argue, since these secs. have remained in substantially the same form since 1849 (R.S. 1849 C 122, §§10-13), and since the forfeiture statutes there referred to related to forfeitures to the state, payable when collected into the state school fund, that the only forfeitures the district attorney would be called upon to collect would be state forfeitures and that the town chairman was a watchman for the state as to whether any state statutes had been violated.

In 1878, however, the predecessor to sec. 288.10, Stats., was enacted which related to collection of municipal forfeitures, then for towns, cities and villages, and the statute was placed in the statutory scheme ahead of what are now secs. 288.11, 288.12. It provided for payment of the forfeiture in those cases to the town, city or village. R.S. 1878 §3303.

The language of secs. 288.11 and 288.12 was retained and the words "any forfeiture" and "every forfeiture" which "has been incurred in his town" would, in my opinion, include forfeitures imposed by a valid town ordinance.

Until the legislature revises sec. 288.12, Stats., or until a municipal justice court is established in your county it is my opinion that you have a duty to pursue an action to collect a forfeiture imposed by a town ordinance when requested to do so by a town chairman.

BCL:RJV

Barber Apprentices—Educational Qualifications—Ch. 111, Laws 1967, amends sec. 158.09 (1) (c) to increase the educational requirements for apprentice barbers.

November 29, 1968.

E. H. JORRIS
State Health Officer

You ask my opinion on the interpretation of ch. 111, Laws 1967, dealing with educational qualifications for barber apprentices. This act is made up of two sections, as follows:

"Section 1. 158.09 (1) (c) of the statutes is amended to read:

"158.09 (1) (c) Who, as shown by affidavits, has completed the eighth *10th* grade or has an equivalent education as determined by the state board of vocational, technical and adult education or the extension division of the university of Wisconsin *and who has graduated from the 12th grade or reached the age of 18 after July 1, 1970*; and

"Section 2. The changed education requirement under Section 1 shall not apply to any person who has reached the age of 18 on or before the effective date of this act.

"Approved August 17, 1967."

In administering this law you have reached certain conclusions and ask my concurrence or disapproval of those conclusions. They are as follows:

1. Applicants who became 18 years of age on or before August 25, 1967, must meet the educational requirements provided under the old law.

Your conclusion seems correct—that anyone who reached the age of 18 on or before August 25, 1967, need only show the completion of an 8th grade education or the equivalent as determined according to the statute.

2. You conclude that applicants who became or will become 18 years of age in the period between August 26, 1967, through July 1, 1970, must have completed the 10th grade to meet the educational requirements of the new law and an equivalent education cannot be substituted for the actual completion of the 10th grade.

Your interpretation is correct, except as to the age significance. Between August 26, 1967, and July 1, 1970, persons 16 years of age may qualify in accordance with sec. 158.09 (1) (a), providing they have completed the 10th grade.

After July 1, 1970, a person must be at least 16 years of age and have graduated from the 12th grade, or have reached the age of 18 and have completed at least the 10th grade.

3. You conclude that after July 1, 1970, applicants who became 18 years of age on or before August 25, 1967, must meet the educational requirements provided under the old law.

This is correct. In fact, from now on, anyone who reached the age of 18 years on or before August 25, 1967, may qualify to receive an apprentice permit with an 8th grade or equivalent education.

4. You conclude that after July 1, 1970, applicants who became or will become 18 years of age in the period August 26, 1967, through July 1, 1970, must have graduated from the 12th grade to meet the educational requirements for an apprentice permit, and that an equivalent education cannot be substituted for actual graduation from the 12th grade.

I must disagree with this conclusion. Although ch. 111, Laws 1967, is not a model in apt phraseology, a reasonable legislative intent may be deduced by the application of familiar principles of statutory construction.

The intent of the legislature must first be determined when an ambiguity is present. 50 Am. Jur., Statutes, § 223; *Wisconsin Central Railroad Company v. Forsythe,* 159 U.S. 46, 40 L. Ed. 71, 15 S. Ct. 1020. The intent of the legislature and the obvious object and purpose of a law passed by it will not be defeated if they are not inconsistent with or outside of the terms of the law merely because they are not defined and declared in the most complete and accurate language. 50 Am. Jur., Statutes, § 256.

The obvious intent of the legislature in enacting ch. 111, Laws 1967, was to gradually increase the educational requirements in the barber apprentice program. I must conclude from the language used that the statute now provides that the 10th grade educational requirement applies to all apprentice applicants in the period between August 26, 1967, through July 1, 1970, unless such applicant was at

least 18 years of age on August 26, 1967. After July 1, 1970, all applicants who had not reached the age of 18 by August 26, 1967, must have either graduated from the 12th grade in school or have completed the 10th grade in school and have reached the age of 18.

In view of the discussion in regard to the last question, I find it unnecessary to answer Questions 5 and 6 of your inquiry.

I might add that better legislative draftsmanship would have included sec. 2 of ch. 111, Laws 1967, with the revised sec. 158.09 (1) (c), or a subdivision thereof. However, such defect does not make the law any less effective, and I understand the revisor of statutes will include a note with the newly printed statute citing the effect of sec. 2 and will probably have it added to the statute by a revisor's bill.

BCL:LLD

Welfare—Halfway House—Sec. 146.30 relating to "nursing homes" and sec. 146.32 relating to "residential care institutions" do not apply to a house or other building which uses the synonym "halfway house" having 3 to 15 residents where a licensed physician states that such residents are not in need of medical or nursing care or social services or care of any kind.

December 2, 1968.

WILBUR J. SCHMIDT, *Secretary*
Department of Health and Social Services

Ch. 299, Laws 1967, created secs. 146.30 (12) (n) and 146.32 of the statutes relating to "residential care institutions" or "halfway houses". In effect these statutory changes provide for a lesser degree of supervision of these institutions than is required under sec. 146.30 (1) (a) relating to the care given in nursing homes.

Your department is authorized by these new statutory provisions to "develop, establish and enforce standards for the

care, treatment, health, safety, welfare and comfort of persons in residential care institutions, and for the construction, general hygiene, maintenance and operation of such institutions, and may adopt and enforce rules for such purposes."

You point out that your department is at present drafting proposed rules to cover these institutions. You also state that a classification of "halfway houses" in which 3 to 15 residents are provided with room and board, who require no medical or nursing care or social services or care of any kind, are operating in this state. You wonder whether they will be required to meet the standards proposed for residential care institutions. If the answer to the first question is in the affirmative, you ask whether you may adopt lesser standards for such institutions.

It is obvious from a reading of ch. 299 that the intention was to make an exception for certain types of "nursing homes" as defined in sec. 146.30, which would permit the department to adopt lesser standards where the residents of such institutions "are in the opinion of a licensed physician, in need of care but not the care given in a nursing home as defined in sec. 146.30 (1) (a)."

The first question to be determined is whether or not the type of facility you describe, that is, a so-called "halfway house" in which 3 to 15 residents are provided with room and board, who require no medical, nursing, or social services or care of any kind, constitutes a "nursing home" within the meaning of sec. 146.30 (1), or a residential care institution within the meaning of sec. 146.32. If we determine that this facility does not come within those definitions, then your department has no jurisdiction over the facility and your first question is to be answered in the negative and your second question becomes moot. This is so because ch. 299 is in effect an exception to the provisions of sec. 146.30 dealing with "nursing homes", a valid type of "class legislation". See 52 OAG 121 for discussion of powers of state board of health to adopt separate and distinct bodies of rules to apply to regular nursing homes and "personal" care institutions.,

Sec. 146.30 (1) (a) defines "nursing home" as:

"* * * any building, structure, institution, boarding home, convalescent home, agency or other place, not limited by enumeration, for the reception and care or treatment for not less than 72 hours in any week of 3 or more unrelated individuals hereinafter designated patients, who by reason of disability, whether physical or mental, including mental retardation and mental illness, are in need of nursing home services."

This statute, which attempts to provide a definition for "nursing home", makes such definition dependent upon the term "nursing home services", which is not defined.

Sec. 146.32 (1) provides:

"Definition. A 'residential care institution' means, without limitation because of enumeration, any building, structure, institution, boarding home or other place for the reception and care of 3 or more unrelated individuals for not less than 72 hours in any week, who by reason of physical or mental disability, including mental retardation and mental illness, are in the opinion of a licensed physician, in need of care but not the care given in a nursing home as defined in s. 146.30 (1) (a)."

Thus, persons residing in a "nursing home" are persons who "are in need of nursing home services", while persons in a "residential care institution" are persons who "are in the opinion of a licensed physician, in need of care but not the care given in a nursing home * * *."

The failure to define "nursing home services" and "care" makes it necessary that these statutory provisions be construed in view of the ambiguous nature of the words and phrases used to define the terms. The meaning of a legislative act must be determined from the language used in the statute in arriving at the intention of the legislature. Those construing the statute must give all words of the statute their ordinary and accepted meaning and must read the subsections together. *Nekoosa-Edwards Paper Co. v. Public Service Commission,* 8 Wis. 2d 582; *Greenbaum v. Department of Taxation,* 1 Wis. 2d 234; *Gridley v. Cardenas,* 3 Wis. 2d 623.

In determining legislative intent great consideration must

be given to the object sought to be accomplished by the statute. *Loof v. Rural Mutual Casualty Insurance Co.*, 14 Wis. 2d 512; and *Scanlon v. City of Menasha*, 16 Wis. 2d 437.

The obvious purpose of ch. 299, Laws 1967, was to allow the state department of health and social services to develop standards for residential care institutions which would be much less strict in regard to care, treatment, health, safety, welfare and comfort of patients than would be the case in a regular nursing home. It was anticipated that these institutions would care for patients who by reason of physical or mental disability, including mental retardation and mental illness, require some care but not the care ordinarily given in a nursing home. These lesser standards would be permitted on the basis that the patients in such institutions, although in need of some nursing home services, would not require all of the care given in a nursing home. It is significant that sec. 146.32 (1) anticipates that a licensed physician will certify that the patient admitted to a "residential care institution" needs less care than is given in a regular nursing home.

This brings us to the question of whether a house or other building going under the name of "halfway house" in which 3 to 15 residents reside who, according to a licensed physician, are not in need of medical or nursing care or social services or care of any kind is to be licensed under either a "nursing home" license or a "residential care institution" license.

Although it does not affect the conclusion I reach, I must comment that the term "social services" may well include the society that is derived by the residents of a "halfway house" living with one another. If this social service is construed to be "care" of any kind, such an institution might well be a "residential care institution" within the meaning of sec. 146.32 (1). Certainly a "halfway house" exists for some social purpose. However, I am inclined to conclude that such social service is not within the meaning of the term "care" as used in sec. 146.32 (1).

Accordingly, it is my opinion that the answer to your first question is that if a house or other building in which 3 to 15 residents are living under the synonym "halfway

house", each of whom has been certified by a licensed physician as not in need of medical, nursing, social services, or care of any kind, such house or building does not constitute a "nursing home" within the meaning of sec. 146.30 (1) (a), or a "residential care institution" within the meaning of sec. 146.32 (1), and accordingly need not be licensed by your department under either of these statutes.

I would recommend that your personnel observe closely the operations of these "halfway houses" to determine if any medical, nursing, or care of any kind is required for any of the residents of such house.

Obviously your second question becomes moot.

This opinion in no way affects the applicable state and local building codes, and such house or building would have to comply with those requirements.

BCL:LLD

Plumbing License Law—Grandfather Clause—Sec. 145.07 (1), the "grandfather clause" under the plumbing license law, requires only a showing that the applicant was actively engaged in the practical installation of plumbing in this state and such experience need not necessarily be all in compliance with local and state laws if the offenses involved are purely statutory misdemeanors, do not involve moral turpitude, and no enforcement effort had previously been made by the licensing agency.

December 9, 1968.

E. H. JORRIS
State Health Officer

You seek my formal opinion on the following question:

"May a person seeking a restricted plumber's license or an expansion of an existing restricted plumber's license be granted credit for qualifying purposes for experience gained in areas of Wisconsin which, prior to January 1, 1964, required a plumber's license, provided that the ap-

plicant has been licensed without examination under the 'grandfather clause', or has submitted an application for licensure thereunder prior to July 31, 1966?"

Your question is basically whether experience gained in violation of the plumbing licensure statute can be used to qualify for a "grandfather license" under sec. 145.07, Stats.

Prior to the enactment of ch. 179, Laws 1963, plumbing as an occupation required licensing only "in any city or village having a system of waterworks and sewerage or in any metropolitan sewerage district or in any area platted under ch. 236 adjacent to such city or village." Sec. 145.06 (1), Stats. 1961. Ch. 179, Laws 1963, amended the law to read in part:

"No person shall engage in or work at plumbing *in the state* unless licensed to do so by the board. * * *"

By sec. (2) of ch. 179, Laws 1963, sec. 145.07 (1) was repealed and re-created to read:

"Any person heretofore not required to be licensed under this chapter, who was actively engaged on or before January 1, 1964, in the practical installation of plumbing in this state, may be licensed without examination as a master or journeyman plumber, whichever is appropriate to the particular applicant, upon presenting to the board on forms prescribed by the board, evidence of the foregoing satisfactory to the board. Such application shall be presented not later than January 31, 1965, and shall be accompanied by the appropriate license fee."

My predecessor, in 53 OAG 195, advised the board that under the above re-created provisions of sec. 145.07 (1) a license should be given to all plumbers who were not previously licensed but were engaged in a limited area of plumbing even though such persons were not necessarily proficient in all phases of plumbing.

Subsequently, in ch. 661, Laws 1965, published July 22, 1966, sec. 145.07 (3) to (9) were created. The board was directed by the legislature in sec. 145.07 (8) as follows:

"If any person licensed without examination under sub. (1) or who submits an application to the board prior to

July 31, 1966, acquired his experience in the practical installation of a limited type of plumbing such as septic tank installations, water softener installations or other limited types of installation, the board shall, in renewing or issuing a license to such person, issue to him, without examination, a master plumber's license (restricted) or a journeyman plumber's license (restricted), whichever is appropriate, and such license, on its face, shall restrict the holder thereof to the specific types of plumbing installation in which such licensee, prior to January 1, 1964, acquired his experience in the practical installation of plumbing."

As a result of this legislative direction you then apparently issued restricted licenses to several hundred persons who had previously held unrestricted master plumbers' licenses. Some of these applicants feel that they should have a full master plumber's license or an expanded license, and you question whether experience gained in possible violation of the licensing law should be accepted by your division in administering the provisions of the "grandfather clause".

The term "grandfather clause" originally came from the provisions in the constitutions of some southern states that exempt from property and literacy restrictions voting privileges for all descendants of men who voted in those states before 1867.

The Kentucky supreme court in *Commonwealth Air Transport v. Stuart,* (1946) 303 Ky. 69, 196 S.W. 2d 866, stated the intention of the so-called grandfather clauses as follows:

"In initial regulatory statutes, they satisfy 'the dictates of fairness by affording sanction for enterprises theretofore established.' United States v. Maher, 307 U.S. 148, 59 S.Ct. 768, 771, 83 L. Ed. 1162. * * * Those who pioneer the way in a new enterprise have the right to have these 'grandfather clauses' liberally construed to preserve the positions which they have struggled to obtain. United States v. Carolina Freight Carriers Corporation, 315 U.S. 475, 62 S.Ct. 722, 86 L. Ed. 971. * * *"

Such clauses have been applied to air routes, trucking routes, bus routes, medical licenses, dental licenses, and in some cases plumbing licenses. However, there are very few

cases in the country turning on the question of whether experience acquired in violation of a state law can be used to qualify an applicant under the so-called "grandfather clauses". Perhaps the leading case in the field is *Alton R. Co. v. United States,* (1942) 315 U.S. 15. In that case the operator of an auto transport company had falsely asserted that he was "the owner" of autos being transported on his truck across Nebraska, the purpose of his false statement being to reduce the state license fees on his trucks. The operator had been denied grandfather rights under the Federal Motor Carrier Act, but the United States supreme court said that such a violation of state law was not disqualifying for the denial of a grandfather certificate. The court said:

"Congress has not conditioned rights under the 'grandfather clause' on compliance with state laws. Their violation is material only insofar as it may be relevant to establishing an absence of 'bona fide operation'. Infractions of state law, however, may be innocent or wilful, minor or considerable. * * * Such operation might well be in good faith though state laws were infracted. And the fact that an applicant may have to make his peace with state authorities does not necessarily mean that his rights under the 'grandfather clause' should be denied or withheld. * * * Occasional noncompliance with state laws does not *per se* establish a course of conduct which is preponderantly one of evasion."

The supreme court of Maryland in *Germenko v. Pub. Service Comm.,* (1961) 226 Md. 295, 173 A. 2d 362, held that in construing "grandfather" provisions, "bona fide operation" means "actual" rather than "lawful". The *Alton* case is cited with approval and the distinction is drawn between defiance of state law and unauthorized acts committed in violation of state law, not involving moral turpitude.

In an older case, *In Re Christensen,* (1910) 59 Wash. 314, 109 P. 1040, the grandfather clause specified that an applicant for a medical license could qualify by showing that he had been "legally engaged in such practice" prior to the licensing act, or that he had been "in continuous practice in one locality within the state for the past two years."

This case involved a number of applicants who had been

engaged illegally in practice in the state of Washington but who could show that they had been in "continuous practice in one locality within the state for the past two years." The court held that although their practices were illegal, they could still qualify. The court pointed out that the offenses were purely statutory, were misdemeanors, and did not involve moral turpitude, and although the persons had violated the existing licensing law, this was not so extraordinary as to attribute to the word "practice" as used in the statute "any other than its ordinary meaning". See also *State v. Carson,* (1910) 231 Mo. 1, 132 S.W. 587.

It should be mentioned that there are many cases where illegal operations by motor carriers have been held by the courts not to be qualifying experience under the grandfather provisions. See *Rowley v. Public Service Commission,* (1947) 185 P. 2d 514. However, the court in the *Rowley* case did not cite and distinguish the *Alton* case. Also, many of the older cases involving medical licenses have denied the use of illegal experience for a license under the grandfather clause, but in many of these cases the statutes specifically require that the experience be *lawful* by using such terms as "lawful practice", "legal practitioner" and "legally engaged". The following three widely quoted cases involved such language: *Commonwealth v. Petry,* (1923) 81 Pa. Sup. 27, 263 U.S. 704 (Certiorari denied); *State ex rel. Eberts v. The Ohio State Medical Board,* (1899) 60 Ohio St. 21, 53 N.E. 298; and *Metcalfe v. State Board of Registration,* (1900) 123 Mich. 661, 82 N.W. 512.

In *McDonald v. Thompson,* (1938) 305 U.S. 263, the United States supreme court ruled that where authority had been asked of a regulatory agency and had been denied at the state level and the operation was then conducted in defiance of the refusal, the operator was not engaged in "bona fide operation" within the meaning of the Federal Motor Carrier Act. It would seem that this case could be in point in cases where the regulatory agency had specifically sought enforcement action against a plumber who was violating the licensing requirements and the plumber persisted in his operation in defiance of state regulation. However, it might also be said that in the absence of state enforcement effort, the language of the United States supreme court in the

Alton case regarding violations of state laws should receive paramount attention:

"Their violation is material only insofar as it may be relevant to establishing an absence of 'bona fide operation'."

In answer to your question, therefore, I am of the opinion that experience gained for qualifying purposes under the grandfather license clause of the plumbing law need not necessarily be all in compliance with local and state laws, especially if the offenses involved are purely statutory misdemeanors, do not involve moral turpitude, and no specific enforcement action has been taken against such applicant in regard to the activities through which qualifying experience was gained. This opinion is further substantiated by the lack of the terms "lawful", "legal", or "legally" in sec. 145.07 (1). Instead, the legislature has used only the terms "actively engaged" during the period in question "in the practical installation of plumbing in this state". This is clearly equivalent to the "bona fide operation" mentioned in the *Alton* case, supra, by the United States supreme court.

BCL:LLD

Anti-Secrecy — Wisconsin State Universities — Faculty meetings at Wisconsin state universities are subject to the provisions of sec. 14.90, and must be publicly held.

December 10, 1968.

EUGENE R. MCPHEE, *Director*
State Universities

You ask whether sec. 14.90, Stats., the Wisconsin anti-secrecy law, applies to meetings of the faculties of the state universities.

In asking whether such meetings are covered by the anti-secrecy law, you present the more fundamental question of what bodies are covered by sec. 14.90. This issue has never been clearly decided by the Wisconsin supreme court, nor

has it been directly addressed in any previous attorney general's opinion relating to the anti-secrecy law. Thus, in order to answer this fundamental question, it is necessary to examine closely the organiation and structure of sec. 14.90.

Sec. 14.90 (1) is the declaration of the public policy of the state concerning secrecy in government:

"In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of the state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental affairs and the transaction of governmental business."

Sec. 14.90 (2) is the implementational or operational subsection of the statute. The language relevant to the question we are considering here is contained in the first sentence of that subsection:

"*To implement and insure the public policy herein expressed,* all meetings of all state and local governing and administrative bodies, boards, commissions, committees and agencies, including municipal and quasi-municipal corporations, unless otherwise expressly provided by law, shall be publicly held and open to all citizens at all times, except as hereinafter provided * * *".

The opening phrase of this supplemental sentence (emphasized above) relates directly back to sub. (1). Thus, sub. (1) must be read not merely as expressing the public policy of the state towards open meetings, but also as an overall definition of the scope of sec. 14.90.

Sec. 14.90 (3) contains certain specifically defined exceptions to the blanket requirement that all described meetings be open. These stated exceptions provide for situations where the legislature believes open meetings would be *incompatible* with the conduct of governmental affairs and the transaction of governmental business. Except for specific situations provided for elsewhere in the statutes, sub. (3) lists the only circumstances where the legislature believes such incompatibility could occur. Furthermore, even if the subject matter of a meeting falls within the excep-

tions of sub. (3), the meeting is not automatically closed. Rather, such a meeting should *not* be closed unless an open meeting *would be incompatible* with the conduct of governmental affairs and the transaction of governmental business.

The scope of coverage of sec. 14.90 must be determined by an examination of the implementational first sentence of sub. (2). The repeated use of the word "all" ("*all* meetings of *all* * * * bodies * * * shall be open to *all* citizens at *all* times") demonstrates the legislature's intent that the statute be interpreted broadly. Similarly, the words "all state and local governing and administrative bodies, boards, commissions, committees and agencies, including municipal and quasi-municipal corporations," are used in their broad, generic sense, rather than as words of limitation. Taken as a whole, the language used in this implementational sentence demonstrates the legislative intent to make the statute as broad and inclusive as possible. Thus, I conclude that the scope of application of sec. 14.90, under sub. (2), is as broad as is necessary to insure the full implementation of the public policy contained in sub. (1).

Clearly, not all bodies are covered by the statute. The stated purpose of the open meeting law is to provide the public with the fullest information possible about the conduct of *public or governmental affairs*. Thus, meetings of bodies that are private and are not substantially related to the conduct of public or governmental affairs are not covered. It is sometimes difficult however, to draw a clear distinction between private and public bodies. Problems may also arise as to whether relationship between a particular body and a public or governmental institution is such that the meetings of that body are covered. Finally, fine distinctions must frequently be made to determine whether a particular group is a body within the purview of the statute. Your question relating to the faculties of the state universities falls into the latter two problem areas.

The prior discussion suggests a two-step approach to problems of whether sec. 14.90 applies to a particular body:

1. Does it perform functions by taking formal actions as a body at meetings?
2. Are those functions related to a public or governmental

institution, and do they constitute substantial participation in the affairs of that institution?

I will attempt to use this two-step approach in analyzing the question you present:

Are meetings of the faculties of state universities covered by sec. 14.90?

1. *Do the faculties of the Wisconsin State Universities perform functions by taking formal actions as a body at meetings?*

A basic but sometimes overlooked fact is that sec. 14.90 applies only to *meetings* of *bodies*. Thus meetings between the one-man head of a department and a member of his staff, or even a meeting of the entire staff of a department, may not be covered by the anti-secrecy law because the staff does not constitute a body. On the other hand, meetings of statutorily defined public bodies, such as the state university board of regents, clearly are covered by sec. 14.90.

The faculties of the state universities lie somewhere between these two extremes. The faculties of the state universities are not statutorily defined, nor specifically recognized, in CH. 37, Stats. On the other hand, the faculties of the state universities are more than mere groups of employes. They have constitutions and bylaws. They play a significant role in the formulation of policy for their respective universities, and in certain aspects of administration of those universities.

An examination of sec. 36.12, relating to the university provides a useful analogy at this point:

"36.12 President of the University. The president of the university shall be president of the several faculties and the executive head of the instructional force in all its departments; as such he shall have authority, subject to the board of regents, to give general direction to the instruction and scientific investigations of the several colleges, and so long as the interests of the institution require it he shall be charged with the duties of one of the professorships. The immediate government of the several colleges shall be intrusted to their respective faculties; but the regents may

regulate the courses of instruction and prescribe the books or works to be used in the several courses, and also confer such degrees and grant such diplomas as are usual in universities or as they shall deem appropriate, and confer upon the faculty by bylaws the power to suspend or expel students for misconduct or other cause prescribed in such bylaws."

In previous attorney general's opinions (49 OAG iv, 54 OAG i), it was stated that meetings of the faculty of the university of Wisconsin are covered by sec. 14.90. These opinions were based in part on the following language of sec. 36.12:

"The immediate government of the several colleges shall be intrusted to their respective faculties; * * *"

This phrase is significant, not because of the occurrence of the word "government" which, in context, is clearly used as a word of art, and would ordinarily be termed "administration." Rather, the phrase is significant in that it demonstrates, in the law itself, a recognition of the delegation of important public functions by the board of regents to the faculties of the several colleges of the university, and to the faculty of the university itself. Thus, the faculty of the university, and the faculties of its several colleges, are covered by sec. 14.90 because, acting formally as a body, they perform important university functions and exercise important powers delegated to them by the board of regents.

Although CH. 37, Stats., contains no such express recognition of the faculties of the state universities, the dissimiliarities between that chapter and CH. 36 reflect the fact that the university has always been regarded by the legislature as a large and diverse institution, whereas state university system was originally devised as a system of small state teachers' colleges. In recent years, however, the state university system has expanded immensely, both in enrollment and in curriculum, in order to meet the expanding needs for higher education in Wisconsin, and is now one of the largest educational systems in the country. The institutional structure of the individual state universities, reflecting this great change, have come to be quite similar to that

of the university of Wisconsin. Thus, the dissimilarities between the university of Wisconsin and the Wisconsin state universities which were the underlying basis for the contextual dissimilarities between CHS. 36 and 37 no longer exist in fact, and one could properly analogize between meetings of the faculty of the university of Wisconsin and the faculties of state universities and conclude that the latter are covered by sec. 14.90.

Neither CH. 36 nor CH. 37 specifically defines the respective faculty body. These chapters provide that the respective board of regents is vested with all ultimate authority for the government and administration of the university(ies). In each instance, policy-making and administrative functions performed by the faculty bodies are solely derived from the delegation of authority by the respective board of regents. Thus, the final determination of the applicability of sec. 14.90 must turn on the functions delegated by the respective board of regents to the faculties and being performed by the faculties, and not on the recognition of such delegation or lack thereof to be found in CH. 36 or CH. 37.

Because your opinion request related to the faculty of the state university—Stevens Point, I have studied their faculty handbook, constitution and bylaws, and it is my opinion that the structure of that faculty body does indeed provide for the taking of formal actions, as a body, with regard to delegated policy-making and administrative functions. I therefore conclude that the faculties of the state universities are bodies such as may be covered by sec. 14.90.

2. *Do the faculties of the Wisconsin State Universities perform functions related to a public institution, and do they participate substantially in the affairs of that institution?*

Sec. 14.90 (1) declares the policy of the state that "the public is entitled to the fullest and most complete information regarding the affairs of government." In sec. 14.90 (2) the legislature intended to fully implement that policy. The phrase "affairs of government" must be construed as being broader than the word "government" itself. Therefore, I conclude that sec. 14.90 relates not only to meetings of arms or agencies of state and local government, but also to meetings of governing and administrative bodies of all public

institutions. By public institution, I mean one that falls within the general definition of "public institution" found in *Black's Law Dictionary,* 4th Ed., page 941:

"*Public institution.* One which is created and exists by law or public authority, e.g., an asylum, charity, college, university, schoolhouse, etc."

There is no question that the state universities are public institutions.

Furthermore, it has already been determined that the board of regents of state universities is an arm or agency of the state. *Sullivan v. Board of Regents of Normal Schools,* (1932) 209 Wis. 242. Thus, to the extent that the faculties are performing governmental, policy-making or administrative functions delegated by the board of regents, they are directly related to an arm of the state.

The nature of the relationship of a particular body to a public institution is another problem area in determining the applicability of sec. 14.90, Stats. "Substantial participation" need not be direct participation in the government or administration of that institution. It has already been determined that advisory committees and groups dealing with governmental affairs and the transactions of governmental business have such a relationship and are covered by sec. 14.90, 54 OAG iv.

The faculty of a Wisconsin state university performs an important role in policy formation for that university. Indeed, the whole structure of the faculty body is designed for that purpose.

"The faculty is organized into councils and committees for policy formulation and advisory functions." (*Wisconsin State University—Stevens Point, faculty handbook,* page A-4.)

It is clear that the faculties of the state universities perform important advisory functions in formulation of policy for their respective institutions.

Furthermore, a state university faculty apparently performs important functions in the government or administration of the university itself. For example, the Wisconsin state university—Whitewater catalogue outlines the respon-

sibility of the graduate faculty in the administration of the school of graduate studies:

"The Graduate Council is the committee responsible for the formulation of policy for the School of Graduate Studies. Its decisions are subject to approval by the entire graduate faculty. Members of the Graduate Council are elected by the graduate faculty. The Graduate Library Committee administers the allocation of funds for the purchase of library material and other matters concerning the development of the library as it pertains to the Graduate School. The Graduate Standards Committee deals with academic standards, probation and dismissal. All committees report their actions to the entire graduate faculty and all committee actions are subject to the approval of that body."

Similarly, the participation of the faculty of Wisconsin state university—Stevens Point in the administration of that university is evidenced by the following quotation from the faculty bylaws:

"No action, of a committee responsible to the Faculty, shall become operative as an action of the university until it has been reported to the Faculty at a regular or special meeting under the procedures outlined below: * * *" *Wisconsin State University—Stevens Point, Faculty Bylaws,* p. 18.

I, therefore, conclude that the faculties of the state universities are advisory to, and participate substantially in, the administration of their respective institutions. It is my opinion, therefore, that meetings of the faculties of the state universities must be publicly held, and open to all citizens at all times as required by sec. 14.90, Stats., subject to only the exceptions provided in sub. (3) of that statute, and to any other exceptions that may be provided by law.

BCL:SMS

Investment Board—Student Loans—Investments by the Wisconsin investment board under sec. 25.17 (3) (bf) lie within the sound discretion of the board to the extent that the liquidity of the general fund is involved.

December 18, 1968.

HOWARD A. SMART
Executive Director
State Investment Board

At the direction of the trustees of the state investment board you have requested my opinion whether the trustees have discretion in the investment of monies in the general fund for the purposes set forth in sec. 25.17 (3) (bf), Stats. It is my opinion that such discretion does reside in the trustees of the state investment board. Under sec. 39.32, Stats., the commission for higher educational aids is authorized to make certain loans to students. Sec. 25.17 (3) (bf), provides for the investment by the state investment board in such loans.

Sec. 25.17 (3) (bf) reads as follows:

"* * * The board shall:

"(3) (bf) Invest sums not exceeding $20,000,000 outstanding at any one time of the balances of the general fund in advance to the state commission for higher education aids for the purpose of making additional loans to needy students under s. 39.32. Such loans shall initially be made by the state commission for higher educational aids from the appropriations under s. 20.235 (1) (g). Despite the specific provisions of sub. (1), the responsibility for collection of the interest and principal on such loans to students shall rest in the state commission for higher educational aids and the function of the investment board shall be limited to advancing funds to the state commission for higher educational aids for not to exceed 95% of such loans outstanding and collectible, based upon the certificates of the state commission for higher educational aids as to the current status of the student loans made, due and collectible under s. 39.32, and to periodically receiving from the appropriations made by s. 20.235 (1) (e), (g), (i) and (m) payments of principal and interest on the advances made to the state commission for higher educational aids, interest to be computed monthly at 4% per annum on the unpaid principal balance of the advances, made prior to July 1, 1966, and at the maximum rate allowable under P. L. 89-329 and P. L. 89-287, or 4%, whichever

is the greater, on all loans made on or after July 1, 1966, computed as of January 1 and July 1 of each year and payable within 90 days thereafter."

The language of sec. 25.17 (3) (bf) has apparently been construed by the investment board and the commission for higher educational aids as making mandatory the investment of sums not exceeding $20,000,000 by the investment board in the loans provided for therein upon request by the commission for higher educational aids. On the understanding that such investments were mandatory on the part of the board, an oral agreement was entered into between representatives of the commission for higher educational aids and the executive director of the state investment board whereby the commission for higher educational aids would first make the loans to students and would then quarterly make demand upon the investment board for such sums as were necessary to "cover" these loans. Certainly such agreement must be considered as of questionable legal effect as to sums not previously approved by the board in view of the provisions of sec. 25.17 (3) (bf) which require that investment of the sums provided for therein are to be made "in advance" to the commission for higher educational aids.

The understanding that the investment by the board in such loans to students is mandatory is apparently based upon the opinion issued by my predecessor in 45 OAG 308. That opinion related to the investment of state building trust fund monies in loans to Wisconsin state building corporation, the Wisconsin university building corporation, and the Wisconsin state colleges building corporation. The opinion states that with respect to the application of these funds, the duty of the investment board was purely ministerial. With respect to these investments, the language of sec. 25.17 (2) (a) is clear that such loans "* * * shall be made at the direction of the state building commission." Further, the monies involved are excepted by the provisions of sec. 25.14, from those funds under the jurisdiction and management of the state investment board.

The monies involved in the student loan program are not so excepted under sec. 25.14, but rather such loans are made

from the general fund and the "loan paper" returns to the general fund and becomes a part thereof.

Any inquiry into legislative intent in the construction of a statute requires first that an ambiguity be present in the language of that statute. Sec. 25.17 (3) (bf) appears to contain such ambiguity in the language "* * * The board shall:

"(3) (bf) Invest sums not exceeding $20,000,000 outstanding at any one time of the balances of the general fund * * *."

Clearly the language "shall invest" is generally regarded as being mandatory. However, it is unclear whether the language "sums not exceeding $20,000,000" should be regarded as a limitation of authority or the extent of the mandate to invest.

Sec. 25.17 (3) (bf) of the statutes was created by ch. 506, Laws 1961. The language of the section at that time included the sentence "Despite the specific provisions of sub. (1), the responsibility for collection of the interest and principal on such loans to students shall rest in the state department of public welfare, and the function of the investment board shall be limited to purchasing such loans at such times and in such amounts as it chooses * * *." By ch. 574, Laws 1963, sec. 25.17 (3) (bf) was amended increasing the amount therein from $5,000,000 to $10,000,000 and in particular anmending the above quoted sentence to read "Despite the specific provisions of sub. (1), the responsibility for collection of the interest and principal on such loans to students shall rest in the state department of public welfare, and the function of the investment board shall be limited to * * * *advancing funds to the state department of public welfare for not to exceed 95% of such loans * * * outstanding and collectible, based upon the certificates of the state department of public welfare as to the current status of the student loans made, due and collectible under s. 49.42 * * *.*"

Under the rules of statutory construction, it would appear that the legislature by removing the language "* * * to purchasing such loans at such times and in such amounts as it chooses, * * *" intended to remove any discretion in the

investment of these amounts by the board of trustees. On the other hand, it could as well be argued that such language was deleted as superfluous in view of the duties and responsibilities of the board of trustees in the investment of monies in the general fund. Sec. 25.14, Stats., vests in the state investment board jurisdiction and management of the state investment fund. The duty of managing such fund includes determination by the board as to the liquidity which must be maintained in the general fund in order to permit the state to pay its obligations as they arise (sec. 25.17 (61)).

At best, it might be seen that the legislature has imposed upon the investment board two duties, both of which appear to be mandatory. In that event a determination would have to be made as to which duty is superior. In my opinion, the overall management of the state investment fund, including the general fund, to insure that the state is always in a position to honor its obligations must be seen as the paramount duty. It therefore follows that if the trustees of the state investment board, in their wisdom, determine that the investment of additional sums under sec. 25.17 (3) (bf) would jeopardize the liquidity of the general fund to the state's detriment, they would then have the discretion to refuse to so invest further amounts in such loans.

However, it should be pointed out that while there is discretion, there is also a duty to provide money from the general fund in an amount not to exceed $20,000,000 for student loans. Therefore, there can be no arbitrary refusal to advance such funds but only a postponement until such time as in the sound judgment of the board such advance would not endanger the liquidity of the general fund.

BCL:DGM

Highways—Authority to Vacate—Neither a town board, nor a county board in a county of less than 150,000 population, has authority to vacate, abandon, or discontinue existing public highways which each has a duty to maintain except in compliance with statutory procedures which must be initiated by the prescribed number of resident freeholders. Secs. 80.02, 80.39, Stats.

December 19, 1968.

JAMES R. SCHIPPER
District Attorney, Vernon County

The United States Army Corps of Engineers is contemplating the construction of a large reservoir on the Kickapoo River near La Farge in Vernon county. Present plans would require the discontinuance, abandonment or vacation of portions of certain county and town highways. Counsel for the corps of engineers is of the opinion that the plan could be expedited if town and county boards could initiate proceedings to discontinue, abandon or vacate highways without the necessity of petition of freeholders or abutting landowners.

Vernon county has a population of less than 150,000.

Your question then is:

Does a town board, or county board in a county of under 150,000 population, have authority, acting on its own motion, to vacate, abandon, or discontinue existing public highways which each has a duty to maintain?

The answer to your question is "no."

Towns and counties have only such powers as are conferred upon them by statute or necessarily implied therefrom. *Pugnier v. Ramharter,* (1957) 275 Wis. 70, 81 N.W. 2d 38. *Maier v. Racine County,* (1957) 1 Wis. 2d 384, 84 N.W. 2d 76.

In the laying out or discontinuance of a highway there must be strict compliance with the applicable statute. *Town of Buchanan v. Wolfinger,* (1941) 237 Wis. 652, 298 N.W. 176. *Roberts v. Jeidy,* (1950) 256 Wis. 603, 42 N.W. 2d 280.

Wisconsin law recognizes the respective rights and duties of the governmental agency charged with maintenance, the public and the abutting landowners with respect to use of the highways and ownership of the fee thereunder.

County and town highways are public highways rather than governmentally owned roads. They are not the "King's Highways" and county and town boards cannot establish and discontinue them at will.

A town meeting does not have power to vacate a highway.

Brock v. Hishen, (1876) 40 Wis. 674. Nor does a circuit court. *Town of Mt. Morris v. Hill,* (1913) 152 Wis. 116, 139 N.W. 734.

The title to the fee in a highway remains in the abutting owners. The title which a county or town acquires for the use of the public is only an easement for highway purposes. *Walker v. Green Lake County,* (1955) 269 Wis. 103, 69 N.W. 2d 252. *Gogolewski v. Gust,* (1962) 16 Wis. 2d 510, 114 N.W. 2d 776.

When any highway shall be discontinued the same shall belong to the owner or owners of adjoining lands. Sec. 80.32 (3), Stats. The statutes also recognize that abutting lands may be benefited, injured or damaged by the discontinuance of a highway and provide for awards of damages in appropriate cases.

Any person who makes application to vacate a highway must file a *lis pendens.* Sec. 281.04 (1).

Sec. 80.02, Stats., as amended by ch. 26, Laws 1967, requires that proceedings to discontinue town roads be initiated by a petition of at *least* six resident freeholders. The statute provides that no town board shall discontinue any part of a state trunk or county trunk highway, nor discontinue any highway when such discontinuance would deprive the owner of lands of access therefrom to a highway.

Secs. 80.04 - 80.10 govern with respect to restrictions and procedures to be followed including supervisor disqualification, notice, hearing, examination, order, award, and damages.

Sec. 80.11, Stats., applies to highways on or across town lines, and requires joint action of the respective boards after application signed by at least six resident freeholders from each town. Sec. 80.12 concerns highways on or across town and municipal boundaries and requires application from at least six freeholders from each municipality.

Sec. 80.41, Stats., should be noted and provides:

"Discontinuing ways to waters. No resolution or ordinance of any town board or county board or committee thereof discontinuing any highway, street, alley or right of way which provides public access to any navigable lake or stream shall be effective until such resolution or ordinance is approved by the state conservation commission."

Sec. 80.39, Stats., provides the basis for county board power to discontinue a county highway and (1) (a) and (b) provide in part:

"(a) The county board may lay out highways in the county, and may widen, alter or discontinue any highway or part thereof laid out by it (but may not discontinue any part of a state trunk highway) upon the petition of not less than 10 resident freeholders of each town in which the highway or any part thereof is proposed to be laid out, widened, altered or discontinued. All the powers herein granted may be exercised by a committee of not less than 3 members of the board. * * *"

"(b) In every county having a population of at least 150,000 the county board, upon a vote of two-thirds of its members, may exercise the powers conferred by this section, without any petition therefor, and shall proceed thereafter in that behalf as in cases of petition duly made."

In *Damp v. Town of Dane,* (1872) 29 Wis. 419 it was held that a petition by the specified number of resident freeholders was absolutely necessary to give the county board of supervisors jurisdiction to make an order laying out a road.

The legislature has enacted express legislation to permit county boards in counties of over 150,000 population to proceed to lay out, alter, widen or discontinue without the necessity of a petition of freeholders.

I am of the opinion that a county board in counties of under 150,000 population, and a town board, can act to vacate or discontinue public highways which they have a duty to maintain, only in response to a petition of the required number of freeholders.

BCL:RJV

Flood Control—Not Internal Improvement—Construction of a dam for the purpose of flood control is a governmental function and therefore not a work of internal improvement under Art. VIII, sec. 10, Wis. Const. Other applications of Art. VIII, sec. 10 discussed.

December 20, 1968.

EARL SACHSE
Executive Secretary
Legislative Council

You have asked a series of questions relating to the authority of the state to engage in certain activities involving flood control structures.

Your first question is:

"In the light of the provisions of Art. VIII, Sec. 10, Wisconsin constitution, relating to internal improvements, can the state appropriate funds for granting aids to municipalities to maintain or construct dams for the purpose of controlling flood waters?"

The answer to this question is yes.

The material portion of the constitutional provision to which you refer states:

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

It was long ago determined that the above quoted prohibitions applied only to the state and not to municipalities and local governments. *Bushnell v. Beloit,* (1860) 10 Wis. 155; *Redevelopment Authority v. Canepa,* (1959) 7 Wis. 2d 643, 97 N.W. 2d 695, but financial aid to municipalities in the carrying on of such works makes the state "a party in carrying on such works" in violation of the constitution. *State ex rel. Martin v. Giessel,* (1947) 252 Wis. 363, 31 N.W. 626.

The question, therefore, is whether a dam constructed for flood control purposes is an "internal improvement" within the meaning of Art. VIII, sec. 10.

Previous opinions of this office have concluded that flood control dams are works of internal improvement. See 32 OAG 420; 36 OAG 264; 44 OAG 148 and 45 OAG 28. These opinions relied primarily on *State ex rel. Jones v. Froehlich,* (1902) 115 Wis. 32, 91 N.W. 115, which held that construction of a system of flood control levees on the Fox River at Portage was a work of internal improvement. In *State ex*

rel. Hammann v. Levitan, (1929) 200 Wis. 271, 228 N.W. 140, the court observed, *obiter dicta,* that "The erection of a dam for the purpose of controlling flood waters would undoubtedly be a work of internal improvement."

There has been no case, however, in which the Wisconsin court has decided this particular issue. Nor have we found any case on this precise point from any other jurisdiction having a similar constitutional provision.

The general definition of the term "works of internal improvement" was, until very recently, unclear because of conflicting statements in various supreme court decisions. See discussions in 55 OAG 61 and Waite, *The Dilemma of Water Recreation and a Suggested Solution,* 1958 Wis. L. Rev. 542, 582. The various definitions turned on such questions as whether the project might possibly be undertaken by private parties for profit; whether it was within the police power; or whether it was in furtherance of a governmental function. The doubt, however, was substantially resolved by the decision in *State ex rel. La Follette v. Reuter,* (1966) 33 Wis. 2d 384, 147 N.W. 2d 304. In this case the court expressly reaffirmed the definition of "works of internal improvement" first stated in *Rippe v. Becker,* (1894) 56 Minn. 100, 57 N.W. 331, and adopted by the Wisconsin court in *State ex rel. Owen v. Donald,* (1915) 160 Wis. 21, 15 N.W. 331. That definition is as follows (160 Wis. at p. 79):

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

"By adopting the foregoing definition of 'internal improvement' by the Minnesota court we are committed thereby to hold that *any structure which is used by the state in the performance of its governmental functions is excluded from being a work of internal improvement.* * * *"

The supreme court in *La Follette v. Reuter* also reiterated its view that the Wisconsin Constitution is not a static document limited for all time by the conventional wisdom of the day on which it was adopted. It must be interpreted "in the light of existing conditions" and given "that meaning which would have been expressed when adopted if the present conditions . . . had then existed or had been within the contemplation of those who drafted the instrument." 33 Wis. 2d at 402. Applying these principles, the court concluded in *La Follette v. Reuter* that construction of local sewerage plants and other water pollution abatement facilities is a governmental function and the use of state funds for this purpose does not violate the internal improvements clause. The governmental function there involved was the preservation and protection of public health from the inimical effects of water pollution.

The question you pose, therefore, boils down to whether the construction of a flood control dam is, under today's conditions and in the light of today's knowledge, a governmental function. If it is a governmental function, under the definition adopted in *La Follette v. Reuter,* it is not a work of internal improvement.

In my opinion there can be little doubt that construction of a flood control dam must today be viewed as furthering a governmental function. We need look no further than the public health functions relied upon in *State ex rel. La Follette v. Reuter.* Not only is a direct threat to the public health found in flood damage to life and property, but it is also well known that floods create significant dangers to public health by such indirect effects as pollution of the water supply.

Flood control dams also protect public safety. The definition of works of internal improvement adopted in *La Follette v. Reuter* does not expressly include protection of public safety as a governmental function outside the scope of the internal improvement prohibition. It does, however, include "other like recognized functions of state government." I know of no more universally recognized function of government at any level than the protection of public safety and I must conclude that it is within the governmental roles anticipated by the court in the above definition.

I conclude that construction of a flood control dam is a governmental function of the state. Construction of such dams is, therefore, under the rule adopted in *State ex rel. La Follette v. Reuter,* not a work of internal improvement prohibited by Art. VIII, sec. 10, Wis. Const.

Your second question is:

"Could the state act as a receiving and disbursing agency for federal funds which may become available for the type of works contemplated by the joint resolution?" [Jt. Res. 90 relating to flood control dams.]

The answer to this question is yes. This conclusion would follow even if the works contemplated were works of internal improvement.

Following the portion of Art. VIII, sec. 10, Wis. Const., which is quoted above, the section continues as follows:

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

Therefore, even if the structures contemplated by the resolution were works of internal improvement, the state could act as a receiving and disbursing agency for federal funds under this exception. For a case involving such a grant-in-aid of a railroad development, see *Sloan, Stevens and Morris v. The State,* (1881) 51 Wis. 623, 8 N.W. 393. See also 50 OAG 27.

Your third question is:

"If a dam site is given to the state and the grant of the site requires the continued maintenance of the dam, could the state expend funds on maintenance?"

The answer to this question is yes. Posed in the context of a specific fact situation involving the Princeton Dam, it has previously been answered in 55 OAG 61. The rationale of that opinion applies as well here.

Your fourth question is:

"Does the fact that the dams which are the subject of the study are for flood purposes and intended to preserve life and property, distinguish them from dams which would be constructed or maintained for recreational or scenic purposes?"

As stated in answer to your first question, a project which is in furtherance of a state governmental function does not violate Art. VIII, sec. 10. It is perhaps easier to see a direct connection with a governmental function in the construction of a dam which will prevent the devastation and danger to public health and safety inherent in a flood than to see the same thing in a dam which creates or preserves recreational or scenic waters. It has, however, been suggested that enhancement of our recreational water resources does promote the public health by providing needed opportunities for relaxation and recreation. See Waite, *The Dilemma of Water Recreation and a Suggested Solution,* supra. For a discussion of the public governmental character of expenditures for recreational and scenic purposes see *Muench v. Public Service Commission,* (1951) 261 Wis. 492, and *Kamrowski v. State,* (1966) 31 Wis. 2d 256 (scenic easements). It is also generally accepted that a dam constructed as an incident to a public park is outside the internal improvements ban. *State ex rel. Hammann v. Levitan,* (1929) 200 Wis. 271, 228 N.W. 140. This is true even though the dam construction may also benefit private property owners. 55 OAG 61.

It cannot be said that preservation of public health and safety are the only governmental functions which might justify the construction of a dam without conflict with Art. VIII, sec. 10. Dams which enhance recreational and scenic values may be justifiable as an appropriate exercise of some other governmental function. These values have, for example, long been recognized as elements of the state's trusteeship over its navigable waters. The determination would have to be made on the basis of the facts in each case.

Your fifth question is:

"In view of the doctrine that the state is trustee of the navigable waters in Wisconsin, does Art. VIII, Sec. 10, preclude the state from expending any money for the preser-

vation or control of those waters? We are aware of the decisions of our supreme court and the opinions of your office which have held that the state may expend its funds on maintenance of dams where the state owns all of the land involved in the dam site and any flowage created by it. [*State ex rel. Hammann v. Levitan,* (1929) 200 Wis. 271] and 52 Ops. Atty. Gen. 97."

In my opinion the state's duty as trustee of navigable waters in the state is a governmental function and actions taken by the state in the performance of that duty are not works of internal improvement. This was the position taken in 55 OAG 61 and is, I believe, substantially supported by the opinion of the Wisconsin supreme court in *State ex rel. La Follette v. Reuter,* supra. I refer you to 55 OAG 61 for further elaboration of this point.

BCL:ACC

Children—Care and Custody—Divorce Judgment—In rendering a judgment of divorce, the court does not have the authority to transfer guardianship in any form to the county or state agencies specified within sec. 247.24 even though the court may give the care and custody of the minor children of the parties to such agencies.

December 24, 1968.

ALLEN J. BUSBY, *Chairman*
Council for Home and Family

In rendering a judgment of divorce, the court under certain circumstances may declare any minor children of the parties dependent and give the care and custody of such children to a county agency specified in sec. 48.56 (1) or the state department of health and social services. Sec. 247.24, Stats. You ask whether the circuit court in rendering a judgment of divorce also has the right or duty to make the county agency or state agency the guardian of these children.

Sec. 247.24, provides:

"Judgment; care and custody, etc., of minor children. In rendering a judgment of annulment, divorce or legal separation, the court may make such further provisions therein as it deems just and reasonable concerning the care, custody, maintenance and education of the minor children of the parties, and give the care and custody of the children of such marriage to one of the parties to the action, or may, if the interest of any such child demands it, and if the court finds either that the parents are unable to adequately care for any such child or are not fit and proper persons to have the care and custody thereof, may declare such child a dependent and give the care and custody of such child to a relative (as defined in ch. 48) of the child, a county agency specified in s. 48.56 (1), a licensed child welfare agency, or the state department of public welfare. The charges for such care shall be pursuant to the procedure under s. 48.27. Whenever the welfare of any such child will be promoted thereby, the court granting such judgment shall always have the power to change the care and custody of any such child, either by giving it to or taking it from such parent, relative or agency, provided that no order changing the custody of any child shall be entered until after notice of such application has been given the parents of such child, if they can be found, and also to the relative or agency that then has the custody of such child."

As it pertains to your question, sec. 247.24 limits the court's powers to giving "the care and custody of a child to the specified county or state agencies. This section incorporates sec. 48.27 which deals with the support of a child when legal custody is transferred from the parent or parents. No mention whatsoever is made of guardianship under secs. 48.27, 247.24 and 247.25, the latter section referring to revision of any judgment concerning care, custody, maintenance and education of these children.

It is important to note the differing rights and duties which arise from the statutory definitions of "guardian" and "legal custody." Sec. 48.02, Stats., provides in part:

"(9) 'Guardian' means guardian of the person and refers to the person having the right to make major decisions affecting a child including the right to consent to marriage, to

enlistment in the armed forces, to major surgery and to adoption or to making recommendations as to adoption as hereinafter set forth in this chapter. The guardian has legal custody of the child unless legal custody is given by the court to another person. A person may be appointed guardian of a child or removed as such guardian only by court action under the provisions of the chapter under which such guardian was appointed. Where a guardian has been appointed and is acting as guardian for a child under this chapter, no guardian of the person of such child shall be appointed under ch. 319.

"(10) 'Legal custody' means the right to the care, custody and control of a child and the duty to provide food, clothing, shelter, ordinary medical care, education and discipline for a child. Legal custody may be taken from a parent only by court action. 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."

If one or more of the conditions enumerated under sec. 48.40 (2) exist, the juvenile court may terminate parental rights and transfer both guardianship and legal custody of any minor to those agencies enumerated under sec. 48.43 (1). These agencies are authoried to accept guardianship of the person, as defined in sec. 48.02 (9), only after the procedures have been followed under secs. 48.40 through 48.43. In this respect, these county and state agencies are not authorized to accept general guardianship, as contrasted with guardianship of the person, under CH. 319, Stats. Under sec. 319.01 (1), the general guardian is defined as one appointed by a court to have care, custody and control of the person of a minor or an incompetent or the management of the estate of a minor, an incompetent or a spend-thrift. The county court has exclusive jurisdiction over all petitions for guardianship except guardianships of the person under CH. 48. Sec. 319.02, Stats. It is apparent that the legislature intended to provide a separate form of proceedings under CH. 48 (children's code) and under CH. 319 (guardians and wards).

You specifically request my opinion on the relevancy of sec. 48.15 which provides:

"Jurisdiction of other courts to determine legal custody. Nothing contained in ss. 48.12, 48.13 and 48.14 shall deprive other courts of the right to determine the legal custody of children upon writs of habeas corpus, or to determine the legal custody or guardianship of children when such legal custody or guardianship is incidental to the determination of causes pending in such other courts. But the jurisdiction of the juvenile court shall be paramount in all cases involving children alleged to come within the provisions of ss. 48.12, 48.13 and 48.14."

At first glance, this section would appear to grant broad powers to other courts to determine the legal custody or guardianship of children as an incident to the determination of causes pending before those courts. It is my opinion, however, that guardianship is not an incident to a divorce proceedings and, therefore, the court which grants the divorce cannot transfer guardianship. If the legislature had intended to include guardianship as an incident to a divorce proceeding, such intent would have been clearly expressed within secs. 247.24 and 247.25. It is also significant that sec. 247.03, in enumerating actions affecting marriage, omits any reference to guardianship.

Upon examining the decisions of the supreme court of Wisconsin in cases arising under CH. 247, I have found a number of instances in which the court has recognized the divorce court's power to order a public agency to accept custody of children under sec. 247.24. For example, see *State v. Ramsay,* (1962) 16 Wis. 2d 154, 114 N.W. 2d 118. At the same time, however, I am unable to find a single case in which the court, in granting a divorce, has transferred guardianship of the children to any county or state agency. Although this factor is not controlling, it may be an indication either that the courts seldom find it necessary to transfer guardianship or that the courts themselves assume they have no authority to do so.

BCL:DPJ

Judges—Uniform Retirement Date—Filling of Vacancies —Under sec. 7.70 (3) (g), Stats., the amendment to Art.

VII, sec. 24, Wis. Const., relating to the uniform retirement date for all supreme court justices and circuit judges became effective upon certification by the board of state canvassers of the result of the vote cast. Sec. 8.50 (4) (f), Stats., relating to vacancies is also discussed.

December 27, 1968.

ROBERT C. ZIMMERMAN
Secretary of State

You request my opinion on two questions concerning a recent amendment to Art. VII, sec. 24, Wis. Const. At the spring election which was held on April 2, 1968, a majority of the electors voting approved the amendment of Art. VII, sec. 24, to read:

"(Article VII) Section 24. No person seventy years of age or over may take office as a supreme court justice or circuit judge. No person may take or hold such office unless he is licensed to practice law in this state and has been so licensed for five years immediately prior to his election or appointment. No supreme court justice or circuit judge may serve beyond the end of the month in *July 31 following the date on* which he attains the age of seventy, but any such justice or judge may complete the term in which he is serving or to which he has been elected when this section takes effect. Any person retired under the provisions of this section may, at the request of the chief justice of the supreme court, serve temporarily as a circuit judge and shall be compensated as the legislature provides. This section shall take effect on July first following the referendum at which it is approved. *A person who has served eight or more years as a supreme court justice or circuit judge may serve temporarily, on appointment by the chief justice of the supreme court or by any associate justice designated by the supreme court, as a judge of a circuit court, under such general laws as the legislature may enact.*"

As it pertains to your questions, this section formerly provided that no supreme court justice or circuit judge could serve beyond the end of the month in which he at-

tained the age of 70. With this amendment, the retirement date for all supreme court justices and circuit judges has been uniformly established as July 31 following the date on which they attained the age of 70.

First, you ask whether this constitutional amendment is now effective or whether some further action must be taken. Under Art. XII, sec. 1, any amendment to the Constitution becomes effective upon approval by the people.

However, sec. 7.70 (3) (g), in part, provides:

"* * * Whenever a constitutional amendment does not expressly state the date of effectiveness, it shall become effective the day the certificate of the board of canvassers shows the result of the vote cast for the constitutional amendment."

Thus, this constitutional amendment did not become effective until the day the certificate of the board of state canvassers showed the result of the vote cast.

As background for your second question, you inform me that your office must publish an election notice in December 1968 for all judicial offices to be filled at the spring election in April 1969. You ask whether these election notices should include those offices presently filled by circuit judges who will reach retirement age before July 31, 1969. Your question apparently arises as a result of the explanatory note which appeared on the ballot in April 1968. This note stated that providing a uniform retirement date of July 31st following attainment of retirement age "would allow time for calling an April election to choose a successor thereby effecting the transition to a new judge during the summer."

At some future time, it is conceivable that legislation could be enacted under which a vacancy in office could be anticipated. In this way, proof that a circuit judge would attain the age of 70 prior to July 31 of any year could be a statutory ground for calling an election during the month of April preceding the judge's retirement date. This result, however, cannot be achieved without further enabling legislation. Special elections to fill vacancies in the office of judge or justice are controlled by sec. 8.50 (4) (f), Stats., which provides:

"A vacancy in the office of judge or justice occurring on or before December 31 shall be filled, if a judge, at the succeeding spring election; or, if a justice, at the first judicial election when no other justice is to be elected. A vacancy in the office of judge occurring after December 31 shall be filled at the judicial election the next year. A vacancy in the office of justice shall be filled at the next judicial election if no other justice is to be elected."

Under sec. 8.50 (4) (f), the critical date is the date upon which the vacancy actually occurs. The clear language of this provision prohibits anticipating any vacancies in the manner apparently anticipated by the supporters of the recent constitutional amendment. For this reason, it is my opinion that you should not publish election notices in December 1968 for any circuit judge who will not vacate his office until July 31, 1969. The special elections to fill those vacancies arising as of July 31, 1969 should be held at the spring election, 1970.

BCL:DPJ

Pension Systems—County Employes—Home rule powers granted to Milwaukee county by ch. 405, Laws 1965, are insufficient to permit the county board to merge the pension systems for county employes created by chs. 155 and 201, Laws 1937.

December 30, 1968.

ROBERT P. RUSSELL
Corporation Counsel
Milwaukee County

You have advised me that Milwaukee county is contemplating the merger of two pension systems covering county employes. The first of these systems was created by ch. 155, Laws 1937, for deputy sheriffs. The second system was created by ch. 201, Laws 1937, and covered all county employes other than deputy sheriffs. By ch. 357, Laws 1947,

membership in the sheriffs system was closed and all persons appointed as deputy sheriffs thereafter became members of the general county retirement system under ch. 201.

You have requested my opinion as to whether Milwaukee county may effect the merger of these two systems under the home rule powers granted to the county by ch. 405, Laws 1965. Such merger would be accomplished by:

1. Establishing a single board to administer the benefits payable and supervise the control and investment of funds.
2. Transferring all members of the closed system (ch. 155, Laws 1937) into the general county retirement system, and
3. Transferring the assets and liabilities of the sheriffs annuity and benefit fund to the general county retirement system.

It is my opinion that a merger, as outlined above, could only be accomplished through action by the legislature either directly or by broadening the home rule powers previously granted to the county by ch. 405, Laws 1965.

Ch. 405, sec. 1, Laws 1965, reads as follows:

"Section 1. Chapter 155, Laws of 1937, section 59.137 is created to read:

"(Chapter 155, Laws of 1937) 59.137 PENSION STUDY COMMISSION. (1) For the purpose of best protecting the employes subject to this act by granting supervisory authority over each benefit fund created hereunder to the governmental unit most involved therewith, it is declared to be the legislative policy that the future operation of each such benefit fund is a matter of local affair and government and shall not be construed to be a matter of state-wide concern. Each county which is required to establish and maintain a benefit fund pursuant to this act is hereby empowered by county ordinance, to make any changes in such benefit fund which hereafter may be deemed necessary or desirable for the continued operation of such benefit fund, but no such change shall operate to diminish or impair the annuities, benefits or other rights of any person who is a member of such benefit fund prior to the effective date of any such change."

Sec. 2, ch. 405, contains similar language with respect to ch. 201, Laws 1937.

As you have pointed out, the foregoing grant of home rule powers which permits changes with respect to the systems in question is modified by the language, "which hereafter may be deemed necessary or desirable for the *continued operation of such fund.*" A merger of the sheriffs system into the general county retirement system would have the effect of abolishing the sheriffs annuity and benefit fund, and would therefore be beyond what was contemplated by ch. 405.

The grant of home rule power by ch. 405 with respect to these funds as set forth above is also limited to the extent that "no such change shall operate to diminish or impair the annuities, benefits, *or other rights* of any person who is a member of such benefit fund prior to the effective date of any such change."

One of the rights specifically granted to the members of the sheriffs annuity and benefit fund by ch. 155, Laws 1937, is the election of three of the five members of the retirement board of such fund and the implied right to have the fund governed by such elected members. Since the merger plan set forth above would extinguish this right, it is clearly contrary to and in excess of the grant of power contained in ch. 405, Laws 1965.

While there may be other effects of the proposed merger that would be adverse to the members of both funds, I believe that the foregoing analyses are sufficient to require that any such change be accomplished through action of the legislature.

BCL:DGM

Vocational School District—The new vocational, technical and adult education school districts established under sec. 41.155, Stats., can be viewed as operating one "school" for the purposes of state aid under sec. 41.21 (1) (b) (2), Stats.

December 31, 1968.

C. L. GREIBER, *Director*
State Board of Vocational, Technical and Adult Education

You have requested my opinion as to the distribution of state aids to vocational, technical and adult schools under sec. 41.21 (1) (b) (2), Stats. Your question is prompted by the recent organizational developments in the state vocational, technical and adult program. Ch. 292, Laws 1965, repealed and recreated sec. 41.155, Stats., to read as follows:

"Vocational, technical and adult education districts. (1) * * * By July 1, 1970, the state board of vocational, technical and adult education shall act to include all areas in such school districts of vocational, technical and adult education as the state board designates. * * *"

Prior to the enactment of ch. 292, Laws 1965, the vocational, technical, and adult program was operated through local boards. Your letter indicated that these 63 boards were viewed as operating 63 separate schools. Since the passage of ch. 292, 37 of the 63 schools have been combined into 13 districts. The consolidation process has created new terminology within these new districts for places where vocational, technical, and adult education programs are offered. You state there are more than 200 so-called "locations" offering vocational, technical, and adult education. These locations operate where 37 "schools" had previously functioned.

Your question arises because, while these dramatic changes in the organiaztion and scope of the vocational, technical and adult education program were being provided by the legislature, no significant change was made in the state aid scheme. The relevant portions of the statutes are:

"41.21 State aid to vocational and adult education. (1) (a) On or before a date designated in each year by the state director of vocational, technical and adult education the secretary of the local board of vocational and adult education maintaining such a school or schools shall report to the state board * * *

"(b) If it appears from such report that such school has been maintained * * * the board shall certify * * * the following amounts in state aids:

"* * *

"2. State aid for administrative, supervisory and coordination salaries, as approved by the state board * * * not to exceed $8,500 for each school.

"* * *

"4. If the appropriation available for state aids in any one year under subds. 1, 2 and 3 is insufficient to pay the full amount as provided in these subdivisions, the payments shall be prorated among the various districts entitled thereto."

With this background, I turn to your specific question: Should each of these districts be considered as one separate school under this provision of the law and receive a maximum amount of $8,500 for the entire district?

The initial reading of sec. 41.21 would seem to indicate a clear dichotomy between the "school" and the district as mentioned in sec. 41.21 (1) (b) (4). Such, however, is not the case. Ch. 696, Laws 1960, created sec. 41.21 (1) (b) (4) at a time when no districts existed. Ch. 224, Laws 1957, created the original consolidation proviso, sec. 41.155. The old sec. 41.155 provided for the creation of voluntary vocational, technical and adult districts. No districts were formed under this law. The term "school" and "district" are not defined anywhere in CH. 41. The word "school" lends itself to several constructions. *Webster's Seventh Collegiate Dictionary* defines it as an institution for the teaching of children, an institution for specialized higher education usually within a university, or a school building. To answer your question, it is necessary to determine what the legislature intended "school" to mean as used in sec. 41.21.

A review of the statutory predecessors of sec. 41.21 reveals the following: ch. 616, Laws 1911, created our first state aid program for "local boards of industrial education." Ch. 616 provided that a maximum of 30 "schools" be established in the state. Operationally, each local board administered one school. Subsequent legislation up to and including sec. 41.21 has followed this organizational pattern with the

result that the local board became administratively synonymous with "school." As described earlier, sec. 41.155, as created by the 1957 legislature, introduced a new organization unit—the district. The legislature's only action to harmonize sec. 41.21 with the old sec. 41.155 was to enact 41.21 (1) (b) (4).

Long-continued interpretation of a statute is a significant aid in statutory construction. *Nelson v. Ohio Casualty Ins. Co.*, (1965) 29 Wis. 2d 315. However, administrative interpretation is significant only where ambiguity exists in the statute. *Beghin v. State Personnel Board,* (1965) 28 Wis. 2d 422.

You have informed me that sec. 41.21 and its predecessors were administered so that each local board was viewed as representing one school or institution. The result was reflected in Vol. II of the 1967 Wisconsin legislative council, report on education, at page 15:

"The Milwaukee vocational, technical and adult education school (MVTAS) consists of 5 divisions or schools which operate as components of the single institution."

This single institution approach is consistent with the definition for "school" as discussed in *State ex rel. Dick v. Kalaher,* (1911) 145 Wis. 243, 248:

"* * * A school or institution of learning is not measured by the walls of a building. It may occupy one building or it may occupy two or more."

While I am satisfied that there is adequate legal ground for answering the first part of the question contained in your letter in the affirmative, I suggest that an ambiguity continues to exist by the presence of sec. 41.21 (1) (b) (4). I advise you to give early attention to preparing legislation which will clearly conform sec. 41.21 (1) (b) to the new organization pattern created by sec. 41.155.

In my opinion, the new districts created under sec. 41.155 can reasonably be viewed as operating one "school" or institution. This being so, the word "school", as used in sec. 41.21 (1) (b) (2), is synonymous with district.

BCL:DRZ

Counties—Health Services—Health Officers—Under sec. 141.04, Stats., towns and villages in a given county can jointly provide for "health services" where there is no existing county health department or county health commission and such joint arrangement would not be affected by a subsequent adoption of a county health commission by that county.

December 31, 1968.

E. H. JORRIS
State Health Officer

You state that a portion of the towns and villages of Dane county have notified you that they have entered into a contractual arrangement dated July 13, 1968, entitled "Contractual Agreement Establishing a Joint Health Department", reportedly in conformity with sec. 140.09 (1) (c), sec. 66.30 (2) and sec. 141.04, Stats.

This agreement provides that a joint health department governed by a joint board of health, consisting of one member from each of the municipalities' parties to the contract shall govern the department; that the board will elect a chairman, vice-chairman and secretary, with those three officers constituting an executive committee with power to appoint a full-time health officer, draw up rules and regulations for the health officer and other employees with the approval of the joint board of health.

It is further provided that the joint board of health shall annually prepare and submit a budget for the operation of the joint health department to the respective municipalities and such operating costs shall be prorated among the participating municipalities on the basis of the equalized assessed evaluation of those municipalities.

In a communication dated August 6, 1968, from Hermann Eisner, secretary for the joint health department of Dane county, it is indicated that Mrs. Howard D. Frederick, 3410 Nottingham Way, Madison, Wisconsin, has been appointed full-time health officer of the joint health department of Dane county. No qualifications are mentioned for Mrs. Frederick. Twenty-nine towns and nine villages are listed as belonging to the joint health department.

Since your inquiry, I have been advised by the corporation counsel of Dane county that the county board passed a resolution establishing a county health commission pursuant to sec. 141.01, Stats., on August 7, 1968.

You question whether this health department complies with the requirements of secs. 140.09, 141.01 and 141.015, Stats., and the health officer with the requirements of ch. H 106 of the Wis. Admin. Code.

You ask my formal opinion on the following three questions:

1. Is the Joint Health Department described in the enclosed Contractual Agreement a legally recognized health agency under the Wisconsin Statutes?
2. Is the health officer, referred to in one of the enclosed letters of Hermann Eisner, a legally appointed official entitled to the powers and duties of a local health officer under the Wisconsin Statutes?
3. What is the legal status of the existing boards of health officers of the towns and villages included in the Contractual Agreement?

The municipalities signing the agreement creating the joint health department of Dane county have relied on the following statutes:

"140.09 County, city-county and multiple county health departments. (1) DEFINITIONS. As used in this section:

"* * *

"(c) 'Health department' means a full-time health department unless otherwise specified and refers to one whose personnel, other than consultants and clinicians, devote their full time to health department duties."

"66.30 Co-operation between municipalities and between school districts and university.

"(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."

"141.04 Joint services. Towns, villages and cities jointly may provide health services as agreed upon under s. 66.30."

There seems to be no question but that the legislature intended, by the enactment of sec. 141.04, that towns, villages and cities may jointly provide for health services by utilizing the provisions of the "co-operation statute", sec. 66.30, unless some other statutory provisions of a specific nature take precedence over sec. 141.04. Therefore, in order to answer your first question, it is necessary to examine the entire scheme of local and county health commissions authorized by the statutes.

Sec. 141.04 was enacted as a part of ch. 563, Laws 1961, became effective on October 19 of that year, and was passed after an opinion of this office dated May 16, 1961, 50 OAG 60, questioned whether a combination of towns, villages and cities had the authority under sec. 66.30 (2) to form a joint full-time health department. That opinion held that a county health department, created pursuant to sec. 140.09 (2), by resolution of the county board, effectively barred any town, village or city from forming a full-time health department *after* such resolution was passed.

We are not concerned with that problem here, but rather with the situation where local units of government have joined to establish a joint health department and the county board has *subsequently* passed a resolution establishing a "county health commission", pursuant to the provisions of sec. 141.01.

Sec. 141.015, Stats., which also became effective on October 19, 1961, as a part of ch. 563, Laws 1961, deals with city and village boards of health. Cities and villages are required by this section to provide for their own board of health, unless a county health commission is created under sec. 141.01, in which case the village or city may elect to come under the jurisdiction of the county health commission.

Towns are required to have boards of health under sec. 141.01 (9), Stats. However, such boards are replaced by the county health commission [sec. 141.01 (1) (a)], if such a commission is established, except for towns which have entered into joint agreements under sec. 141.04.

Ch. 563, Laws 1961, also created sec. 141.01, authorizing a "county health commission". Under that statute, if the county does not have a county health department under sec. 140.09, if the entire area of the county does not have local

boards under secs. 141.05, 141.02 or *141.04*, or unless the county has a population of 500,000 or more, the county board may provide for a "county health commission". In other words, if the entire county is under a joint health department created under authority of sec. 141.04, no county health commission can be created. If part of the county is under a joint department when the commission is created, the commission would not replace a joint department in the municipalities party to such joint agreement since sec. 141.01 (4) provides:

"The commission shall have jurisdiction over the areas of the county which do not have boards of health as provided in s. 141.015, 141.02, or *141.04*."

In construing statutes, it is proper to determine the reasons for the enactment of the law, and also to determine intent of the legislature as disclosed by the language, scope, history, context, subject matter and object intended to be accomplished. 50 Am. Jur. Statutes, § 304. *Scanlon v. City of Menasha*, 16 Wis. 2d 437; *Loof v. Rural Mutual Ins. Co.*, 14 Wis. 2d 512.

Applying these principles, it appears clear that the legislature, for the purpose of promoting the public health, has authorized local units of government to enter into agreements with one another for the purpose of providing full-time health services, because such joint health services would be more effective and more practical and perhaps less expensive than having health services provided by individual health departments in each town, village and city in the county.

Accordingly, it is my opinion that under sec. 141.04, Stats., towns and villages of Dane county could jointly provide for "health services" on July 13, 1968, where there was no existing county health department or county health commission at that time. It is my further opinion that such joint arrangement would not be affected by a subsequent adoption of a county health commission by that county on August 7, 1968.

Your second question is whether the health officer, mentioned in the letter from the secretary of the joint health department of Dane county, constitutes a legally appointed

official entitled to the powers and duties of a local health officer under the Wisconsin Statutes. Sec. 141.015 (2), provides:

" 'Health officer' as used in this chapter means the officer performing the duties thereof regardless of his designation."

There is no specific statute which permits towns and villages to jointly appoint a "health officer", although it seems inherent in the power to jointly provide "health services" as granted by sec. 141.04.

To construe the statute as not permitting towns and villages who are jointly providing health services to appoint a health officer to administer such services would be to assign an absurdity to the legislature. Our supreme court has said on numerous occasions that in construing statutes absurd results are to be avoided. *Reynolds v. Nusbaum,* 17 Wis. 2d 148; *State v. Fischer,* 17 Wis. 2d 141; *Wisconsin Valley Imp. Co. v. Public Serv. Comm.,* 9 Wis. 2d 606; *State v. Surma,* 263 Wis. 388. The authority to "jointly provide health services" also includes the authority to administer the program agreed upon.

Thus, I must conclude that when an agreement is entered into between towns and villages to provide health services jointly in accordance with sec. 141.04, Stats., the power does exist to name a health officer to carry out the administrative program of providing "health services" for the members of the agreement. The extent of the authority and responsibilities of the health officer is the subject of discussion regarding your third question herein.

You point out that the health officer appointed under the joint agreement in question might not be qualified under ch. H 106, Wis. Adm. Code, which contains training and experience requirements for health officers. H 106.01 contains qualification requirements for non-medical health officers and H 106.02 provides qualifications for medical health officers.

H 106.01 specifically applies to non-medical health officers permitted by secs. 140.09 (4) in counties, 141.015 (13) in cities, and 141.02 (2) in cities. None of those statutory sections apply to the instant situation, since the joint health

department of Dane county is made up only of villages and towns. As to H 106.02, that section applies only to county health departments. The express inclusion of qualifications for health officers in cities, county health commissions and county health departments, and failure to specify qualifications for town, village and joint departments under sec. 141.04 made up only of towns and villages, calls for the application of the principle *expressio unius est exclusio alterius*. The express mention of one thing implies the exclusion of another. 50 Am. Jur., Statutes, §429.

Therefore, the above provisions of the Administrative Code are not applicable to an agreement between towns and villages for joint health services under sec. 141.04, Stats.

In answer to your second question, therefore, I must advise that in absence of any evidence to the contrary, Mrs. Howard D. Frederick must be presumed to be the properly appointed health officer of the joint health department of Dane county as reported to you by Secretary Eisner.

Your third question asks the legal status of the existing boards of health and health officers of the towns and villages included in the contractual agreement.

There is no change in the statutes which require all towns and villages to maintain health officers and boards of health. Health officers and boards of health of individual villages and towns must still be appointed, even though there has been an agreement for joint services under sec. 141.04. Since only "joint services" are authorized, and no residence or other qualifications for a health officer are prescribed, the joint health officer could be designated by each municipality to dispense services dealing with "health", i.e., nursing, etc. However, statutory *duties* of the health officer would still have to be fulfilled by the duly appointed health officer of each community.

Each town and village would still be required to have a board of health named from the membership of each town and village board, as required by sec. 141.01 (9) and sec. 141.015 (1). Specific statutory *duties* of individual local boards probably could not be delegated to a joint board, since sec. 141.04 authorizes only the joint provision of "services" relating to health. For instance, the local board and the local health officer have certain *duties* imposed un-

der the communicable disease statute, CH. 143, while certain health *services* are authorized by other statutes, including local public health nurses under sec. 141.05 and sanitarians under sec. 140.45.

Although sec. 66.30 permits "furnishing of services or the joint exercise of any power or duty required or authorized by statute", the legislature in enacting sec. 141.04 relating to health chose to limit such co-operation to "health services", leaving out duties and powers. Sec. 141.04, being a specific statute, takes precedence over the general statute, sec. 66.30, and joint health agreements thereunder must be limited to "services".

BCL:LLD

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