OPINIONS

OF THE

ATTORNEY GENERAL

OF THE

STATE OF WISCONSIN

VOLUME 58

January 1, 1969 through December 31, 1969

ROBERT W. WARREN
Attorney General

MADISON, WISCONSIN

1969

900—331

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	Jan. 6, 1968
ROBERT W. WARREN, Green Bay	from	Jan. 6, 1969,	to	

ATTORNEY GENERAL'S OFFICE

ROBERT W. WARREN	Attorney General
ARVID A. SATHER	Deputy Attorney General
DANIEL P. HANLEY	Executive Assistant
JOHN WM. CALHOUN	Director of Legal Services
WILLIAM F. EICH	Assistant Attorney General
WILLIAM A. PLATZ	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
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ROBERT D. MARTINSON	Assistant Attorney General
WARREN M. SCHMIDT	Assistant Attorney General
DAVID G. McMILLAN	Assistant Attorney General
BETTY R. BROWN	Assistant Attorney General
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JOHN C. MURPHY	Assistant Attorney General
LOWELL E. NASS	Assistant Attorney General
MARY V. BOWMAN[1]	Assistant Attorney General
WARD L. JOHNSON[2]	Assistant Attorney General
MILO W. OTTO	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 October 6, 1969
2. Appointed November 10, 1969

OPINIONS

OF THE

ATTORNEY GENERAL

Volume 58

Legislature—Debt Limitations—The debt limitations imposed by A. Jt. Res. 1 are annual debt limitations but nevertheless have the effect of establishing an aggregate state debt limitation of 5% of the total value of all taxable property in the state plus the amount of debt sinking fund reserves on hand.

February 10, 1969.

THE HONORABLE, THE ASSEMBLY

By A. Res. 19, you have requested my opinion as to the effect of the language in lines 17 to 26 on page 1 and lines 1 to 14 on page 2 of A. Jt. Res. 1. These lines read:

"(2) Any other provision of this constitution to the contrary notwithstanding:

"(a) The state may contract public debt and pledges to the payment thereof its full faith, credit and taxing power to acquire, construct, develop, extend, enlarge or improve land, waters, property, highways, buildings, equipment or facilities for public purposes.

"(b) The aggregate public debt contracted by the state in any calendar year pursuant to paragraph (a) shall not exceed an amount equal to the lesser of:

"1. Three-fourths of one per centum of the aggregate value of all taxable property in the state; or

"2. Five per centum of the aggregate value of all taxable property in the state less the sum of: a. the aggregate public debt of the state contracted pursuant to this section outstanding as of January 1 of such calendar year after subtracting therefrom the amount of sinking funds on hand on January 1 of such calendar year which are applicable exclusively to repayment of such outstanding public debt and, b. the outstanding indebtedness as of January 1 of such calendar year of any entity of the type described in paragraph (d) to the extent that such indebtedness is supported by or payable from payments out of the treasury of the state."

You are particularly concerned about the foregoing language of A. Jt. Res. 1, "* * * shall limit state borrowing to an overall total of 5% of the aggregate value of all taxable property in the state less certain exclusions, and to an annual ceiling of ¾ of 1% of the aggregate value of all taxable property in the state.

The three-fourths of one per centum formula as defined in subs. 2 (b) 1. and the five per centum formula as defined in 2., in this same subsection, are both annual debt limitations. Under the proposed amendment, the state is authorized to borrow annually that sum of money which represents the smaller amount as arrived at by application of these formulas. However, the annual five per centum authorization has the effect of imposing a total or aggregate debt limitation on state borrowing.

It is my understanding that at first, the lesser amount will be arrived at by application of the three-fourths of one per centum formula. However, as state indebtedness increases the lesser annual amount of authorized borrowing will be arrived at by application of the five per centum formula.

It is my opinion, that under the previously quoted language from the proposed amendment, state indebtedness cannot at anytime exceed an amount equal to five per centum of the aggregate value of all taxable property plus the value of debt sinking funds on hand, except to the extent as hereinafter described.

It should be further noted that the five per centum formula includes within its limitations the indebtedness of the various state building corporations. Therefore, the state debt limitation of 5% plus sinking fund reserves cannot be reached until the indebtedness of the building corporations is satisfied.

Specifically answering your questions, it is my opinion, that the three-quarters of one per centum and the five per centum formulas are both annual debt limitations. Generally, state indebtedness under the proposed amendment is limited to five per centum of the total taxable property of the state plus sinking fund reserves rather than five per centum of the total taxable property less exclusions as stated in A. Res. 19.

It should be noted that the 5% limitation is a restriction on borrowing. It is obvious that actual state indebtedness could exceed 5% of the value of all taxable property in the event of a subsequent decline in the value of taxable property. Under such circumstances, the existing indebtedness would have been legally contracted and would, of course, be a binding obligation of the state even though it exceeded the 5% restriction. However, no new borrowings could be made under these provisions.

It should be further noted that the proposed amendment includes in subs. 2 paragraph (c) which allows, "without limit, (the state) to fund or refund the whole or any part of any public debt contracted pursuant to paragraph (a), including any premium payable with respect thereto and any interest to accrue thereon," or similarly to refund indebtedness of state building corporations incurred prior to 1972. Under proposed paragraph (c) the state might borrow a substantial amount when its debt was already up to the 5% limit. Of course, the additional borrowing would have

to be for retiring outstanding debt and thus the total borrowing would shortly be reduced to or very nearly to the 5% limit. The new borrowing, however, may exceed the amount to be retired for it could include premiums and interest. The proposed paragraph (c) would permit a refunding loan even when shrinking property values had produced a situation in which the total state debt already exceeded 5% of the value of taxable property in the state.

RWW:CAB

Insurance—State Employes—Proposed amendment to sec. 66.919, although in conflict with secs. 206.60 (1) (d) and 206.60 (7), would nevertheless be valid.

March 5, 1969.

JOHN R. SUMNICHT, *Director,*
Group Insurance Bureau

The group insurance bureau has under consideration a proposed amendment to sec. 66.919, Stats., governing the group life insurance program for state employes, which would provide all eligible employes with a minimum of group life insurance (e.g. $8,000) for which the state would pay the entire premium. The amendment further would permit all eligible employes, at each employe's option, to obtain additional insurance in the amount of one-and-a-half times the employe's earnings in the previous year. The premium for this additional insurance would be paid partly by the employe and partly by the state.

You ask whether, in the event such legislation is enacted, it would be in conflict with sec. 206.60, Stats., and if so which section would control.

In my opinion such an amendment to sec. 66.919 would be in conflict with sec. 206.60, however, sec. 66.919 nevertheless would control and would be effective.

Sec. 206.60, Stats., is the general statute governing the issuance of group life insurance policies in this state. The pertinent portion thereof is subs. (1) (d) which provides:

"The amounts of insurance under the policy must be based upon some plan precluding individual selection either by the employes or by the employer or trustees."

The proposed amendment to sec. 66.919, Stats., would create a plan permitting individual selection by the employes as to the amounts of insurance. In other words, an eligible employe (assuming his annual earnings would permit it) could elect to have only the $8,000 of life insurance for which the state paid the premium or could elect to have an additional amount of one-and-a-half times his earnings wherein he would share the cost.

Where two statutes conflict, the latter supersedes the earlier and the specific prevails over the general. *Jones v. Broadway Roller Rink Co.*, (1908) 136 Wis. 595, 118 N.W. 170; *State v. Dingman*, (1941) 237 Wis. 584, 297 N.W. 367; *State ex rel. M. A. Hanna Dock Co.v . Willcuts*, (1910) 143 Wis. 449, 128 N.W. 97; *Abdella v. Abdella*, (1954) 268 Wis. 127, 66 N.W. 2d 689; *David A. Ulrich, Inc. v. Town of Saukville*, (1959) 7 Wis. 2d 173, 96 N.W. 2d 612; *State ex rel. Mitchell v. Superior Court of Dane County*, (1961) 14 Wis. 2d 77, 109 N.W. 2d 522.

I conclude, therefore, that the above stated proposed amendment to sec. 66.919, although in conflict with sec. 206.60 (1) (d), would supersede the latter statute and be effective.

Moreover, by the same reasoning, the proposed amendment would conflict with sec. 206.60 (7), Stats., which establishes limits of coverage under group life insurance, and the proposed amendment would supersede that section to the extent of the conflict.

RWW:JEA

Mental Institutions—Under sec. 51.02 (5), only the superintendent of a "state hospital" within the meaning of sec. 51.001 (3) may cause a person under temporary detention to be treated during the detention period if in the superintendent's judgment such treatments are necessary for the patient's health.

March 6, 1969.

LAWRENCE W. DURNING,
District Attorney, Eau Claire County

You request my interpretation of sec. 51.04 (5), Stats., relating to treatment of persons under temporary detention in certain mental institutions.

The overall purpose of ch. 51, Stats., entitled state mental health act, is to provide for care and treatment in state and county hospitals for persons who by reason of mental illness, infirmity or deficiency are in need of care and treatment not feasible in their own homes or in private facilities. Sec. 51.005, Stats. Sec. 51.04 sets forth emergency provisions for the temporary detention of certain persons pending further disposition of the case. Subs. (5) of sec. 51.04, which is the basis for your inquiry, provides:

"TREATMENT. When a patient is temporarily detained in a state hospital for the mentally ill, the superintendent thereof may cause the patient to be treated during the detention period if in his judgment such treatments are necessary for the patient's health."

On the basis of the above quoted language, you ask whether the superintendent of the Eau Claire county hospital may cause a patient to be treated during such detention period if in the superintendent's judgment such treatments are necessary for the patient's health. You assert your belief that the legislative purpose of this statute is to afford superintendents of all public institutions the opportunity to treat patients during the period of detention.

Sec. 51.04 (5) is of relatively recent origin, having been created by ch. 701, Laws 1951. Prior to that time, one of

my predecessors commented upon extending such treatment without the patient's consent in 37 OAG 549, 552 as follows:

"You next inquire whether the hospital has authority to treat the patient without his written consent. The patient has not been committed for treatment. He has not been adjudged mentally ill. He is in custody only pending action on a petition to determine his mental condition. The hospital should under no circumstances give any treatment whatsoever to a patient who has not been adjudicated mentally ill, infirm, deficient or epileptic and committed for treatment pursuant to sec. 51.02, Stats., in the absence of a valid consent that such treatment be given."

It is reasonable to assume that the creation of sec. 51.04 (5) by ch. 701, Laws 1951 was designed to change the law as set forth in this 1948 opinion. At the same time, however, the legislature specifically referred to "a state hospital" and made no reference whatsoever to "county hospitals." These two types of institutions are easily distinguishable based upon definitions contained within sec. 51.001 which, in part, provides:

"**Definitions.** As used in this chapter:

"* * *

"(2) 'County hospital' means a hospital for mental disturbances established pursuant to s. 51.25 and the county mental health center, south division, established under s. 51.24 (1).

"(3) 'State hospital' means any of the institutions operated by the state department of public welfare for the purpose of providing diagnosis, care or treatment, for mental or emotional disturbance or mental deficiency.

"* * *"

Based upon this legislative differentiation between county hospitals and state hospitals, it is my opinion that the specific reference to state hospitals under sec. 51.04 (5) withholds the power to order treatment of a person under temporary detention from the superintendents of any other type of facility, including a county hospital.

RWW:DPJ

Forest Crop Law—Tract—In order to be eligible for entry under the forest crop law the lands must be continuous or contiguous and 40 or more acres in size. Secs. 77.02 (1) and 77.16, Stats., discussed.

March 7, 1969.

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

You have requested my opinion regarding the legal definition of the word "tract" as it appears in the forest crop law and the woodland tax law—particularly in secs. 77.02 (1) and 77.16, Stats.

Pertinent provisions of these statutes are as follows:

"77.02 (1) **Petition.** The owner of any tract of land of not less than 40 acres may file with the conservation commission a petition * * * requesting that such lands be approved as 'Forest Crop Lands' under this chapter. * * *"

"77.16 **Woodland tax law.** (1) The owner of any tract of land of less than 40 acres may file with the conservation director an application setting forth a description of the property which he desires to place under the woodland tax law and on which land he will practice forestry."

You state that, in administering the forest crop law since its enactment, you have considered a "tract" to be a legally described parcel or parcels of land that are continuous or contiguous, and 40 or more acres in size. You have, however, considered detached parcels of less than 40 acres eligible for entry under the woodland tax law (sec. 77.16, Stats.). Finally, you indicate that your department has received petitions for entry of detached land holdings of less than 40 acres under the forest crop law. This gives rise to the specific question of whether areas of less than 40 acres are eligible for entry under the forest crop law (sec. 77.02 (1)) if they are not continuous or contiguous to other lands of the same owner.

The general rule is to give statutory words and phrases their common and approved usage excepting technical words

and phrases which have a peculiar meaning in the law. *Nekoosa-Edwards Paper Co. v. Public Service Comm.,* (1959) 8 Wis. 2d 582, 99 N.W. 2d 821; *Perry Creek C. Corp. v. Hopkins Ag. Chem. Co.,* (1966) 29 Wis. 2d 429, 435, 139 N.W. 2d 96. This rule has been expressly recognized by the Wisconsin legislature. Sec. 990.01 (1), Stats.

The essence of the word "tract", as applied to land, is continuity. *Webster's Third New International Dictionary* (1961 Ed.), p. 2421. In legal terms, "tract", as ordinarily understood, means "*contiguous* bodies of land embraced in one deed." *Saulsberry v. Maddis,* (6th Circ., 1942) 125 Fed. 2d 430, 444. See also *Westerheide v. Wilcox,* (1942) 190 Okla. 382, 124 P. 2d 409; *Schofield v. Harrison Land & Mining Co.,* (Mo., 1916) 187 S.W. 61, 64; *Provine v. Thornton,* (1908) 92 Miss. 395, 46 So. 950, 951.

An early Wisconsin case considered the meaning of the word "tract" as it appeared in a statute allowing printers 30¢ for each "lot or tract" of land listed in a published tax redemption notice. The court stated:

"Where parcels of land are *contiguous* and owned by the same person, they may be assessed together as one tract. * * *" *Bohan v. Ozaukee County,* (1894) 88 Wis. 498, 500, 60 N.W. 702.

To register isolated parcels of land which, if taken together, total the requisite 40 acres, would, in my opinion contravene the common, ordinary meaning of word "tract" in sec. 77.02 (1), Stats. Common sense alone seems to dictate that a "tract of land" cannot be made up of scattered holdings in various parts of the state—or even within a single county or township.

Accordingly, a "tract of land not less than 40 acres," as that phrase is used in sec. 77.02 (1), Stats., is limited to described parcel or parcels of land that are continuous or contiguous and of 40 acres or more in size.

Since there is no minimum acreage limitation in the woodland tax law, detached parcels of less than 40 acres would be eligible for entry under sec. 77.16, Stats.

RWW:WFE

Workmen's Compensation Act—State Employes—Members of state boards, committees, commissions, or councils who have been appointed and qualify under sec. 16.08 (2), Stats., are state employes and are covered as such by the workmen's compensation act.

March 10, 1969.

GLEN POMMERENING,
Deputy Secretary,
Department of Administration

You have requested my opinion whether members of state boards, committees, commissions, or councils who are not fulltime or salaried employes but who are compensated for meetings attended either by per diem or by reimbursement of actual and necessary expense are covered under the workmen's compensation act as state employes.

The individuals described may be considered employes of the state within the provisions of sec. 16.08, Stats., which provides in part:

"(2) UNCLASSIFIED SERVICE. The unclassified service comprises positions held by:

"(a) All officers elected by the people.

"(b) All officers and employes appointed by the governor whether subject to confirmation or not, unless otherwise provided.

"* * *

"(e) All other officers and employes of the state whose positions are expressly excluded from the classified service by statute or whose positions cannot be placed under the classified service because of the restrictions placed on them by statute.

"* * *

"(3) CLASSIFIED SERVICE. (a) The classified service comprises all positions not included in the unclassified service."

Assuming the requirements of sec. 16.08 (2), Stats., are fulfilled, sec. 102.07, Stats., would apply. It provides in part:

" 'Employe' as used in this chapter means:

"(1) Every person, including all officials, in the service of the state, or of any municipality therein whether elected or under any appointment, or contract of hire, express or implied, and whether a resident or employed or injured within or without the state. The state and any municipality may require a bond from a contractor to protect it against compensation to employes of such contractor or employes of a subcontractor under him.

"* * *

"(10) Further to effectuate the policy of the state that the benefits of this chapter shall extend and be granted to employes in the service of the state, or of any municipality therein on the same basis, in the same manner, under the same conditions, and with like right of recovery as in the case of employes of persons, firms or private corporations, any question whether any person is an employe under this chapter shall be governed by and determined under the same standards, considerations, and rules of decision in all cases under subs. (1) to (9). Any statutes, ordinances, or administrative regulations which may be otherwise applicable to the classes of employes enumerated in sub. (1) shall not be controlling in deciding whether any person is an employe for the purposes of this chapter."

Under the compensation act, the department of industry, labor and human relations is the finder of fact. The variety of factual circumstances under which coverage may be established by members of these classes of state employes must be left for resolution by the department on a case by case basis.

I am of the opinion that in general, members of state boards, committees, commissions or councils who are compensated either by a per diem or by actual and necessary expense, while holding an office or appointment pursuant to sec. 16.08 (2), Stats., are in the service of the state and are covered under the workmen's compensation act where

an injury occurs in the course of and arises out of such employment. See sec. 102.03 (1) (c) 2, Stats. This opinion is not intended to cover factual situations such as contained in the recent case of *Schwab v. ILHR Department,* (1968) 40 Wis. 2d 686, 162 N.W. 2d 548, where the state employee was determined not to be in the course of his employment.

RWW:DRZ

County Court—Inheritance Tax—A proceeding in county court to determine the inheritance tax on the interest passing to survivors in an *inter vivos* trust where the settlor decedent had retained full power of revocation is a proceeding in the estate of a deceased person and the register in probate is required to collect a filing fee under sec. 253.34 based on the value that passes to survivors. Secs. 72.01 (3) (b), 72.15 (2) and 72.24 also discussed.

March 11, 1969.

DONALD J. BERO,
Corporation Counsel,
Manitowoc County

You have requested my opinion on the following question:

Is the Register in Probate required to collect a filing fee under the provisions of sec. 253.34, Stats., based on the value of the property in an *inter vivos* trust which passes where the settlor decedent had retained full power of revocation and where a proceeding to determine inheritance tax is sought in County Court independent of or in connection with probate of the decedent's will, administration of his estate, termination of a life estate in realty or termination of a joint tenancy in realty or personalty?

I am of the opinion that such a fee should be collected.

The material portions of sec. 253.34 provide:

"(1) The register in probate shall collect the following fees:

"(a) For filing a petition *whereby any proceeding in estates of deceased persons* is commenced, when the *gross estate or value of the property* is $1,000 or less, no fee; * * * [schedule rises from $3 to $100 for a gross estate not over $200,000] * * * and for each succeeding $100,000 or fraction thereof, an additional fee of $100. Such fees shall be paid at the time of the *filing of the inventory, or other documents,* setting forth the value of the estate in such proceedings. The fees fixed in this paragraph shall also be paid in survivorship proceedings and in such survivorship proceedings the value shall be based on the value of the property passing to the survivors.

"(b) For a certificate terminating a life estate or homestead interest, $3, but the fee shall not be collected if such termination is consolidated with probate or administration proceedings.

"(c) For a certificate or judgment of descent of lands the same fees shall be charged and collected as are charged in estate proceedings in par. (a) based upon the valuation of the property passing by said certificate or judgment of descent.

"* * *

"(2) For purposes of determining fees payable under sub. (1), the following shall apply:

"(a) U. S. government bonds which by their terms are payable to another person upon death of the original registered owner are included in his gross estate and not subject to the fee for terminating a life estate.

"(b) Life insurance, retirement benefits or annuities are excluded unless paid or payable to the estate or personal representative in which case they are included.

"(c) When survivorship proceedings are pursued independent of probate or administration, a fee shall be collected for each, such fee not to be less than that payable if the proceedings were consolidated.

"(d) Proceedings to administer assets subsequent to entry of final judgment in an estate are subject to fees as separ-

ate proceedings which fees shall not be less than those which would have been chargeable if such assets had been included in the original proceedings.

"(e) The value of decedent's interest in real estate shall be diminished by the unpaid balance on duly recorded or filed liens and mortgages.

"(f) Special administrations are subject to filing fees, such fees to be credited upon fees for subsequent general administration or probate."

Sec. 253.34 (3), Stats., provides for a division of the fees collected; 35% to the county, and 65% to the state general fund. Counties of over 500,000 retain the entire amounts collected. While the funds are not earmarked, it is apparent that they are collected to aid the county and state in the costs incurred in the operation of the various county courts.

When sec. 253.34 is considered as a whole, it is clear that the legislature did not intend that the fees apply only to property which passes under a will, or property which passes by the law of descent. The fee is to be collected "whereby any proceeding in estates of deceased persons is commenced". Value determination is not limited to the inventory, but may include "other documents". One of such other documents will be the notice of hearing for the determination of inheritance tax and information required by the department of revenue and public administrator pursuant to sec. 72.15 (2), Stats. Where an *inter vivos* revocable trust is involved, the court shall require, in order to properly determine any inheritance tax, the filing of the trust agreement and an inventory of the property involved, with appraisal as of the date of death.

In survivorship proceedings the fee basis value shall be based "on the value of the property passing to the survivors." I am of the opinion that the words "survivorship proceedings" do not limit the application of the statute to the commonly used forms, termination of joint tenancy, termination of life estate or homestead interest.

In 40A Words and Phrases 568, 569, it is stated:

" 'Survivorship' is where a person becomes entitled to property by reason of his having survived another person who had an interest in it. In re Conklin's Estate, 20 N.Y. 2d 59, 62, 259 App. Div. 432."

A "survivor" is a person who survives or outlives another person or a time, an event, or a thing. *In re Estate of Rosencrantz,* (1924) 183 Wis. 643, 198 N.W. 728.

Sec. 253.34 (1) (a), Stats., applies to "any proceeding in *estates of deceased persons.*" If the deceased had any interest in the property in question at the time of his death, the value of that interest which passes must be determined and included in the value to which the fees apply. Such interest, whether it passes by will, by law of descent, by deed, grant, insurance policy or instrument finally effective or payable at or after death is part and parcel of the decedent's estate, to the extent of his interest. Its value must be included in determining the decedent's gross estate under sec. 253.34 (1) (a), unless it is expressly excluded under sec. 253.34 (2). The listing in sec. 253.34 (2) as to items to be excluded from the gross estate for the purposes of determining fees payable under sec. 253.34 (1) (a) is final; however, the listing of specific items which are to be included does not prevent the inclusion of others which are properly a part of the decedent's estate.

A man's "estate" is the value of his property over and above his liabilities. *In re Estate of Seliger,* (1965) 27 Wis. 2d 323, 134 N.W. 2d 447.

There is no question but that the interest which a donor or settlor has in an *inter vivos* revocable trust and which passes to others at or after his death is part of his estate and subject to inheritance taxes as far as the inheritance tax laws are concerned.

Sec. 72.24 (1), (2) and (3) provide:

"(1) The words 'estate' and 'property' mean the real and personal property or the interest therein of the testator, intestate, grantor, bargainor, vendor or donor passing or transferred to individual legatees, devisees, heirs, next of

kin, grantees, donees, vendees or successors and include all personal property within or without the state.

"(2) The word 'transfer' includes the passing of property or any interest therein in possession or enjoyment, present or future, by inheritance, descent, devise, succession, bequest, grant, deed, bargain, sale, gift or appointment in the manner prescribed in ss. 72.01 to 72.24.

"(3) The word 'decedent' includes the testator, intestate, grantor, bargainor, vendor or donor."

Sec. 72.01 (3) (b) provides:

"When a transfer is of property, made without an adequate and full consideration in money or money's worth by a resident or by a nonresident when such nonresident's property is within this state, or within its jurisdiction, by deed, grant, bargain, sale or gift, intended to take effect in possession or enjoyment at or after the death of the grantor, vendor or donor, including any transfer where the transferor has retained for his life or for any period not ending before his death: 1 the possession or enjoyment of, or the right to the income, or to economic benefit from, the property, or 2 the right, either alone or in conjunction with any person, to alter, amend, revoke or terminate such transfer, or to designate the beneficiary who shall possess or enjoy the property, or the income, or economic benefit therefrom."

In *Estate of Perry* (1967) 35 Wis. 2d 412, 415, 416, the court stated:

"From the time of the creation of the trust and the transfer of assets to it, and until Perry's death, Perry retained the full equitable interest in the trust and had the power to exercise all the indicia of absolute ownership. He could revoke the trust and withdraw its assets, and the income was to be paid to him. At best this was a naked trust, the value of which to the beneficiaries was dependent upon the settlor's management skills, his restraint in using the trust assets, and the nonexercise of the power to revoke prior to death. In fact, nothing but an expectation was conveyed to the donees, and even the trustees received only a bare legal title to the assets. The settlor parted with little

of value, and the donees received nothing by virtue of the transfer to the trustees."

At Page 417:

"In the case at bar, the beneficiaries of the trust received the interest of the donor only at the death of the donor, Homer G. Perry. As we said in *Ogden, supra,* at page 167, 'Then and then only was there a shifting of economic use and benefit of the property to the donee.' It is the right to receive the benefits of the shifting of the economic use of the property from the decedent to the beneficiary that is taxable."

It is my opinion that the interest of such a donor is part of his gross estate. While the property may pass by virtue of the trust agreement a determination of inheritance tax by the county court is necessary after proof of death is established. The proceeding is in the nature of a survivorship proceeding and the inheritance tax determination is a proceeding in the estate of a deceased person and a filing fee, based on the value of property passing to survivors, must be charged.

RWW:RJV

Motor Vehicles—Licenses, Special Drivers'—The provisions of secs. 343.05 (1) and 347.485 (1) (a) and (2), Stats., requiring special drivers' licenses, crash helmets, and goggles for the operators of motor driven cycles, do not apply to the operators of three-wheeled trucks, automobiles, golf carts, and other special purpose vehicles such as street sweepers, industrial fork-lift trucks, and motorized wheelbarrows.

March 12, 1969.

JAMES L. KARNES, *Administrator,*
Department of Transportation
Division of Motor Vehicles

You have asked my opinion whether the new motorcycle safety statutes apply to three-wheeled trucks and power-driven golf carts. You also would like the opinion to cover many special purpose vehicles, such as three-wheeled street sweepers, three-wheeled automobiles, industrial fork-lift trucks, and motorized wheelbarrows. The reason for your question is that motorcyclists are required to obtain special drivers' licenses and to wear crash helmets and goggles, and you wish to know whether these requirements are applicable to all other two and three-wheeled vehicles.

The following statutes are involved in your question:

Sec. 343.05 (1), Stats. 1967, provides, in part:

"* * * No person shall operate a motor driven cycle unless he possesses a valid operator's license which has been specifically indorsed for motor driven cycle operation."

Sec. 347.485 (1) (a), Stats. 1967, reads:

"No person shall operate or ride upon a motor driven cycle on any highway unless such person is wearing protective headgear of a type and in the manner approved by the commissioner."

Sec. 347.485 (2), Stats. 1967, reads:

"No person shall operate a motor driven cycle on any highway unless such person is wearing eye protection as follows: (a) protective face shield attached to the headgear, or (b) glasses or (c) goggles. If the vehicle is equipped with a windshield which rises a minimum of 15 inches above the handlebar, the use of other eye protective devices is not mandatory. This subsection shall not apply to persons operating a motor driven cycle in a parade sanctioned by the local municipality."

These statutes require the operator of a motor driven cycle to wear a crash helmet and goggles, and have a special driver's license. Motor driven cycle is defined by sec. 340.01, Stats., as follows:

"* * *

"(33) 'Motor driven cycle' means a motor vehicle designed to travel on not more than 3 wheels in contact with the

ground and having a seat for the use of the rider, including motorcycles, power driven cycles and motor bicycles but excluding tractors."

This statute also contains the following definitions:

"(30) 'Motor bicycle' means a bicycle to which a motor has been added to form a motor driven cycle as distinguished from a power driven cycle or motor cycle in which the motor is an integral part of the original vehicle."

"(32) 'Motorcycle' means a motor driven cycle which does not come within the definition of power driven cycle or motor bicycle."

"(45) 'Power driven cycle' means a motor driven cycle weighing between 100 and 300 pounds fully equipped but without gasoline or oil and designed to travel not over 35 miles per hours with a 150-pound rider on a dry, level, hard surface with no wind."

As above defined, a power driven cycle is obviously a small, low powered motor scooter. A motor bicycle is a bicycle to which a motor has been added. A motorcycle is a motor driven cycle which does not come within either of these definitions. A motor driven cycle includes all three of these, excluding tractors. It has not more than three wheels in contact with the ground and a seat for the rider. The question arises whether every motor vehicle with not more than three wheels is to be considered a motor driven cycle. Tractors are specifically excluded. This leaves for consideration three-wheeled trucks, such as the Cushman Truckster and the postal department's Mailster, three-wheeled golf carts, and other special purpose three-wheeled vehicles, such as street sweepers, three-wheeled automobiles, industrial fork-lift trucks, and motorized wheelbarrows. A common sense conclusion would be that the legislature never intended such trucks, automobiles, and special purpose vehicles to be included in the definition of motor driven cycle. The common understanding of the meaning of the word, "cycle", is a two-wheeled vehicle, such as a bicycle or a motorcycle, which requires an operator experienced enough to balance and steer it safely. There are also unicycles, tri-

cycles, three-wheeled motorcycles, and motorcycles with side cars. They all have a saddle-type seat. They are chiefly for transporting persons rather than goods and commodities. Riders sit in the open and are not surrounded by a protective body, as are automobile passengers. Motorcycles are small, fast moving vehicles, which are sometimes difficult for other motorists to see. The legislature has directed that their headlights shall be lighted in the daytime to make them easier to see. Sec. 346.595 (5), Stats. 1967. Because motorcycles have no protective bodies and because of their speed and small size, many riders have been severely injured in accidents. Head injuries have been especially severe. Thus, the legislature has required motorcyclists to wear crash helmets. Since balancing and steering a powerful two-wheeled motorcycle requires special skill, the legislature has required that operators must pass a special driver's test before operating such vehicles. It is obvious that the legislature has imposed these special requirements because of the special characteristics of motorcycles.

Three-wheeled trucks, automobiles, and other special purpose vehicles have almost none of the special characteristics of motorcycles. The Cushman Truckster, and the postal department's Mailster, for example, have a substantial truck body which surrounds and protects the driver. They have windows, doors, windshields with wipers, tops, bench seats, safety belts, and a substantial capacity for hauling goods and commodities. They are not designed for hauling people, except the driver. They are obviously three-wheeled trucks and not motorcycles. They have only the remotest similarity to motorcycles in that they have less than four wheels; the front wheel is suspended with a fork, like a bicycle, and they have only one headlight. Otherwise, they look and perform like any other small truck. They have a steering wheel, not handlebars. They have engines of about 18 Hp. and are capable of speeds up to 25 Mph. Their usual operating speed is about 15 Mph. They weigh about 1,230 pounds and carry a 500 pound load. They are 10 feet long, 6 feet high and 5 feet wide.

Because of their low speed and substantial protective bodies, they do not present a substantial threat of head in-

juries, such as are experienced by motorcycle operators. Thus, there is no need for the wearing of crash helmets. They do not require the special skills of a cycle rider to steer and balance; thus, there is no need for their drivers to pass special tests and obtain a motorcycle driver's license indorsement on their regular driver's license. Because of their larger size, they may more readily be seen by other motorists and there is not the need for a lighted headlight, as in the case of motorcycles.

Sec. 346.595 (1) through (4), Stats. 1967, reads as follows:

"(1) All motor vehicles including motor driven cycles are entitled to the full use of a traffic lane and no vehicle shall be driven or operated in such a manner so as to deprive any other vehicle of the full use of a traffic lane, with the exception that motor driven cycles may, with the consent of both drivers, be operated not more than 2 abreast in a single lane.

"(2) No person shall ride any motor driven cycle while in a side-saddle position.

"(3) No passenger shall ride a motor driven cycle who when properly seated cannot rest his feet on the foot rests or pegs.

"(4) No passenger shall ride in front of the operator on a motor driven cycle."

This statute permits two motor driven cycles to be operated abreast in a single traffic lane. This would be impracticable for vehicles which are 5 feet wide, as are the trucksters. Also, no person may ride a motor driven cycle in a side-saddle position, and there must be foot rests or pegs for his feet, and the passenger may not ride in front of the operator. These requirements are appropriate only to a motorcycle type of vehicle which is ridden astride. These requirements make little sense when applied to a truck-type vehicle with a bench seat. It seems clear the legislature never intended these requirements to be applicable to a truck-type vehicle.

Motorized golf carts are small, open, one and two passenger vehicles, sometimes referred to as golf cars. They are

gasoline or electric powered and are capable of top speeds of about 15 Mph. They range from 5 to 12 Hp., and from 500 to 1100 pounds in weight. They are about 4 feet wide and 8 feet long. They are intended for use on the golf course. While a very few are equipped and registered for use on the public highway, this is not their usual purpose. The only similarity to motorcycles is that they are passenger vehicles and the passengers sit in the open. Their low power, slow speed and non-highway use distinguish them from motorcycles. Thus, crash helmets are unnecessary and the special skills of a motorcyclist are unnecessary to their safe operation. The legislature could not have intended the motorcycle safety statutes to be applicable to such vehicles.

For similar reasons, it is apparent that the legislature never intended such statutes to apply to special purpose vehicles such as street sweepers, industrial fork-lift trucks, and motorized wheelbarrows. Although, the legislature has defined a motor driven cycle as a motor vehicle designed to travel on not more than three wheels and having a seat for the use of the rider, I conclude that what they had in mind was powered cycles in the usual sense, including three-wheeled motorcycles. They did not intend that all vehicles with less than four wheels are to be regarded as cycles.

This conclusion is further supported by the legal maxim *noscitur a sociis,* which means that a general word will be known or understood to be used in the same sense as specific words associated with it. *Blacks Law Dictionary,* 3rd ed. The general words here used, are motor driven cycle. The statute then says, "including motorcycles, power driven cycles and motor bicycles, but excluding tractors." These specific words clearly show that the legislature was thinking in terms of cycles in the conventional sense and did not mean to include all other motor vehicles with less than four wheels.

RWW:AOH

Vocational Schools—The Milwaukee technical college may acquire and operate a retail service station as part of a vocational training program.

March 25, 1969.

C. L. GREIBER, *State Director,*
Board of Vocational, Technical and Adult Education

You ask that I render an opinion on whether the Milwaukee technical college can acquire and operate a retail automobile service station for the express purpose of training service station attendants and kindred personnel as part of a course called auto systems servicing.

The proposition that municipal governments are statutory creatures and only have such powers as are expressly granted or necessarily implied is too well established to need citations. As was said in 2 McQuillan, *Municipal Corporations,* 3rd ed., § 10.12, pp. 772-773:

"However, there can be no implied powers independent of express powers, or in conflict therewith. The power must relate to some corporate purpose, some purpose which is germane to the general scope of the object for which the corporation was created, or such as has a legitimate connection with that object and a manifest relation thereto, and will not be enlarged by construction to the detriment of individual or public rights."

Since your question involves the acquisition of real estate, it is necessary to determine whether such authority has been expressly granted to the Milwaukee technical college. The college through its governing board does have authority to acquire real estate. Sec. 41.15, Stats., provides in part:

"(14) The board may purchase machinery, tools and supplies, and purchase or lease suitable grounds or buildings for the use of such schools; * * *."

Turning now to this particular acquisition, it is necessary to inquire whether it is within the purpose envisioned by the statute. Putting it another way, the question becomes whe-

ther the operation of the service station by the Milwaukee technical college serves a public purpose. In *State ex rel. Wisconsin Dev. Authority v. Dammann,* (1938) 228 Wis. 147, 180, 227 N.W. 278, the court stated:

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

Heimerl v. Ozaukee County, (1949) 256 Wis. 151, 160, 40 N.W. 2d 564, was a case in which the court supplied this further guideline:

"* * * In order for a municipality to employ taxes to carry on a competitive business, such business must involve a public function or be concerned with some element of public utility."

This office has previously stated that private commercial operations can only be operated an an incidental feature of some governmental activity. See 41 OAG 162. 55 OAG 179 expressed the view at p. 183 that a county "may engage in the incidental marketing of the products of a greenhouse operated in connection with a handicapped children's school or center." The public purpose which saved this otherwise commercial venture was its reasonable relationship to the rehabilitation and instruction of physically handicapped children and adults.

The operation of a retail service station in conjunction with a vocational school's course in automobile systems servicing is certainly analogous to the facts discussed in 55 OAG 179. The station like the greenhouse sells to the public, in the former case a service in the latter a product. Yet, the commercial character of the enterprise should be viewed as incidental to its public purpose of vocational training. The information you have made available to me indicates that the station will serve a dual purpose. First, it will provide in-service training. Second, it would serve as an intake

center for automobile servicing presently available in shop courses.

You have also informed me that 90% of the monies to finance the acquisition would come from federal grants under the manpower development and training act of 1962. This contractual arrangement was approved by the state board of vocational, technical and adult education on October 22, 1968. I will not discuss, but wish you to note that sec. 20.292 (1) (m), Stats., may provide alternative grounds for sustaining the acquisition. It provides in part:

"**Vocational, technical and adult education, board of.** There is appropriated to the board of vocational, technical and adult education for the following programs:

"* * *

"(m) *Federal aid for vocational and adult education.* All moneys received as federal aids for vocational and adult education programs for which the board is responsible, to be expended in conformity with the purposes and requirements of the several acts of congress under which such federal aid is granted."

Each venture of this type must be examined in its own factual setting and the applicable statutes reviewed. Having done this, it is my opinion that the Milwaukee technical college with the approval of its governing board may acquire and operate a retail service station for the training of service station attendants and kindred personnel.

RWW:DRZ

State Universities—Police Services—The board of regents of state universities is not liable for the cost of local police or sheriff services in maintaining the peace on a campus.

March 26, 1969.

EUGENE R. MCPHEE,
Executive Director,
Wisconsin State Universities System

You have requested my opinion as to whether it is legal for the board of regents of state universities to pay for the services of municipal police and county sheriffs rendered at the request of a particular state university to maintain the peace.

It is my understanding that the cost of these services include not only the cost of the local police department and county sheriff's office but also the cost of services rendered by peace officers from areas outside the county and municipality wherein the university is located. It is my further understanding that such outside assistance was rendered at the request of the local police or sheriff's department.

Actually your question encompasses the questions of whether the state has a legal obligation to pay for such local services and outside assistance, and if not legally bound, may the state nevertheless pay for such services.

LEGAL LIABILITY

In my opinion, the state has, in the absence of a contractual agreement which is not herein discussed, no legal obligation to pay for services rendered by local county or municipal peace officers. Sec. 37.11 (16) (d), Stats., provides:

"(d) This subsection does not impair the duty of county or municipal police officers within their jurisdictions to arrest and take before the proper court or magistrate persons found in a state of intoxication, engaged in any disturbance of the peace or violating any state law on any property under the jurisdiction of the board."

This section notes that it is the duty of local, county and municipal police officers to protect persons and property within the confines of a state university campus.

The duties of county sheriffs are prescribed by sec. 59.24, Stats., and the duties of municipal police officers are similarly enumerated in sec. 62.09 (13), Stats. Further, both county sheriffs, their deputies and municipal police officers are peace officers within the definition of sec. 939.22 (22), Stats.

These statutory references show that the legislature has prescribed the duties of peace officers and has not generally provided for charges or compensation for such services whether they be rendered to a private citizen, corporate entity or the state.

However, under sec. 66.305, Stats., mutual assistance between law enforcement agencies is authorized.

Under sec. 66.315, Stats., charges may be made for the cost of such mutual assistance. This section provides:

"66.315 **Police, pay when acting outside county or municipality.** (1) Any chief of police, sheriff, deputy sheriff, county traffic officer or other peace officer of any city, county, village or town, who shall be required by command of the governor, sheriff or other superior authority to maintain the peace or who responds to the request of the authorities of another municipality, to perform police or peace duties outside territorial limits of the city, county, village or town where employed as such officer, shall be entitled to the same wage, salary, pension, workmen's compensation, and all other service rights for such service as for service rendered within the limits of the city, county, village or town where regularly employed.

"(2) All wage and disability payments, pension and workmen's compensation claims, damage to equipment and clothing, and medical expense, shall be paid by the city, county, village or town regularly employing such peace officer. Upon making such payment such city, county, village or town *shall be reimbursed by the state,* county or other political subdivision *whose officer or agent commanded the services out of which the payments arose.*"

Under subs. 2 the state is liable for such assistance when properly commanded. It appears from subs. 1 that only the governor of the State is authorized and empowered to command such services or incur liability on behalf of the state. It is my opinion, that a state agency, such as the board of regents of state universities, is not within the meaning of the term "other superior authority", as employed in subs. 1.

Consequently, when a local chief of police or county sheriff requests outside assistance to maintain peace on a state campus, his governmental unit is liable for the cost of the outside assistance unless he was acting under the command of the governor.

Under the circumstances discussed, the local law enforcement agency whether city or county is not entitled to compensation from the state for the performance of its duty nor is the local authority entitled to be reimbursed for the cost of the outside assistance it requested.

MAY THE STATE PAY

In my opinion, in the absence of a legal obligation, the board cannot pay for police protection.

Generally, under sec. 37.07, Stats., payments, by the board, are to be made on the warrant of the department of administration. The warrant in turn directs and authorizes the state treasurer to make the actual payment. In making payments the treasurer is governed by the provisions of sec. 14.42 (4), Stats., which read in part:

"* * * Pay out of the treasury, on demand, upon the warrants of the department of administration and not otherwise such sums only as are authorized by law to be so paid, * * *"

In the absence of a legal obligation* the board of Regents cannot, in my opinion, authorize payment to county or city governments whose assistance was required in maintaining the peace on state university property.

In conclusion, the board of regents cannot under any circumstances (excluding prior contractual agreements) pay for local, county or municipal police assistance in maintaining the peace on state campuses. The board of regents would be obligated, however, to pay for the cost of services rendered by peace officers from other jurisdictions who are acting under the command of the governor to aid the local authorities in maintaining peace on the campus.

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* *State ex rel. Reynolds v. Smith*, (1963) 19 Wis. 2d 577, 120 N. W. 2d 664.

In the absence of a legal obligation to pay for police assistance, the board of regents may not make gratuitous payments to local governmental units.

RWW:CAB

Grain and Warehouse Commission—Public Officials— Member of grain and warehouse commission cannot accept private employment, waive compensation payable to officer as commissioner and continue to serve on the commission. Sec. 126.03 (2), Stats.

April 24, 1969.

WARREN P. KNOWLES,
Governor

You have requested my opinion whether a member of the grain and warehouse commission of the state of Wisconsin can legally accept other private employment, waive the compensation payable to the officer as commissioner and continue to serve on the commission.

The commission is currently faced with financial problems and has reduced its staff of employes. In a spirit of cooperation the commissioner in question has suggested that she would be willing to accept private employment and at the same time continue as a member of the commission in a without-pay basis until the legislature determines the future of the commission.

I am of the opinion that such an arrangement would be improper by reason of the express provision of sec. 126.03 (2), Stats. A commissioner is a public officer of the state, appointed by the governor for a given term, and is required to take an oath and file a bond. Secs. 126.03 (2) and 126.04.

The legislature has provided that the compensation of a commissioner shall be $6800 per annum. Sec. 20.923 (1) (a) 7.

Although the legislature could abolish the office or shorten the term, it could not increase or decrease the compensation during a term so as to affect the officer during his term. Sec. 26, Art. IV, Wis. Const.

We are not concerned with action of the legislature here.

The salary of a public officer is an incident of the office and the incumbent thereof has the same title to the salary that he has to the office.

Wisconsin law permits a waiver of compensation in the nature of a donation back to the city or state where the agreement is wholly voluntary.

In *Maxwell v. Madison,* (1940) 235 Wis. 114, 117, 292 N.W. 301, the court reaffirmed its holding in *Coughlin v. Milwaukee,* (1938) 227 Wis. 357, 279 N.W. 62:

" 'It is not against public policy, in times of great public distress or otherwise, for a municipal or state officer or employee to donate to his city, county, or state such part of his salary or emoluments of office as he sees fit to contribute for the relief of the municipality or state. While his salary may not be diminished, . . . he can do what he will with his own, and if he chooses to devote part of it to the city or state, and the latter accepts the same, no public policy forbids it.'

"It seems manifest that a city officer, like any other person, may make a gift to the city, if he wants to, and that the gift may be made of a part of his salary as well as of anything else. The officer cannot be coerced to waive his salary by threats of removal or refusal to reappoint. But 'the case should not be made to turn upon the mere mechanics of the operation.' *Schuh Case, supra; Eck v. Kenosha,* 226 Wis. 647, 276 N.W. 309; *Coughlin v. Milwaukee, supra.* Nor can it be made to depend on the system of bookkeeping used in effecting the gift."

Also see 67 CJS, Officers, §98, p. 359, and 118 ALR 1452, 1462.

It will be noted that the case permits a gift back, and the situation there did not involve the total compensation. It is

apparent that complications as to income tax status and retirement benefit credits are involved.

I am of the opinion that the officer could continue to serve and voluntarily donate any compensation back to the state. However, sec. 126.03 (2), Stats., would preclude the commissioner from other employment.

A commissioner is required by law to give his entire time to the performance of his duties. Sec. 126.03 (2), Stats., provides:

"(2) Each commissioner shall give his entire time to the performance of his duties, and shall not engage in any other active business."

RWW:RJV

Highway Commission—CATV—Under sec. 86.16, Stats., the highway commission has the authority to approve the construction of coaxial cable pole lines by community antenna television operators along, across or within highways in towns.

April 25, 1969.

WILLIAM R. REDMOND, *Chairman,*
State Highway Commission

You ask whether the highway commission has authority under sec. 86.16, Stats., to approve the construction of coaxial cable lines by community antenna television operators along, across or within the limits of highways in towns.

You describe community antenna television, also known as CATV or cable television, as a system whereby signals from television stations are picked up by a large master antenna, amplified and then distributed to individual television receivers via coaxial cable. You further indicate that although CATV systems normally operate in urban areas, such as cities or villages, the only acceptable site for the master

antenna often lies outside municipal limits, thereby necessitating the construction of a cable line through a portion of a town. The pole lines which CATV operators would construct within the highways of the town would apparently be similar to those constructed by public utilities which furnish telephone, telegraph or electric service.

The pertinent subsections of sec. 86.16 are as follows:

"(1) Any person, firm or corporation including any foreign corporation authorized to transact business in this state may, with the written consent of the town board, but subject to the approval of the state highway commission, construct and operate telegraph, telephone or electric lines, or pipes or pipe lines for the purpose of transmitting messages, water, heat, light or power along, across or within the limits of any highway.

" * * *

"(4) Any person erecting any telephone, telegraph, electric light or other pole or stringing any telephone, telegraph, electric light or other wire, or constructing any pipes or pipe lines in violation of the provisions of this section shall forfeit a sum not less than $10 nor more than $50.

"(5) Any person, firm or corporation whose written application for permission to construct such lines within the limits of any highway of any town has been refused, or when such application shall have been on file with the town clerk for 20 days and no action shall have been taken thereon, such applicant may file with such town clerk a notice of appeal to the state highway commission. The town clerk shall thereupon make return of all the papers and action of the board to the state highway commission, and such commission shall proceed to hear and try and determine such appeal on 10 days' notice to the town board, and the applicant. The order entered by the commission shall be final."

At present, sec. 86.16 (1), Stats., provides that persons, firms or corporations may, with the consent of the town board and subject to the approval of the state highway commission, ". . . construct and operate telegraph, telephone or electric lines . . . for the purpose of transmitting messages,

. . . heat, light or power along, across or within the limits of any highway." Where the town board fails or refuses to allow the construction of such lines, the highway commission may authorize construction under sec. 86.16 (5), Stats.

Administrative boards and commissions, such as the highway commission, have only such powers as are conferred upon them by statute expressly or by fair implication. 42 Am. Jur., Public Administrative Law, p. 316, sec. 26. Thus, the crux of your question is whether CATV cables or lines come within the regulations of sec. 86.16, Stats. It is my opinion that they do.

From its earliest enactment, as ch. 84, Laws 1895, sec. 86.16, Stats., had a dual purpose — it empowered the construction of certain lines along or within public highways (in towns), and it regulated the placement of poles and lines within the right-of-way. The authority to construct lines was made subject to the approval of the town board. The section was later amended to provide for appeal from a refusal of the town board to the courts. Ch. 215, Laws 1913; ch. 108, Laws 1923. The state highway commission subsequently was substituted for the county and circuit courts in the appeal procedure (ch. 446, Laws 1923).

Sec. 86.16 is not a public utilities regulation, nor does it give towns any authority to franchise public utilities. *South Shore Utility Co. v. Railroad Commission,* (1932) 207 Wis. 95, 240 N.W. 784. The primary purpose of the section is to regulate the construction or placement of lines, pipes and poles within highways in towns. It is in the nature of a police power regulation enacted to protect the public from highway obstruction. *Milwaukee E. R. & L. Co. v. Milwaukee,* (1932) 209 Wis. 668, 671, 245 N.W. 860. Thus the numerous cases from other jurisdictions deciding whether or not a CATV company comes within the regulations of a state's public utility law do not apply here. We are only concerned with the question of whether CATV pole lines come within the scope of sec. 86.16; that is, whether their regulation is within the purpose, and within the language of that statute.

There can be no doubt that the regulation of the placement of CATV cables and poles along, across or within the limits of a highway is within the purpose of sec. 86.16. The statute was intended, from the very first, to regulate the placement of poles and lines for the public safety, and to prevent highway obstruction. The question remaining is whether the language of sec. 86.16 (1) includes such equipment within its scope when it refers to ". . . telegraph, telephone or electric lines, . . . for the purpose of transmitting messages. . . ."

The general rule to be followed when interpreting the language of statutes is as follows:

" * * * The general rule is to give all words and phrases their common and approved usage excepting technical words and phrases which have a peculiar meaning in the law. Sec. 990.01 (1), Stats. *Nekoosa-Edwards Paper Co. v. Public Service Comm.*, (1959) 8 Wis. 2d 582, 99 N.W. 2d 821.* * *" *Perry Creek C. Corp. v. Hopkins Ag. Chem. Co.*, (1966) 29 Wis. 2d 429, 435, 139 N.W. 2d 96.

It appears that the common and approved usage of the words in question has already been established to include the equipment in question. Coaxial cables are presently used by telephone companies for purposes identical to those of a CATV company—the transmission of television programming. Because sec. 86.16 is essentially a police power regulation, aimed at protecting highway users, and not a public utilities regulation, it follows that if sec. 86.16 regulates the placement of coaxial cables used for the transmission of television programming, it does so regardless of whether the cables are owned by a telephone company or by a CATV company. Thus it appears that the common and approved usage of the words defining the section's scope have already been interpreted to include such equipment.

A look at the dictionary definitions of the various words also leads to the conclusion that coaxial cable lines are within the common and approved usage of the words. *Webster's New International Dictionary* (Third Ed.) defines "message" as:

"a written or oral communication or other transmitted information sent by messenger or by some other means (as by signals)."

and defines "telegraph" broadly as:

"an apparatus, system or process for communication at a distance other than ordinary ones of speech or letter writing."

The *Random House Dictionary of the English Language* contains the following definition of the word "line":

"a wire circuit connecting two or more pieces of electric apparatus, esp. the wire or wires connecting points or stations in a telegraph or telephone system, or the system itself."

"Message" is defined by the *Random House Dictionary* as:

"a communication containing some information, advice, request, or the like sent by messenger, radio, telephone or other means."

From the above discussion it is clear that coaxial cables are within the common and approved usage of the words "telegraph, telephone or electric lines" and that the transmission of television programming is within the common and approved usage of the words "transmitting messages" as they appear in sec. 86.16 (1). Furthermore, there is nothing in the statutory language or history that would tend to support a narrow construction of the law's scope of application, nor do I find anything to support a distinction solely on the basis of ownership between identical cable lines performing identical functions.

I, therefore, conclude that the construction and operation of coaxial cables and pole lines by CATV companies comes within the regulations of sec. 86.16, Stats., and, therefore, that the highway commission has the authority under that statute to approve the construction and operation of such lines along, across, or within the limits of highways in towns.

RWW:SMS

Obscenity—Motion Pictures—Proposed amendments to bills creating variable obscenity laws, which would exempt motion picture films shown at theaters that comply with the film ratings of the motion picture association of America, constitute an unconstitutional delegation of legislative power.

April 30, 1969.

THE HONORABLE, THE SENATE

You have requested my opinion regarding proposed amendments to S. B. 45 and 121.

Each of these bills would create a variable obscenity law similar in some respects to the one which was sustained by the United States supreme court as applied to printed matter in *Ginsberg v. New York*, (1968) 390 U.S. 629, 20 L. ed. 2d 195, 88 Sup. Ct. 1274.

S. B. 45 would create sec. 944.25, Stats. It defines "minor" as any person under the age of 17, and provides a penalty for anyone who, among other things, "knowingly exhibits for a monetary consideration to a minor or knowingly sells to a minor an admission ticket or pass or knowingly admits a minor for a monetary consideration to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity[1], sexual conduct[2] or sadomasochistic abuse[2] and which is harmful to minors[1]."

For some unexplained reason, S. B. 121 would put its variable obscenity law into ch. 947 instead of 944, creating sec. 947.09. It contains a prohibition with reference to motion pictures similar to the one just quoted from S. B. 45, but it defines "minor" to mean any person under the age of 21.

S. Amend. 6 to S. B. 45, and S. Amend. 1 to S. B. 121, provide that the respective provisions relating to motion pic-

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[1]Each of these terms is defined as in the statute involved in the *Ginsberg* case.

[2]These terms are also defined in the proposed statutes.

tures, etc., "shall not apply to motion picture films that are exhibited in theaters that comply with the film ratings assigned by the code and rating administration pursuant to the principles of the code of self-regulation of the motion picture association of America."

You inquire whether such an amendment to each of the bills is constitutionally valid. My answer in each case is, "No".

The authors of the amendments apparently were under the impression that only films so pure, virtuous and nonviolent as to meet the test of fitness for youthful audiences as set forth in these two bills are rated by the motion picture association of America. This is not the case. At least under present rules, all pictures submitted for review by the code and rating administration of the association will receive a rating based on the following scale:

"[G] SUGGESTED FOR GENERAL AUDIENCES
This category includes motion pictures that in the opinion of the Code and Rating Administration would be acceptable for all audiences, without consideration of age.

"[M] SUGGESTED FOR MATURE AUDIENCES—ADULTS & MATURE YOUNG PEOPLE
This category includes motion pictures that in the opinion of the Code and Rating Administration, because of their theme, content and treatment, might require more mature judgment by viewers, and about which parents should exercise their discretion.

"[R] RESTRICTED — Persons under 16 not admitted, unless accompanied by parent or adult guardian. This category includes motion pictures that in the opinion of the Code and Rating Administration, because of their theme, content or treatment, should not be presented to persons under 16 unless accompanied by a parent or adult guardian.

"[X] PERSONS UNDER 16 NOT ADMITTED
This category includes motion pictures submitted to the Code and Rating Administration which in the opinion of the Code and Rating Administration are rated [X] because of the treatment of sex, violence, crime or profanity. Pictures

rated [X] do not qualify for a Code Seal. Pictures rated [X] should not be presented to persons under 16.

"The program contemplates that any distributors outside the membership of the Association who choose not to submit their motion pictures to the Code and Rating Administration will self-apply the [X] rating."

It follows that under the proposed amendments to the bills, films rated [X] by the association could be shown locally to "minors" even though in most cases they would probably come under the condemnation of the variable obscenity statute and even though under the *present* motion picture association rules they could be shown to anyone over 16. On the other hand, another film of the same type and equally objectionable to the statutory variable obscenity standards could not be shown to any minors because it was not rated by the association's code and rating administration.

Films rate [R] might or might not be in violation of the statutory variable obscenity standards, yet under the code children of 16 or older could attend and those under that age if accompanied by a parent or adult guardian.

It is apparent that the proposed amendments would delegate to the motion picture association of America the power to exempt from the operation of the law films which conceivably might violate the statutory standards, when shown in certain theaters. *No standards for rating films are imposed by the proposed laws as amended,* leaving the association free to act without fixed standards or to adopt and from time to time change its standards. The law as so framed would not provide penalties for violating the code (presumably by admitting juveniles into [X] -rated films or unaccompanied juveniles into [R] -rated films), but would exempt from the statutory standards and penalties those theaters and films which conformed to the current code standards. This cannot be done.

It is elementary that the legislature cannot delegate even to an administrative agency of the government, let alone a private association, "the power to declare whether or not

there shall be a law; to determine the general purpose or policy to be achieved by the law; to fix the limits within which the law shall operate * * *." *State ex rel. Wis. Inspection Bureau V. Whitman,* (1928) 196 Wis. 472, 505, 220 N.W. 429; *Schmidt v. Local Affairs and Development Dept.,* (1968) 39 Wis. 2d 46, 59, 158 N.W. 2d 306.

Viewed as authorizing the association, which is not even a governmental agency, to make a code having legal effect, without any statutory guidelines or standards to follow, the proposed amendments are therefore clearly an invalid delegation of legislative power to a nongovernmental agency.

It has been held that the operation of a law may be made dependent upon the happening of a contingency consisting of the determination of some fact, even if the fact is determined by private individuals. *State v. Wakeen,* (1953) 263 Wis. 401, 407-408, 57 N.W. 2d 364. The proposed amendments are not such a law. They prescribe no fact to be found by the association to bring the law into operation. If they did, it should of course be a fact or facts relevant to the scheme and purpose of the statute.

RWW:WAP

Taxation—Real Estate—Under sec. 75.01, Stats., owner is entitled to redeem land sold for taxes before tax deed is recorded and may on application require county treasurer to apportion taxes to portion sought to be redeemed.

May 14, 1969.

JAMES R. SCHIPPER,
District Attorney, Vernon County

You advise that a nine-acre parcel of land, having farm buildings and a house thereon, is held in joint tenancy and has a single description. It has been assessed as a single parcel. Real estate taxes since 1964 are delinquent and the county has taken tax certificates for the years 1964, 1965,

1966 and 1967 and is eligible to take a tax deed for the 1964 taxes.

You request my opinion whether the owners, prior to the recording of a tax deed, can present the county treasurer with a description of the portion of the property they wish to redeem and an application for proration of taxes and require the treasurer to determine the proportion of taxes chargeable to the part sought to be redeemed, and upon payment of that amount, require the treasurer to issue a certificate of redemption for such portion.

The answer to your question is in the affirmative.

Sec. 75.01, Stats., expressly provides for such a procedure. The intent of the legislature to permit the redemptioner to redeem a portion of the land is also manifested in sec. 74.32, Stats.

The application of the redemptioner should contain a legal description of the portion sought to be redeemed.

In 25 OAG 546 it was stated that a single tax certificate containing several lots should be divided by the county treasurer to permit redemption of individual lots. In that case the land descriptions were fixed and it was only the tax chargeable to each lot which had to be determined. In your case the land is not divided. If it does not occur earlier, a recordable division would occur when the county takes a tax deed to the unredeemed portion of the nine-acre parcel.

Prior to 1945, secs. 74.32 and 75.01, Stats., relating to apportionment of delinquent taxes upon application for redemption applied only where the property was owned "in severalty," i.e., single ownership. However, it now applies to joint ownership or tenancy in common. *State ex rel. Anderton v. Sommers*, (1943) 242 Wis. 484, 8 N.W. 2d 263.

In the apportionment the county treasurer can resort to an actual view, affidavits, surveys, and the opinion of the assessor or clerk of the local municipal units. *State ex rel. Dorst v. Sommers*, (1940) 234 Wis. 302, 291 N.W. 523.

The period within which the former owner is permitted to redeem from tax sale is prescribed by secs. 75.01, 75.03,

Stats. *Swanke v. Oneida County,* (1953) 265 Wis. 92, 60 N.W. 2d 756.

In general, where owner is not a minor, idiot or insane person, redemption must be made before any tax deed is recorded.

RWW:RJV

Anti-Secrecy—Public Records—A regular open meeting of a district vocational, technical and adult education board, which was held subsequent to an executive session of the board on the same calendar day, does not constitute a reconvened open session where there was no prior open meeting on that calendar day, and thus was not a violation of sec. 14.90, Stats.

June 9, 1969.

WILLIS J. ZICK
Corporation Counsel, Waukesha County

You ask whether an open meeting of an area vocational, technical and adult education school district board is legal under sec. 14.90, Stats., when it follows a closed meeting of the board scheduled on the same day, and when adequate notice was given of both meetings and the subject matter of the meetings was unrelated.

The particular facts are as follows: On June 18, 1968, the Board of Vocational, Technical and Adult Education, District No. 8 held two meetings. The first meeting was an executive session set at 6:45 p.m., to consider site selection. The second meeting was a regular meeting of the board set for 7:30 p.m. Your letter states that adequate notice was given for both meetings.

At 7:30 p.m., the president of the board left the executive meeting to apologize to people who had assembled for the regular meeting because the executive meeting was running late. At 8:45 p.m. the board opened its regular session. An

objection was made to the board to the effect that the board was prohibited from carrying on business at an open meeting on the same calendar date following an executive session. The meeting was held, nonetheless, and you now ask whether that meeting was in violation of sec. 14.90.

The relevant language of sec. 14.90 is as follows:

" * * * No formal action of any kind, except as provided in sub. (3), shall be introduced, deliberated upon or adopted at any closed session or closed meeting of any such body, or at any reconvened open session during the same calendar day following a closed session. * * *"

Your letter also states that subject matter of the open meeting was the regular business of the board, and was not related to the subject matter of the executive session.

From the facts that you present, it appears that the executive session was in fact legally held, under the provisions of sec. 14.90 (3) (d): " * * * Deliberating or negotiating on the purchasing of public property, * * * ." Thus, the only question raised is whether the regular meeting that was scheduled for 7:30 p.m., and held at 8:45 p.m., constituted a "reconvened open session" within the meaning of sec. 14.90. It is my opinion that it did not.

The most reasonable and natural interpretation of this language leads to the conclusion that it was inserted into sec. 14.90 to prevent a public body from adjourning to a closed session and subsequently reconvening to conduct business and take formal action unrelated to the subject matter of the closed meeting. By this language, I believe the legislature intended to prevent a public body from avoiding public attendance through the device of going into a lengthy closed session, for an indeterminate amount of time, and later reopening the meeting for general business after most of the people attending had become discouraged and gone home. If the legislature had meant to prohibit *any* open session subsequent to a closed session, it would have used the word "subsequent" rather than the word "reconvened."

In the situation at hand, there was no prior open meeting that was adjourned to the closed session, therefore the regu-

lar business meeting which followed the executive session cannot be said to constitute a "reconvened open session." As long as adequate notice was given of that regular meeting, and the information you transmitted assures me that such notice was given, the 7:45 p.m. meeting did in fact merely constitute a regular open meeting of the district board, and was not in violation of sec. 14.90.

RWW:SMS

Retirement Fund—Contitutionality—Surpluses in the annuity reserve fund may be distributed to annuitants as dividends under sec. 66.916 (1) (a), Stats., without conflicting with the provisions of Art. IV, sec. 26, Wis. Const.

June 10, 1969.

C. M. SULLIVAN, *Secretary*
Department of Employe Trust Funds

In 56 OAG 267 my predecessor advised Wayne F. McGown, secretary, department of administration, that payment of dividends by the Wisconsin retirement fund, pursuant to sec. 66.916 (1) (a), Wis. Stats., as amended by ch. 110, Laws 1967, would probably be unconstitutional in that it would constitute a use of public funds for a private purpose. This earlier opinion, however, expressed a notable lack of confidence with respect to the result reached therein. In view of the doubt expressed in that opinion as to its conclusion, you have requested further examination of this question.

The amendment to sec. 66.916 (1) (a) added the following:

". . . The board may order and make such distribution of said annuity payment surplus as it deems equitable."

You have advised me that at the present time there is a surplus in excess of $15,000,000 in the annuity reserve account of the Wisconsin retirement fund. The annuity reserve account consists of the accumulated employe and employer

contributions transferred to that account at the time a participant retires and his annuity is granted. This surplus has accumulated over a period of approximately 25 years and is largely due to investment experience of the fund which has been more favorable than the anticipated investment experience upon which the annuities were calculated.

Funds such as those in the annuity reserve account were described in *Tesch v. Board of Deposits,* (1941) 237 Wis. 527, as public funds though not usable for general governmental expenses. That case further stated that while they are public funds, only persons named as beneficiaries in the law establishing such fund can participate in the enjoyment thereof. It also follows that, not only are the contributions of the participant and his employer a fund held in trust for the benefit of the annuitant but also any accretions to such contributions by way of interest earned after transfer to the annuity reserve fund income. This result must attain since one of the fundamental principles involved in the establishment of an annuity is the inclusion in the calculation of the annuity of the expected interest income on amounts upon which the annuity is based. The distribution to annuitants of surpluses in the annuity reserve fund would therefore not be a grant of compensation within the purview of Art. IV, sec. 26, Wis. Const., but rather an adjustment of annuities to reflect the actual investment experience which created such surplus.

The objection that such payments would constitute using public funds for a private purpose as suggested by my predecessor relying upon *State ex rel. Thomson v. Giessel,* (1952) 262 Wis. 51, must also be examined. While the concept is well established in the law, no specific clause in the Constitution establishes this doctrine. The Wisconsin supreme court examined the genesis of this doctrine in *State ex rel. Wisconsin Development Authority v. Damman,* (1938) 228 Wis. 147, and stated with respect thereto that:

"* * * the validity of an appropriation must be judged by the validity of any tax which might be levied to support it, and that for the state to appropriate for a private purpose money raised or to be raised by taxation would be to take

the property of one citizen or group of citizens without compensation and to pay it to others, which would constitute a violation of the equality clause as well as the taking of property without due process of law." P. 175

It may be seen from the foregoing analysis of the development of the surpluses in the annuity reserve fund that distribution of such surpluses to annuitants by the way of dividends would not involve the prohibitions of either the equality clause or due process clause of the Fifth Amendment of the Constitution since no additional public funds are involved. These surpluses in the annuity reserve fund may, therefore, be distributed to annuitants as dividends under sec. 66.916 (1) (a), Stats.

I would further observe that if the conclusion were not reached permitting payment of these sums as dividends to the annuitants, the prior opinions of this office and the opinion of the court in *Tesch v. Board of Deposits, supra,* which prevent these surpluses from being used for general governmental purposes would result in an anomoly in the law in that these funds would be frozen ad infinitum.

RWW:DGM:MDR

State Employes—Protective Occupation—Protective occupation coverage under ch. 355, Laws 1967, is restricted to the employes in the classifications specifically named therein.

June 19, 1969.

WAYNE MCGOWN, *Secretary*
Department of Administration

Ch. 355, Laws 1967, made certain changes in secs. 66.90 and 66.919, Stats., with respect to those individuals who would qualify under the "protective occupation participant" classification. Sec. 66.901 (4e), Stats., now reads in part as follows:

"(4e) (a) 'Protective occupation participant' means any participant whose principal duties involve active law enforcement or active fire suppression or prevention, provided such duties require frequent exposure to a high degree of danger or peril and also require a high degree of physical conditioning. This definition is deemed to include any participant whose name is certified to the fund as provided in par. (d) and who is a conservation warden, conservation patrol boat captain, conservation patrol boat engineer, conservation pilot, conservation patrolman, forest fire control assistant, member of the state patrol, state motor vehicle inspector (if hired prior to January 1, 1968), policeman, including the chief and all other officers, fireman, including the chief and all other officers, sheriff, undersheriff, deputy sheriff, county traffic policeman, state forest ranger, or fire watchman employed by the Grand Army home for veterans.

"(b) 'Protective occupation participant' also means any state correctional-psychiatric officer, state investigator whose primary duties consist of investigational work in enforcing compliance with alcoholic beverage, gambling, prostitution or cigarette laws or special agent in the division of criminal investigation of the department of justice whose name is certified to the fund as provided in par. (d). * * *"

By letter of June 11, 1969, you have requested a clarification to assist the various constitutional officers, state departments and agencies in determining which individuals should be certified as protective occupation participants.

Specifically you ask the following:

"In view of the statutory construction resulting from enactment of Ch. 355, Laws of 1967, are those employees who are to be included in the protective occupation retirement program limited to the classifications delineated in subsection 66.901 (4e) (a) and (b)?"

My answer to your first question is yes. Subs. 66.901 (4e) (a) describes a protective occupation participant as an individual "whose principal duties involve active law enforcement or active fire suppression or prevention, provided such duties require frequent exposure to a high degree of danger

or peril and also require a high degree of physical conditioning." The subsection then proceeds to list the classifications to be included in the definition set forth above. By listing the classifications included it must be presumed that the legislature intended to exclude those positions not listed since paragraph (c) of that subsection requires that "Any participant holding a position which previously qualified him as a protective occupation participant but whose position has been deleted from this subsection * * * shall cease to be a protective occupation participant * * *."

Further, in analyzing the actuarial effect on the retirement system, the joint survey's committee report to the legislature showed that 1,520 state employes would qualify as protective occupation participants under sec. 66.901 (4e), Stats., as re-created by ch. 355, Laws 1967. This figure was arrived at by excluding those employes of the conservation commission designated by the conservation director as being subject to call for forest fire control or warden control since this position was deleted from ch. 355 and including the specific positions added by ch. 355; to wit, forest ranger, fire watchman employed by the Grand Army Home for veterans, state correctional-psychiatric officer, state investigator and special agents in the division of criminal investigation for the department of justice.

Your second question asks:

"Are *all* employes who are in the classifications delineated in subsection 66.901 (4e) (a) included, or just those whose specific jobs meet the criteria delineated in subsection 66.901 (4e) (a) ?"

In my opinion all employes who fall within the specific classifications set forth in subs. 66.901 (4e) (a) should be included within the classification of "protective occupation participant" if, in addition to being classified as such employe, he in fact devotes 50% or more of his work time to such duties as are normally regarded as functions of that classification. The joint survey committee on retirement systems in reporting to the legislature on S. B. 415 (ch. 355, Laws 1967) pursuant to subs. 13.50 (6) (a), Stats., stated as follows:

"An individual who is a protective occupation participant performs duties which are principally concerned with active law enforcement or active fire suppression. He is exposed to a high degree of danger or peril. He must meet the basic qualifications for membership in WRF and devote 51% or more of his work time to the duties listed above. An individual whose principal duties do not consist of 51% or more of his work time being devoted to active law enforcement or active fire suppression would not be eligible for protective occupation membership."

Essentially the same criteria is found in Wis. Adm. Code sec. RET 2.41:

"Major occupation. Whenever a participating employe occupies a single job involving some duties as a protective occupation participant the normal contribution rate shall be that specified in section 66.903 (2) (f) 1, Wis. Stats., but if the duties as a protective occupation participant regularly require more than 50% of the working time of such single job the normal contribution rate shall be that specified in section 66.903 (2) (f) 3 or 4, Wis. Stats."

In addition, the provisions of subs. 66.901 (4e) (e) should be observed with respect to the inclusion of policemen, firemen, deputy sheriffs or county traffic policemen. Those provisions would exclude from that classification employes of police departments, fire departments, sheriffs' officers or county traffic departments those employes who are not actively engaged in law enforcement or fire suppression or prevention.

Your third question asks:

"In the absence of any limiting criteria in subsection 66.901 (4e) (b), can it be assumed that *all* employes in the delineated classifications are to be considered eligible for inclusion in the protective occupation retirement system (assuming they so elect in those instances where employe election discretion is permitted) ?"

My answer to your third question with respect to the employe classification set forth in subs. 66.901 (4e) (b) is essentially the same as the answer given above with respect

to individuals falling within the classifications set forth in paragraph (a) of subs. 66.901 (4e). Individuals in the particular classifications set forth in paragraph (b) are presumed to be protective occupation participants. However, the first sentence of subs. 66.901 (4e) (a) which requires the individual be involved in actual law enforcement or active fire suppression or prevention would not apply. The three classes set forth in paragraph (b), i.e., correctional-psychiatric officer, state investigator, and special agent of the department of justice come within the classification of "protective occupation participant" without limitation by the provisions of paragraph (a) of that subsection. This conclusion must follow from the fact that the "psychiatric officer" classification does not necessarily fall within the scope of active law enforcement or active fire suppression or prevention.

Your fourth question asks:

"Do you interpret the quarterly report requirement in subsection 66.901 (4e) (d) as a means of updating the inclusion or exclusion of all affected employes? For example, if an employe is certified for inclusion on July 1, 1969, and subsequently changes positions or classifications to one not covered by the statute, can it be assumed that the next quarterly report would indicate the change and thereby exclude him from the protective occupation coverage?"

My answer to this question is yes. It would certainly be unreasonable to assume that an individual could, by employment for a period of time in a job which would qualify him for inclusion as a protective occupation participant, avail himself of the increased benefits of that classification after transferring to a position not considered within the protective occupation classification. I would observe, however, that while the "classification" of the individual carries with it a presumption that he is to be included as a protective occupation participant under subs. 66.901 (4e) (a) and is controlling as to his inclusion under paragraph (b) of that subsection, the job activity of the individual is also a consideration in determining inclusion as a protective occupation participant. Thus, a change in the "classification" of

a protective occupation participant which does not result in any change in his work activity would not necessarily result in his exclusion from the protective occupation coverage.

The law is clear that under subs. 66.901 (4e) (d) it is the responsibility of each department to make its own determination as to the eligibility of its employes. Clearly the heads of the various departments are best able to make this determination due to their understanding of the work requirements of their various employes. Paragraph (d) further makes it clear that the certification by the department as to eligibility of its employes is subject to review by the individual whose name has been certified or omitted from certification.

It is my opinion that because of the increased benefits available to employes in the protection occupation classification, the provisions of subs. 66.901 (4e) should be read restrictively. Where there is a doubt as to whether an individual qualifies for coverage under that subsection, that individual should be excluded from the certification while the individual has the opportunity for review of such exclusion.

RWW:DGM

Annexation—School Districts—Under sec. 66.023 (1), Stats., territory annexed to city operating under the city school plan, secs. 120.40 to 120.58, Stats., is transferred for school purposes on July 1 following the effective date of the annexation (absent agreement for earlier transfer), notwithstanding sec. 66.021 (7) (c) and (d), stating that annexation ordinance must annex the territory for school purposes also, and that the annexation is effective upon enactment of the ordinance.

June 23, 1969.

A. HENRY HEMPE
Corporation Counsel, Rock County

You state that a question has arisen with respect to annexations of unincorporated territory to cities operating under the "City School Plan". I assume that you are referring to city school districts operating under subch. II of CH. 120, Stats. The question is based on a conflict as to when the annexed territory is transferred for school purposes. The applicable statutes are secs. 66.021 (7) (c) and (d), and 66.023 (1), Stats. If the first statute applies, the territory is transferred for school purposes as of the enactment of the annexation ordinance; if the latter statute controls, the transfer date is July 1 following the effective date of the ordinance. You ask which statute governs.

The material parts of the cited statutes provide, respectively:

"66.021 Annexation of territory.

"(7) ANNEXATION ORDINANCE. * * *

"(c) The ordinance for the annexation of territory to a city that operates its schools under the city school system shall provide that the annexed territory is annexed for school purposes and is thereby made a part of the city school district and subject to all of the laws governing the same.

"(d) The annexation shall be effective upon enactment of the annexation ordinance. The board of school directors in any city of the first class shall not be required to administer the schools in any territory annexed to any such city until July 1 following such annexation.

"66.023 Consolidation or annexation to a city operating under city school plan; taxes. (1) In the absence of an agreement to the contrary under this section, territory in a school district which is annexed to or consolidated with a city operating under the city school plan shall be transferred for school purposes on July 1 following the effective date of the annexation or consolidation."

Sec. 66.021 (7) (c), Stats., was enacted as a part of ch. 676, §3, Laws 1957. Sec. 66.023, Stats., was not enacted until 1959 as ch. 130, Laws 1959. Sec. 66.021 (7) (c), Stats., however, was created after sec. 66.023 (1) by ch. 571, Laws

1959. Under this state of affairs, sec. 66.021 (7) (c), Stats., would control if the well-settled rule that a later statute prevails over an earlier conflicting statute is properly to be given application.

However, we have the further rule that in case of irreconcilable conflict, the specific statute controls over a statute of general or less specific application. The rule that a statute relating to a specific subject controls a general statute which includes the specific subject in the generality of its terms, prevails without regard to priority of enactment, even though both are adopted at the same session of the legislature—the presumption being that the specific act is to remain in force as an exception to a later general act. 50 Am. Jur., Statutes, §562, p. 564.

Sec. 66.023 (1), Stats., specifically states that the transfer for school purposes occurs on July 1 following the effective date of the annexation. Significantly, subs. (3) says that the school district board and the board of education may provide, by agreement, for an earlier transfer date. There is no other statute providing for any other method of an earlier transfer. In addition, subs. (4), specifically provides:

"(4) Between the date of accomplishment of statutory requirements to effectuate a consolidation or annexation of territory to a city operating under a city school plan and the date any such territory becomes a part of such city for school purposes, as provided herein, no portion of the city school tax or taxes levied by the city to repay obligations incurred to finance school facilities shall be levied against the property in said annexed or consolidated territory, and during said period such territory shall continue to vote on school matters within, and pay school taxes for the support of, the district of which it was a part when such consolidation or annexation proceedings were commenced and shall not vote on any matter relating to the city school plan within such city. The school district clerk shall certify to the proper clerk as provided in s. 120.17 (8) the proportion of the school taxes to be levied by the city or town."

Sec. 66.023 (5), Stats., provides that the section applies only to cities operating under subch. II of CH. 120, Stats., which is secs. 120.40 to 120.58 of the statutes.

As a matter of practical administration, the establishment of a definite transfer date, either by statute or by specific agreement, appears to be highly desirable. For example, a school district not operating under the city school plan levies its own taxes for school purposes upon the taxable property in the district. Sec. 120.10 (7), Stats. School taxes must be voted at the annual meeting held on the fourth Monday in July in case of common school districts, and on the third Monday in July in case of union high school districts, unless voted at a special meeting called for that purpose. Sec. 120.08 (1) and (2), Stats. The "school year" is defined by sec. 115.01 (6), Stats., as "the time commencing with July 1 and ending with the next succeeding June 30." Quite clearly from an administrative view alone, an estimate of a budget and consequent tax levy is rendered more reliable if the taxable property in the district will not be decreased by annexation during the school year for which the budget and tax levy has been formulated. Since the legislature must be presumed to have acted rationally in the enactment of statutes, the foregoing may justifiably be considered as a probable reason why the legislature intended sec. 66.023 to prevail over sec. 66.021 (7) (c), Stats.

Because of the more specific provisions of sec. 66.023 and, especially, the provisions of subs. (4), with respect to taxes and voting, I am of the opinion that the legislature intended that sec. 66.023 (1), Stats., should mean exactly what it says, and that therefore the provisions of that subsection must control over sec. 66.021 (7) (c), Stats.

RWW:RDM

Institutions—School Services—The state and its agencies, constitutionally can require the payment of fees for services to children between 4 and 20 who seek admission to an institution or program because school services are

lacking in their community or district. Recognition of substitutes for public educational facilities must come through legislative action and not from action by existing state agencies.

June 26, 1969.

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

You requested of my predecessor an opinion concerning the following three questions:

(1) "Does the superintendent of any of the state's colonies and training schools (Northern, Southern, and Central) have the right, under the statutes, to deny the services of these institutions to children between the ages of 4 and 20 years who seek admission to the institution because proper school services are lacking in local communities?

(2) "Does the superintendent, or any member or members of his staff, have the right, under the statutes, to discharge to the community children between the ages of 4 and 20 years because in their judgment, they do not meet certain preconceived criteria such as being in need of intensive medical care or specialized therapeutic treatment available only at colonies, which criteria are not necessarily related to either the ability of the retarded person to learn or the ability of his community to provide the training?

(3) "Does the State of Wisconsin have the right, constitutionally, to require applicants for grants under sec. 51.38, Stats., to establish fee schedules and to require day care centers to recover fees for services rendered to school age children from financially able parents?"

In an earlier opinion isued to the mental health advisory committee and dated April 13, 1967, there is discussed at length the constitutional and statutory responsibilities of the state and the several school districts relative to the education of mentally handicapped children. 56 OAG 82. The three questions which you have submitted obviously seek to clarify certain statements which appear in this prior opinion.

In that opinion the mental health advisory committee was advised that, although entry to the district school may be barred under certain circumstances, the obligation to provide a meaningful and free public education remains unless it can be shown that a child is incapable of benefiting from any education or training. In addition the committee was advised that the state, in its own capacity or through the respective school districts, must provide a reasonable alternative to education by the district school. The obvious alternative in many instances is special training through the establishment of special schools or special classes. At the present time, the state colonies and training schools and the day care centers established under sec. 51.38 are not recognized under our school laws as substitutes for special schools or special classes even though the participants may gain certain educational benefits from these programs. The programs which are established at the state colonies and training schools and at the day care centers are established, operated and supervised by the department of health and social services. The state department of public instruction and the several school districts have no rights or duties in the operation of these programs.

Your three questions do not embody all of the possible alternatives which might be raised now and in the future concerning the state's responsibility under Art. X, sec. 3, Wis. Const., to provide a free education to all children between the ages of 4 and 20. For this reason, I choose to answer the more comprehensive question of whether the state and its several agencies, excluding the state department of public instruction, can constitutionally require the payment of fees for services to children between 4 and 20 and whether the state and these agencies can deny services to these children who seek admission to any institution or program because school services are lacking in their community or district. It is my opinion that these actions by the state and its agencies are constitutionally permissible.

I am not unmindful of the arguments often put forth by some parents in favor of substituting state colonies and training schools or day care centers for public education programs where local school services are not available. When

reference was made to the state's responsibility for educating all children between 4 and 20 in 56 OAG 82, it was to call to the attention of the legislature its constitutional duty to provide the statutory framework within which the several state agencies can implement the mandate of Art. X, sec. 3. Recognition of various substitutes for public educational facilities must come through legislative action and not from action by agencies, such as the department of health and social services, who have no statutory duties or powers in the field of education. The obvious legislative intent to the present time has been to place the supervision of special educational programs under the state department of public instruction and the local school authorities.

Although I have not discussed separately the three questions which you have submitted, it is apparent from the above discussion that each question must be answered in the affirmative.

RWW:DPJ

Subminimum Wage Licenses—Sheltered Workshops—The department's authority under ch. 104 relates only to establishment of a minimum hourly wage for women and minors; issuance of subminimum wage licenses to handicapped employees on an individual basis; requiring the employer to keep records of wages paid and hours worked for all women and minors; and hearing complaints by individuals on a case by case basis alleging payment of less than the minimum wage as established by the department or by its license pursuant to secs. 104.05, 104.07, and 104.12, Stats.

June 27, 1969.

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

You ask whether the department of industry, labor and human relations may grant subminimum wage licenses to sheltered workshops as provided by Ind 72.14 (3), Wis. Adm.

Code, rather than to the individual handicapped persons working therein; and whether the department can require employers to keep records of employee productivity, product pricing, etc., as provided by proposed rule Ind 72.14 (1) (e), Wis. Adm. Code. The answers to these questions are in the negative.

Sec. 104.01, Stats., defines the term "living-wage". The living-wage concept is based on an earning rate per hour or more specifically a minimum hourly wage. See *Blanca Barrera et al. v. ILHR Dept.,* case number 125-100, Dane County circuit court, opinion dated June 27, 1968. Sec. 104.02, Stats., applies the living-wage provisions only to women and minors.

Sec. 104.04, Stats., gives the department the authority to determine the living-wage — to set the rate per hour — and to fix reasonable classifications of the minimum wage. The department has fixed classifications pursuant to its statutory authority. Ind 72.03, Wis. Adm. Code, provides a living-wage of $1.30 per hour for women and minors 18 years of age and older and $1.10 per hour for those women and minors under age 18. The classifications, when fixed, must apply to all persons in that class. Sec. 104.06, Stats., provides in part as follows:

". . . The living-wage so determined upon shall be the living-wage for *all* women and minor employes, within the same class as established by the classification of the commission."

Since classification under sec. 104.04, Stats., means classification of women and minor employees by groups for payment of the determined minimum wage, sec. 104.04, Stats., must be construed according to the rule of *ejusdem generis.* That is, where general words follow an enumeration relating to a specific or particular thing — i.e., determining the living-wage for women and minors — then the general words cannot be construed in their widest meaning, but apply only to that thing specifically mentioned.

The *ejusdem generis* rule also applies to sec. 104.09, Stats. Sec. 104.09, Stats., requires all employers to keep records

of the names of each woman and minor employee, their addresses, the hours worked and the wages paid to each, and such other records as the department requires. The "other records" provisions of sec. 104.09, Stats., must be read in the context of records of hours and wages paid to women and minors, and cannot be construed as a general grant of authority to the department allowing the department to require employers to keep records of matters not related to hours worked and wages paid to women and minors, and not necessary for the proper administration of the specific provisions of ch. 104, Stats., concerning able bodied women and minors or handicapped women and minors.

Sec. 104.07, Stats., provides the only exception to the state-wide application of minimum wage rates for women and minors. Sec. 104.07, Stats., provides that the department may issue subminimum wage licenses to women and minor employees on an individual basis "commensurate with his or her ability," and "*Each* license so granted shall establish a wage for *the licensee*, and no licensee shall be employed at a wage less than the rate so established."

The language of secs. 104.04, 104.06 and 104.07, Stats., reflects a strong state policy to require the payment of the minimum wage to all women and minors except in the most unusual circumstances. That is, employers must pay at least the minimum wage to all women and minors, even to those handicapped, unless the handicapped individual can get permission from the department, after submission of proper proof, to work at a rate lower than the minimum "commensurate with his or her ability."

Thus, the granting of subminimum wage licenses to the employer for his employees, rather than to individual employees upon individual applications, is an act beyond the statutory authority of the department and therefore is invalid. Power to grant employers subminimum wage licenses must be found within the four corners of the statute. Subminimum wage licenses may be granted only to individuals. Therefore, Ind 72.14 (3), Wis. Adm. Code, and proposed rule Ind 72.14 (1) (e), Wis. Adm. Code, are invalid for the reason that they are not based on a specific or implied grant

of power by statute. See, *American Brass Co. v. State Bd. of Health,* (1944) 245 Wis. 440, 448, and the cases following. For the same reason, the employer record keeping provisions of proposed rule Ind 72.14 (3) relating to disability records, productivity records, product pricing records, and so forth, would be invalid. Ch. 104, Stats., contains no authority permitting the department to require such record keeping by the employer.

In conclusion, the department's authority under ch. 104 relates only to: (1) Establishment of a minimum hourly wage for women and minors; (2) Issuance of subminimum wage licenses to handicapped employees on an individual basis; (3) Requiring the employer to keep records of wages paid and hours worked for all women and minors; (4) Hearing complaints by individuals on a case by case basis alleging payment of less than the minimum wage as established by the department or by its license pursuant to secs. 104.05, 104.07, and 104.12, Stats. Further department authority under ch. 104, Stats., will require legislative enactment.

RWW:JPA

Milwaukee City Charter—Ordinance No. 341 Invalid— Charter ordinance No. 341 of the city of Milwaukee adopting sec. 62.13 (5)(b), Stats., providing further that the procedures, processes and trial thereunder should be conducted in the same manner as other trials provided in ch. 29 of the Milwaukee city charter is invalid.

June 30, 1969.

THE HONORABLE, THE SENATE

You have requested my opinion regarding the constitutionality of sec. 29.27 of the Milwaukee city charter, as adopted by Milwaukee charter ordinance No. 341, and the constitutionality of sec. 3 of said ordinance, which reads:

"Section 29.27. Charges may be filed against a subordinate by the chief, by a member of the board, by the board as a

body, or by an elector of the city. Such charges shall be in writing and shall be filed with the president of the board. Pending disposition of such charges, the board or chief may suspend such subordinate.

"Section 3. It is the intention of the common council that the procedures, processes, and trial under this section shall be conducted in the same manner as other trials provided in chapter 29 of the charter of the city of Milwaukee."

Sec. 1 of charter ordinance No. 341 (which was approved July 3, 1968, and published July 9, 1968) reveals that sec. 29.27 was deliberately copied from sec. 62.13 (5) (b), Stats., which is a paragraph of the general charter law applicable to cities of the second, third, and fourth classes, but not to Milwaukee. Sec. 62.03 (2) authorizes Milwaukee to "adopt by ordinance the provisions of chapter 62 of the statutes or *any section or sections* thereof, which when so adopted shall apply to such city."

Had Milwaukee attempted to adopt a single paragraph (62.13 (5) (a), Stats.) by a simple ordinance, it could not do so by authority of sec. 62.03 (2) which does not authorize adoption of less than an entire section in that manner. However, charter ordinances are adopted pursuant to sec. 66.01, and are not limited by 62.03 (2).

Had Milwaukee adopted all of 62.13 it would have included (5) (d), (e) and (f) relating to procedure, which provide:

"(d) Following the filing of charges in any case, a copy thereof shall be served upon the person charged. The board shall set date for hearing not less than 10 days nor more than 30 days following service of such charges. The hearing on the charges shall be public, and both the accused and the complainant may be represented by an attorney and may compel the attendance of witnesses by subpoenas which shall be issued by the president of the board on request and be served as are subpoenas in justice court.

"(e) If the board determines that the charges are not sustained, the accused, if he has been suspended, shall be immediately reinstated and all lost pay restored. If the board determines that the charges are sustained, the accused, by

order of the board, may be suspended or reduced in rank, or suspended and reduced in rank, or removed, as the good of the service may require.

"(f) Findings and determinations hereunder and orders of suspension, reduction, suspension and reduction, or removal, shall be in writing and, if they follow a hearing, shall be filed within 3 days thereof with the secretary of the board."

It would also have included other provisions such as that no person shall be deprived of compensation while suspended during the pendency of charges.

The question is, therefore, whether Milwaukee could properly avoid these provisions by the device of a charter ordinance. Matters relating to the control of the police department and of the police and fire commission have been held to be of *state-wide* concern. *Van Gilder v. Madison,* (1936) 222 Wis. 58, 75, 267 N.W. 25, 268 N.W. 108; *Logan v. Two Rivers,* (1936) 222 Wis. 89, 94, 267 N.W. 36. It has also been held that sec. 66.01 authorizing charter ordinances applies only to *local* affairs. *Wauwatosa v. Milwaukee,* (1954) 266 Wis. 59, 67, 62 N.W. 2d 718.

In conformity with the above cases I must conclude that the method of filing charges against a police officer and the procedure for hearing thereon are matters of state-wide concern, and ordinances relating thereto must be adopted as provided in sec. 62.03 (2), Stats.

Ordinances are presumed to be valid and constitutional, and a party attacking one must establish its invalidity beyond a reasonable doubt. *J & N Corp. v. Green Bay,* (1965) 28 Wis. 2d 583, 585, 137 N.W. 2d 434; *Milwaukee v. Hoffmann,* (1965) 29 Wis. 2d 193, 197, 138 N.W. 2d 223; *Clark Oil & Refining Corp. v. Tomah,* (1966) 30 Wis. 2d 547, 553, 141 N.W. 2d 299; *State ex rel. Baer v. Milwaukee,* (1967) 33 Wis. 2d 624, 630, 148 N.W. 2d 21; *Jelinsky v. Eggers,* (1967) 34 Wis. 2d 85, 94, 148 N.W. 2d 750.

It is my opinion that the supreme court would hold charter ordinance No. 341 invalid beyond a reasonable doubt

for the reason that it deals with a matter of state-wide concern in a manner not authorized by the legislature.

RWW:WAP

Banking—The commissioner of banking and the banking review board may not simultaneously consider a bank merger application, which would create a bankless community, and an application for a branch bank under sec. 221.04 (1) (j), Stats.

July 2, 1969.

ROGER L. HEIRONIMUS,
Commissioner of Banking

You have asked whether sec. 221.04 (1) (j), Stats., authorizes the commissioner of banking and the banking review board to simultaneously consider a bank merger under ch. 221, thereby creating a bankless community, and an application by the remaining bank to use the closed merged unit as a branch bank.

Under sec. 221.04 (1) (j), Stats., a state bank may ". . . 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 . . . ."

The general rule is that in the absence of express statutory authority a bank has no right to establish a branch bank. 10 Am. Jur. 2d, *Banks,* sec. 324. Consequently, the question whether a bank merger and branch bank application may be simultaneously considered by the commissioner of banking and banking review board depends upon the meaning of the above underscored statutory language, particularly ". . . at the time of application . . . ."

Webster's *Third New International Dictionary* defines "application" as the "act of applying" and an "appeal, request, petition." The root "apply" is defined as "to make an appeal or a request especially formally and often in writing and usually for something of benefit to oneself."

The word "application" implies the act of presentation of a form of application to the proper person. *Farely v. State,* (1960) 240 Ind. 318, 319, 163 N.E. 2d 885, 886. In that case, the court stated that the word "application" in the motor vehicle title code necessarily implies the act of presentation of the form or paper commonly called a form of application.

Clearly, then, the prerequisite of a bankless municipality ". . . at the time of application . . . ." for a branch bank means bankless at the moment the application form is submitted to the commissioner of banking. In a simultaneous merger and branch bank application, the municipality would not become bankless until after the merger is approved and the commissioner of banking has cancelled the charter of the merged bank under sec. 221.245, Stats. Under such circumstances, the consideration of the branch banking application would occur prior to the creation of the bankless community and would, therefore, be contrary to the plain language of the statute.

If the legislature had intended the bankless prerequisite to mean at the time of approval, rather than at the time of application, it could have said so. As was said in *State Bank of Drummond v. Nuesse,* (1961) 13 Wis. 2d 74, 79, 108 N.W. 2d 283, "The right to engage in banking in the state of Wisconsin is purely a matter of . . . legislative grace."

It is therefore my opinion that unless and until the legislature modifies the language of sec. 221.04 (1) (j), Stats., the commissioner of banking and the banking review board may not simultaneously consider a bank merger creating a bankless community and an application for a branch bank in the same community.

RWW:JDJ:LEN

Teachers Retirement Fund—Dividend Distribution—When a distribution of gains and savings from any surplus in the annuity reserve fund is made pursuant to sec. 42.34, Stats., in the form of a dividend to persons receiving benefits under sec. 42.49 (4), (6) (a) and (b), (6) (c) or (7), the formula portion of the annuity paid from the contingent fund should be decreased by the amount of the dividend.

July 15, 1969.

HARRY JOYCE, *Executive Secretary*
State Teachers Retirement Fund

You have requested my opinion on the following question:

"When a distribution of gains and savings from any surplus in the annuity reserve fund is made pursuant to sec. 42.34, Stats., in the form of a dividend to persons receiving benefits under sec. 42.49 (4), (6) (a) and (b), (6) (c) or (7), should the formula portion of the annuity paid from the contingent fund continue without decrease?"

My answer to this question is "no."

Sec. 42.49, Stats., provides for the payment of an annuity under subs. (4) and (7) computed as a formula benefit based on years of Wisconsin teaching experience, and, under subs. (6) as a formula benefit based on years of Wisconsin teaching service and the average annual salary received by the member for the last five years of Wisconsin teaching experience.

Under secs. 42.49 (4), 42.49 (6) (a) and (b) and 42.49 (7), the member's required deposit accumulation is applied as a money purchase annuity and is paid from the annuity reserve fund. The formula portion of the benefit is computed as the state's cost of the benefit after applying the member's state deposit accumulation and any prior service credit under sec. 42.51. The benefit available from the state deposit accumulation is paid from the annuity reserve fund and the remaining portion of the formula benefit is paid from the contingent fund.

Under sec. 42.49 (6) (c) the member's required deposit accumulation and state deposit accumulation are applied to the purchase of an annuity which is paid from the annuity reserve fund. The balance of the formula benefit computed under this subsection, including and prior service credit under sec. 42.51, is paid from the contingent fund.

Sec. 42.34, Stats., directs that "the board shall from time to time order and make such distribution of gains and savings as it deems equitable including transfers to the state accumulation fund from any surplus in the annuity reserve fund."

You have provided in your opinion request an example setting forth the manner in which an annuity granted under sec. 42.49 (6) (c), Stats., has been affected by dividends granted heretofore.

	Annuity Res. Fund		Contingent Fund		
	Member Deposits	State Deposits	Prior Service	Formula Portion	Total
Basic Annuity	87.77	80.50	5.09	20.93	194.29
1½% dividend on annuities granted prior to 7-1-56	1.32	1.20	.08	(2.60)	-
6% dividend on annuities in force 6-30-61	5.27	4.83	.30	(10.40)	-
8% dividend on annuities in force 6-30-64	7.02	6.44	.41	(7.93)	5.94
Basic Annuity and dividends	101.38	92.97	5.88	-	200.23

1½% Dividend - The dividend was applied as a reduction of the basic annuity paid as the formula portion of the annuity from the contingent fund.

6% Dividend - The dividend was treated in the same manner as in the case of the 1½% dividend.

8% Dividend - The dividend on the basic annuity provided from the member's deposit accumulation, state deposit accumulation and prior service was greater than the remaining portion of the formula annuity from the contingent fund. The excess dividend was added to the member's basic annuity and increased the monthly payment.

Due to investment experience of the fund having been more favorable than the anticipated investment experience upon which the annuities were originally calculated, surpluses have developed in the annuity investment fund. These surpluses have been distributed as dividends to annuitants from time to time as is described in the above example. However, in the case of annuitants whose total benefits included a formula portion payable from the contingent fund the dividends were added to the basic annuity payable to the member thereby reducing the state's liability for the formula portion payable to the annuitant from the contingent fund. This was done on the theory that could the initial annuity have been calculated on the basis of actual investment experience which was realized, the formula portion would have been smaller at the time the annuity was granted. The dividend is therefore merely effecting a correction in the judgment made at the time the annuity was granted as to anticipated investment income of the members and state's deposits in the annuity reserve fund.

The supreme court opinion in *Thomson v. Giessel,* (1952) 262 Wis. 51, 53 N.W. 2d 726 and prior opinions of this office (56 OAG 268) which hold that earnings on funds contributed by the employes and the state's contribution to their account in the retirement fund could not be used to reduce the financial obligation of the state to these funds are not in point. The only obligation which the state has in the contingent fund is to maintain that fund in a ratio related to the present value of the annuities payable out of such fund.

In each case the increased annuity to be paid from the contingent fund is described by the statutes as an amount

which, when added to the accumulated state and member deposits, will bring the total benefit to the individual to a given level. In the example given above which relates to sec. 42.49 (6) (c) the increase payable from the contingent fund is for the purpose of providing a minimum annuity of one-seventieth of the average annual salary of the participant multiplied by the number of years of teaching experience not to exceed 35 years. Each of the other plans under discussion here contain similar provisions with respect to benefits payable from the contingent fund; that is, that the increased annuity payable from the contingent fund is for the purpose of providing a set minimum annuity to the member, thus any payment from the contingent fund which would result in an annuity greater than the prescribed minimum annuity would be unauthorized.

RWW:DGM:MDR

Public Records — Commercial Purposes — The English common-law rule that an inspection of public records and documents could be had by a private person only where he could show a legal interest was abrogated by such statutes as 59.14 and 18.01, Stats.

July 16, 1969.

E. H. JORRIS, *State Health Officer*
Department of Health and Social Services

You have asked my formal opinion on two questions:

(1) Should anyone be permitted to examine and copy birth records for commercial purposes? For instance, insurance salesmen, credit unions' representatives, salesmen for baby foods, clothing, magazines, and such other sales promotion programs.

In your request you indicate that on November 8, 1967, you forwarded to local registers of deeds an interpretation that the words "with proper care," as used in sec. 59.14 (1),

and "subject to such orders or regulations as the custodian thereof may prescribe," as used in sec. 18.01 (2), authorize registers of deeds to require a person to show a legitimate interest in the records he desires to inspect. You have written to the registers that "To demand access, a person must be able to identify *a* specific record and provide evidence of legitimate interest. General review of all records, thumbing records, is not legitimate interest, nor is the procedure of obtaining information for commercial purposes."

The above is not an accurate statement of the law as it exists in Wisconsin. At common law it was held that every person is entitled to inspection of public records, provided he has an interest therein which is such as would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information. However, the common-law rule has been changed in most states by statutes, by the passage of laws similar to sec. 18.01 of our statutes. Kentucky is one of the few states which still follow the common-law rule, and as the Supreme Court of of Kentucky stated in *Courier-Journal & Louisville Times Co. v. Curtis,* 335 S.W. 2d 934, Cert. Denied 364 U.S. 910, since Kentucky has neither a constitutional nor a statutory provision for the public inspection of judicial records, an action for mandamus can be maintained only where the petitioner states in his pleadings the interest that he has in examining the record and this interest must be proven.

However, this is no longer the case in the majority of states, including Wisconsin. In 1887 the supreme court of this state, in *Hanson vs. Eichstaedt,* 69 Wis. 538, 35 N.W. 30, considered the statute which read almost word for word the same as sec. 59.14 (1) as it relates to examination of records in possession of registers of deeds. The court said, at page 544:

"The statute of this state declares that 'every . . . register of deeds . . . shall keep his office . . . open during the usual business hours of each day, . . . and with proper care, shall open to the examination of *any person* all books and papers required to be kept in his office, and permit *any*

person so examining to take notes and copies of such books, records, or papers, or minutes therefrom; . . ."

At page 545, the court continued:

"Under such a statute can we say that when a respectable person, in a respectful manner, applies to the register to make such examination, etc., he is to be excluded, merely because he does not belong to some class of persons unnamed and undefined in the statute; or if permission is given, is his examination, etc., to be confined to lands in which he or his clients have a present pecuniary interest?"

The court answered its own question at page 547:

"On the contrary, we must hold that our statute in question extends such right of examination, etc., to 'any person,' applying to such custodian of public records in a proper manner, subject, however, to the payment of fees when allowed, and such reasonable supervision and control by such officer as are essential to the convenient performance of his duties, and the current business of the public. It may be that some more definite regulations should be made in such matters, but that is a question for the legislature, and not for us."

In *Rock County v. Weirick,* (1910) 143 Wis. 500, 128 N.W. 94, the court followed the *Eichstaedt* case and held that where the county compiled abstract books as a part of the public records of the register of deeds office, any person had a right to copy under the reasonable supervision of the registrar even for the purpose of making a rival set of abstract books.

Finally, in *International Union v. Gooding,* (1947) 251 Wis. 362, 373, 29 N.W. 2d 730, the court pointed out that there was some question whether the common-law rule that a member of the public is required to have some interest other than curiosity in order to investigate public records ever was established in this state and concludes that if it was, statutes such as sec. 18.01 (2) supplanted the common-law rule, citing the *Eichstaedt* case.

Our supreme court in *State ex rel. Youmans v. Owens*, (1965) 28 Wis. 2d 672, 137 N.W. 2d 470, considered many of the questions involved in the common-law right of the public to examine records and papers in the hands of an officer of the government. In determining that the publisher of the *Waukesha Freeman* newspaper was a real party in interest who could sue the mayor of the city of Waukesha to permit the examination of certain papers in the custody of the mayor, the court pointed out:

"That his motivation in seeking inspection is to benefit his newspaper and permit it to publish the material gained therefrom is immaterial. The fact that he as a citizen deems it essential that the material contained in the report be made available to the public is sufficient to qualify him as the real party in interest."

The court pointed out, however, that as at common law the right to inspect public records is not absolute, and there are situations where the public interest may outweigh the right of a member of the public to have access to public records. The test, as adopted by the court in the *Youmans* case, is that the custodian of the records must determine whether inspection would result in harm to the public interest which outweighs any benefit which would result from granting inspection. If the custodian concludes that inspection would be detrimental to the public interest, it is incumbent upon him to refuse the demand for inspection and state specifically the reasons for the refusal. If the person seeking inspection thereafter institutes court action to compel inspection, the supreme court indicated that the trial judge should examine in camera the record or document sought to be inspected and then make his determination on whether or not the harm likely to result to the public interest by permitting the inspection outweighs the benefit to be gained by granting inspection. Trial judges were warned that public policy favors the right of inspection and that only in exceptional cases should that right be denied.

Within less than two years the supreme court was again called upon to discuss the subject of the inspection of public

records in the case of *Beckon v. Emery,* (1967) 36 Wis. 2d 510, 153 N.W. 2d 501. At page 518, the court said.

"We pointed out in *Youmans* that public policy favors the production of official documents, and their nonproduction is justified only if the reasons stated show that this policy favoring the 'right to know' should be subordinate to other public interest. In short, there is an absolute right to inspect a public document in the absence of specifically stated sufficient reasons to the contrary. Mandamus is the proper remedy to test the reasons for withholding documents or records from inspection. In Wisconsin we have traditionally tested the right to inspection by the use of mandamus, *e.g., Youmans, supra,* and *International Union v. Gooding* (1947), 251 Wis. 362, 29 N.W. 2d 730."

It is obvious that our supreme court considers "the right to know" as a paramount factor in determining whether public documents and records should be open for inspection.

The right to inspect and copy public records is in general extended to those who are engaged in the business of searching public records and furnishing to customers the information which is to be gained therefrom. 45 Am. Jur., Records and Recording Laws, §19. However, the custodian may enforce such reasonable supervision and control of the records and those examining them as is necessary to the carrying out of the duties of his office and allowing other members of the public access to such records. See *Eichstaedt* case, supra.

Accordingly, in answer to your first question I must conclude that subject to specific statutory restrictions to the contrary, specifically stated sufficient reasons of denial by the custodian, and subject to the reasonable rules and regulations of the custodian, any person may examine and copy birth records, and his reasons for doing so are immaterial.

Your second question is as follows:

(2) If a person presents a list of names with year of birth and is willing to pay the prescribed fee for a short

form certificate, is the custodian obligated to provide such certificate for such purely commercial purposes?

As our discussion in the answer to Question (1) indicates, a custodian of public records in this state cannot be concerned with the purposes behind a person's request to view records and obviously the purposes for which certified copies are requested is also immaterial. Sec. 889.18 (3), relating to copies of records, provides:

"(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 therefor."

RWW:LLD

Law Enforcement—Contract for Police Services—There is some latitude under sec. 66.30, Stats., for counties to contract with municipalities within the county to furnish or supplement certain law enforcement services in the municipality.

July 17, 1969.

WILLIS J. ZICK
Corporation Counsel, Waukesha County

You have requested my opinion as to the legality of a county entering into a contract with individual townships and villages within the county for the purpose of having the sheriff's department furnish such municipalities with law enforcement or police services on a contractual basis.

You state that several townships and villages within Waukesha County have requested the sheriff's department to furnish such services on a contractual basis and the sheriff believes that such an arrangement would solve many

of the problems which exist with regard to small, inexperienced police agencies.

Your question is of such a general nature that no specific answer as to specific services to be covered can be given. The words "law enforcement" and "police services" are capable of extensive and irrelevant interpretations.

We are concerned with different units of government, having certain similar and certain dissimilar powers. Counties and towns have only such powers as are expressly granted by statute or which are necessarily implied. *Maier v. Racine County,* (1957) 1 Wis. 2d 384, 84 N.W. 2d 76; *Pugnier v. Ramharter,* (1957) 275 Wis. 70, 81 N.W. 2d 38. They have no home-rule amendment powers over matters of local concern as villages do. Sec. 3, art. XI, Wis. Const.; sec. 66.01, Stats. In addition, town powers may vary. A town meeting may authorize its town board to exercise all the powers relating to village boards conferred by ch. 61, Stats. Sec. 60.18 (12).

We are also concerned with geographical location and jurisdictional areas of the local governmental units involved. Towns and villages are within the corporate limits of a county. However, certain county ordinances may be applicable to all land within the county, whereas others may apply only outside the corporate limits of cities and villages or even towns which have not consented, i.e. county zoning ordinances, sec. 59.97 (5) (c), Stats. In addition, certain village ordinances may have extraterritorial effect and extend within the geographical limits of a town. Sec. 66.32, Stats.

There are areas, then, where there is overlapping jurisdiction.

At the present time a sheriff and his deputies have very broad overall power with respect to law enforcement involving state statutes, county ordinances and keeping of the peace in the entire county, regardless of municipal boundary lines. The effectiveness of the department has been limited only by budgetary and manpower limitations and gentlemen's agreements to allow municipal police to have primary concern of the matters within the boundaries

of a city or village. Cooperation, however, does not displace duties imposed by statute.

Sec. 66.30 (2), Stats., which applies to counties, cities, villages and towns, provides:

"(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."

If such section is applicable, the sheriff could not contract directly with any municipality. The power to contract would rest in the county board. Secs. 59.02, 59.07. In the case of a village, power would lie in the village board under sec. 61.34. A town board of a town exercising village powers could contract, but there is a question as to whether cooperation contracts in other towns would have to have approval of the town meeting. See secs. 60.18 (3) and 60.29.

With respect to law enforcement, each municipality or subdivision of government is primarily concerned with state laws, statutory and administrative, and their local ordinances.

In order for municipalities to cooperate by contract under sec. 66.30, Stats., it is necessary that each municipality have separate statutory authority to perform the particular act. As stated in 47 OAG 278, 279:

"The use of the terms 'joint' and 'cooperative' imply that each municipality, and not only one, has an interest in the power or duty to be exercised under the agreement."

Without necessity of listing all statutes which may be applicable it must be conceded that the county has an interest and duty to provide law enforcement in all of the villages and towns, and that the sheriff and his deputies can enforce village or town ordinances if necessary to maintain peace and order. Sec. 59.24, Stats.

Towns are required to maintain peace and order within the town by constables or police. Secs. 60.19 (1) (a), 60.18 (3), 60.29 (7) - (9), 60.54. A constable has general law

enforcement duties, including that provided by sec. 60.54 (6), which provides:

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

Secs. 288.11 and 288.12 impose on the town chairman a duty to cause to commence actions for all forfeitures which he shall know or have reason to believe have been incurred in his town. This would include county and state forfeiture actions. Also see sec. 288.10. Town officials, therefore, have a duty to enforce county ordinances which are effective in the town.

Villages of over 5,000 must have a police department. See sec. 61.65, Stats.

Villages are required to elect a constable under sec. 61.19 and may have a village marshal. See secs. 61.28, 61.29 for powers. Each has the power of a constable and the duty to enforce all laws within his village. This would include county ordinances which are effective in the village. A village may be reason of sec. 61.195 proceed pursuant to sec. 66.01 to discontinue the office of marshal or constable. However, the president and each trustee are also officers of the peace, and cannot escape their duties to enforce the peace by doing away with regular police officers.

Enforcement of village ordinances and state laws usually suffers where a village abrogates its duty and attempts to have the sheriff's department and/or county traffic officers fill the needs for police protection. The authority of county traffic officers who are not also deputy sheriffs is extremely limited. Sec. 83.016, Stats. The duty of the sheriff and his deputies extends within the borders of a village, especially where state statutes are concerned. Such officers usually prefer to act within a village only in cooperation with local police in most matters. At 46 OAG 283 it is stated:

"As a general proposition a law enforcement officer is clothed with the powers and correlative responsibilities of his office anywhere within the territorial limits of the governing body for which he acts. Thus, the sheriff, town

constable, village marshal, and city police officer, have the duty and responsibility to maintain law and order throughout the county, town, village, and city respectively, regardless of who owns the land or buildings therein. * * *"

Sec. 61.24, Stats., provides in part:

"President. The president * * * shall maintain peace and good order, see that the ordinances are faithfully obeyed, and in case of disturbance, riot or other apparent necessity appoint as many special marshals as he shall deem necessary, who for the time being shall possess all the powers and rights of constables. He shall have charge of the village jail, which he shall conduct in the manner provided in s. 62.09 (13) (c); but he may delegate this duty to the constable or any police officer of the village."

Sec. 61.31, Stats., provides:

"(1) The president and each trustee shall be officers of the peace, and may suppress in a summary manner any riotous or disorderly conduct in the streets or public places of the village, and may command assistance of all persons under the same penalty for disobedience provided in section 61.28.

"(2) Every village police officer shall possess the powers, enjoy the privileges, and be subject to the liabilities conferred and imposed by law upon village marshals."

It can be said, therefore, in general, that a village cannot drop "police protection." If a village president and board choose not to have a police department, or a marshal or constable, they increase their personal responsibility to keep the peace. They can call upon the sheriff in matters of keeping general order and enforcement of state laws. However, they cannot force the county to provide the same type or degree of "police protection" which the inhabitants or frequenters of a village are entitled to.

Having concluded that the county and town have separate statutory power to enforce state law, county ordinances and town ordinances within a town, I am of the opinion that sec. 66.30, Stats., permits some latitude for counties to con-

tract with towns to furnish or supplement certain law enforcement services in the town. The same can be said as between a county and village.

It can be argued that since the county already has law enforcement duties with respect to the maintenance of law and order in the town (or village), that it would be against public policy for the town (or village) to have to pay for the protection it is already entitled to.

The answer to this argument is that in our complex system of law enforcement there are areas of special local concern and emphasis. The legislature has provided for concurrent duties in certain areas of law enforcement and that the effectiveness of law enforcement be enhanced by supplement. While there are benefits from such supplementary arrangement, including checks, areas of primary responsibility and direct local control, equal benefits might well accrue through cooperative arrangements. By enactment of sec. 66.30, Stats., the legislature has left the policy determination as to whether there should be a cooperative arrangement, by contract, to the local legislative bodies concerned. The local units of government cannot, however, avoid their ultimate responsibilities of maintaining peace and order in their respective units by means of cooperative arrangements. Some of the duties and services may be shifted to the other unit of government, but the basic responsibility involved cannot.

Before considering any cooperative arrangement, consideration should be given to the provisions which are available for mutual assistance between law enforcement agencies by reason of secs. 66.305, 66.315, Stats.

RWW:RJV

Chiropractor's Excuse—Schools—Although school authorities in Wisconsin are not required by law to accept an excuse from a licensed chiropractor as sufficient proof of a child's inability to attend classes regularly, sec. 118.15, Stats., requires that school authorities may not refuse to

consider any reasonable evidence, properly submitted, which tends to prove that a child is not in proper physical or mental condition to attend school.

July 25, 1969.

D. N. LAMOUREUX, D.C., *Secretary*
Chiropractice Examining Board

You have requested my opinion on the following questions:

"1. Can an excuse from a licensed chiropractor given after examination of the student by him, and on the basis of such examination, be lawfully refused by public school authorities in Wisconsin?

"2. Can public school authorities lawfully adopt a rule requiring that, in order for a pupil to be excused from physical education classes, or any other classes requiring physical stress and strain in the school, he must present an excuse signed by a physician?"

Unless lawfully exempted, children are required to attend the appropriate public or private school during the full period and hours that the school is in session. Physical education classes are part of the standard curriculum requirement for every pupil. Sec. 118.01 (3), Stats. School authorities may cause an action to be brought, under sec. 118.15, Stats., based on a child's unlawful absence from school. Sec. 118.15 (1), Stats., entitled "Compulsory School Attendance," provides in relevant part:

"(1) Unless the child has a legal excuse, any person having under his control a child between the ages of 7 and 16 years shall cause such child to attend school regularly, during the full period and hours, religious holidays excepted, that the public or private school in which such child should be enrolled is in session, to the end of the school term, quarter or semester of the school year in which he becomes 16 years of age.

"* * *

"(2m) A school board may permit a pupil who is in good standing academically to attend school part-time during his last school term preceding graduation from high school.

"(3) This section does not apply to any child who is not in proper physical or mental condition to attend school, to any child exempted for good cause by the school board of the district in which the child resides or to any child who has completed the full 4-year high school course. The certificate of a reputable physician in general practice shall be sufficient proof that a child is unable to attend school.

"* * *"

It is clear from the language of the statute that school authorities have reasonable discretion in determining whether a child should be attending school regularly and in exempting a child from the compulsory school attendance requirement. School authorities are charged with the responsibility of causing an action to be brought under sec. 118.15 (5), Stats., when any child is "unlawfully and habitually absent from school." Secs. 118.16 (4), (5), Stats. Such responsibility necessarily implies the power to determine whether an absence is lawful or unlawful. Therefore, school authorities have the power to determine the adequacy of a health disability excuse for the limited purpose of deciding whether an action under sec. 118.15 (5) should be commenced.

The compulsory school attendance section "does not apply to any child who is not in proper physical or mental condition to attend school." Sec. 118.15 (3), Stats. It would be a defense to prosecution that a child is not in proper physical or mental condition to attend school, irrespective of any contrary ruling by school authorities. The controlling fact is the *physical or mental disability itself*, not the school authorities' permission to be absent.

The "certificate of a reputable physician in general practice" is the only evidence which *must* by statute be accepted by school authorities as "sufficient proof" that a pupil is physically or mentally disabled and cannot attend school. Sec. 118.15 (3), Stats. The term "physician," as used in this

section, does not include a licensed chiropractor. See sec. 990.01 (28), Stats.; *Corsten v. Industrial Comm. of Wis.*, (1932) 207 Wis. 147, 240 N.W. 834; *Isaacson v. Wisconsin Casualty Assoc.*, (1925) 187 Wis. 25, 203 N.W. 919. Therefore, neither a court nor school authorities under the present statute would be required to accept an excuse from a licensed chiropractor, in and of itself, as sufficient proof that a child is unable to attend school.

However, it is my opinion that sec. 118.15, Stats., requires that school authorities consider any reasonable evidence, properly submitted, which tends to prove that a child is not in proper physical or mental condition to attend school regularly. School authorities must decide whether such evidence establishes that the child should be exempted from attendance as provided under sec. 118.15, Stats. If they are not satisfied that the evidence warrants exemption they may ask for additional information, commence an investigation or proceed to cause a prosecution. But should a prosecution be commenced, whether the child was in proper physical or mental condition to attend school would be a matter of fact to be determined by the court.

With regard to your second question, a school board may make rules for the "organization, graduation and government of the schools of the school district ***" sec. 120.13, Stats. See also, sec. 120.49, Stats. The power thus granted is sufficiently broad to allow the board to adopt reasonable rules and regulations dealing with government of the school and discipline of the pupils. 27 OAG 447; *State ex rel. Dresser District Board,* (1908) 135 Wis. 619, 116 N.W. 232. However, the rule or regulation cannot be arbitrary or unreasonable and must have some reasonable relation to the problem sought to be remedied. *Morrow v. Wood,* (1874) 35 Wis. 59; *State ex rel. Beattie v. Board of Educ.*, (1919) 169 Wis. 231, 172 N.W. 153. And the board has no power to promulgate a rule which is inconsistent, or in conflict, with a statute. *State ex rel. Wasilewski v. Board of School Directors,* (1961) 14 Wis. 2d 243, 111 N.W. 2d 198, cert. den., appeal dismissed, 370 U.S. 720, 82 S.Ct. 1574, 8 L.Ed. 2d 802.

As set forth above, sec. 118.15 (3), Stats., requires the school board to accept as "sufficient proof" of physical or mental disability, the "certificate of a reputable physician in general practice." However, a school board rule providing that such a certificate is the only valid proof acceptable would appear to be arbitrary and unreasonable. It would in effect avoid the responsibility of school authorities to determine, in an individual case, whether the physical or mental disability is of such a nature as to justify non-attendance. In addition, sec. 118.16 (1), Stats., provides that "*** Upon request of the truant officer, a statement from the local health officer or nurse or attending physician shall be submitted explaining the cause of the pupil's absence." Safeguards for the veracity of that statement are provided. See sec. 118.15 (5), Stats. A nurse is certainly not a physician; nor is there any requirement that a local health officer be a physician. See 57 OAG 245.

Sec. 118.15 and 118.16 make it abundantly clear that evidence from sources other than physicians may be sufficient proof of physical or mental inability to attend school. Any rule promulgated by school authorities limiting such evidence solely to excuses submitted by physicians would be in conflict with the clear intent of secs. 118.16 (1) and 118.15 (3), Stats.

RWW:JBB:AAS

Federal Aid—Students—When an institution of higher education has a reasonable belief or actual knowledge that a student-applicant for federal assistance may not be eligible for federal aid by reason of a criminal conviction or the institution's sanction either of which arose out of a campus disturbance, the institution must provide a hearing pursuant to sec. 504, P.L. 90-575, Oct. 1968, to determine the student's eligibility for federal benefits.

School sanction or criminal conviction based on activity involving a campus disturbance does not, as a matter of law, foreclose a student from state programs.

August 14, 1969.

EUGENE R. MCPHEE, *Director*
Wisconsin State Universities

You have requested my opinion regarding the eligibility of approximately twenty-five students for federal student assistance.

The twenty-five students had been suspended from the State University-Oshkosh last December for engaging in rioting on the campus. Subsequent to their suspension they had, it is my understanding, been convicted of a criminal charge arising out of the campus disturbance. It is my further understanding that the period of their suspension has expired and that they are now seeking readmission at Oshkosh and federal assistance.

You are primarily concerned with the question of whether the university has discretion in the matter of granting federal assistance or whether the granting of such aid has been prohibited by act of congress.

The applicable federal law reads in part:

"Eligibility for student assistance—Conviction of crimes involving force, disruption, or seizure of property of the educational institution.

"(a) If an institution of higher education determines, after affording notice and opportunity for hearing to an individual attending, or employed by, such institution, that such individual has been convicted by any court of record of any crime which was committed after October 16, 1968, and which involved the use of (or assistance to others in the use of) force, disruption, or the seizure of property under control of any institution of higher education to prevent officials or students in such institution from engaging in their duties or pursuing their studies, and that such crime was of a serious nature and contributed to a substantial disruption of the administration of the institution with respect to which such crime was committed, then the institution which such individual attends, or is employed by, shall

deny for a period of two years any further payment to, or for the direct benefit of, such individual under any of the programs specified in subsection (c) of this section. If an institution denies an individual assistance under the authority of the preceding sentence of this subsection, then any institution which such individual subsequently attends shall deny for the remainder of the two-year period any further payment to, or for the direct benefit of, such individual under any of the programs specified in subsection (c) of this section.

"Refusal to obey regulations or orders; disruption of administration of institution

"(b) If an institution of higher education determines, after affording notice and opportunity for hearing to an individual attending, or employed by, such institution, that such individual has willfully refused to obey a lawful regulation or order of such institution after October 16, 1968, and that such refusal was of a serious nature and contributed to a substantial disruption of the administration of such institution, then such institution shall deny, for a period of two years, any further payment to, or for the direct benefit of, such individual under any of the programs specified in subsection (c) of this section.

"Covered programs

"(c) The programs referred to in subsections (a) and (b) of this section are as follows:

"(1) The student loan program under title II of the National Defense Education Act of 1958.

"(2) The educational opportunity grant program under part A of title IV of the Higher Education Act of 1965.

"(3) The student loan insurance program under part B of title IV of the Higher Education Act of 1965.

"(4) The college work-study program under part C of title IV of the Higher Education Act of 1965.

"(5) Any fellowship program carried on under title II, III, or V of the Higher Education Act of 1965 or title IV or

VI of the National Defense Education Act of 1958." (Tit. 20 U.S.C.A. Sec. 1060) P.L. 90-575, title V, s. 504, Oct. 16, 1968).

As can be seen from the above quoted act, eligibility for federal asistance depends on the results of a hearing held for that express purpose. The obvious question is whether the university is obligated to hold such a hearing. In this respect the act is ambiguous and resort may be had to rules of statutory construction.[1]

I have recently been advised that the office of education has not adopted any regulation designed to force compliance upon educational institutions.[2] Notwithstanding, the office of education has issued the statement that "* * * an institution may arbitrarily decide not to activate the statutory machinery. Such an interpretation of Sec. 504 (a) and (b) is not correct."[3]

It is a common rule of statutory construction that the interpretation of a statute by the agency having the responsibility of its enforcement is entitled to great weight.[4] Further, to say that the provisions of sec. 504 are not mandatory could vitiate the purposes of the statute and would violate the rule of construction that statutes are to be interpreted so as to give them force and effect.[5]

In the light of these rules of statutory construction, I can only conclude that sec. 504 places a duty upon educational institutions to initiate a hearing whenever it has a reasonable belief that a student-applicant would fall within the prohibition of the statute.[6]

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[1]50 Am. Jur. s. 225, Statutes.

[2]The office of education does, however, require each institution to report the number of students whose federal assistance was terminated under the act.

[3]No. 8, May 27, 1969, *Keeping You Posted* by office of education.

[4]2 Am. Jur. 2d 241, Admin. Law.

[5]50 Am. Jur. s. 357, Statutes.

[6]"As with any provision of law, Section 504 demands compliance in good faith by those to whom it applies. So we expect that colleges and universities will strive in good faith to implement its provisions for aid termination where the facts disclose the 'abuse'

(Continued on bottom of Page 85)

As to the twenty-five or so students—applicants at State University-Oshkosh—I am of the opinion that federal assistance cannot be either granted or denied without a hearing; that eligibility for federal assistance must depend on the results of the hearing.

As further indicia of legislative intent P.L. 90-557 s. 411, October 11, 1968, reads:

"Sec. 411. No part of the funds appropriated under Act shall be used to provide a loan, guarantee of a loan or a grant to any applicant who has been convicted by any court of general jurisdiction of any crime which involves the use of or the assistance to others in the use of force, trespass or the seizure of property under control of an institution of higher education to prevent officials or students at such an institution from engaging in their duties or pursuing their studies."

The appropriation that sec. 411 refers to apparently includes for the current year the national defense student loan program, federally insured student loans, state guarantee loans and private nonprofit loans.

Currently pending in congress is sec. 407 of the 1969 HEW Appropriation Act which reads in part:

"None of the funds appropriated by this Act shall be used to formulate or carry out any grant to any institution of higher education that is not in full compliance with Section 504 of the Higher Education Amendments of 1968 (Public Law 90-575)."

In regard to the hearings, ineligibility for benefits is mandatory upon a showing at the hearing that the applicant was either convicted of a criminal offense or found guilty in a school disciplinary hearing which conviction or school proceeding involved misconduct engaged in after October 16, 1968, that seriously and substantially contribut-

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has taken place. Compliance in this sense is mandatory and, as I have already indicated, we have every good reason to believe educational institutions genuinely intend to comply." Secretary of Health, Education, and Welfare, Robert H. Finch, before the House Special Subcommittee on Education, April 18, 1969.

ed to the disruption of the administration of the institution or use of the facilities by those entitled to their use which involved the use of or assistance to others in the use of force, disruption or seizure. The issues presented in the hearing are the identity of the student and whether the conviction or school sanction involved conduct as described in the statute.

In this same regard it would not be proper, in my further opinion, to consider any issue other than those above discussed. For example, it would not be proper in the case of either the criminal conviction or the student disciplinary sanction to in effect review those prior determinations by allowing the student to raise the issue that he really wasn't guilty for he had been forced or coerced in participating in the disruption.

The school has no authority to review the prior decisions which are presumed under the law to be valid.

Any suspension under the statute commences on the date of the determination of ineligibility and runs for a period of two years from that date.

Additionally, you have requested my opinion as to whether these same students are barred by law from participating in the many state student programs.

At the present time there is no specific state statute comparable to the federal act just discussed.[7] Consequently, it is necessary to review the specific standards upon which the benefits are granted to determine whether the students are necessarily barred from participating. In this regard, you have specifically referred to those programs authorized by secs. 37.11 (12), 37.11 (15), 37.11 (17), 39.31 and 39.32, Stats.

Sec. 37.11 (12), Stats., creates a scholarship dependent upon bona fide residency, being a good student (scholastic), financial need and qualification of leadership.

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[7]Such legislation is, however, pending; see Bills 53S, 442S and 260A.

Sec. 37.11 (15), Stats., establishes a scholarship having comparable criteria in the preceding section excepting residency.

Sec. 37.11 (17), Stats., creates a scholastic grant to needy and worthy nonresidents who are deserving of relief because of extraordinary circumstances.

The conduct of the students in question, which gave rise to the school sanctions and criminal convictions, does not, in my opinion, as a matter of law, conflict with the prescribed standards nor necessarily bar the students from consideration under these three programs.

The honor scholarship created by sec. 39.31, Stats., is only available to "first-time, full-time freshman" and, therefore, not relevant to the students in question.

Sec. 39.32, Stats., creates a student loan fund. This state program is in conjunction with the federal program created by P.L. 89-329 and 89-287.

P.L. 89-329 relates in part to federal, state and private programs of low-interest insured loans to students in institutions of higher education. Specific reference is made to this program in Tit. 20, U.S.C.A. s. 1060 (c) (3), as a covered program. Consequently, it is my opinion that eligibility of the students in question for an insured loan under this state program is dependent upon a hearing as provided in tit. 20 U.S.C.A. s. 1060.[8]

Sec. 39.35, Stats., creates a teacher scholarship program. The standards for eligibility are set forth in the statute and do not foreclose the students in question from participation in this program. However, any suspended student who has been under this program when suspended would not appear to be eligible in view of the provisions of subs. (d) which requires the maintenance of a certain scholastic standing.

In conclusion it may be stated as a general proposition, the twenty-five students in question are not barred from

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[8]This is true regardless of whether the loan is made by a private corporation under sec. 39.33, Stats., guaranteed student loan program; also see Note 7.

the state programs by reason of their having engaged in disruptive activity on the Oshkosh campus last fall.

RWW:CAB

Apportionment—County Lines—Recent U.S. Supreme Court decisions requiring almost absolute equality of population among electoral districts render nugatory the state court's construction of art. IV, sec. 4, Wis. Const., as prohibiting assembly districts from dividing counties except where a county is entitled to more than one assemblyman.

August 15, 1969.

THE HONORABLE, THE ASSEMBLY

By 1969 A. Res. 34 you have requested my opinion as to whether art. IV, sec. 4, Wis. Const., prohibits establishing assembly districts which cross county lines. That section provides that assembly districts "be bounded by county, precinct, town, or ward lines * * *." You point out that prior to 1892 some such districts did cross county lines and that this was held unconstitutional in *State ex rel. Atty. Gen. v. Cunningham,* (1892) 81 Wis. 440, 51 N.W. 724. Also, you state that the populations of the present assembly districts vary from 32.5% above the average to 43.7% below the average.

Art. IV, sec. 4, Wis. Const., was discussed at length in the *Cunningham* case and was held to require that each assembly district be bounded by county lines only except that when a county is entitled to more than one assemblyman, the county may be divided into two or more assembly districts, using town and ward lines. ["Precinct," which also appears in art. IV, sec. 4, had ceased to have any significance as there used, by the time of the *Cunningham* case, as the opinion noted at page 520.] Since that decision and within the past decade, several decisions by the United States Supreme Court have altered materially the earlier concepts of the meaning of the equal protection clause of the

Fourteenth Amendment to the Federal Constitution, as applied to laws apportioning legislative districts.

In *Reynolds v. Sims,* (1964) 377 U. S. 533, 84 S.Ct. 1362, 12 L.ed. 2d 506, the court held invalid an Alabama legislative apportionment on the grounds that it was not based on population. The opinion stated, 377 U.S. at 566-567:

"* * * we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment * * *."

The opinion also held, at page 584:

"* * * With respect to the operation of the Equal Protection Clause, it makes no difference whether a State's apportionment scheme is embodied in its constitution or in statutory provisions. * * *"

The majority opinion in *Kirkpatrick v. Preisler,* (1969) 394 U.S. 526, 89 S.Ct. 1225, at 1230, 22 L.ed. 2d 519, quoted with approval the following language from the *Reynolds* case:

"* * * '[N]either history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes.' * * *"

On the same page the *Kirkpatrick* opinion rejected the contention that population variances among districts are justifiable if they are a necesary result of adherence to county boundaries. The opinion put it thusly:

"Similarly, we do not find legally acceptable the argument that variances are justified if they necessarily result from a State's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries. * * *"

I do not consider it a sufficient distinction that your problem concerns state legislative districts whereas *Kirkpatrick* was concerned with congressional districts. The principles are the same in each case, and the *Reynolds* case in 1964 had made it clear that the equal protection requirements applied to the apportionment of districts of state legislatures.

Despite some of the sweeping language used in the *Kirkpatrick* opinion, the majority expressly stated that the test to be applied is whether the apportionment is as nearly as practicable such that one man's vote is worth as much as another's, recognizing that mathematical precision may be impossible. In *Kirkpatrick* the variances ranged from 3.13% above, to 2.83% below, average. However, the lower court found that the Missouri legislature had relied on census figures less accurate than the federal census; that simple switching of whole counties would reduce markedly the variances from average; and that the legislature had rejected a plan with smaller variations than those of the plan adopted. Thus the United States Supreme Court concluded that Missouri had not limited the population variances to those "which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." 89 S.Ct. at 1229.

Kirkpatrick and *Wells v. Rockefeller*, (1969) 394 U.S. ——, 89 S.Ct. 1234, 22 L.ed. 2d 535, decided on the same day, adhere to the position that the burden is upon the proponent of a districting plan to justify deviations from equality in the populations of the various districts. Unhappily, neither opinion sets forth any standards as to what constitutes justification, other than a good-faith effort to achieve absolute equality as nearly as practicable, yet "justification" is stated in the last above quotation as an alternative to the good-faith effort.

One can only surmise how the court would rule in the case of an apportionment plan based upon county lines, except for counties entitled to more than one assemblyman apiece, and keeping population variances between districts to a spread of, say, plus or minus 1% from average. Such

a plan might be upheld if it were the product of a good-faith effort to achieve equality, if some compelling reasons for adherence to county lines could be shown, and if no alternative plan more nearly achieving equality were readily available. In my opinion the Wisconsin Constitution no longer may be considered as prohibiting assembly districts from crossing county lines, in view of the emphasis the United States Supreme Court has placed upon population equality among electoral districts. Nevertheless, apportionment of assembly seats should be done in accordance with both federal and Wisconsin constitutions, if possible. In other words, the county line requirement of *Cunningham* should be followed insofar as it does not compel disregard for the requirements of the federal equal protection clause.

RWW:EWW

Indian Lands—Zoning Restrictions—Under the grant of civil and criminal jurisdiction contained in 18 U.S.C. §1162 and 28 U.S.C. §1160, restrictions on land use through duly enacted zoning ordinances may be applied to lands held by the United States in trust for the Winnebago Indian Tribe so long as they do not conflict with federal treaty, agreement or statute, and so long as any land use sought to be proscribed is not a federal governmental function.

August 25, 1969.

RAY C. FELDMAN, JR.
District Attorney Juneau County

You have requested my opinion on whether the Juneau County zoning ordinance (as adopted by one of the towns within the county) may be applied to certain lands within the town which are held in trust by the federal government for the benefit of the Wisconsin Winnebago Indian Tribe.

It appears that certain lands in the town of Lyndon were deeded to "The United States of America in trust for the Wisconsin Winnebago Tribe" on April 22, 1966. The deed

recites that title to the land was "taken pursuant to the Act of June 18, 1934 (48 Stat. 985) . . . ." That Act (25 U.S.C. 465) authorizes the secretary of the interior to acquire "any interest in lands . . . or surface rights to lands . . . for the purpose of providing land for Indians." The act further provides that title to any such lands "shall be taken in the name of the United States in trust for the Indian tribe . . . for which the land is acquired." Such trust lands are declared to be exempt from state or local taxation.

Members of the Winnebago Tribe who live on this land operate a stand during the summer months for the purpose of selling baskets, Indian crafts and other souvenirs to tourists. Prior to the time such activity was begun, the town had duly adopted the county zoning ordinance and the area in question was zoned residential, excluding any commercial use.

The Indians contend that the zoning laws and ordinances are inapplicable to these trust lands. They base their contention on: (1) a 1942 opinion of the acting solicitor for the U. S. Department of the Interior (58 I.D. 52 (1942) which concludes that a state may not interfere with such trust lands through application of zoning laws; (2) a recent Washington state case (*Snohomish County v. Seattle Disposal Co.*, (1967) 70 Wash. 2d 668, 425 P. 2d 22; cert. den. 389 U.S. 1016; reh. den. 390 U.S. 930) which held that a use permit requirement imposed by local zoning ordinances constituted a "burden" or "encumbrance" on the land and could not be imposed against the tribe; and (3) the exemption from Wisconsin zoning laws of certain land uses belonging to or inherent in the federal government.

Because the situation you describe does not involve tribal treaty rights, we need not be concerned with the problems discussed in 53 OAG 222 and 56 OAG 11, dealing with the applicability of state fish and game laws to certain Indian lands. Moreover, the above-mentioned 1942 solicitor's opinion is inapplicable here. More than ten years after that opinion was issued, Congress enacted 28 U.S.C. §1360, which provides in part as follows:

"(a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

"State or Territory of	Indian country affected
* * *	
"Wisconsin	All Indian country within the state.

"(b) Nothing in this section shall authorize the alienation, encumberance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; * * *."

For the companion statute dealing with criminal jurisdiction, see 18 U.S.C. §1162.

Congress has, of course, plenary power to deal with Indians, and the extent to which tribal Indians should be emancipated from their status as wards of the federal government is a matter which rests entirely within the discretion of Congress. *Super, et al, v. Work,* (D. C. Circ., 1925) 3 Fed. 2d 90, affirmed per curiam 271 U.S. 643; *Lone Wolf v. Hitchcock,* (1903) 187 U.S. 53; *United States v. Waller,* (1917) 243 U.S. 452. In pasing 28 U.S.C. §1360 and 18 U.S.C. §1162, Congress determined that, with certain limited exceptions, the civil and criminal laws of the state shall apply to Wisconsin Indians.

The exception that concerns us here is the statement in 28 U.S.C. §1360 (b) that nothing in that section "shall authorize the . . . encumbrance" of any Indian trust lands. *Snohomish County vs. Seattle Disposal Co., supra,* held that a county zoning ordinance constituted an "encumbrance" within the meaning of 28 U.S.C. §1360 (b) and could not be applied to trust lands. 425 P. 2d at p. 26. In so holding, the court cited several Washington cases stating that any burden on land—including zoning restrictions—is an "encumbrance." Wisconsin, however, takes a contrary view. *Miller v. Milwaukee Odd Fellows Temple,* (1932) 206 Wis. 547, 240 N.W. 193, was an action for declaratory judgment on the marketability of title to certain property. The argument was raised that certain restrictions on the use of the property imposed by a zoning ordinance were encumbrances which entitled the purchaser to declare the contract at an end. In rejecting this contention the court held (206 Wis. at p. 559):

"This matter was given very careful consideration by the trial court and it is considered that it correctly held that the restrictions imposed by the zoning ordinance or the laws of the state are not incumbrances within the meaning of that term as used in a contract to convey real estate.

* * *"

This holding has been reaffirmed in several later cases. See *Kend v. Herbert Finance Co.,* (1933) 210 Wis. 239, 246 N.W. 311; *Lasker v. Patrovsky,* (1953) 264 Wis. 589, 60 N.W. 2d 336; *George v. Oswald,* (1956) 273 Wis. 380, 78 N.W. 2d 763; *Brunke v. Pharo,* (1958) 3 Wis. 2d 628, 89 N.W. 2d 221; *Venisek v. Draski,* (1967) 35 Wis. 2d 38, 150 N.W. 2d 347. See also Kucirek & Beuscher, "Wisconsin's Official Map Law." 1957 Wis. L. Rev., 176, 201 *et seq.*

The word "encumbrance" in 28 U.S.C. §1160 (b), given its commonly accepted meaning and taken in context with the accompanying language ("alienation . . . or taxation"), cannot be said to prohibit any and all state restrictions on the use to which the land may be put. Succeeding (and separate) portions of the sections apply specifically to land use regulation and prohibit such regulation "in a manner

inconsistent with any Federal treaty, agreement . . . statute . . . or . . . regulation." I am unaware of any such conflict, and this opinion assumes that none exists.

What Congress intended was to prohibit the alienation and taxation of trust lands, and also any "encumbrances" on the fee interest and transferability of the lands. In Wisconsin, restrictions imposed by zoning ordinances do not so "encumber" the lands and that exception to the general grant of state jurisdiction drops out. Such a construction is in harmony with the stated purpose of the federal act, which was one in a series of acts designed to extinguish the special status of our Indian citizens and Indian lands. The senate committee report accompanying the bill creating 26 U.S.C. §1360 clearly indicates that its purpose was to permit state courts to extend to Indian lands "the substantive civil laws of the respective states insofar as those laws are of general application to private persons or private property . . . ." Senate Report 699, H. R. 1063, July 27, 1953; 1953 U. S. Code Congressional & Administrative News, pp. 2409, 2412.

It is my opinion, therefore, that a zoning ordinance is not an encumbrance *per se* within the meaning of 28 U.S.C. §1360. All zoning is, of course, grounded in the police power and a different rule might prevent the state, in the reasonable exercise of this power, from enforcing on Indian lands such laws as are designed to prevent pollution of the state's waters; to control and reduce air pollution; to secure compliance with electrical and safety codes; to protect the public health, etc.

The Indians quite properly raise another question, however. Wisconsin's zoning enabling law (sec. 62.23, Stats.) is regarded as exempting from any zoning control by the locality land and uses belonging to the state, county and federal government, so long as such uses are governmental in nature as distinguished from uses which are merely proprietary. Cutler, *Zoning Law and Practice in Wisconsin.* (The Institute of Continuing Legal Education, Wisconsin Property Law Series, Vol. 1) p. 89; Bassett, *Zoning,* p. 212; 2 Metzenbaum, *Law of Zoning* (2d ed.) 1289; *Green County*

v. Monroe, (1958) 3 Wis. 2d 196, 198-199, 87 N.W. 2d 827; *Milwaukee v. McGregor,* (1909) 140 Wis. 35, 121 N.W. 642.

Examples of matters considered to be the sort of "governmental functions" which cannot be prohibited by local zoning ordinances are: parking meters, state office buildings, schools, courthouses, fire departments, waterworks, etc. See 61 ALR 2d 974-976. The Wisconsin court, in a long line of cases dealing with the "internal improvements" clause of the state constitution, has consistently adhered to the rule that public works used by and for the state in the performance of its "governmental functions" do not come within the constitutional ban. In these cases the court has cited the following examples of "governmental functions":

" ' * * * 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.' * * * " *State ex rel. La Follette v. Reuter,* (1967) 33 Wis. 2d 384, 401; 147 N.W. 2d 304.

In my opinion, the operation of private souvenir stands on the trust lands is not the type of federal "governmental function" which would make such use exempt from the zoning laws. These laws are, after all, made expressly applicable to Wisconsin Indian lands by 28 U.S.C. §1360. Unless federal legislation or valid and binding treaty obligations prohibit the exercise of state jurisdiction, the state may exercise its police power (including the power to zone) over Indian lands so far as may be reasonable necessary to preserve the health, safety and general welfare of its citizens—including, of course, its Indian citizens. See 48 Am. Jur. Indians, pp. 572-3, sec. 48, and the dissent of Hale, J., in *Snohomish County v. Seattle Disposal Co., supra,* pp. 27-30.

I therefore conclude that the occupants of the Indian lands in question are subject to the particular zoning ordinances of the town as described above, insofar as such ordinances do not conflict with any federal treaty, agreement or statute. What has been said does not, of course, restrict the

rights of the persons involved to seek variances or exceptions from the applicable zoning ordinances for what appear to be minimal violations.

RWW:WFE

Judicial Terms—Constitutionality—Act resulting from passage of A.B. 57 (1969) which would advance starting date of office of judge for newly created 2nd branch, 3rd judicial circuit, six months, and advance end of term twelve months, where election has taken place but judge-elect has not taken office would be unconstitutional. Secs. 252.015 (1) (bm), 252.01, Stats., secs. 6, 7, art. VII, Wis. Const.

August 29, 1969.

THE HONORABLE THE SENATE

S. Res. 18 (1969), dated July 8, 1969, requests my opinion on the constitutionality of an act which would result from enactment of A. B. 57 (1969) which changes the commencement and expiration dates for the office of the newly created 2nd branch of the 3rd judicial circuit. A new judge has been elected to the post, but has not taken office.

Sec. 252.015 (1) (bm), Stats., provides that the 3rd judicial circuit shall have two branches. This section was created by sec. 2, ch. 275, Laws 1967.

Sec. 16, ch. 275, Laws 1967, provided for the election of a circuit judge for such branch, as follows:

"SECTION 16. A judge for the 2nd branch of the 3rd judicial circuit shall be elected in Winnebago and Calumet counties in the spring election of 1969. The term of office for the judge chosen at this election shall commence on the first Monday in January 1970 and expire on the first Monday in January 1976."

At that time and at present the general statute relating to terms of circuit judges was and is set forth in sec. 252.01, Stats., which provides:

"The term of office of every elected circuit judge is 6 years, and until his successor is elected and qualified, which term commences with the first Monday in January next succeed- his election."

A. B. 57 (1969), introduced January 23, 1969, would amend sec. 16, ch. 275, Laws 1967, to provide:

"A judge for the 2nd branch of the 3rd judicial circuit shall be elected to Winnebago and Calumet counties in the spring election of 1969. The term of office for the judge chosen at this election shall commence on ~~the first Monday in January 1970~~ *July 1, 1969*, and expire on the first Monday in January ~~1976~~ *1975*."

The bill also provides an appropriation for the July 1, 1969, to December 31, 1969, period.

At the spring election of 1969 one Edmund P. Arpin was elected judge of the 2nd branch. This opinion assumes that he has been issued a certificate of election and is otherwise qualified, but has not taken and filed an oath or entered on the duties of the office.

A. B. 57 is an apparent effort to accelerate the effective date of the branch because of the press of judicial business in the circuit. The commencement of term date is proposed to be advanced from the first Monday in January, 1970 to July 1, 1969. The bill if enacted would in fact, however, shorten the term of the judge elected at the spring election to five and one-half years, as the expiration date is advanced from the first Monday in January, 1976, to the same date in 1975. One of the reasons for this advancement is that the term of the judge of the 1st branch of the 3rd circuit expires on the first Monday in January, 1976.

Generally an office created by act of the legislature may be abolished in like manner, or the term of the officer otherwise shortened by general legislation, after his election, in the absence of any special provision of the constitution forbidding it. *The State and DeGuenther vs. Douglas,* (1870) 26 Wis. 428, 7 Am. Rep. 87.

Circuit judge, however, is a constitutional office and the legislature must comply with the constitutional provisions

pertaining to it with respect to establishing new circuits, changing circuits, adding new branches, compensation, terms and removal.

It must also be noted that there is a difference between the term which applies to the office and the term of office which is personal to the incumbent.

The first question is whether the beginning date of the term of office may be advanced from the first Monday in January, 1970, to July 1, 1969, where the election has already taken place but the Judge-elect has not assumed the duties thereof.

I am of the opinion that it cannot be so advanced so as to permit the judge-elect to take office at the earlier date. I am of the further opinion that the term which applies to the office cannot be advanced to the earlier date to permit a gubernatorial appointment of the judge-elect or some other person for the period July 1, 1969, to the first Monday in January, 1970.

The additional branch was created by ch. 275, Laws 1967, and become effective on December 28, 1967, the day following publication. The same chapter provided for the election of the first judge of said branch and there was no vacancy to which appointment could be made until and unless a vacancy occurred after the first judge had been elected and assumed office. We are not here concerned with what would be the law in the event that the first judge-elect should die before taking office.

In *State ex rel. Attorney General vs. Messmore,* (1861) 14 Wis. 177, it was held that when a new judicial circuit is created the first judge must be elected by the people. I am of the opinion that the same rule applies to new branches.

Secs. 6 and 7, art. VII, Wis. Const., provide:

"SECTION 6. The legislature may alter the limits or increase the number of circuits, making them as compact and convenient as practicable, and bounding them by county lines; but no such alteration or increase shall have the effect to remove a judge from office. In case of an increase of

circuits, the judge or judges *shall be elected* as provided in this constitution and receive a salary of not less than that herein provided for judges of the circuit court."

"SECTION 7. For each circuit there *shall be chosen by the qualified electors* thereof one circuit judge, except that in any circuit in which there is a county that had a population in excess of eighty-five thousand, according to the last state or United States census, the legislature may, from time to time, authorize additional circuit judges *to be chosen.* Every circuit judge shall reside in the circuit from which he is elected, and shall hold his office for such term and receive such compensation as the legislature shall prescribe."

The judge-elect was chosen at the spring 1969 election for a term to begin the first Monday in January, 1970, and to end the first Monday in January, 1976.

The legislature is without power to now alter the term of office for which the judge-elect was elected. It can be argued that if an earlier commencement date were to apply that other qualified persons may have sought the position. Advancement would deprive the electors from electing the first judge for the real term. He was elected for a six-year term, which was the term applicable to other circuit judges.

A second question is whether the legislature can shorten the term of office of circuit judges, where the election has been held and before the term commences.

I am of the opinion that it cannot.

The total effect of the change sought here would be to shorten the term by six months. However, one year would be erased from the term for which the judge-elect was elected. The effect would be removal of the judge from office during the term for which he was elected, and sec. 13, art. VII, Wis. Const., prescribes that circuit judges shall be removed only by impeachment. It is immaterial that the legislative action would have taken place before he had assumed the duties of office. *State ex rel. Kleist v. Donald,* (1917) 164 Wis. 545, 160 N.W. 1067.

As noted above, A. B. 57 (1969) would have a 5½-year term apply to the first judge to be elected to the branch at a time a 6-year term was applicable to other circuit judges.

While not controlling, the decision in *State ex rel. Pierce v. Kundert*, (1958) 4 Wis. 2d 392, 90 N.W. 2d 628, indicates that the legislature would have to have substantial reason for nonuniformity of term. In that case the court stated that the provisions of secs. 2, 5, 6, 7, and 10, art. VII, Wis. Const., show a purpose of the framers of the constitution to provide a system of circuit courts with uniform jurisdiction, compensation and term of office, with salaries to be paid by the state.

RWW:RJV

Legislature—Retirement Benefits—Sec. 26, art. IV, Wis. Const., constitutes both a limitation of legislative power to grant extra compensation, and a presumption that any such expenditure would not be for a public purpose. An amendment that would allow for "increased benefits for persons who have been or shall be granted benefits of any kind under a retirement system," as proposed in S. Jt. Res. 13, would not only remove the limitation on legislative authority to grant such funds, but would also constitute a declaration that such expenditures would be for a public purpose.

September 5, 1969.

THE HONORABLE THE SENATE

In S. Res. 9 you requested my opinion whether S. Jt. Res. 13, which would amend sec. 26, art. IV, Wis. Const., to allow "increased benefits for persons who have been or shall be granted benefits of any kind under a retirement system," is such a broad exemption as to purport to give legislative authorization in areas not constitutionally subject to state law, or is so vague as to fail to delimit with sufficient clarity its scope. S. Jt. Res. 13 reads as follows:

"Whereas, at the general session of the legislature in the year 1967 an amendment to the constitution was proposed by Senate Joint Resolution 41 and agreed to by a majority of the members elected to each of the 2 houses, which amendment reads as follows:

" '(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.'

"* * *

"Resolved, That the question of the ratification of the foregoing amendment be stated on the ballot as follows:

" 'Shall section 26 of article IV of the constitution be amended to permit the legislature, upon a ¾ majority vote of its members-elect, to grant increased benefits to persons under public retirement systems?' "

The amendment constitutes an exemption to sec. 26, Art. IV, and its scope is therefore limited by that section as it now exists. The section relates to extra compensation of any "public officer, agent, servant or contractor." Persons covered in each of these aforementioned descriptions have been the subject of numerous court decisions and such decisions

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*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.

provide the framework for determining the scope of the exemption contemplated in the amendment. The amendment is further limited in application to persons entitled to benefits under a retirement system. Thus, S. Jt. Res. 13 cannot be said to be so vague as to fail to delimit its scope with sufficient clarity.

The other question asked is whether the exemption granted by S. Jt. Res. 13 is so broad as to purport to give legislative authorization in areas not constitutionally subject to state law. This question appears to raise the issue of whether an expenditure of public funds to increase benefits to previously retired state employees would be an unconstitutional expenditure of public funds for a private purpose. This issue was considered in *State ex rel. Thomson v. Giessel,* (1951) 262 Wis. 51 (hereinafter referred to as "the first *Giessel* case"), where the legislature attempted to provide increased retirement benefits to retired teachers. The court found that such increased benefits were clearly extra compensation for services rendered in the past. The court said that this was exactly the sort of extra compensation prohibited by sec. 26, art. IV. 262 Wis. at 56.

It was also argued in that case that, because the legislation required a payment of $100 by the retired teacher into the general fund, the legislation could be sustained as merely providing for a new contract for new consideration. The court disagreed, stating (at pp. 62-3) that:

" * * * It appears to us that if the factor of past services and compensation therefor is withdrawn, we have nothing left but a group of people in whom the legislature has become interested and to whom it is willing to sell a life annuity. When the applicants rest their claims on their former service they are entangled with sec. 26, art. IV, Const. When they free themselves from that by relying only upon the new consideration to support a new contract they put themselves into the class of other private citizens, with former teaching status as an identifying mark only, and the special benefit granted them is a use of public funds for a private interest and, hence, unconstitutional. *State ex rel. Smith v. Annuity & Pension Board* (1942), 241 Wis. 625, 6

N.W. 2d 676; Attorney General v. Eau Claire, (1875) 37 Wis. 400, 436. * * *"

The above-quoted language implies that *but for* the prohibition of sec. 26, art. IV, the legislature could have used "the factor of past services and compensation therefor" as a basis for creating a special classification for retired teachers. The court had previously rejected "gratitude" or "inducement" as a reasonable basis for making such a classification. 262 Wis. at 56-60. Because sec. 26, art. IV, prohibited a classification based upon past services, there remained no reasonable basis for singling out the retired teachers and the payments constituted an expenditure of public funds for a private purpose (a denial of equal protection).

The proposed amendment would remove the "entanglements" of sec. 26, art. IV, and permit the legislature to create special classifications of people entitled to increased benefits on the basis of their past services to the state. Such designation of a particular group of persons to be benefited by the statute would not be, in itself, an unconstitutional denial of equal protection. *State ex rel. Thomson v. Giessel,* (1953) 265 Wis. 558, 567-8 (Hereinafter referred to as "the second *Giessel* case"); *State ex rel. Holmes v. Krueger,* (1955) 271 Wis. 129, 137-8.

The legislature responded to the first *Giessel* case by enacting legislation that provided for the rehiring of retired teachers on a standby basis, and the paying of compensation for such services. This legislation was upheld in *State ex rel. Thomson v. Giessel,* (1953) *supra* (the second *Giessel* case), where the court declined to consider the motives of the legislature and found the contracts valid on their face. The legislation was also attacked on the grounds that it constituted an appropriation of public funds for a private purpose according to the first *Giessel* case and the court replied succinctly that:

" * * * The contention is of course based upon the erroneous assumption that the payments prescribed are for services previously rendered. We would refuse to assume that the able counsel who represents respondent would maintain

that an appropriation made to promote the efficiency of our school system is made for other than a public purpose." 265 Wis. at 568.

One implication of this statement is that, because sec. 26, art. IV, constitutes a declaration of public policy against expenditures in the nature of extra payments for services previously rendered,* such expenditures presumably would not be for a public purpose even if the constitution did not act to prevent the legislature from making the particular payments in question. Such a presumption would require an *independent* determination of the public purpose question whenever sec. 26, art. IV, was involved. Furthermore, enactment of the legislature providing for such payments would not be entitled to the usual persumption that the legislature is the proper body to determine what constitutes an expenditure of public funds for a public purpose and that the judiciary should interfere only in cases of clear abuse. 42 Am. Jur. *Public Funds,* pp. 758-9, sec. 57; 81 C.J.S. *States,* p. 1149; sec. 133.

This implication was made explicit in *State ex rel. Holmes v. Krueger,* (1955) *supra,* which involved an increase in retirement benefits to retired teachers paid by the city of Milwaukee. The court began by showing that the constitutional prohibitions of sec. 26, art. IV, did not apply to employees or officers of cities or other municipalities so long as no salaries or funds are paid out of the state treasury. The court felt compelled, however, to meet the objection that such payments would not be for a public purpose. They concluded that the expenditures were for a moral obligation and were, therefore, for a public purpose. Thus, the court was interpreting sec. 26, art. IV, to constitute both a limitation on legislative power to give extra compensation for services previously rendered and a presumption that any such expenditures are not for a public purpose.

" ' * * Sec. 26 of art. IV of the state constitution prohibits the legislature from granting any extra compensation to any public officer, agent, servant, or contractor after the services shall have been rendered or the contract entered into. This declares a wise public policy. * * *' " *Seib v. Racine,* (1922) as quoted in *State ex rel. Holmes v. Krueger, supra,* at p. 134.

Sec. 26, art. IV, has since been amended to specifically allow for increased compensation to teachers under a teacher's retirement system, and for changes in judge's salaries during their term. By S. Jt. Res. 13, you intend to expand the exceptions to include all state employees. The constitutional question is, then, whether such an amendment removes only the limitation on legislative authority to make such an expenditure, or whether it constitutes *both* a removal of such limitation *and* a declaration that such an expenditure is for a public purpose. It is my opinion that the latter is correct.

In the first *Giessel* case the court suggested that, in light of the clear constitutional prohibition, the way for the legislature to provide for increased benefits to retired teachers was through the process of constitutional amendment:

"* * * If exceptions are to be made, they should not come from the legislature or the court but from those whose proper function it is to amend the constitution. When the people determined that the times required state participation in the construction of highways, airports, veteran's housing, and the preservation and development of forests, they adopted amendments to the constitution excepting these interests from the terms of sec. 10, art. VIII, which forbade the state to engage in works of internal improvement. *If, now, to underwrite certain contracts against the effects of inflation is deemed, by the people, to be desirable, or if they consider that the cause of public service requires power in the legislature to grant bonuses, apart from compensation, to retired public servants, the road to amending the constitution is well traveled,* * * *." 262 Wis. at 64.

The language italicized above implies that a constitutional amendment allowing for expenditures to increase benefits to retired teachers *would* constitute a declaration by the people that such expenditures are for a desirable public purpose. The court's analogy to the internal improvements clause (sec. 10, art. VIII, Wis. Const.) supports this interpretation, as exceptions to the internal improvements clause have been held to constitute not only an exemption from the constitutional prohibition but also a declaration that such activities would be a proper governmental func-

tion. *State ex rel. La Follette v. Reuter,* (1967) 36 Wis. 2d 96, 120, 153 N.W. 2d 49. It is, therefore, my opinion that the proposed amendment to sec. 26, art. IV, contained in S. Jt. Res. 13, would not only remove the limitation on the legislature's power to provide increased benefits to retired state employees but would also constitute a declaration that such expenditures are for a public purpose. Such a declaration could not be conclusively determinative of the public purpose question, which is a judicial doctrine, but would constitute a presumption in favor of the constitutionality of expenditures specifically provided for in the proposed constitutional amendment.

I therefore conclude that S. Jt. Res. 13 cannot be said to be so broad as to purport to give legislative authorization in areas not constitutionally subject to state law.

RWW:SMS

Treasurer—Check Float Monies—Secs. 14.42 and 25.17 (61) require that state deposits in a working bank be payable on demand, withdrawn only by check of state treasurer issued on warrant authorized by department of administration and proposal of "X" bank for utilization of "check float" monies for purchase and repurchase of interest-bearing securities for the account of the state is unauthorized.

September 8, 1969.

HAROLD W. CLEMENS
State Treasurer

You have requested my opinion on the legality of a proposal to utilize funds in the working bank in which state deposits are made, which result from temporary "check float", for periodic investment in interest-bearing securities until such time as the funds are required to cover outstanding state checks.

You give the following background in your request:

"The Investment Board in accordance with section 25.17 (61) has authority to '. . . allocate the deposits of all public moneys coming into the hands of the state treasurer, and limit the amount of such public moneys, as determined from the state treasurer's records, which may be deposited in any public depository so designated.'

"To determine which bank or banks to designate, the Investment Board recently secured bids from banks for the purpose of serving as the state depository. The bid form essentially asked the banks to indicate how much money would be required to be on deposit to secure the services enumerated by the state.

"In addition, the bidding banks were asked to indicate a method wherein the state would realize income from any excess balance maintained in the State Treasurer's account. Since federal regulation prohibits the paying of interest on a demand account the proposal has been made to use any excess balance to purchase interest bearing securities until such time as the funds are required to pay state checks. The excess funds which would be used for such security purchases result from 'check float.'

" 'Check Float' is a term used in the banking business and is money on deposit at a bank against which the depositor has already drawn checks. These monies, or float, remain in the account until such time as the payee of the checks present them for payment."

One of the proposals of Bank "X" would provide in part:

"9. The bank offers and agrees, so long as it is the depository of the State working bank account, to provide the State of Wisconsin with the following services, * * * subject to the conditions stated at the end of this paragraph:

"(a) The bank will enter into a repurchase agreement with the State, covering the State working bank account for a one year period, and renewable from year to year thereafter, subject to cancellation by either party on six

months' written notice thereof to the other. The repurchase agreement will provide:

"(1) The bank will, on the first business day of the second month during the term of such agreement, and on such day in each and every month thereafter, purchase for the account of the State such assets as are then authorized as the subject of a repurchase agreement under applicable Federal Reserve Board regulations (hereinafter, the 'obligations') in an amount equal to, as nearly as may be reasonably possible, the amount of the average daily excess collected balance in the State working bank account over and above the required collected balance in such account for the preceding calendar month, (said amount to be determined as if all monies had been kept in the working account and none applied to any repurchase agreement).

"(2) The amount so purchased by the bank for the account of the State shall be deducted from the collected balance of the working bank account.

"(3) The bank shall hold the obligations so purchased for the State for a period of one week, or until the next succeeding business day thereafter if the end of such weekly period does not fall on a business day, or until the end of the current month, if less than one week remains in such month, (hereinafter the 'period'). The bank shall pay interest thereon to the State at a rate * * *.

"(4) At the end of such period, the bank shall repurchase the obligations from the State, and shall credit the State working bank account with the amount of the original purchase price plus interest determined as above, unless the State exercises the option which it shall have for renewal of all or any part of the repurchase agreement for successive similar periods with the interest rate payable to the State during any renewal period to be * * *."

Sec. 1828 (g), 12 USCA, Banks and Banking, p. 100, provides that the board of directors of the Federal Deposit Insurance Corporation " * * * shall by regulation prohibit the payment of interest on demand deposits in insured nonmember banks and for such purpose it may define the term 'demand deposits' * * *."

By regulation in 12 CFR 329.2 (a) the corporation has provided:

"(a) Interest prohibited. Except as provided in this part, no insured non-member bank shall directly or indirectly, by any device whatsoever, pay any interest on any demand deposit. Within this part any payment to or for the account of any depositor as compensation for the use of funds constituting a demand deposit shall be considered interest."

In 12 CFR 329.1 (a), it is provided:

"The term 'demand deposit' includes every deposit which is not a 'time deposit' or 'savings deposit,' as defined below."

Substantially the same definitions and restrictions apply to member banks of the Federal Reserve System. See 12 CFR 217.1 (a), 217.2.

The Federal Reserve Board has interpreted these sections as including as demand deposits certain deposits on which a bank reserves the right to require notice of less than 30 days before withdrawal. Also see 10 Am. Jur. 2d, Banks, §356, Demand and Time Deposits, p. 318.

It is noted that the proposal of Bank "X" is submitted on conditions, including:

" * * *

"(2) The continued exclusion of repurchase agreements from the definition of 'deposits' under Federal Reserve Board Regulations Q and D, and the non-violation by the bank in the operation of this Proposal of any present or future applicable banking law, rule, or regulation; and

"(3) One of the following:

"(a) The State's obtaining any necessary authorization or modification in the Wisconsin Constitution and Statutes to enable the State to incur debt to the bank in those instances where the transfer of funds pursuant to a repurchase agreement results in the incurrence of debt to the bank by the State and where the issuance of checks by the State on its working bank account and the honoring of such

checks on presentment by the working bank results in overdraft situations; or

"(b) An acknowledgement by the State that the bank would be under no obligation to transfer funds pursuant to a repurchase agreement if the transfer would result in the incurrence of debt to the bank by the State or to pay items presented on it drawn on the working bank account against insufficient funds until a sufficient balance on the books of the bank appears in such account, * * *."

From the foregoing it is clear that it is contemplated that any money used by the bank to purchase securities for the account of the state will be withdrawn from the state demand deposit account. During the period that such monies are out of the account, the amounts in the account will be insufficient to cover checks issued by the state treasurer. The plan contemplates that, because of the average "check float", there will be sufficient monies in the account to cover the checks which are presented for payment. However, the conditions of the bank contemplate that the account could be overdrawn by reason of early presentation of checks for payment and payment therefor before the time set for repurchase of securities by the bank and crediting of the account with the amount of the repurchase plus interest earned. In such event there would be at least a temporary debt of the state to the bank.

A general deposit in a bank, such as a checking account, creates a debtor-and-creditor relationship between the depositor and the bank, and no cause of action arises on behalf of a depositor for deposit until demand has been made upon the bank and it has refused such demand, unless facts have arisen which dispense with such demand. *Peppas v. Marshall & Ilsley Bank,* (1957) 2 Wis. 2d 144, 86 N.W. 2d 27.

Your first question is whether the state treasurer can authorize payment of money out of the demand deposit account in the working bank for purchase of securities without the approving warrant of the department of administration.

Your second question is whether, if warrants are required, the department of administration and state treasurer can pay out sums of money for the purchase of securities thereby creating an overdraft in the fund against which the warrant is drawn.

The answer to both questions is "no."

Sec. 14.42 (4) provides:

"(4) PAY ON WARRANTS SUMS AUTHORIZED BY LAW. Pay out of the treasury, on demand, upon the warrants of the department of administration and not otherwise such sums only as are authorized by law to be so paid, if there are appropriate funds therein to pay the same, and, when any sum is required to be paid out of a particular fund, pay it out of such fund only; and upon each such warrant, when payment is made in currency, take the receipt indorsed on or annexed thereto, of the payee therein named or his authorized agent or assignee. The state treasurer shall accept telephone advice believed by him to be genuine from any state depository bank stating that a specified amount of money has been deposited with such state depository bank for the credit of the state treasurer, and shall act upon such telephone advice as though it had been in writing."

It is my opinion that there must be warrants for specific amounts for each withdrawal.

Under the statute it is difficult to see how the amount in the account in the nature of a "check float" could be utilized for temporary investment purposes even if warrants were sought from the department of administration, as amounts temporarily available by reason of "check float" are already liable to draw by reason of checks issued upon warrants duly issued. The treasurer can only issue checks upon warrants if he knows that there are appropriate funds to pay the same. Checks cannot be issued on the basis of an agreement with a bank to place money in the account, by repurchase of securities, at a time the checks are likely to be presented.

Sec. 14.42 (1), (4), (6) and (12) require that the treasurer pay out state funds by check. Withdrawals from time to time by the bank for the purchase of securities could not be supported by the purchase and repurchase agreement standing alone.

Your third question is whether monies deposited in the working bank, which constitute average "check float," may be withdrawn for short periods for purchase of securities for the account of the state under a repurchase agreement arrangement with the bank.

I am of the opinion that they cannot.

Sec. 25.17 (61), Stats., requires the investment board to designate public depositories for deposit of state monies in working banks. Such deposits must be payable on demand. This statute would require that all monies so deposited remain in the account subject to check withdrawal on demand. The statute also provides for the designation of special depositories for excess funds for temporary investment purpose.

Sec. 25.17 (61) provides:

"(61) Designate public depositories for the deposit of public moneys, as defined in s. 34.01 (5), coming into the hands of the state treasurer; allocate the deposits of all public moneys coming into the hands of the state treasurer, and limit the amount of such public moneys, as determined from the state treasurer's records, which may be deposited in any public depository so designated. It shall have all the powers and duties with relation to the state treasurer and state moneys that are herein granted and imposed upon other governing boards by ch. 34, and only such banks as have been named by the state of Wisconsin investment board *as working banks shall carry state deposits on which checks are drawn to conduct the daily business of the state, all of which deposits shall be payable on demand.* The board may designate banks as special depositories in which the state treasurer may make special deposits of funds, not exceeding the amount limited by the board, which are not currently needed for the conduct of the daily business of

the state as determined by the board, which special deposits shall be deposited subject to such bank's rules and regulations relative to either savings accounts, time certificates of deposit or open time accounts, as the case may be. Public depositories heretofore designated as state depositories shall continue as such until further action by the board."

The statute makes no provision for utilizing "check float" monies for investment purposes. It contemplates that all money remain in the account subject to demand by checks issued against available funds. Even the bank's proposal is conditioned on continued treatment by federal authorities that amounts withdrawn under the purchase and repurchase of securities agreement *shall not constitute "deposits."* Monies withdrawn for the purchase of securities would, therefore, not be on deposit subject to withdrawal on demand.

It is unnecessary to consider all of the implications of the Wisconsin contitutional provisions which prohibit the state from contracting debt. Every such debt in any case must be authorized by law. Art. VIII, secs. 4, 6, 7, 8, 9, 10, Wis. Const.

Since investment of monies on deposit in the working bank which constitute average "check float" might result in a diversion of appropriated funds, your attention is called to sec. 20.903 (1), Stats., which provides:

"(1) LIABILITIES CREATED ONLY BY AUTHORITY OF LAW. It is unlawful for any state agency, or any officer or employe thereof, to contract or create, either directly or indirectly, any debt or liability against the state for or on account of any state agency, for any purpose whatever, without authority of law therefor, or prior to an appropriation of money by the state to pay the same, or in excess of an appropriation of money by the state to pay the same. Unless otherwise empowered by law, it is unlawful for any state agency to authorize, direct or approve the diversion, use or expenditure, directly or indirectly, of any funds, money or property belonging to, or appropriated or set aside by law for a specific use, to or for any other purpose or ob-

ject than that for which the same has been or may be so set apart. Nothing herein contained shall be construed to prevent the employment of the inmates or ordinary laborers at any institution to aid in the prosecution of work for which appropriations have been made. Any person who violates this section may be fined not less than $200 nor more than $1,000 or imprisoned not less than one month nor more than 6 months or both."

RWW:RJV

Towns—Police and Fire Commission—Towns, including those of over 6,000 population, do not have authority to have a police and fire commission. Secs. 60.18 (12), 61.65, 62.13, 60.29 (1), (7), (8), (18).

September 12, 1969.

HAROLD D. GEHRKE
Corporation Counsel, Racine County

You have requested my opinion on the following question:

Does a town having a population of over 6,000 have statutory authority to have a police and fire commission?

I am of the opinion that it does not.

NO SPECIFIC STATUTORY AUTHORITY

A town acting through its town meeting or town board has only such powers as are conferred upon it by statute or necessarily implied therefrom. It is a municipal corporation of limited powers and not possessed of any home rule powers under sec. 3, Art. XI, Wis. Const. *Puinier v. Ramharter,* (1957) 275 Wis. 70, 81 N.W. 2d 38; *Greenlawn Memorial Park v. Neenah Town Board,* (1955) 270 Wis. 378, 71 N.W. 2d 403; *Village of Milton Junction v. Town of Milton,* (1953) 263 Wis. 367, 57 N.W. 2d 186.

There is presently no provision in the statutes specifically applicable to towns providing for the creation of a police and fire commission.

It is significant that the legislature has seen fit to enact special provisions enabling towns of a certain class to have a board of police and fire commissioners. Such special provisions have been repealed, however.

Ch. 108, Laws 1939, created sec. 60.18 (19), 1939 Stats., to provide that a town board of any town of over 10,000 population could be authorized by the town meeting to establish a board of police and fire commissioners consisting of five citizens, as provided for cities under sec. 62.13 and with the same powers and privileges.

Ch. 259, Laws 1943, repealed and recreated sec. 60.18 (19), Stats., to apply only to any town in counties having a population of 500,000 or more. This law further detailed what the words in sec. 62.13 should mean when applied to a town and town officers, and created sec. 60.29 (36) to authorize the establishment of a police and fire department, and created sec. 62.135 to authorize a firemen's pension fund.

Ch. 67, Laws 1945, renumbered sec. 62.135 to 60.73.

Ch. 206, Laws 1947, repealed sec. 60.73.

In 1963 no towns remained in Milwaukee County and by ch. 5, Laws 1963, the legislature repealed secs. 60.18 (19) and 60.29 (36) as obsolete provisions relating to towns in Milwaukee County.

ESTABLISHMENT OF A BOARD OF POLICE AND FIRE COMMISSIONERS WOULD CONFLICT WITH STATUTES RELATING TO TOWN BOARD POWERS.

If a town has authority to have a police and fire commission it would have to be under authority granted under secs. 60.18 (12) and 60.29 (13).

Sec. 60.18 (12), Stats., provides that a town meeting can:

"(12) TOWN BOARD TO EXERCISE POWERS OF VILLAGE BOARDS; WHEN. To direct, by resolution, the town board

to exercise all powers relating to villages and conferred on village boards by ch. 61, except such power, the exercise of which would conflict with the statutes relating to towns and town boards. Any such resolution heretofore adopted pursuant to existing law or hereafter adopted pursuant to this law shall remain in force until rescinded."

Under sec. 60.29 (13) a town board is "empowered and *required*":

"(13) POWERS LIKE VILLAGE BOARDS. To exercise powers relating to villages and conferred on village boards when lawfully authorized so to do by resolution of the town meeting adopted pursuant to subsection (12) of section 60.18."

When a town meeting passes a resolution enabling a town board to exercise powers of village boards, it is in effect a mandatory direction to the board to exercise "all powers relating to villages and conferred on village boards by CH. 61, except such power, the exercise of which would conflict with the statutes relating to towns and town boards." *Bennett v. Nebagamon,* (1904) 122 Wis. 295, 99 N.W. 1039; *Land, Log & Lumber Co. v. Brown,* (1889) 73 Wis. 294, 40 N.W. 482.

Sec. 62.13, Stats., provides that in every city of over 4,000 there shall be a board of police and fire commissioners consisting of five citizens appointed by the mayor. A commission is optional in smaller cities. Chiefs are appointed by the board, hold office during good behavior and are subject to suspension or removal by the board for cause. Subordinates are appointed by the chiefs subject to approval of the board. The statute provides for a procedure of disciplinary action against subordinates, and optional powers which may be granted to the board by electors including power to contract and purchase all necessary equipment, apparatus and supplies, and to organize and supervise fire and police departments and to provide rules and regulations for their control and management. Provisions are also made for no decrease or increase in salaries by the council unless recommended by the board, rest days, hours of labor, volunteer or paid fire department, and pension rights.

The above section is important in that it is in part the basis for powers of a village board of police and fire commissioners.

Sec. 61.65 (1) and (2) provide:

"(1) Every village having a population of 5,000 or more, according to the last federal census, shall have a police department, and every village having a population of 5,500 or more shall have a fire department, with chiefs and subordinates; a board of police and fire commissioners; a police pension fund and a firemen's pension fund. All matters pertaining to the board and to appointments, promotions, suspensions, removals, dismissals, reemployment, compensation, rest days, sources of pension funds, control, management and administration of pension funds, eligibility for and payment of pensions, exemptions, organization and supervision of departments, contracts and audits, shall be administered, regulated and otherwise governed by s. 62.13 and amendments thereto, insofar as the same pertains to cities of the second or third class. Appointments to the police and fire commission shall not be subject to confirmation by the village board unless required by ordinance.

"(2) In the carrying out of the provisions of this section, the following words, whenever used in said section 62.13, shall, unless the context otherwise requires, have the following meaning:

"(a) 'Mayor' means village president.

"(b) 'Comptroller' means village clerk.

"(c) 'City Treasurer' means village treasurer.

"(d) 'Council' means village board.

"(e) 'City' means village."

Under sec. 60.29 (7), (8), the town board has power to appoint policemen and a superintendent of police for service in an unincorporated village within the town and to appoint policemen and a superintendent of police for service in other areas of the town. Towns of over 5,000 may establish a civil service system under 66.19 (2), Stats. However, where

that has not been done policemen and superintendents of police serve at the pleasure of the town board. See sec. 17.13 (1). Compensation is fixed by the board, and supervision of police is a board matter under sec. 60.29 (1), (7), (8), subject to "orders and by-laws for the management of all of the affairs of the town conducive to the peace, welfare and good order thereof" passed by the town meeting under sec. 60.18 (3).

Under sec. 60.29 (18) the town may establish a fire department, appoint officers and members, and prescribe and regulate their duties and fix compensation, purchase, use and maintain fire equipment, or it may contract for fire protection as provided in sec. 60.29 (18).

It is my opinion that there is irreconcilable conflict between the operation of police and fire departments under secs. 61.65 and 62.13 and secs. 60.29 (1), (7), (8), (18).

Having concluded that there is a material conflict within the meaning of sec. 60.18 (12), Stats., it is unnecessary to consider any constitutional argument relative the uniformity of town government required under Art. IV, sec. 23, Wis. Const.

RWW:RJV

Convention Center—Constitutionality—State participation in a proposed convention center in the city of Milwaukee would not violate either the "public purpose" doctrine or the internal improvements prohibitions of Art. VIII, sec. 10, Wis. Const., so long as such participation is directed solely to the clearly identifiable portion of the center allocated to use as a state-operated tourist information center or some similar state governmental function.

A state tax operable only in two or three counties would not be a proper means of operational financing of such a center.

September 15, 1969.

WAYNE F. MCGOWN
Secretary, Department of Administration

You seek my opinion on several questions relating to a proposal for the state of Wisconsin to participate in the financing, construction and operation of facilities in the city of Milwaukee for "conventions and tourists and for attracting major sports franchises to the city." You have provided me with a lengthy document entitled "Report of the Mayor's Committee on Facilities for Conventions and Other Activities" from which I will extract what I believe to be the pertinent facts underlying your questions.

The mayor's committee operated under a charge to determine whether the tourist and convention business represents an appropriate investment of public funds and efforts; and, if so, to develop an integrated plan for the construction and operation of comprehensive facilities for such purposes—including the role of the city, county and state in such a project. The committee reached several conclusions, some factual and some speculative. It is clear, for example, that the Milwaukee metropolitan area accounts for approximately one-third of the state's population and contributes approximately 40% of the total taxes paid to the state of Wisconsin. In addition, approximately 72% of the state's total population is within a two and one-half hour drive from Milwaukee. The report details the general transportation facilities in the area and contains page after page of statistical data purporting to show the need for large-scale convention facilities in Milwaukee. From the many national, regional and local figures concerning the number and size of various conventions, the average amount of money spent by each convention delegate, etc., the report concludes that, even though the facility cannot be supported by its revenues alone, the direct and indirect financial benefits to the city, county and state far outweigh the costs.

The benefits to the state as a whole—which obviously are of prime importance to this discussion—may be summarized as follows: (1) an increase of $54 to $58 million in total

annual income from conventions, etc., held in Milwaukee—which would generate $6 to $7 million in city, county and state tax revenues; (2) provision of approximately 2500 new jobs at the outset; (3) increased promotion of the state's "image" to out-of-town visitors; (4) a vehicle for state tourism promotion through a tourist center located in the proposed complex; and (5) incidental benefits to Wisconsin convention groups and citizens generally from the mere presence of these facilities within the state.

Based upon its consideration of the many facts before it, the mayor's commission concluded as follows:

"1. *Need of Scope of Facilities*:

The State needs a modern convention and exhibition facility. A location in the area of the present Auditorium-Arena complex in downtown Milwaukee is ideal for this purpose.

The total facility should include:

A. *Exhibition Hall* * * *

B. *Meeting Rooms* * * *

C. *Auditorium* * * *

D. *Arena* * * *

"2. *Control*:

The entire facility should be under the control of a commission with representatives of the City, County and State.

"3. *Elimination of Private Ownership*:

The Auditorium Company with its existing private ownership should be eliminated.

"4. *Creating of Operating Commission*:

The existing facilities should then be conveyed to the Commission or a building corporation which leases to the Commission.

"5. *Financing*:

Because the benefits of a convention and exhibition center are more than purely local but accrue to the advantage of the entire State, the entire project should be financed by the City, County and State and should be styled to take advantage of available Federal funds. The outstanding debt of the existing facilities should be assumed and integrated into the overall financing package. As an alternative, if necessary for financing purposes, the State could separately own and finance the exhibit hall and the City and County own and finance the balance of the facilities. All facilities would be leased to and operated by the Commission.

"6. *Hotel*: * * *

"7. *Parking*:

Convenient adjacent parking should be provided for 3000 cars, all-weather walkways from this and the MacArthur Square parking should be provided.

"8. *Sports Facilities*: * * *

"9. *Coordination of Promotion and Facilities*:

Both the Wisconsin Vacation Center, Office of the Vacation and Travel Service of the Conservation Division of the Department of Natural Resources, and the Office of the Milwaukee Convention and Visitors Bureau should be located at a convenient, appropriate place within the Auditorium-Arena-Exhibit Hall complex. The management of the facilities should adopt a plan for cooperation and coordination with these two offices to promote tourism in the State. In addition, the operation of the facilities should be coordinated with the operation of the Center for the Performing Arts and the Milwaukee County War Memorial Center, Inc."

Your letter refers to several possible financing arrangements, and since they are an integral part of your questions, they will be summarized here:

Plan #1. This plan contemplates the participation of the city, county and state as full partners, and may be described as follows:

The city, county and state would create a "Public Facilities Commission," which would in turn be authorized to establish a nonprofit corporation. The corporation would develop the needed facilities as directed by the commission. The capital costs of the facilities would be provided by:

1. Contributions by the city and county raised by taxation or borrowing.

2. Contributions by the state from current revenues if permitted under the Constitution.

3. Bonds issued by the corporation secured by an assignment of rentals and possibly by a mortgage on part or all of the facilities.

The corporation would lease the facilities to the commission at net rentals sufficient to service the funded debt. Such rentals would be made an obligation of city, county and state.

The commission would operate the facilities and receive all revenues resulting from such operations. Other revenues might be received by the commission from:

1. A special tax or allocation of an existing tax.

2. State aids based on the use of the facilities for educational, scientific and civic use and promotion of commerce and industry.

In effect, the city, county and state would pick up any deficits after application of all revenues referred to above. Reserve funds could be set up to balance the bad years against the good.

Plan #2 would be essentially the same as Plan #1, except that the state would not be a full participant. The commission would act as the agent of the city and county. The lease rentals would not be an obligation of the state, but only of the city and county. Only the city and county would bear the deficits after application of other revenues. The revenues would include some form of state aids and special taxes, as in Plan #1.

Plan #3 would be similar to Plan #2, except that the emphasis would be on financing the capital improvements by the use of direct obligation bonds issued by the city or the county, or both. The state would not be a full participant, but would participate to a limited degree as in Plan #2. The use of a nonprofit corporation to issue revenue bonds could be preserved as an optional method of financing under Plan #3 in case it was determined that direct obligation bonds should not be used. The city and county would provide a guarantee of rents or project deficits.

In all of the plans discussed above the proportionate participation by the units of government could be based on percentages agreed upon as representing appropriate sharing of the financial burdens.

Plan #4. The legal and constitutional problems referred to above might make it advisable for the state to participate in a completely different manner. This suggests the need for a different approach which might be illustrated by an alternative plan. Under this plan — the module approach — the state would arrange for the construction and financing of a separate portion, that is the exhibition hall of the overall complex. The exhibition hall might be financed through use of a state building corporation. This corporation might lease the exhibition hall to the state which in turn would either sublease that part of the project to a commission set up by the city and county, or enter into a contract under which the commission would operate the state facility as a part of an overall convention-sports complex.

Under Plan #4 the city and county could proceed with the remaining portions of the project essentially as set forth in either Plan #2 or Plan #3. To the extent that various portions of the complex did not pay their own way, the state would bear the financial burdens attributable to its own structure, while the city and county would underwrite their portion. Presumably there would be no state aids, but some use might be made of special taxes or special tax allocations.

You indicate that the legislature will undoubtedly attempt to enact legislation to provide appropriations and statutory authority for the project on the basis of some form of joint participation by the city, county and state. Among the possibilities that have been mentioned as revenue sources are: (1) a tax on hotel and motel rooms in the Milwaukee area, perhaps including the neighboring counties of Waukesha, Ozaukee and Washington, as well as Milwaukee county; and (2) annual state appropriations from the funds allocated for promotion of tourism.

Your questions will be considered somewhat out of order.

Question #1. Could the state appropriate money from the general fund for such purposes, based on the facilities' value to the state as a whole in aiding tourism and promoting Wisconsin industry, commerce, recreation and the arts?

Wisconsin law has long recognized that taxes can be raised and funds appropriated only for "public purposes" of "statewide concern." *Heimerl v. Ozaukee County,* (1949) 256 Wis. 151, 158, 40 N.W. 2d 564. The rule for determining whether or not a "public, statewide purpose" is served by a particular appropriation is set forth in *State ex rel. Thomson v. Giessel,* (1953) 265 Wis. 207, 215-216, 60 N.W. 2d 763, as follows:

"The general rule as to the public purpose of the expenditure of public funds is stated in 81 C.J.S., States, p. 1149, sec. 133, as follows:

" 'Generally, in connection with the validity of the expenditure of state funds, what is . . . a public purpose, is a question for the legislature to decide, with respect to which it is vested with a large discretion, which cannot be controlled by the courts unless its action is clearly evasive. . . . Where a doubt exists whether the purpose of an appropriation is public or private, it will be resolved in favor of the validity of the appropriation, . . .'

"That rule has been followed in Wisconsin. In the case of *Brodhead v. Milwaukee,* 19 Wis. *624, this court said:

" 'To justify a court in declaring a tax void, and arresting proceedings for its collection, the absence of all possible public interest in the purposes for which the funds are raised must be so clear and palpable as to be immediately perceptible to every mind. Claims founded in equity and justice, in the largest sense of those terms, or in gratitude or charity, will support a tax.' (Headnotes 3 and 4.)"

See also *State ex rel. La Follette v. Reuter,* (1967) 33 Wis. 2d 384, 397, 147 N.W. 2d 304; *State ex rel. La Follette v. Reuter,* (1967) 36 Wis. 2d 96, 114-115, 153 N.W. 2d 49.

If a public purpose can be conceived which might rationally be deemed to justify an act of the legislature, courts cannot further weigh the adequacy of the need or the wisdom of the method. *State ex rel. Zillmer v. Kreutzberg,* (1902) 114 Wis. 530, 549, 90 N.W. 1098; *State ex rel. Bowman v. Barczak,* (1967) 34 Wis. 2d 57, 68, 148 N.W. 2d 683.

It is clear that if the purpose of an expenditure is legitimate because it is "public," it will not be defeated because some private interests benefit. Conversely, incidental benefits to the public which result from the promotion of private interests do not justify their aid through the use of public funds. Am. Jur., Public Funds, pp. 757-758, §57. Between these two extremes, the matter is primarily one for the exercise of legislative discretion, and, as indicated above, the legislative judgment will only be overturned in "a plain case of departure from every public purpose which could reasonably be conceived."

No cases have been found which involve state funding of a structure of the type proposed, although there has been considerable discussion of what facilities involve a "public purpose" and are thus proper recipients of municipal funds.

In *Hallbrugger v. City of St. Louis,* (1924) 302 Mo. 573, 262 S.W. 379, it was held that an "auditorium and convention hall" served a city public purpose because of its proposed use for "public meetings, gatherings and conventions . . . suitable meeting places for educational, moral, musical, industrial, labor and other purposes." For other cases approving city appropriations for such things as auditoriums,

coliseums, opera houses, convention halls, etc., see *State ex rel. Manhattan Const. Co. v. Barnes,* (1908) 22 Okla. 191, 97 P. 997; *Egan v. San Francisco,* (1913) 165 Cal. 576, 133 P. 294; *Lewis v. Fort Worth,* (1936) 126 Tex. 458, 89 S.W. 2d 975; *McKinney v. Owensboro,* (1947) 305 Ky. 253, 203 S.W. 2d 24; *City of Boston v. Merchants National Bank,* (1958) 338 Mass. 245, 154 N.E. 2d 702. The *City of Boston* case is interesting in that the court based its holding of "public purpose" on the fact, among others, that without a new auditorium, "Boston might disappear from the list of great convention cities." (154 N.E. 2d at p. 705). Other cases have found a "public purpose" in a county farm bureau, a public market, and an athletic stadium involving possible use by a professional baseball team. *Jasper County Farm Bureau v. Jasper County,* (1926) 315 Mo. 560, 286 S.W. 381; *Woodmansee v. Kansas City,* (1940) 346 Mo. 919, 144 S.W. 2d 137; *Meyer v. City of Cleveland,* (1930) 35 Ohio App. 20, 171 N.E. 606.

As can be seen, there is little difficulty in finding that a convention center of the type described serves a valid public purpose for the municipality involved. Whether it serves a "statewide" purpose, and is thus a proper recipient of state funds, however, is more difficult to ascertain.

The specific activity of economic promotion by the state is evident at many points in the Wisconsin history. Our extensive aids to private agricultural societies and in fostering farm cooperatives are well-known, as is state support of promotional advertising of dairy and agricultural products. Since 1951, the state has devoted funds (including the establishment of a state agency) to encourage and promote the attraction of new industry into the state. The same may be said for the promotion of tourism.

The Wisconsin court has held the following matters to be proper public (and, presumably, statewide) purposes: a tax assessment for lakeshore protection (*Soens v. City of Racine,* (1860) 10 Wis. 214); harbor improvements (*Hasbrouck v. Milwaukee,* (1860) 13 Wis. 42); creation of a forestry reserve (*State ex rel. Owen v. Donald,* (1915) 160 Wis. 21, 151 N.W. 331); cash bonuses for army volunteers

and veterans (*Broadhead v. Milwaukee,* (1865) 19 Wis. 658); (*State ex rel. Atwood v. Johnson,* (1919) 170 Wis. 218, 175 N.W. 589); and relief of unemployment during the depression (*Appeal of Van Dyke,* (1935) 217 Wis. 528, 259 N.W. 700).

A few cases have dealt with the problem of local benefits *vis-a-vis* state benefits on the question of a statewide public purpose. In *City of New Richmond vs. Davidson,* (1902) 114 Wis. 563, 88 N.W. 596, the state's discharge of city debts incurred to relieve severe cyclone damage was upheld. The court emphasized the severity of the "calamity," the suddenness of the destruction, etc. In *State ex rel. W.D.A. v. Dammann,* (1938) 228 Wis. 147, 277 N.W. 278, the court held that an appropriation to a nonprofit corporation for the purpose of promoting municipal and cooperative utilities through generalized activity fulfilled a public, statewide purpose. Promoting the formation and acquisition of a *particular* enterprise was, however, held to be violative of the "statewide" purpose doctrine. In *State ex rel. Thomson v. Giessel,* (1953) 265 Wis. 207, 216, 60 N.W. 2d 763, the court upheld state payments to towns under the Forest Crop Law, stating:

"In the case of *State ex rel. Wisconsin Development Authority v. Dammann,* 228 Wis. 147, 178, 277 N.W. 278, 280 N.W. 698, this court cited with approval the following quotation from *Carmichael v. Southern Coal & Coke Co.* 301 U.S. 495, 514, 57 Sup. Ct. 868, 81 L. Ed. 1245:

" 'This court has long and consistently recognized that the public purposes of a state, for which it may raise funds by taxation, embrace expenditures for its general welfare. [Citations.] The existence of *local conditions* which, because of their nature and extent, are of concern to the public as a whole, *the modes of advancing the public interest* by correcting them or avoiding their consequences, *are peculiary within the knowledge of the legislature,* and to it, and not to the courts, is committed the duty and responsibility of making choice of the possible methods. [Citations.] As with expenditures for the general welfare of the United States [Citations,] *whether the present expenditure serves*

a public purpose is a practical question addressed to the lawmaking department, and it would require a plain case of departure from every public purpose which could reasonably be conceived to justify the intervention of a court. [Citations.]'

"Thus, as in the case of taxation, the question of whether an expenditure of public funds constitutes a public purpose is largely within the discretion of the legislature. The courts cannot interfere with the legislative determination upon either subject unless there is a very clear abuse of discretion. * * *"

The "local conditions" principle was reaffirmed in *State ex rel. La Follette v. Reuter,* (1967) 33 Wis. 2d 384, 397, 147 N.W. 2d 304, wherein the court found a statewide public purpose in a law providing aid to municipalities for the financing and construction of sewage treatment plants. In *State ex rel. Bowman v. Barczak,* (1967) 34 Wis. 2d 57, 148 N.W. 2d 683, the court sustained an act providing state funds (through the vehicle of a "dummy corporation") to aid localities in fostering industrial development.

In *State ex rel. American Legion 1941 Conv. Corp. v. Smith,* (1940) 235 Wis. 443, 293 N.W. 161, the court upheld payments to a nonprofit corporation for the purpose of financing the holding of a national American Legion convention in Milwaukee. Funds earmarked for *securing* the convention were declared to be violative of the public (statewide) purpose doctrine, however, because of the degree of speculation involved. The court stated (pp. 456-7):

"The fact that the convention is to be held in but one city will not render the public purposes served thereby merely local, instead of state-wide. * * * In a way such use of an appropriation is not unlike the use thereof by a state educational institution, which is located and conducted in but one city. * * *"

While far from conclusive on the point of the statewide purposes served by conventions (and, by analogy, convention centers) in a given locality, it does lend support to the argument that such purposes are proper recipients of

state assistance and participation. The state of Wisconsin has, for example, provided financial assistance for the operation of the State Fair and other promotional ventures such as the "World's Largest Cheese." As to the latter, ch. 137, Laws 1963, appropriated $25,000 for manufacture of the cheese, and an additional $10,000 for its promotion and exhibition at the New York World's Fair. These are examples of past legislative policy of aiding an otherwise private function because of its public benefit aspects. There are many such examples found in the statutes. See 56 OAG 233, 241-2.

Courts in other jurisdictions have sustained state appropriations for similar endeavors. In *Norman v. Ky. Bd. of Managers,* (1892) 93 Ky. 537, 20 S.W. 901, the court approved a state appropriation for Kentucky's exhibit at the Columbian Exposition as serving a valid public purpose. *Lerch v. Maryland Port Authority,* (1965) 240 Md. 438, 214 A. 2d 761, 763, involved a challenge to the issuance of revenue bonds by the Port Authority (an "instrumentality of the state of Maryland") for construction of an "International Trade Center." The proposed trade center was to include:

" * * * buildings, structures, improvements and areas necessary, convenient or desirable in the opinion of the Authority for the centralized accommodation of functions, activities and services for or incidental to the transportation of persons by water, the exchange, buying, selling and transportation of commodities and other property in international and national waterborne trade and commerce, the promotion and protection of such trade and commerce, and governmental services related to the foregoing and other Federal, State and municipal agencies and services, * * *."

In holding the expenditures to serve a public purpose, the court considered the state of policy and purpose of the act and discussed in detail the items making the Trade Center "public." This case should be considered carefully in the drafting of legislation authorizing state participation in the proposed Milwaukee Convention Center.

The documentation of benefits and supporting data in the report of the Mayor's committee will certainly lend strong support to a legislative declaration that the proposed center will serve a statewide public purpose—particularly insofar as the tourism center is concerned. Since the state of Wisconsin has traditionally supported the promotion of tourism through the use of state funds, the greater the degree to which the state's participation in the proposed convention center can be related (and perhaps limited) to this function, the greater the likelihood that such participation will be upheld by the courts.

As will be seen below, this does not mean that all aspects of the proposed facilities would be proper recipients of state aid. Nor does the fact that the center, or portions thereof, may serve a "public, statewide purpose" completely open the door for state participation in the plan. It is my opinion, however, that, given appropriately drafted enabling legislation, the "public purpose" doctrine would not bar state participation in the financing, construction and operation of at least portions of the described facilities.

Question #2. If appropriate legislation were enacted, could the state participate with the city and county in the construction, ownership, operation and financing of the described facilities in the manner set forth in the alternate plans set forth above?

Art. VIII, sec. 10, Wis. Const., provides as follows:

"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. * 195; *Redevelopment Authority v. Canepa,* (1959) 7 Wis. 2d 643, 97 N.W. 2d 695. Financial aid to municipalities in the carrying on of such works, however, 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. 2d 626.

State ex rel. La Follette v. Reuter, (1966) 33 Wis. 2d 384, 147 N.W. 2d 304, 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, 151 N.W. 331. That definition is as follows:

" '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."

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 the 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.

In an opinion isued on December 20, 1968, my predecessor in office departed from earlier opinions and advised the legislative council that state aid to municipalities for the purpose of constructing and maintaining flood control dams, did not violate art. VIII, sec. 10.

Meeting the "governmental function" test is not nearly as simple for the project you mention, however. Whether or not its purpose is public, if the project is not a proper governmental function of the state, the state's participation is prohibited by the internal improvements clause. The definition quoted above specifically declares "construction or improvement of channels of trade or commerce" to be works of internal improvement. Moreover, a convention center does not represent the type of governmental function described in *Owen v. Donald, supra*—even when viewed in the light of "present conditions." Cf. *State ex rel. La Follette v. Reuter,* (1967) 33 Wis. 2d 384, 402, 147 N.W. 2d 304.

It appears from the above that we have at last reached the real possibility of a given project meeting the "public purpose" requirement, but failing the "governmental function" test implicit in the internal improvements clause. While it may seem, at first glance, impossible for a project to fulfill a public, statewide purpose and still not be the type of governmental function excluded from the definition of "works of internal improvement" it must be remembered that these are two distinct legal principles—one (internal improvements) being a concise constitutional prohibition, and the other (public purpose) a judge-made doctrine only loosely grounded in the constitution. The Wisconsin court has consistently treated the two as separate questions. See *Hasbrouck v. Milwaukee,* (1860) 13 Wis. 42; *Jensen v. Bd. of Supervisors of Polk County,* (1879) 47 Wis. 298, 2 N.W. 320, 543; *State ex rel. Owen v. Donald,* (1915) 160 Wis. 21, 151 N.W. 331; *Loomis v. Callahan,* (1928) 196 Wis. 518, 220 N.W. 816; *Appeal of Van Dyke,* (1935) 217 Wis. 528, 259 N.W. 700; *State ex rel. W.D.A. v. Dammann,* (1938) 228 Wis. 147, 277 N.W. 278; *State ex rel. Martin v. Giessel,* (1948) 252 Wis. 363, 31 N.W. 2d 626; *State ex rel. Thomson v. Giessel,* (1953) 265 Wis. 185, 60 N.W. 2d 873; *Glendale Development v. Board of Regents,* (1960) 12 Wis. 2d 120, 106 N.W. 2d 430; *State ex rel. La Follette v. Reuter,* (1967) 33 Wis. 2d 384, 147 N.W. 2d 304; *State ex rel. Bowman v. Barczak,* (1967) 34 Wis. 2d 57, 148 N.W. 2d 683.

For these reasons, it is extremely doubtful whether the state could be a direct participant in the construction, financing or operation of a total convention center. Past legislatures, when faced with problems of internal improvements (and the debt provisions of art. VIII, secs. 3, 4, 6, 7 and 9), have relied on "dummy corporation" financing plans as a shield against violation of these sections. Although the court has never squarely held that such corporations constitute a shield in all circumstances, their effectiveness to this end may be assumed. See *State ex rel. Thomson v. Giessel,* (1953) 265 Wis. 185, 206, 60 N.W. 2d 873; *Glendale Development v. Board of Regents,* (1960) 12 Wis. 2d 120, 133-4, 106 N.W. 2d 430.

In April of this year, however, the voters gave final approval to a constitutional amendment which will permit direct borrowing by the state, and which also provides that:

"(d) No money shall be paid out of the treasury, with respect to any lease, sublease or other agreement entered into after January 1, 1971, to the Wisconsin State Agencies Building Corporation, Wisconsin State Colleges Building Corporation, Wisconsin State Public Building Corporation, Wisconsin University Building Corporation or any similar entity existing or operating for similar purposes pursuant to which such nonprofit corporation or such other entity undertakes to finance or provide a facility for use or occupancy by the state or an agency, department or instrumentality thereof." A. Jt. Res. 1 (1969).

The intent of this portion of the amendment to eliminate the present need for dummy corporation financing is evidenced by the referendum question itself, which precisely reflected such a purpose. Determination of the exact limiting effect of this amendment on the future viability of dummy corporations will have to be made at some future time.

The amendment does, however, authorize the state to incur debt directly "to acquire, construct, develop, extend, enlarge or improve land, waters, property, highways, buildings, equipment or facilities for *public purposes.*" The amendment also contains a broad disclaimer clause: "Any

other provision of this constitution to the contrary notwithstanding. . . ."

If indeed there is—as there clearly appears to be—a legal distinction between the "public purpose" necessary to permit the raising of taxes or the appropriation of state funds, and the "governmental function" which must be found to escape the internal improvements ban, a void may exist in the law which could prove fatal to a project which fulfills a public, statewide purpose, but which is not the type of governmental function discussed above. I have indicated that the proposed convention center appears to be such a project. While the disclaimer clause of the amendment undoubtedly applies to the various debt restrictions in art. VIII, its effect on the general internal improvements ban is unclear.

I have given my opinion that state financial participation in the convention center project is not prohibited by the public purpose doctrine. I have also indicated that the proposed center does not appear to be the type of governmental function described in *State ex rel. Owen v. Donald, supra,* and succeeding internal improvements cases.

In view of the fact that dummy corporation financing plans may no longer (after January 1, 1971) be available as a shield against the effect of the internal improvements clause, it is my opinion that art. VIII, sec. 10, Wis. Const., prohibits the state from participation in any portion of the proposed center except those that may be used "for the purposes of education . . . charity . . . furnishing accommodations for the transaction of public business by state offices, and other like recognized functions of state government." See *State ex rel. Owen v. Donald* and *State ex rel. La Follette v. Reuter, supra.*

State participation would, then, have to be directed solely to the clearly identifiable portion of the center allocated to use as a state-operated tourist center or some similar state governmental function.

As to your request for comment on the four financing plans reproduced at the beginning of this opinion, I cannot

approve or disapprove of any of them. In their present form, the alternative financing plans represent gradations in policy (e. g., full or limited state participation) rather than law. As a result, I cannot do more than furnish the above general comments, which apply to all the plans. My office will, of course, provide whatever legal assistance is desired during formulation of the program.

Question #3. Could the state levy a tax on the use of hotel and motel rooms in Milwaukee and adjoining counties and appropriate the proceeds of the tax toward the operating expense or debt service, or both, of such facilities?

The legislature has plenary power over the entire subject of taxation, subject only to constitutional restrictions and limitations. Since the power to appropriate funds is coextensive with the power to tax, the "public purpose" doctrine, to which a large portion of this opinion is devoted, is equally applicable to this question. See *State ex rel. Thomson v. Giessel,* (1953) 265 Wis. 185, 213, 60 N.W. 2d 763. The hotel and motel tax you describe is not an *ad valorem* property tax, and thus is not subject to the strict "uniformity" requirements of art. VIII, sec. 1, Wis. Const., *Barnes v. West Allis,* (1957) 275 Wis. 31, 37, 81 N.W. 2d 75. The Wisconsin court has held, for example, that the rule of uniformity requiring either total inclusion or total exemption is inapplicable to inheritance taxes (*Nunnemacher v. State,* (1906) 129 Wis. 190, 108 N.W. 627), "privileges" taxes (*Northwestern Mut. Life Ins. Co. v. State,* (1916) 163 Wis. 484, 155 N.W. 609), license taxes (*Business Brokers Asso. v. McCauley,* (1948) 255 Wis. 5, 38 N.W. 2d 8), income and occupational taxes (*Appeal of Van Dyke,* (1935) 217 Wis. 528; 259 N.W. 700); *State ex rel. Bernhard Stern & Sons v. Bodden,* (1917) 165 Wis. 75, 160 N.W. 1077), and excise taxes in general (*Beals v. State,* (1909) 139 Wis. 544, 121 N.W. 347). For all such taxes there may be classifications, as well as partial exemptions. Uniformity with respect to taxes of this type merely means that there be equal treatment within a classification ". . . based on reasonable differences or distinctions which distinguish the members of a class from those of another in respects germane to some general and public purpose or object of the particular legislation."

Welch v. Henry, (1937) 223 Wis. 319, 323, 271 N.W. 68; *Gottlieb v. Milwaukee,* (1967) 33 Wis. 2d 408, 428, 147 N.W. 2d 633.

It must be remembered, however, that the validity of state participation in any aspect of the proposed convention center depends largely on the public, *statewide* purpose involved. It seems highly incongruous to advance lengthy arguments as to the project's benefits to the state as a whole in order to sustain the state's initial financial participation therein, and then urge that the legislature impose a local tax in the Milwaukee area for additional financial support—presumably on the basis that a single area of the state would be more substantially and directly benefited by the center.

The Wisconsin court, in *State ex rel. New Richmond v. Davidson,* (1902) 114 Wis. 563, 576, 88 N.W. 596, quoted as follows from *Hammett v. Philadelphia,* 65 Pa. St. 146:

"The legislature, by its general powers, cannot levy . . . a local tax for general purposes."

In 51 Am. Jur., Taxation, p. 428, sec. 402, it is stated that "the people of a particular municipality cannot be taxed for a public purpose inuring equally to the benefit of the people of the whole state." For similar statements on the benefits and burdens of taxation, see 1 Cooley, *Taxation* (4th ed.), pp. 653, 663, secs. 314, 316; *Peterson v. Hancock,* (1952) 155 Neb. 801, 54 N.W. 2d 85, 94-97; *Wilson v. City of High Point,* (1953) 238 N. C. 14, 76 S.E. 2d 546; *Tennant v. Sinclair Oil & Gas Co.,* (Wyo. 1960), 355 P. 2d 887.

There are conflicting statements to be found approving tax statutes applicable only in particular areas, and indicating that the legislature may impose the whole cost of a public function on the community most immediately benefited. See 51 Am. Jur., Taxation, pp. 245, 428, secs. 184, 403. In other words, the validity of such a tax is arguable. Mere advancement of the "local benefit" argument, however, contravenes to a significant degree the "public purpose" arguments necessary to sustain any degree of state participation in the program.

Accordingly, it is my advice to you that a state tax levied for the purposes indicated and operable only in a 4-county area, would not be sustainable in court in view of the public, statewide purposes which must be legally established for the project at the outset. If appropriate enabling legislation were enacted, it would be far better for the individual counties themselves to impose the hotel taxes should they be deemed essential to the project.

RWW:WFE

Public Instruction—Driver Education—Under secs. 20.255 (2) (v) and 121.15, Stats., state superintendent of public instruction may not include the purchase of buses, equipment and cost of instructional items for aids in training driver education teachers as necessary cost of administration of the driver education program in the public schools.

September 17, 1969.

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

You ask whether funds allotted to the department of public instruction by sec. 20.255 (2) (v), Stats., and referred to in sec. 121.15, Stats., may be used to purchase buses and equipment to be contained therein for use at college campuses as aids in the instruction of college students in order to fit them for teaching driver education. Because sec. 20.255 (2) (v), Stats., allocates such funds to your department "as are necessary for the administration of the driver education program," the question becomes whether the buses and equipment are properly included as being necessary for program administration.

Sec. 20.255 (2) (v), Stats., is a part of the section appropriating funds to your department, and includes:

"(v) *Driver education.* All moneys received from the allocation made under s. 20.395 (6) (v) to be distributed to

school districts which operate driver education courses in accordance with s. 121.15. The distribution shall be made to school districts upon such reports in such form and containing such information as the state superintendent requires. Of this amount such sums are allotted to the department as are necessary for the administration of the driver education program."

Sec. 20.395 (6) (v), Stats., relating to the department of transportation, is the statutory source of the allocation described in sec. 20.255 (2) (v), Stats. It does not provide any material specifics with respect to your administration of the driver education program.

Sec. 121.15, Stats., provides:

"**State aid for driver education programs.** To promote a uniformly effective driver education program among high school and vocational, technical and adult education school pupils, each school district operating high school grades and each school of vocational, technical and adult education shall receive $25 *$30* for each pupil of high school age who successfully completes a course in driver education approved by the state superintendent, but in no case may the state aid exceed the actual cost of instruction. If the appropriation under s. 20.255 (2) (v) is inadequate in any year to provide $25 *$30* per pupil, the state aid shall be prorated after the appropriation for administration is deducted. Such state aid shall be paid at the same time as the state aid under ss. 121.08 to 121.13 is paid."

A reading together of secs. 20.255 (2) (v) and 121.15, discloses that the essential purpose of these statutes is to promote a uniformly effective driver education program *as carried out in the public high schools and vocational schools*—i.e., to induce these schools to teach driver education to their students on a uniform basis which would be achieved by each school adhering to methods and requirements approved by you, in return for which, the schools so complying would receive the aids provided therefor. The sums necessary "for the administration of the driver education program" must therefore, in my view, be related to the program as taught in the public high schools and voca-

tional schools, and must be limited to that purpose. Such being my view, I am constrained to say that I can find no authority for the proposed purchase by your department of buses and equipment which, as a self-evident proposition, would not constitute a part of the driver education program as taught to high school and vocational school pupils, as desirable as the use of buses and equipment for the stated purpose might be.

One could hardly doubt that an effective driver education program must necessarily depend upon the quality of the teaching thereof, which, in turn, is dependent upon the training and instruction given to those who later teach driver education in the public schools. But, as stated, secs. 20.255 (2) (v) and 121.15, do not encompass the state universities in the "driver education program" to which those sections relate. Consequently, an "effective" program under sec. 121.15, must depend upon and be restricted to program requirements promulgated by you for the purposes of the statutes cited.

So far as the aids source is concerned [sec. 20.395 (6) (v), Stats.], the legislature has committed to the state universities the task of preparing an effective corps of driver education teachers to function in the public schools. Thus, sec. 20.265 (1) (u), Stats., (1967), appropriates to the board of regents of the state universities:

"The amounts in the schedule from the appropriation made by s. 20.395 (6) (v) for the purpose of providing driver education teacher training."

I am unable to find any other statute which expressly makes an appropriation to your department for the purpose of assisting the state universities in driver education teacher training. I cannot construe secs. 20.255 (2) (v) and 121.15 as impliedly authorizing such assistance.

You also ask whether the following activities would be properly includible in the program administration:

1. Development of statewide evaluation study.
2. Participation in the statewide E.T.V. Network.

3. Development of a pilot program for counseling graduates of high school driver education.
4. Development of several pilot K-12 programs for schools in traffic safety education.
5. Conducting a variety of extensive curriculum workshops.
6. Letting of special contracts to select universities to carry out experimental research and development projects.
7. Providing inservice training grants for driver education teachers.
8. Providing internship grants for select local school programs and the department of public instruction.
9. Providing of graduate fellowships.
10. Setting up several pilot teacher preparation programs at select universities in Wisconsin.
11. Contracting special services of driver and traffic safety education consultants from the national and state level.
12. Purchasing driver education simulators, developing multiple-car-ranges, skid pads and emergency driving facilities at several pilot schools which could be studied by the department of public instruction for their effectiveness.

I have carefully considered each of these items. It would appear that these and perhaps other activities by your department not included in the list might well benefit indirectly a local driver education program. However, based on the facts as submitted, it appears that they are designed as aids in the training of driver education teachers rather than direct aid to the instruction of high school and vocational school pupils. In my opinion, expenditures for the training of driver education teachers and other activities mentioned above are not provided for by statute but constitute a separate program outside of the ambit of necessary costs of

administration authorized by statute to be spent by your department for the administration of a driver education program.

RWW:RDM

Counties—Fines and Fees—Sec. 345.13 permits trying traffic defendants in absentia and judgment of guilt or innocence must be entered by the court trying the case. The clear proceeds, at least 50 percent of the fines imposed, must be sent to the state treasurer to be deposited in the school fund in accordance with art. X, sec. 2, Wis. Const.

Sec. 59.20(8) may be unconstitutional, in violation of art. X, sec 2, Wis. Const., insofar as it attempts to allocate 50 percent of traffic fines to counties.

The $2.00 filing fee authorized by sec. 59.42(1)(e) applies to all criminal cases, including state traffic cases brought under sec. 345.13, and all such fees must be deposited with the state treasurer.

September 19, 1969.

ROBERT R. RINGWOOD
State Auditor

You ask my formal opinion on three questions:

1. Under sec. 345.13, Stats., what is the proper disposition of deposit monies retained by the court due to the nonappearance of the accused?

Sec. 345.13 allows a person to be found guilty of a criminal charge in absentia by specific statutory provision. As your predecessor, J. Jay Keliher, the State Auditor, was advised on May 22, 1952, bail forfeited in a criminal case belongs to the county. He was advised that the failure of the accused to appear did not authorize imposing a fine in absentia and collecting the fine out of the bail money, except for the provisions of then sec. 85.40, the predecessor

of sec. 345.13, which allowed imposing a fine in absentia on state speeding violations. The above opinion, 41 OAG 166, in referring to sec. 85.40 (b), held as follows:

"Subsec. (b) provides that in case the person accused fails to appear personally or by an authorized agent at the time fixed, 'then the money deposited with the sheriff or clerk shall be retained and used for the payment of the penalty, which may be imposed after an ex parte hearing * * * together with the costs,' the surplus if any to be returned to the person making the deposit, and in case of an acquittal the whole amount deposited shall be refunded. In speeding cases, therefore, the deposit may be applied upon a fine imposed *in absentia* and disposed of in the same manner as though the defendant had appeared for trial and been convicted."

Jurisdiction of the person of the accused may be conferred by consent. 22 C.J.S. Criminal Law §147.

Although secs. 85.40 of the old Vehicle Code and 345.13 of the Vehicle Code adopted in 1957 limited the section to speeding cases, the legislature changed the law by ch. 143, Laws 1961, to include chs. 129, 194 and the complete Motor Vehicle Code, chs. 341 to 348, inclusive. Accordingly, all traffic violations brought under state statutes and municipal ordinances are now subject to the provisions of 345.13. In traffic cases where there has been a deposit of money made with the proper authorities and the defendant does not appear in court at the time set for hearing of the case, the court must hold an "ex parte hearing upon the accused." If the defendant is found guilty, the money is to be used for payment of the penalty imposed, together with the costs, and any excess must be returned to the person who made the deposit upon his application therefor. If the accused is acquitted, the entire deposit must be refunded to the depositor upon his application.

Once the penalty has been imposed under the state law, these monies are to be deposited by the state treasurer in the state school fund within the meaning of art. X, sec. 2, Wis. Const., the applicable portion of which reads as follows:

"* * * and the clear proceeds of all fines collected in the several counties for any breach of the penal laws * * * shall be set apart as a separate fund to be called 'the school fund' * * *."

To erase any doubt that art X, sec. 2, refers to state traffic laws when it refers to "breach of the penal laws," we are referring to a state law which imposes a penalty or punishment for "some offense of a public nature or wrong committed against the state." *Black's Law Dictionary,* Third Edition. A crime is defined by the same source as "* * * a positive or negative act in violation of penal law; an offense against the state." The same source defines "fine" as "* * * pecuniary punishment imposed by a lawful tribunal upon a person convicted of crime or misdemeanor."

Sec. 939.12 provides:

"A crime is conduct which is prohibited by state law and punishable by fine or imprisonment or both. Conduct punishable only by a forfeiture is not a crime."

Under that definition the violation of the state traffic laws is a crime for which a fine can be collected within the meaning of art. X, sec. 2, and the clear proceeds of all such fines must be sent to the state school fund.

A state forfeiture is also a penalty and the "clear proceeds" are required to be deposited in the school fund by the same constitutional provision.

Sec. 59.20 (8), Stats., provides that 50 percent of all fines under the traffic laws of the state may be retained by the county as fees. The other 50 percent goes to the state school fund. There is a serious question as to whether that portion of sec. 59.20 (8) which gives 50 percent of traffic fines under state law to the counties is consistent with the "clear proceeds" provisions of art. X, sec. 2. However, until a proper action is brought to determine the validity or invalidity of the statute, it enjoys a presumption of constitutionality.

To answer your first question then, it is my opinion that in proceedings under sec. 345.13 of the statutes the clear

proceeds of the fine, 50 percent as provided in sec. 59.20 (8), shall be sent by the county treasurer to the state school fund as anticipated in art. X, sec. 2, Wis. Const. In the case of municipal ordinances the money goes to the municipality whose ordinance was violated.

Your second question is:

2. If no ex parte hearing is held, what is the status of the deposit monies?

If no hearing resulting in a finding as required by sec. 957.01 (3) is held, the court proceedings specified in the statute have not been complied with, no valid judgment can be entered, and the money deposited in accordance with the section remains with the court itself until such time as the case is disposed of in accordance with the statute. There is no authority for disposing of these monies as bail bond forfeitures.

Your third question is:

3. Do convictions of all state traffic cases fall under 59.42 (1) (e)? Do the cases in Question No. 1 above also fall under 59.42 (1) (e)?

The above provision calls for a fee of $2.00 to be assessed against the defendant in all criminal actions which shall be paid into the state treasury. The language of the statute is clear and unambiguous and needs no statutory construction or interpretation. All criminal cases are included and violation of all state traffic laws are criminal violations and, accordingly, the $2.00 fee must be collected and paid into the state treasury.

RWW:LLD

Platting—A recorded subdivision may be replatted under sec. 236.36, Stats., without undertaking the court proceedings set forth in secs. 236.40, 236.41 and 236.42, Stats., where the replate complies with the requirements of ch. 236, Stats., applicable to original plats and does not alter areas dedicated to the public.

October 22, 1969.

WALTER J. SWIETLIK
District Attorney, Ozaukee County

You advise that although a subdivision plat covering a certain area in your county has been previously recorded in the office of your register of deeds, he has recently received a second plat which not only includes the same area as originally platted, but also additional area adjacent thereto. You further indicate that the subsequent plat not only enlarges the area of the first plat but substantially changes the boundary lines of lots included therein. There is no area dedicated to the public in either the first plat or the second plat.

You request my opinion as to whether, under the above described circumstances, sec. 236.36, Stats., permits the alteration of a recorded subdivision plat by a subsequently recorded plat even though no application for the vacation or alteration of the original plat has been made to the circuit court for the county in which it is located, pursuant to the provisions of secs. 236.40 — 236.42, Stats.

Sec. 236.36, Stats., provides as follows:

"236.36 Replats. Except as provided in s. 70.27 (1), replat of all or any part of a recorded subdivision, if it alters areas dedicated to the public, may not be made or recorded except after proper court action, in the county in which the subdivision is located, has been taken to vacate the original plat or the specific part thereof."

"Replat" is defined in sec. 236.02 (13), Stats., as follows:

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

Secs. 236.40 - 236.42, Stats., provide a procedure whereby all or part of a recorded subdivision plat may be vacated or

altered upon application to the circuit court for the county in which the subdivision is located.

I find no difficulty in accepting sec. 236.36, Stats., at face value. In my opinion, the statute clearly provides that if a replat of all or part of a recorded subdivision does not alter areas dedicated to the public, it may be made and recorded without the necessity of pursuing the court procedure provided for in secs. 236.40 - 236.42, Stats. On the other hand, if the proposed replat alters areas dedicated to the public, proper court proceedings *must* be taken to vacate or alter the original plat, or the specific plat thereof, before the replat may be made or recorded. See Sec. 236.43, Stats., regarding court vacation or alteration of platted areas dedicated to the public.

Such conclusion is not only supported by, but is perhaps better understood and appreciated in light of the legislative history of the above statutes and their relationship to each other.

In 49 OAG 113 (1960), this office first considered the question as to whether a replat of an existing land subdivision or a part thereof was entitled to be recorded without having the first plat or part thereof vacated in accordance with secs. 236.40 - 236.42, Stats. At that time, neither present day sec. 236.36 nor 236.02 (13), Stats., existed. It is therefore not unexpected that we find the following stated at page 114 of that opinion:

"Ch. 236 does not provide a procedure for replatting. However, secs. 236.40, 236.41 and 236.42, provide a procedure for applying to the circuit court for the county in which a subdivision is located for the vacation or alteration of all or part of a recorded plat of a subdivision. In view of the fact that a procedure is prescribed for altering plats, it is my opinion that plats cannot be altered by means of a replat. It is a well-settled principle of statutory construction that where a statute designates a method by which a certain fact is to be determined or ascertained, such method is exclusive. This is the maxim of *expressio unius est exclusio alterius*. [Authorities cited.] There is nothing

in ch. 236 to indicate that the legislature intended a plat could be altered without following a procedure as prescribed in the chapter."

Significantly, shortly following the above opinion, the definition of replat utilized therein was introduced, verbatim, into ch. 236 by the creation of sec. 236.02 (13), Stats., by ch. 214, Laws 1961. Equally significant was the enactment of sec. 236.36, 1961 Stats., by the same chapter, to read as follows:

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

This statute clearly allowed non-judicial replat of all or any part of a recorded subdivision "when all the parties in interest" agreed thereto in writing. It was the option of this office, however, that unless such replat by consent in all respects met the requirements of ch. 236, Stats., for a new (original) plat, such replat was limited by secs. 236.40 to 236.43, Stats. 52 OAG 411, 415 (1963).

Sec. 236.36, 1961 Stats., was subsequently repealed by ch. 361, Laws 1963, however, and it was the opinion of this office that the effect of such repeal was to reinstate the law in reference to replats as it existed prior to 1961 and as construed in 49 OAG 113, supra. 55 OAG 14, 18 (1966). Thus, in the latter opinion, at page 17, the attorney general indicates:

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

The reason for the 1963 repeal of sec. 236.36, 1961 Stats., is not clear. However, it was not long before the void was

filled by the adoption of present sec. 236.36, Stats., above quoted, by ch. 193, Laws 1965.

The current statute commences with a legislative recognition that the law already provides for non-judicial vacation of subdivision plats, in the case of assessor's plats ordered by the governing body of a city, village, town or county under the provisions of sec. 70.27 (1), Stats. Sec. 70.27 (1), Stats., quite simply provides in part that:

"* * * A plat or part of a plat included in an assessor's plat shall be deemed vacated to the extent it is included in or altered by an assessor's plat. * * *"

Further, sec. 236.36, Stats., describes, as did its antecedent, the circumstances which determine whether or not court action need be undertaken to vacate an original plat or a specific part thereof. The provisions of the statute in this regard indicate that court action is not required for such purpose unless the replat "alters areas dedicated to the public."

However, although sec. 236.36, Stats., allows non-judicial replat of land under certain circumstances, it does not follow that such replat requires any less formality or adherence to statutory standards than is required for original subdivision plats. On the contrary, if the purpose, integrity and effectiveness of the platting statutes, as well as each subdivision plat adopted pursuant thereto, is to be maintained, a replat under the authority contained in sec. 236.36, Stats., must comply in all respects with the provisions of ch. 236, Stats., relating to new subdivision plats, including those regulating the survey, approval and recording thereof.

In addition, in light of the apparent rule that a purchaser of any part of a recorded subdivision plat is entitled to rely upon the statutes existing at the time of his purchase, a note of caution is warranted in reference to any proposed replat of less than all of a previously recorded subdivision plat. In *In re Vacation of Plat of Garden City,* (1936) 221 Wis. 134, 226 N.W. 202, at page 137, the court observed that the statutes under consideration, which related to the vacation of plats, were imported, as a matter of law, into a contract to purchase a platted lot;

"* * * and, in the absence of any provision therein to the contrary, his [the purchaser's] rights as well as the relative rights and obligations of all others interested in the platted land, *or any part thereof,* are subject to all provisions in those statutes. That includes the manner and conditions under which the plat, *or any part thereof,* may be vacated * * *"

Therefore, a party whose interest in a subdivision antedates present sec. 236.36, Stats., such as a subdivision lot owner who purchased his lot prior to the enactment of present sec. 236.36, Stats., apparently may resist a replat of any part of his subdivision in which he does not join, even if his lot is not located in that part of the subdivision which is to be replatted. This question would not arise in the situation you relate, since the replat you describe includes all the area covered by a previously recorded subdivision and therefore would be joined in by all owners, mortgagees, etc., pursuant to sec. 236.21 (2) (a), Stats.

In summary then, it is my opinion that as long as a replat such as you describe does not alter areas dedicated to the public and fully complies with the same statutory requirements demanded of original plats, such replat is authorized by sec. 236.36, Stats., even though court action, pursuant to secs. 236.40 - 236.42, Stats., has not been resorted to vacate or alter the previous plat.

RWW:JCM

Insurance—State Employees—Sec. 66.18, Stats., provides authority for the purchase of liability insurance for state officers, agents and employees for errors or omissions in carrying out responsibility of their governmental positions.

October 23, 1969.

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

You state that at the present time the department of transportation is studying the problem of procuring liability insurance for its officers, agents and employees to protect them in case of liability because of error or omission in carrying out the responsibilities of their governmental positions. The question has arisen as to the statutory authority for the purchase of such insurance. You call my attention to sec. 66.18, Stats., which reads as follows:

"Liability insurance. The state, and municipalities as defined in s. 345.05, are empowered to procure liability insurance covering both the state or municipal corporation and their officers, agents and employees."

The department of administration has raised the question of the applicability of the above statute to this type of insurance because of the reference to sec. 345.05, Stats., which is contained in the statute. It contends that since the reference is to civil liability for motor vehicle accidents, the statute is not intended to cover other forms of liability.

It is true that the cross-reference is to liability for motor vehicle accidents. However, the term "municipalities" has been the subject of numerous interpretations so that I attach no particular significance to the cross-reference, except that it is quite broad. Sec. 345.05, Stats., reads as follows:

"State and municipal liability for motor vehicle accidents. (1) In this section the following terms have the designated meanings:

"(a) 'Municipality' means any county, city, village, town, school district [as enumerated in s. 67.01 (1)], sewer district, drainage district, community center and, without restriction because of failure of enumeration, any other political subdivision of the state.

" * * * * "

In the case of *Pohland v. Sheboygan,* (1946) 251 Wis. 20, 27 N.W. 2d 736, the city had secured liability insurance in connection with the governmental function of maintaining a park and a toboggan slide for the use of its citizens for recreational purposes. The plaintiff was badly injured be-

cause of an alleged defect in the construction of the slide. While the court held that neither the city nor the insurance company were liable because sovereign immunity was in effect at that time, the court nevertheless pointed out that sec. 66.18, Stats., authorized the procuring of insurance to protect the city and its officers, agents and employes from liability. Based on this decision and a clear wording of the statute it becomes obvious that the liability insurance authorized by sec. 66.18, Stats., is general liability insurance and is not to be construed as being limited in its authority to the acquisition of automobile liability coverage.

The statute itself dates back to 1925 and originally did not apply to the state. The state was added, effective July 1, 1957. There is nothing ambiguous in the wording of the statute and, therefore, I am not called upon to discuss matters of construction.

It is my opinion that sec. 66.18, Stats., authorizes the state to procure liability insurance for acts of error or omissions of its officers, agents and employees.

RWW:REB

Condemnation—Kline Law—The so-called "Kline Law," ch. 275, Laws 1931 (relating to acquisitions of real property in cities of the first class), is procedural only and does not govern the law of "just compensation," which is a matter of judicial determination. Sec. 32.19, Stats., which allows payments to property owners in addition to "just compensation" applies to all property acquisitions in the state including those made under "Kline Law" procedure, as would the additional payments proposed in A.B. 604 (1969).

October 24, 1969.

THE HONORABLE THE ASSEMBLY

You have requested my opinion as to the effect of A. Subst. Amend. 2 to A. B. 604 and sec. 32.19, Stats., in cities

of the first class employing ch. 275, Laws 1931 (Kline Law), in real property acquisitions.

A. B. 604 proposes to allow certain payments over and above "just compensation" to assist persons who must relocate their homes or businesses due to the construction of a public improvement. The bill follows the general pattern of the federal highway act of 1968, although, it is broader and includes all takings for public purposes.

Sec. 32.19, Stats., allows payment to property owners for certain items of actual damage over and above just compensation. These are: realignment of personal property, removal of personal property to another site, refinancing costs, certain rental losses, and expense of plans rendered unusable.

The "Kline Law" is a method of property condemnation applicable only to cities of the first class. It is not found in the statutes. It is ch. 275, Laws 1931, as amended, and is entitled as follows:

"AN ACT empowering any city to plan and make certain public improvements, to acquire or condemn property for public purposes and improvements, to make assessments of benefits and damages for such improvements and acquisitions of property, to finance the same, and providing the procedure therefor."

Essentially, this law pertains to procedure. Perhaps, the most important difference between the Kline Law and the procedures provided in ch. 32, Stats., is that the Kline Law provides for a procedure for assessments of benefits and damages which is not provided in ch. 32 procedures. (See secs. 32.05 and 32.06, Stats.) The law also provides for a simplified method of jury determination of the necessity of the taking which, of course, is no longer needed.

The important point to note is that nowhere in the Kline Law and its various amendments, can I find any provision that purports to set up any different standard as to just compensation or the payment or non-payment of additional benefits found in sec. 32.19, Stats. In fact, if any separate set of standards were set forth, grave legal problems would arise since "just compensation" is a question for judicial

determination and I fail to see how the law could allow different standards in different parts of this state for the payment of sec. 32.19 claims or relocation assistance claims. There are only two sections in ch. 32, where the Kline Law is referred to. These are secs. 32.05 and 32.06, Stats., which are procedural statutes. They read as follows:

"32.05 Condemnation for streets, highways, storm or sanitary sewers, watercourses, alleys and airports. This section does not apply to town highways created or altered under ch. 80 except as to jury trials on appeals provided for by ss. 80.24 and 80.25, nor to proceedings in cities of the first class under chapter 275, laws of 1931, as amended (Kline Law). All other condemnation of property for public alleys, streets, highways, airports or storm sewers and sanitary sewers or watercourses undertaken by sewerage commissions governing metropolitan sewerage districts created by s. 59.96 or 66.20 shall proceed as follows:

"* * *"

"32.06 Condemnation procedure in other than highway, etc., matters. The procedure in condemnation in all matters except streets, highways, storm or sanitary sewers, watercourses, alleys and airport acquisitions, acquisitions under chapter 275, laws of 1931, as amended (Kline Law), acquisitions under ch. 157, and acquisitions under ch. 197, shall be as follows:

"* * *"

The provisions of sec. 32.19, Stats., were originally made a part of our law by ch. 639, Laws 1959. This act was a rather complete recodification of Wisconsin eminent domain laws which was the work of a special committee appointed by the governor for this purpose.

A. B. 483 (1959), which became ch. 639, contains this explanatory note as to sec. 32.05, Stats.:

"The ordinary laying out of town roads pursuant to ch. 80, Stats., is not affected. *Proceedings* for laying out streets and alleys in the city of Milwaukee under the Kline Law are not affected."

I am aware that the city of Milwaukee has enacted an ordinance under its code which deals with claims for damages. This section, 2-195, reads as follows:

"2-195 *Committee on Claims in Condemnation.* (a) Such committee shall have jurisdiction over all claims presented to the city of Milwaukee for damages because of the taking or using of private property by the city of Milwaukee for public purposes, except school purposes. * * * Such committee shall consider all claims arising from condemnation proceedings instituted under Chapter 275, Laws of 1931 as amended, or under any other law under which the city of Milwaukee is authorized to condemn, or arising by reason of negotiations under threat of condemnation under any such law. * * *"

I believe this section of the Milwaukee Code, like the Kline Law, only deals with procedures and does not alter the basic state law as to "just compensation" or other damages which the legislature now has or may make payable.

In my opinion, the Kline Law is procedural only. Sec. 32.19 payments must be made as required by law, as well as relocation payments set forth in A. B. 604, if enacted into law, to all affected property owners.

RWW:REB

Mob Damage—Liability—1969 S.B. 242 proposes to repeal sec. 66.091, Stats., which imposes liability on cities and counties for mob damage. The effect of such a repeal on rights of citizens to redress against cities, counties and the state for mob damage is discussed.

October 28, 1969.

THE HONORABLE THE ASSEMBLY

By 1969 A. Res. 41, you have requested my opinion as to "what rights of private citizens to redress against cities,

counties and the state for mob damage would be if Senate Bill 242 is enacted into law."

S. B. 242 provides for the repeal of sec. 66.091, Stats., which statute presently provides in part as follows:

"66.091 Mob damage. (1) The county shall be liable for injury to person or property by a mob or riot therein, except that within cities the city shall be liable.

" * * * *"

The statute goes on to provide for certain exempting conditions.

It was clear under the common law that neither the state nor its governmental subdivisions were liable for damage done by mobs either to persons or property. *Long v. Neenah,* (1906) 128 Wis. 40, 42, 107 N.W. 10, 18 McQuillin Mun. Corp., §53.145 (3d) Ed. Rev., 49 Am. Jur., States, Territories, and Dependencies, §73. However, statutes providing for governmental liability for damage occasioned by mob or riot have existed in Wisconsin since 1863, and the language utilized in the current statute, sec. 66.091, Stats., has remained unchanged since enacted by ch. 396, Laws 1921. In addition, that language has been held to impose liability regardless of whether or not the city or county involved is actually negligent or otherwise at fault. Thus, in *Northern Assur. Co. v. Milwaukee,* (1938) 227 Wis. 124, 277 N.W. 149, at page 129, the supreme court characterizes the statute as follows:

"It is to be observed that the statute by its terms imposes absolute liability upon the city unless the exempting conditions are present * * * *"

In the event of a repeal of sec. 66.091, Stats., by the adoption of S. B. 242, the strict liability referred to by the court in the *Northern Assur. Co.* case, supra, would no longer exist. In the absence of said statute, citizens seeking redress for mob damage would be required to place reliance on actions asserting governmental liability for their damages as a result of a negligent or other tortious failure on the part of the government involved to control or suppress a mob or riot.

The recent judicial abrogation of the governmental immunity doctrine by *Holytz v. Milwaukee,* (1962) 17 Wis. 2d 26, 115 N.W. 2d 618, significantly increased the exposure of cities and counties to liability for tort, whether by commission or omission, and, in a proper case, the private citizen could conceivably obtain some measure of redress for injury to his person and property by mob or riot through such an action. However, from a practical legal standpoint, the effectiveness of such a remedy is questionable.

Without sec. 66.091, Stats., in order to recover, the claimant would have to prove the existence of the tortious conduct alleged. In the event of a negligence action, for instance, he would be required to prove, not only the negligence of the county or city involved, but also the causal relationship between that negligence and the damage incurred. The very nature of the subject disturbances, as well as the subtle and often complex circumstances which may give rise to them, makes such a burden of proof extremely onerous. Further, of course, the defendant government would be entitled to show justification and assert all the defenses available in such actions. 52 Am. Jur., Torts, §85, et seq.

In addition, such actions would be further limited, in amount of recovery and otherwise, by the provisions of sec. 895.43, Stats., which among other things, prohibits punitive damages, limits damages in any such action to $25,000 and completely prohibits such suits against a political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees or for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions. Furthermore, no action apparently lies against a county for acts of a sheriff which are within the provisions of art. VI, sec. 4, Wis. Const. This immunity would appear to extend to the acts of undersheriffs and deputy sheriffs as well. 45 OAG 152, 156 (1956).

Since sec. 66.091, Stats., does not apply to the state, its repeal would not affect the present law in reference to suits against the state. The status of the state in this re-

gard was most succinctly stated by the supreme court in the *Holytz* case, supra, at page 41:

" * * * The decision in the case at bar removes the state's defense of nonliability for torts, but it has no effect upon the state's sovereign right under the constitution to be sued only upon its consent."

See also, *Townsend v. Wisconsin Desert Horse Assoc., Inc.*, (1969) 42 Wis. 2d 414, 167 N.W. 2d 425.

It should be noted, however, that sec. 270.58 (1), Stats., provides that where a state officer or employee is proceeded against because of acts committed while carrying out his duties, and the court or jury finds that he acted in good faith, any judgment as to damages and costs entered against him shall be paid by the state.* In a riot situation where the national guard is called to duty, the potential for such judgments is substantial. Furthermore, a plaintiff, deprived of his comparatively simple remedy against a city or a county under sec. 66.091, Stats., might well be expected to look to the state for payment.

RWW:JCM

University—Regent as Student—A regent of the University of Wisconsin is not precluded by law from attending the university as a student or from receiving a degree from the university, but he must guard against and refrain from any possible conflict of interest. The regents should establish policy and guidelines to govern this situation.

October 30, 1969.

CLARKE SMITH, *Secretary*
The Regents of the University of Wisconsin

*The statute makes similar provisions in reference to public officers and employees of political subdivisions of the state. Although deputy sheriffs serving not at the will of the sheriff but on civil service basis are covered by this subsection, payment of judgments against them is discretionary and not mandatory.

You request my opinion on the following questions:

1. May a regent of the University of Wisconsin attend the University of Wisconsin as a graduate student taking courses for credit?

2. May such a regent receive a graduate degree from the University of Wisconsin while serving as a regent of the University of Wisconsin?

Regents of the University of Wisconsin have been held to be public officers. *Martin v. Smith,* (1941) 239 Wis. 314. Secs. 946.12 and 946.13, Stats., are concerned with private interests of public officers.

Sec. 946.12 (3), Stats., prohibits a public officer from exercising a discretionary power "in a manner inconsistent with the duties of his office" and "with intent to obtain a dishonest advantage for himself or another." It is my opinion that this section does not prohibit a regent from attending the university as a student, nor from receiving a degree while serving as such regent without some indication that such attendance or awarding and receipt of such degree was done "with intent to obtain a dishonest advantage."

Sec. 946.13, Stats., prohibits a public officer from negotiating or entering into a contract in which he has a private pecuniary interest, whether direct or indirect. The question which then necesarily arises is what is the legal relationship of a student to the regents, the ultimate governing body of the university. Courts have frequently used a contract theory to describe the relationship between the student and the university. In *Zanders v. Louisiana,* (1968) 281 F. Supp. 747, 756, the federal district court for the Western District of Louisiana after dismissing "in loco parentis" as of little use in dealing with the problems of students' rights, alluded to the "contract" theory as being more valid in these words:

"On the other hand, the contract theory defines the basic relationship between university and student in terms of rights and obligations which naturally lends itself to a more fitting position within the judicial framework. While most

of the emphasis and interest in the field of student rights has occurred in recent years, concern for these rights was exhibited over sixty years ago in *Koblitz v. Western Reserve University.* * * *"

"The court went on to characterize the university-student relation as a contract and then stated:

'What then are the terms of such a contract? He [the student], upon making that contract, agrees to submit himself to the *reasonable discipline* of the school. He agrees that his conduct and character shall be such as to in no manner be detrimental to the school; and this conduct and character he must bear in all his relations with the school and with other students. He agrees that he will conform to the customs of the school; if it is the custom of the school that the professors shall discipline the scholars, reprimand and inflict such punishment as is proper under the circumstances, then he has agreed that he will conform to that custom. And he agrees that when he fails in any of the duties devolving upon him, the authorities over the school may discipline him in such a manner as shall be proper under the circumstances.

'The University agrees with him that it will impart to him instructions; that it will aid him in the ordinary ways in his studies; that it will treat him fairly; that it will give him every opportunity to improve himself, and that it will not impose upon him penalties which he in no wise merits, and that it will deal with him impartially.' 21 Ohio Cir. Ct. R. 154, 155"

If the regent-student relationship is therefore considered as one of contract, such relationship would be prohibited by sec. 946.13, Stats., if the regent entered into such contract and had a private pecuniary interest therein. *Webster's Third New International Dictionary* defines pecuniary as "1: taking the form of or consisting of money * * *; 2: of or relating to money * * *." It is clear that a college education and degrees constitute a substantial aid to achieving higher income, however, the amount of income specifically related to such education is so subjective that I do not deem this to be a "pecuniary interest" within the intent of sec.

946.13, Stats. There is, of course, the pecuniary interest of a student in the tuition and fees which he must pay to attend the university. Although these fees and charges are under the regents' jurisdiction, they are determined for the various groups of students as a whole, and therefore the regent-student participating in such determination does not, in my opinion, have a "private" pecuniary interest as such. His interest in this respect is similar to that of a regent who has children attending the university at the time of determination. For this reason I do not construe regent activity of setting fees for university attendance to constitute a private pecuniary interest for a specific regent.

The regents of the University of Wisconsin constitute a body corporate acting as an instrument for performing one of the functions of the state government. Sec. 36.03, Stats. The general rule regarding personal dealings between corporate directors and the corporation is that "a director cannot place himself in a position where his individual interest clashes with his duty to his corporation * * *." 19 Am. Jur. 2d 695. This general rule does not however preclude all dealings of a director with the corporation. The bounds of such dealing are set forth in *Nonprofit Corporations, Organizations and Associations,* Howard L. Olek, Prentice-Hall, Inc., 1965, at page 321 as follows:

"It is obvious that a director is to act for his corporation's — not his own — benefit. He may not, directly or indirectly, profit personally from his fiduciary position. This does not mean that a director or officer may touch nothing connected with the corporation. If no contract relationship and no loss or disadvantage to the corporation is involved, he is as free to act as is anyone else."

Also in 36 OAG 552, 557, a predecessor of mine opined as follows:

"We therefore advise that in our opinion it would not be unlawful for the commissioner of savings and loan associations to retain his connection with and accept salary as an officer from an association which is subject to his supervision, with the qualification that he must refrain from passing on, considering, or taking any action in his official ca-

pacity with respect to any matter involving the association with which he is affiliated."

Powers and duties of the regents directly related to students are set forth in secs. 36.06 and 36.12, Stats., as follows:

"36.06 * * *(1) The board of regents shall enact laws for the government of the university in all its branches; * * * and determine the moral and educational qualifications of applicants for admission to the various courses of instruction; * * *"

"36.12 * * * The immediate government of the several colleges shall be intrusted to their respective faculties; but the regents may regulate the courses of instruction * * * 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."

While most of the powers and duties accorded the regents are normally and necessarily exercised to relate to students as a group, there are instances where regents can and do exercise powers relating to individual students. See sec. 36.161, Stats., authorizing the regents to grant scholarships; sec. 36.185, Stats., authorizing the regents to grant loans to students of exceptional merit and Chapter V of the Regent Bylaws at section 5 (a) which reserves to the regents the power to review or instigate disciplinary proceedings against individual students.

It is my opinion, based upon the above discussion, that a regent is not precluded by statute or common law from attending the university as a student. Nor is such regent thereby precluded from receiving a degree from the university while he is serving as such regent. It is clear however, that the regents, as the governing body of the university, have great power over the operation of the university and the probability is great that situations could arise wherein duties as a regent would clash with individual rights or duties as a student. In such situation the regent is of course bound to keep himself aloof and must refrain from

voting or debating such matter. See 52 OAG 367 and 133 ALR 1257, 1258. I therefore suggest that the regents, as a group or by committee, consider the implications of attendance of a regent as a student at the university and establish a policy and guidelines to internally govern such a regent-student relationship. You have provided me with a copy of the Report of the Special Regent Committee on Conflict of Interest Policies dated June 9, 1966. It, however, appears from such report that the basic consideration of the committee was whether there was "private pecuniary interest, direct or indirect" and there is no indication that the subject of a regent attending the university as a student was considered.

RWW:WMS

Aid to Private Schools—Constitutionality—Discussion of the effect of *State ex rel. Warren v. Reuter,* (1969) ____ Wis. 2d ____, 170 N.W. 2d 790, on proposed legislation (S.B. 346 and A.B. 801) to permit state tuition grants to parents of resident students enrolled in state-supervised private elementary or high schools, together with discussion of certain factors affecting the constitutionality of such legislation.

November 11, 1969.

THE HONORABLE THE SENATE

S. Res. 13 requests my opinion on the constitutionality of S. B. 346. A. Res. 40 requests my opinion on the constitutionality of A. B. 801. These bills, identical in all respects material to this opinion, provide for state tuition grants to parents of resident students enrolled in state supervised private elementary or high schools.

Ch. 3, Laws 1969, directed me to test in the Wisconsin Supreme Court the constitutionality of state financial aids to Marquette Medical School. Since issues raised in the Marquette case also are raised in these bills, I concluded it

was necessary for me to withhold this opinion until the decision in the Marquette case had been rendered.

Sec. 1 of the bills states that their purpose is "to promote the secular education of the children of this state who attend private schools by providing for tuition grants to parents to help them pay tuition charges for such education."

Sec. 2 sets forth legislative findings, summarized as follows:

There is a financial crisis in elementary and secondary public education in this state which is being aggravated by the rapid flow of children from private to public schools. More than twenty percent of all elementary and secondary school children in this state attend private schools; such attendance fulfills the requirements of the compulsory school attendance laws. Elementary and secondary education of children serves a public purpose, and the secular education of children in private schools is an important contribution to the achievement of such public purpose. The state has a right, in the fulfillment of its education duties, to provide tuition grants to parents to help them pay for the secular education of their children in private schools and such grants serve a public purpose. If, as a result of the rapidly rising costs of education, a majority of private school children would be forced to attend the public schools of the state, a huge added financial burden to the public would result along with possible school stoppage and long-term derangement and impairment of public education. Such a hazard may be substantially reduced and all education in the state improved through tuition grants to parents for the secular education of their children in private schools.

Under sec. 5 of S. B. 346, sec. 39.305, Stats. is created to read in part:

"* * *

"(2) GRANT. To the parents of each resident student in any such private school in this state, the state shall grant an amount as provided in this section for each school term of attendance.

"(3) BASIS OF GRANTS. Subject to the limitations and requirements set forth in this section, the amount of the grants for each school term shall be $50 in the case of the students attending grades 1 to 8 and $100 in the case of students attending grades 9 to 12, but said amounts shall be doubled in the case of parents whose effective income is $3,000 or less per year, and tripled in the case of parents whose effective income is $2,000 or less per year.

"* * *

"(6) LIMITATION ON GRANTS. Such grants shall be made only to help parents pay tuition in private schools. No such grant shall:

"(a) Exceed the actual tuition payment;

"(b) Exceed the school's cost per student of providing education in secular subjects nor 80% of the school's cost per student of providing education in all subjects, whichever is less; or

"(c) Be applied for tuition payments for religious instruction.

"* * *"

A. B. 801 does not provide for the multiple aids referred to in the latter part of sec. 39.305 (3) as quoted above, nor does the A. B. contain subs. (6) (b) of sec. 39.305.

Secs. 1 and 2 of S. B. 346 and A. B. 801 constitute a finding that the tuition aids are for a public purpose. This determination by the legislature is entitled to great weight but is not conclusive if the law in its realistic operation does not fulfill a public purpose. The Wisconsin Supreme Court in *State ex rel. Warren v. Reuter,* (1969) _____ Wis. 2d _____, 170 N.W. 2d 790, at page _____ states:

"Although this court is not bound by the declaration of public purpose contained in an act, nevertheless what constitutes a public purpose is in the first instance a question for the legislature to determine and its opinion should be given great weight. The legislature, of course, cannot call black white or even gray white to reach a result; but it does have discretion in its declaration of public purpose.

State ex rel. Bowman v. Barczak, supra; David Jeffrey Co. v. City of Milwaukee, (1954) 267 Wis. 559, 578, 66 N.W. 2d 362. In *State ex rel. Reynolds v. Nusbaum,* (1962) 17 Wis. 2d 148, 115 N.W. 2d 761, this court did not accept the declaration of the legislature but determined the purpose of the school bus law in its 'realistic operation' was to benefit the private schools rather than promote the safety of children. We have no such problem in this case because the declaration of the legislature is supported by the facts."
and at page_____:

"But the respondent does not dispute that public health is a public purpose so much as he argues the appropriation will support a private school which is not a public purpose. This argument confuses the means with the end. An act is constitutional if it is designed in its principal parts to promote a public purpose so that the attainment of the public purpose is a reasonable probability. We cannot take the short rather than the long view of the problem because a private school is used as a means to attain the end. The appropriation is not primarily to benefit the Marquette School of Medicine but to promote and maintain public health. This law is no frivolous pretext for giving money to a private school but the using of a private school to attain a public purpose. What benefit is derived by the medical school is necessary and incidental to the main purpose. * * *"

It is therefore clear from *Warren v. Reuter, supra,* that the court will accept the declaration of the legislature if the facts support its determination that the "realistic operation" of the law is the legitimate public purpose of promoting the education and welfare of children rather than to benefit private schools.

Most of the private elementary and secondary schools in Wisconsin are sectarian. *State ex rel. Reynolds v. Nusbaum,* (1961) 17 Wis. 2d 148, 151, 115 N.W. 2d 761. Since, therefore the majority of tuition aids are intended and expected to go to parents of pupils attending parochial schools, it is necesary to consider the prohibitions of aid to religious societies of the United States and Wisconsin Constitutions. art I, sec. 18, Wis. Const. provides in part:

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

The appropriation for these grants is from the state's general fund and hence "drawn from the treasury." In *Nusbaum, supra,* at page 156, the court referred to the term "religious societies" as contained in that constitutional provision as follows:

"We construe 'religious societies' to be synonymous with religious organizations, and, under the stipulated facts, practically all of the nonpublic schools, whose pupils are to be transported under the attacked act, are operated by religious organizations. * * *"

The religious organizations operating these nonpublic or private schools would be benefited by the proposed grants under the bills, since these grants are intended to help pay tuition to private schools, and will subsidize parents of children attending private secular and sectarian schools. That religious societies would benefit from S. B. 346 or A. B. 801 is clear but what is not clear is whether such benefit is precluded by art. I, sec. 18, Wis. Const.

The Wisconsin Supreme Court said in *Warren v. Reuter, supra,* at page ____:

"* * * Granting that sec. 18, art. I, of the Wisconsin Constitution is more prohibitive than the First Amendment of the federal constitution, it does not follow and we cannot read sec. 18 as being so prohibitive as not to encompass the primary-effect test. In the case before us, the primary effect of the legislation is not the advancement of religion but the advancement of the health of Wisconsin residents." And at p. ____ the court observed:

". . . The appropriation is not primarily to benefit the Marquette School of Medicine but to promote and maintain public health. This law is no frivolous pretext for giving money to a private school but the using of a private school to attain a public purpose . . ."

The Wisconsin court appears to have put to rest the absolutist interpretation of art. I, sec. 18, Wis. Const., which

would prohibit all aid which benefits religious institutions either directly or indirectly. Such case construes art. I, sec. 18, as not precluding incidental benefits as long as the primary effect is not the advancement of religion.

The U.S. Supreme Court has stated that under the prohibitions of the First Amendment neither the Federal Government nor a state "can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Everson v. Board of Education,* (1946) 330 U.S. 1, 15, 67 S.Ct. 504, 91 L.Ed. 711. Busing arrangements for pupils attending parochial schools were upheld in *Everson* but the court stated in such case that the subject legislation "approaches the verge" of the power of the states. In *Zorach v. Clauson,* (1952) 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954, the U.S. Supreme Court upheld a New York statute permitting released time for pupils to obtain religious instruction off the public school premises on the ground that the program involved neither religious instruction in public schools nor the expenditure of public funds. The court stated therein that "Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education * * *." Thereafter in *Board of Education of Central School District No. 1 v. James E. Allen,* (1968) 392 U.S. 236, 88 Sup.Ct. 1923, 20 L.Ed. 2d 1060, the U.S. Supreme Court stated at page 245, "* * * this court has long recognized that religious schools pursue two goals, religious instruction and secular education." This court then held constitutional the application of a New York law which provided the loan of state owned school books to parochial schools. The court stated at page 243:

"* * * The statute upheld in *Everson* would be considered a law having 'a secular legislative purpose and a primary effect that neither advances nor inhibits religion.' We reach the same result with respect to the New York law requiring school books to be loaned free of charge to all students in specified grades. The express purpose of §701 was stated by the New York Legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose. The law mere-

ly makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools. Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution."

It must be further noted in connection with *Central School District v. Allen, supra,* that the school books to be used in the parochial schools were not the sames ones used in the public school system. The dissent of Justice Fortas reads in part as follows at pages 270, 271:

"It is misleading to say, as the majority opinion does, that the New York 'law merely makes available to all children the benefits of a general program to lend school books free of charge." (*Ante,* p. 6) This is not a 'general' program. It is a specific program to use state funds to buy books prescribed by sectarian schools which, in New York, are primarily Catholic, Jewish, and Lutheran sponsored schools. It could be called a 'general' program only if the school books made available to all children were precisely the same—the books selected for and used in the public schools. But this program is not one in which all children are treated alike, regardless of where they go to school. This program, in its unconstitutional features, is hand-tailored to satisfy the specific needs of sectarian schools. Children attending such schools are given *special* books—books selected by the sectarian authorities. How can this be other than the use of public money to aid those sectarian establishments?"

The primary-effect test is set forth in *School Dist. of Abington Township, Pa. v. Schempp,* (1963) 374 U.S. 203, 222, 83 S.Ct. 1560, 10 L.Ed. 2d 844 in these words:

"The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment ex-

ceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and primary effect that neither advances nor inhibits religion."

The *Schempp* case construed the establishment clause of the First Amendment to the U.S. Constitution in dealing with religious exercises in public schools and not with the use of public funds to aid religious institutions. The Wisconsin Supreme Court has in *Warren v. Reuter, supra,* used a similar test in interpreting art. I, sec. 18, Wis. Const.

It is clear that parochial schools would benefit from the tuition aids which are the subject of S. B. 346 and A. B. 801; but, is such benefit incidental or substantial? A tuition grant, even when limited by the cost of secular instruction, provides a direct benefit to religious societies if the secular subjects are intended generally to be permeated by religious teachings. This point is raised in *The Establishment Clause and Aid to Parochial Schools,* Jesse H. Choper, 56 California Law Review 260 at page 291 in these words:

"Probably the most complex matter concerning public financial assistance to parochial education is the permeation (or integration) issue. It is frequently contended that 'official Catholic doctrine refuses to recognize any distinction between secular and religious teaching.' Pope Pius XI and Pope Leo XIII are quoted as ordering 'that every . . . subject taught, be permeated with Christian piety, as are Catholic educators, theologians and philosophers.' A Lutheran school manual demands 'that all areas of the curriculum reflect an adequate philosophy of Christian education.' Seventh Day Adventists declare their 'endeavor to permeate all branches of learning with a spiritual outlook.' *After all, it is asked, 'if religion is taught only one or two hours a day in church schools, what is the point of maintaining the separat parochial school system?'* "

It is therefore clear that supporting the teaching of secular subjects in a parochial school also supports the religious teaching and therefore a benefit accrues to the religious

organization running such school. The fiscal notes contemplate a resulting benefit in these words:

"(1) Most private elementary schools do not charge tuition per se; but are supported by donations from the membership of the parish or church operating the school. *This fiscal note is based on the assumption that all private schools would immediately establish a tuition which would thereby allow all students enrolled to benefit from the proposed program.*"

It is apparent from this that the expectation is that tuition will be established or raised to meet the aids provided. Even if courses were devised to be completely secular, the aids would have the tendency to free, for religious purposes, money formerly and necessarily spent on teaching of secular courses—an obvious benefit to the religious society.

In *Almond v. Day,* (1955) 197 Va. 419, 89 S.E. 2d 851, a statute providing for the appropriation of funds to pay the tuition of war orphans at secondary schools and colleges was held to violate sec. 67, Virginia Const., which provides in part:

"* * * The General Assembly shall not make any appropriation of public funds, or personal property, or of any real estate, to any church, or sectarian society, association, or institution of any kind whatever, which is entirely or partly, directly or indirectly, controlled by any church or sectarian society; * * *."

The court stated at page 857:

"* * * the parent or guardian to whom the tuition fees are paid is merely the conduit or channel though whom the aid from the state to the school is transmitted."

The court distinguished cases upholding appropriations for transportation of children to private schools and the furnishing of textbooks for the use of children at private schools, the theory being that such aid was primarily for the benefit of the children and only incidentally for the benefit of the private institutions involved. Typical of those cases are: *Everson v. Board of Education,* (1947) 330 U.S.

1, 67 S.Ct. 504, 91 L.Ed. 711; *Borden v. Louisiana State Board of Education,* (1929) 168 La. 1005, 123 So. 655, 67 A.L.R. 1183. The court stated in *Almond v. Day, supra,* at page 857:

"* * * Tuition and institutional fees go directly to the institution and are its very life blood. Such items are the main support of private schools which are not sufficiently endowed to insure their maintenance. Surely a payment by the State of the tuition and fees of the pupils of a private school begun on the strength of a contract by the State to do so would be an appropriation to that school."

Direct aids to parochial schools were also held unconstitutional in *Swart v. South Burlington Town School School District,* (1961) 122 Vt. 177, 167 A. 2nd 514 and *Opinion of the Justices,* (1967) 108 N.H. 268, 233 A. 2d 832. It should be noted, however, that in none of the aforementioned state cases was any attempt made in the subject statutes to limit the tuition aids to the cost of secular instruction. Proposed sec. 39.305 (6) precludes application of tuition grants to religious instruction.

In rejecting the argument that the school bus act could be sustained on the grounds that the transportation of parochial school pupils would promote their health and welfare, the court analogized in *State ex rel. Reynolds v. Nusbaum,* (1962) 17 Wis. 2d 148, 160, 115 N.W. 2d 761:

"* * * It could also be argued with equal plausibility that a direct grant in aid of public funds to parochial schools promotes the general welfare of the pupils of such schools because it aids in their education. * * *"

Thereafter, the court stated in *State ex rel. Warren v. Reuter, supra,* at p. ———:

"We find nothing in *Nusbaum* inconsistent with the primary-effect test. On the contrary, the court was of the view that the primary effect was a benefit to private schools rather than the declared legislative purpose that school-bus rides were for the safety of children. The majority of this court rationalized that because school-bus service to parochial schools was not a governmental function, i.e., 'an edu-

cational objective,' no benefit could be permitted to accrue to a private school. * * *"

It is clear therefore that since education is a governmental function the court will countenance incidental benefit to parochial schools as long as the primary effect is not aid to religious societies. S. B. 346 and A. B. 801 have as their purpose "* * * education of the children of this state who attend private schools * * *." Sec. 2 of the legislative findings of the bills declares in part at paragraph (3) "That the elementary and secondary education of children serves a public purpose; that the secular education of children in private schools is an important contribution to the achieving of such public purpose; * * *." In order for the appropriation to be for a public purpose, the primary effect of the tuition aids must necessarily be other than in aid of sectarian education. The subjects bills in effect determine that the primary effect of the tuition aids is to provide for the secular education of children rather than to aid religious societies. Under the primary-effect test set forth in *Schempp, supra,* legislation which satisfies a public purpose is constitutional unless the resulting aid to religion is substantial and directly intended. The declaration of the legislature is entitled to great weight as to the intended effect of the tuition aids; however, the court is not bound by such declaration if it is not supported by the facts.

The Wisconsin Supreme Court has in *Warren v. Reuter, supra,* made it clear that incidental benefits to religious societies are permissible under art. I, sec. 18, Wis. Const., as long as the primary effect of the legislation is in aid of a valid public purpose. The purpose and legislative findings as stated in secs. 1 and 2 of the bills indicate that the purpose of the act is to aid in the secular education of private school students. The legislature has discretion to determine the public purpose and has in the aforementioned purpose and legislative findings determined that the purpose of the bill in its "realistic operation" is to promote the education of children rather than to benefit private schools. It is for the courts to determine the bounds of the permitted benefits to religious societies.

The "primary-effect" test requires determination of facts to which the test can be applied. In *Warren v. Reuter, supra,* the facts were supplied by a stipulation regarding the structure and composition, and mode of operation of the Marquette School of Medicine. Interpretation of the proposed bills does not provide such a fact structure with which to work, thus leaving me without the means to predict whether or not the "primary-effect" is other than as stated in the bills.

If the constitutionality or unconstitutionality of these bills were clear I would feel obligated to so advise you. However, with Wisconsin adopting in *Warren v. Reuter, supra,* the "primary-effect" test, I am unable to look beyond the words of public purpose enunciated in the bills. Because of the importance of this matter to our education system and to the people of this state, I must advise that the constitutionality can only be determined by the state supreme court where it can be measured against the facts of a specific case.

RWW:WMS

Board on Government Operations—Unless restricted by statute, powers of the board on government operations continue when legislature is in session. Under present law, legislature may not, by joint resolution, order Board to act. Under present law, legislature may not, by joint resolution, release funds over which Board has statutory discretion.

November 12, 1969.

THE HONORABLE THE SENATE

By 1969 S. Res. 25, you have asked:

(1) What is the authority of the board on government operations during periods when the legislature is in actual session?

(2) May the legislature by joint resolution order the board on government operations, a legislative body con-

sisting solely of legislative members, to release these funds if it finds that the board has failed to carry out its instructions in accordance with the pertinent legislative directive?

(3) May the legislature, while in actual session, release funds designated for release through the board through some other expression of legislative will that the funds be released such as a joint resolution?

Art. VIII, sec. 2, Wis. Const., provides in part: "No money shall be paid out of the treasury except in pursuance of an appropriation by law * * *." Interpreting this, our court held:

"So long as the legislature keeps within the limits of the state and federal constitutions and the treaties of the land its power to appropriate public money is almost unbounded. Legislative bodies may appropriate money wisely or unwisely, too sparingly or too extravagantly, but so long as they keep within the limits of the organic law they are accountable not to the courts but to their constituents alone.

"As to the form which appropriations may take, the constitution lays down no ironclad rules. There is no such requirement that appropriations shall be specific or definite in amount as is found in the constitution of some of our sister states.

"In two lines it is declared that no money shall be paid out of the treasury except in pursuance of an appropriation by law. We do not consider that it is within the province of the court to annex restrictions or limitations to this plain language, or to prescribe the form of appropriation bills. The means by which legitimate expenditures are to be made necessarily rest largely in legislative discretion, a discretion which the courts have little power or little inclination to control so long as there is no violation of constitutional requirements."

State ex rel. Board of Regents v. Zimmerman, (1924) 183 Wis. 132, 139, 140, 197 N.W. 823.

In the *Zimmerman* case the court sustained the validity of sec. 20.74 which delegated to a state emergency board,

composed of the governor, secretary of state and state treasurer, power to release, pursuant to a sum-sufficient appropriation, funds to meet operating expenses of any state institution, department, board, etc. The court took a broad view of the meaning of the word "emergency" and recognized with apparent approval the system that had long prevailed by which appropriations were made for the benefit of departments of state and which provided for making expenditures on the approval or in the discretion of designated state officers. *Zimmerman, supra,* at page 145.

The authority of the board on government operations (hereinafter, Board) is mainly set forth in sec. 14.72. Other provisions dealing with the Board's functions are found in secs. 16.004 (4), 16.105 (2) (bx) and (4) (a), 16.21 (3), 16.53 (1) (d), 16.54 (5), 16.545 (7), 16.82 (4) (c), 20.251, 20.255 (3) (a) 2, 20.265 (1) (a) and (g), 20.285 (1) (g) and (h), 20.505 (5) (a), 20.545 (1) (d) and (2) (h), 20.566 (2) (a), 20.725, 20.907 (1), and 142.07 (1) (b). Some of these provisions, viz. 16.105 (2) (bx), 16.105 (4) (a), and 16.54 (5), do contain a specific limitation on the Board's power—that it may only act when the legislature is not in session. The other provisions have no such limitation. These statutes are *in pœri materia,* that is, upon the same subject matter. Where a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant in showing that a different intention existed. 82 C.J.S. Statutes, p. 813, sec. 366a; *State v. Welkos,* (1961) 14 Wis. 2d 186, 192, 109 N.W. 2d 889. In other words, the fact that the legislature chose in certain enactments to limit the power of the Board to act only when the legislature was not in session indicates an intent not to so limit the Board's power in other enactments dealing with a related subject (the Board's power) where no such limitation is expressed. Thus, I conclude that, in general, the authority of the Board continues during periods when the legislature is in session, except where the statute under which the Board purports to act expressly states otherwise. Specifically, for example, sec. 14.72, the principal source of the Board's power, contains

no such limitation and the Board's authority under that statute, therefore, continues when the legislature is in session.

Your second question deals with the power of the legislature to give orders to the Board by means of a joint resolution.

"Among the commonly recognized inherent powers of all legislative bodies is the power to express the legislative will by joint resolution upon all matters which the constitution does not require to be adopted with the formalities prescribed as essential to the passage of a law."

State ex rel. Fulton v. Zimmerman, (1926) 191 Wis. 10, 16, 210 N.W. 381.

In *Fulton* the court, while declining to say whether a certain joint resolution performed the function of a law in certain respects, approved the legislature's power to designate by joint resolution the question to be submitted to the people where the statutes prescribed what the secretary of state shall do to carry out the will of the legislature. An appropriation, as mentioned above, can only be made by law. A resolution is not sufficient for this purpose. 6 OAG 329, 331 (1917). A law of the state cannot be changed by a resolution; it can only be changed by an act ofthe legislature. 21 OAG 52, 53 (1932); 30 OAG 249, 250 (1941). In this latter cited opinion it was concluded that a joint resolution did not have the effect of law in directing the actions of the state highway commission—that the joint resolution amounted merely to an advisory request by the legislature expressing its wishes or opinion on the subject covered by the joint resolution.

The legislature created the Board and vested in it certain powers and duties. The fact that the Board is comprised, partly or totally, of members of the legislature does not affect the ability of the legislature to alter the manner in which the Board discharges its statutory duties.

The legislature has ample power to amend the laws by which it has conferred broad discretionary authority on the Board. For example, sec. 14.72 could be amended to provide in substance that the Board *shall* release or trans-

fer certain funds when certain facts are determined either by the Board or by joint legislative resolution; or that, when the legislature is in session, the Board's powers are suspended and transferred to some other agency; or that the Board's acts or refusals to act are reviewable *de novo* by another body or officer. These are ways, of course, which the Board's exercise of its power may be moderated, vectored or displaced through *statutory* action. Under present law, however, the legislature cannot, through a joint resolution or other expression of legislative will, except by law, order the Board to exercise or decline to exercise its statutory discretion or to act in a certain way or upon certain matters. Moreover, under present law, if the Board, in the legislature's opinion, is failing to follow a legislative directive, i.e. a statute, the passage of a joint resolution stating that the Board is thus in violation of the law is still an expression of legislative opinion and without legal effect upon the Board.

The question of whether a taxpayer's suit would lie to determine whether the Board has in fact exceeded its statutory authority or abused its discretion (for example, in making findings under sec. 14.72 (2)) is a matter I deem not germane to the issues here under consideration.

Answering your second question, then, a joint legislative resolution ordering the Board to release certain funds would be merely an expression of legislative opinion and would not be legally binding upon the Board.

Your third question is substantially answered by reasons stated with respect to the second. Thus, in my opinion, the legislature may not, through a joint resolution or other expression of legislative will (except by law), release funds concerning which the Board enjoys a statutory, discretionary power to release.

RWW:JEA

Parking Lots—1969 S.B. 405, providing for the creation of sec. 66.048(4), Stats., relating to the leasing of space over parking lots in cities and villages, deemed constitutional.

November 17, 1969.

THE HONORABLE THE SENATE

S. Res. 19 requests my opinion as to the constitutionality of 1969 S. B. 405, relating to leasing of space over municipal parking ramps. S. B. 405 creates sec. 66.048 (4), Stats., to read as follows:

"66.048(4) LEASE OF SPACE OVER PARKING LOTS. (a) Any city or village may lease the space over any municipally owned parking lot to any person, if the governing body determines by resolution that such lease is in the best public interest and stating the reasons therefor. Such lease shall be granted by an ordinance and shall not exceed 99 years in length.

"(b) The lease shall specify the purpose for which the leased space is to be used. If the purpose is to erect in the space a building or a structure attached to the lot, the lease shall contain a reasonably accurate description of the building to be erected and of the manner in which it shall be imposed upon or around the lot. The lease shall also provide for use by the lessee of such areas of the surface of the parking lot as are essential for ingress and egress to the leased space, for the support of the building or other structures to be erected and for the connection of essential public or private utilities to the building or structure.

"(c) Any building erected in the space leased shall be operated, as far as is practicable, separately from the parking lot owned by the muncipality.

"(d) Any leases under this subsection shall be subject to sub. (3) (c) and (d).

"(e) Any building or other structure erected above a municipally-owned parking lot shall be subject to all proper-

ty taxes levied on private property within the same taxing authorities unless the building or structure is wholly owned by the municipality and wholly used for governmental purposes."

There is no doubt that the ownership of the air space immediately above a landowner's property has taken on a new significance today, particularly in rapidly growing urban areas where practical necessity and modern technology have combined to make air space an increasingly valuable property right.

The statute in which the proposed subsection is intended to be placed, sec. 66.048, Stats., already provides limited authority to cities and villages to permit certain uses of the air space above public property. Sec. 66.048 (1) and (2), Stats., sets forth the circumstances under which a city or village may grant the privilege of erecting a viaduct above a public street or alley for the purpose of connecting buildings on each side. Under sec. 66.048 (3) (a) and (b), Stats., cities and villages are authorized to lease space which is more than twelve feet above the level of any "street, alley or other public place" to the person who owns the property on both sides of the area to be leased, if the governing body is of the opinion that the space is no longer needed for any public purpose and that the public interest will be served by such a lease.

Under art. XI, sec. 3, Wis. Const., and sec. 66.01, Stats., cities and villages are given power to determine their local affairs and government subject only to the Constitution and to such enactments of the legislature of state-wide concern as shall with uniformity affect every city or every village. In addition, cities and villages possess broad powers under secs. 62.11 (5) and 61.34 (1), Stats., to act for the welfare of the public and the commercial benefit of the municipality. Both of these statutes place the management and control of the municipal property in the hands of the governing body and provide that "The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language." Secs. 62.22 (1) and 61.34 (3), Stats., also provide additional specific authority

for cities and villages to acquire and dispose of real and personal property for public purposes. Thus, in *Smith v. City of Wisconsin Rapids,* (1956) 273 Wis. 58, 76 N.W. 2d 595, the court held that under the home-rule amendment, art. XI, sec. 3, Wis. Const., and statutes enacted pursuant thereto, a city which had acquired certain land in good faith for a public purpose could lease the land to a private party for a public business when it was no longer needed for that public purpose, even though the property would be used in competition with existing private business. It also has been recognized that a municipality, having once decided that certain land is no longer needed for public purposes, possesses considerable discretion in the manner of its disposition and, in the absence of a statute so providing, need not sell or lease the property by the competitive bid method. *Hermann v. Lake Mills,* (1957) 275 Wis. 537, 82 N.W. 2d 167. Finally, the court has indicated that before it will void the sale of municipal property, illegality, fraud, or a clear abuse of discretion on the part of the governing body of the municipality which has authorized the sale, must be shown. *Newell v. City of Kenosha,* (1959) 7 Wis. 2d 516, 523, 96 N.W. 2d 845.

In Wisconsin, therefore, unless *restrained* by statute, cities and villages possess substantial authority to sell or lease real property to which they have fee title and which is not affected by a public trust. The Wisconsin Supreme Court emphasized this broad authority in *S. D. Realty Co. v. Sewerage Commission of City of Milwaukee,* (1961) 15 Wis. 2d 15, 27, 112 N.W. 2d 177:

"At the time of execution of the 1958 lease the district possessed no express statutory power to alienate or lease property. However, we conclude that it possessed an implied power to do so.

"In *Kranjec v. West Allis,* (1954) 267 Wis. 430, 66 N.W. 2d 178, this court had before it a lease of city park land made by the city of West Allis and its park commissioners. The land was to be used as a private parking lot for automobiles of employees of the lessee, a private business corporation. In upholding the lease, the court stated (p. 434): "Munici-

palities have the same right, unless restricted by statute, to convey property as they have to acquire property, and such matters are within the reasonable discretion of the proper municipal authorities.' Furthermore, 10 McQuillin, Mun. Corp. (3d ed.), p. 96, sec. 28.42, states: 'Generally, a municipality may lease its property which is no longer required for municipal or other public use.'

"The annotations in 63 A.L.R. 614, and 133 A.L.R. 1241, indicate that the majority rule in this country is that a municipality cannot lease muicipal property in the absence of statutory authority. However, we are satisfied that the rule in Wisconsin is otherwise."

It appears quite probable, then, that our court would uphold the authority of a city or village to lease air space over a municipally-owned parking lot—even without specific statutory authorization—upon a determination that such a lease is in the public interest and that the proposed use will not materially alter or interfere with existing public uses. The provisions of S. B. 405 directed toward establishing procedures for taking such action.

Under the terms of proposed sec. 66.048 (4) (a), a city or village may lease the air space over a municipally-owned parking lot "* * * if the governing body determines by resolution that such lease is in the best public interest and stating the reasons therefore. * * *"

It is recognized that a consideration as to what is in the "best public interest" involves questions of public policy and statecraft, and determinations of applicable political and economic factors, and therefore is a legislative rather than a judicial function. *In re City of Beloit,* (1968) 37 Wis. 2d 637, 155 N.W. 2d 633; *In re City of Fond du Lac,* (1969) 42 Wis. 2d 323, _____ N.W. 2d _____.

The discretionary powers over air space leasing provided by the bill are consistent with the broad, judicially recognized powers already possessed by municipalities. This, together with the strong presumption of constitutionality which attaches to all acts of the legislature, adds greatly to the viability of S. B. 405.

"* * * Any city or village without necessity of a referendum may purchase, acquire, rent from a lessor, construct, extend, add to, improve, conduct, operate, or rent to a lessee a municipal parking system for the parking of vehicles, including parking lots and other parking facilities, upon its public streets or public grounds and issue mortgage bonds to acquire funds for any one or more of such purposes. Such parking lots and other parking facilities may include space designed for leasing to private persons for purposes other than the parking of vehicles if such space is incidental to the parking purposes of such lots or other facilities. * * *"

The mortgage bonds referred to in sec. 66.079 (1), Stats., are subject to the applicable provisions of sec. 66.066, Stats., including sec. 66.066 (2) (i), which indicates that the ordinance providing for the issuance of such bonds may contain provisions or covenants deemed necessary or desirable for the security of the bondholders or the marketability of the bonds including the "maintenance and operation, improvements or additions to and sale or alienation of the public utility." That subsection also provides that "* * * Any ordinance authorizing the issuance of bonds or other obligations payable from revenues of a public utility shall constitute a contract with the holder of any bonds or other obligations issued pursuant to such ordinance."

Obviously, I do not wish to imply that air space may be leased, under proposed sec. 66.048 (4), or otherwise, in violation of the rights of bondholders, for any such bonds are governed by the law in effect at the time of their issuance and may not be impaired by subsequent legislation. 15 McQuillin, *Municipal Corporations* (3d ed.), §43.122, p. 682. Furthermore, property held for public use cannot be disposed of in any way that violates the terms, under which it is held. 10 McQuillin, *Municipal Corporations* (3d ed., 1966 Rev. Vol.), §28.39, p. 105. Such terms would include those set forth in sec. 66.079, Stats. However, nothing in proposed S. B. 405 suggests that any such unconstitutional impairment of contract or interference with the terms upon which property may be held is either authorized or intended by the bill.

Governmental leases and conveyances have been challenged under the provisions of sec. 3a, art. XI, Wis. Const., the material portion of which reads as follows:

"Acquisition of lands by state and subdivisions; sale of excess. SECTION 3a. [As created Nov. 1912 and amended Apr. 3, 1956]. The state or any of its * * * cities * * * or villages may acquire * * * lands for establishing, laying out, widening, enlarging, extending, and maintaining memorial grounds, streets, highways, squares, parkways, boulevards, parks, playgrounds, sites for public buildings, and reservations in and about and along and leading to any or all of the same; and after the establishment, layout, and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such real estate, so as to protect such public works and improvements, and their environs, and to preserve the view, appearance, light, air, and usefulness of such public works. * * *"

Constitutional questions raised under this provision are usually based on the contention that it restricts the power of government to authorize leases of lands described therein, and that in the particular situation under consideration, such restrictions were not complied with. In *State ex rel. Thomsen v. Giessel,* (1955) 271 Wis. 15, 53, 72 N.W. 2d 577, however, our court recognized that the specific purpose of the adoption of this section as a constitutional amendment in 1912, was to cope with the problem of excess condemnation; and that the provision was a *grant* of power which broadened the authority of the state and cities in this regard. See also *Ferguson v. Kenosha,* (1958) 5 Wis. 2d 556, 565, 93 N.W. 2d 468; *State ex rel. Evjue v. Seyberth,* (1960) 9 Wis. 2d 274, 101 N.W. 2d 118, and *Newell* case, *supra.* Moreover, it is not at all clear that the acquisition of lands for a parking lot even comes within the terms of the provisions. Regardless, I find nothing in the proposed enactment which appears to contravene the provisions of sec. 3a, art. XI, Wis. Const.

The constitutionality of the proposed enactment should also be considered from the standpoint of a possible challenge under the well-established public purpose doctrine. Although no specific constitutional provision sets forth the doctrine, it has nevertheless become a firm and basic tenet of constitutional law in Wisconsin. *State ex rel. Larson v. Giessel,* (1954) 266 Wis. 547, 551, 552, 64 N.W. 2d 421. Under this concept, public debt, taxes, appropriations and expenditures may be authorized only for public purposes, and any such authorization for private or individual ends or purposes is unconstitutional. *State ex rel. Bowman v. Barczak,* (1967) 34 Wis. 2d 57, 62, 148 N.W. 2d 683; *State ex rel. LaFollette v. Reuter,* (1967) 36 Wis. 2d 96, 153 N.W. 2d 49; *City of West Allis v. Milwaukee County,* (1968) 39 Wis. 2d 356, 159 N.W. 2d 36.

The concept also appears to form a basis for determining the proper bounds within which the power of eminent domain may constitutionally be exercised. For instance, it dictates that the private property of one individual may not be taken by the public for the private use of another. *Piper v. Ekern,* (1923) 180 Wis. 586, 591, 194 N.W. 159, 34 A.L.R. 32. Thus, it is said that the courts will stand between the owner and the public demand "* * * unless the public purpose is clear and the public use, for which the private owner is to be compelled to surrender his property, is assured." *Schumm v. Milwaukee County,* (1950) 258 Wis. 256, 45 N.W. 2d 673.

First, constitutional problems may arise under the public purpose doctrine by virtue of the fact that the bill would appear to permit the construction of a city or village parking lot concurrent with the construction of a private building or other private facility in leased air space over the parking lot. This type of "package deal leasing agreement" was struck down by the Pennsylvania Supreme Court in *Price v. Philadelphia Parking Authority,* (1966) 422 Pa. 317, 221 A. 2d 138. See "Leasing of Air Space Above Public Buildings — The Public Use Doctrine and Other Problems," 28 Univ. of Pittsburgh Law Review 661, for a discussion of the *Price* case.

The agreements under consideration by the court in the *Price* case were consummated pursuant to the parking authority law of Pennsylvania, which provided, in part, as follows:

"Nothing herein contained shall be construed to prohibit the sale or leasing by the Authority of the right to occupy and use the space above any parking facility for commercial uses other than parking * * * together with the right to use and occupy such space within the parking facility as may be necessary for the purposes of access to and support of structures occupying the space above such parking facility."

A majority of the court in the 4-3 *Price* decision concluded that the two agreements under consideration were illegal inasmuch as the parking authority had not adhered to the provisions of the enabling act requiring competitive bidding in the leasing of air-rights. The court further indicated, however, that the proposed combination garage and high-rise apartment project, which was to be constructed as a "package deal," was illegal as beyond the scope of the power statutorily conferred upon the authority, since the benefit to be derived therefrom would be predominantly private, not public in nature, and since the parking authority law conferred no power on an authority to act other than for the public benefit in providing off-street parking facilities. Thus, the court indicated:

"* * * Hence, the totality of private benefit accruing to National must be considered in determining whether the project as proposed reflects the required predominate public benefit. In the instant case, in the face of the numerous and substantial benefits accruing to the private developer from the Academy Housing Project, the record fails to disclose any benefit to the public of more than a limited and incidental nature." 221 A. 2d, at p. 149.

Our court has likewise indicated that the crucial question under the public purpose doctrine is whether the return to the public is in sufficient degree so as to negate the suspicion that a private benefit is foremost. *State ex rel. Bowman v. Barczak,* (1967) 34 Wis. 2d 57, 71, 148 N.W. 2d 683.

It seems clear, however, that the proposed statute, just as the statute under consideration in the *Price* case, confers no power on cities and villages to act other than in the public interest in acquiring property to fulfill a public need for parking facilities or in the leasing of air space over parking lots.

Furthermore, the courts have not been unmindful that surplus, but nevertheless valuable, property rights may be generated as a natural *result* of a legitimate public project. In 2 Nichols, *Eminent Domain*, §7.222 [3], p. 658, the following was stated:

"When a taking is made for a public use, it is no objection that a by-product of the property taken is to be sold for private profit, even, it has been held, if the public improvement would not have been made had it not been for the expected profit from the by-product."

See also *Wisconsin River Improvement Co. v. Pier*, (1908) 137 Wis. 325, 118 N.W. 857; *In Re Southern Wisconsin Power Co.*, (1909) 140 Wis. 245, 263, 122 N.W. 801; and *David Jeffrey Co. v. Milwaukee*, (1954) 267 Wis. 559, 66 N.W. 2d 362. It is further stated in 2 Nichols, *Eminent Domain*, §7.223 [2], p. 664, that:

"* * * If a taking of the fee is made for a public use, in good faith and without a wholly unnecessary excess, it is no ground for opposing the taking that the parties making it intend to derive a private revenue by leasing the land not required for immediate occupation or by selling the surplus water when it is not needed for the public use."

There is a recognizable distinction, therefore, between cases where a public improvement is erected for "express or apparent" private purposes or the public improvement is shown to be "wholly unnecessary," and cases where "the surplus is a mere incident" to the public improvement and the public purpose it serves. *Kaukauna W. P. Co. v. Green Bay & M. C. Co.*, (1891) 142 U.S. 254, 35 L. Ed. 1004, 12 S.Ct. 173. See also *Bell v. Platteville*, (1888) 71 Wis. 139, 146, 36 N.W. 831, and *Stone v. Oconomowoc*, (1888) 71 Wis. 155, 36 N.W. 829.

Further consideration of the application of the public purpose doctrine to the lease of municipal air space contemplated by 1969 S. B. 405 appears appropriate in light of the apparent necessity of allowing some private use of the public parking lot to enable the air space above to be utilized for the purpose of leasing to private parties.

Any private construction of appreciable magnitude in the air space over a parking lot will probably require some utilization of the public parking lot area for purposes related to the private use. Obviously, however, any such use would be merely incidental to the full and complete enjoyment of property ownership to which the public is entitled. More importantly, such use would be minor, of little real significance, and would not materially affect the parking lot use. Under proposed sec. 66.048 (4) (b), Stats., use of the surface of the parking lot is limited to only such areas as are "essential" for ingress, egress, support and utilities. Sec. 66.048 (4) (c), Stats., also requires that any building erected in the leased space be operated separately from the parking lot as far as is practicable.

Further, where reasonable justification is apparent courts have recognized that public property originally designated and intended for a specific purpose may be utilized for other purposes in addition thereto as long as the additional use is not repugnant to and does not materially burden or interfere with the main public purpose to be served. *San Francisco v. Linares,* (1940) 16 Cal. 2d 441, 106 P. 2d 369, 8 A.L.R. 2d 370, 390; *Lowell v. Boston,* (1948) 322 Mass. 709, 79 N.E. 2d 713, appeal dismissed in *Pierce v. Boston,* 335 U.S. 849, 93 L.Ed. 398, 69 S.Ct. 84, 8 A.L.R. 2d 373, 391; *Shreveport v. Kahn,* (1939) 194 La. 55, 193 So. 461; *Winkenwerder v. City of Yakima,* (1958) 52 Wash. 2d 617, 328 P. 2d 873. This concept may have been at least partly involved in the thinking of our court in the *S. D. Realty Co.* case, *supra,* where the plaintiff was challenging a 99 year lease from the defendant metropolitan sewerage commission to private developers. The leased property consisted of a strip of land which the commission had "created" by encasing a watercourse with a tunnel and allowing fill to be added on top. Interestingly, in addition to an annual rent, the lessee was

required to reimburse the sewerage district for the installation of the tunnel, together with "the financing costs incurred." After recognizing that enclosing a stream in an urban area tends to protect the public safety and health, the court indicated, at page 30:

" * * * This court has held that the motives which may prompt a legislative body, such as a city council, in acting to authorize a public improvement, are not within the field of judicial scrutiny. [authorities cited] We deem that the same rule is applicable here to the exercise of discretion by the city commission, since there is no showing that it acted in bad faith.

"Plaintiff contends that the tunnel serves the private purposes of the developers and L. & L. Operating Company, Inc., and that such private purpose was the motivating factor which caused the installation of the tunnel. Even if the private purpose was a factor which motivated the expenditure, it would not invalidate the lease or the expenditure of public funds to construct the public improvement. [authorities cited.] * * * "

The public benefit in converting unused, unneeded air space over municipal property into revenue-producing property, while at the same time preserving the public use for which the property was acquired in the first instance, can hardly be doubted. And, if the main public purpose of the parking lot is affected only incidentally by the lease arrangement, as appears to be contemplated under proposed sec. 66.048 (4), Stats., it is probable the courts would uphold the constitutionality of such an arrangement.

In summary, then, it is my opinion that 1969 S. B. 405 does not on its face violate any constitutional provisions. In so concluding, however, I naturally do not purport to rule on any *modus operandi* which is not before me.

RWW:JCM

Motor Carrier---Permit—Under subs. (3) of sec. 194.44, Stats., a leasing company is relieved of the obligation to obtain a private motor carrier permit under subs. (2) only if the lessee obtains the necessary permit on the leased vehicle under subs. (1).

November 19, 1969.

JAMES L. KARNS, *Administrator*
Department of Transportation

You have asked for my opinion in relation to the following fact situation. A private motor carrier owns a truck for which he obtains a private motor carrier permit. He leases a trailer weighing less than 3,000 pounds from a motor vehicle leasing company. Neither the lessor nor the lessee obtains a private motor carrier permit for the trailer. Sec. 194.44 (2), Stats., provides that the lessor must get the permit. However, sec. 194.44 (3), Stats., exempts the lessor from this requirement, if the lessee gets the permit under sec. 194.44 (1), Stats. The lessor claims he is exempt from the requirement to get a permit for his trailer because the lessee had a permit for his truck. The question raised is whether the lessee's permit on his truck is enough to exempt the lessor from the requirement to get a permit for his trailer, or whether the lessee must first get a permit on the trailer before the lessor is exempted from such requirement.

Sec. 194.44, Stats., reads in part:

"(1) No private motor carrier shall operate a motor vehicle upon the public highways without first having obtained from the motor vehicle department a private motor carrier permit therefor.

"(2) If any person engaged in the business of leasing motor vehicles without drivers, or leasing trailers to be hauled or propelled by a motor vehicle, leases such motor vehicles without drivers, or leases such trailers to private motor carriers, such lessor shall procure a private motor carrier pemit in his name for the motor vehicles or trailers

leased to private motor carriers. In such event, a lessor's private motor carrier's permit on a motor vehicle or trailer being used by a private motor carrier shall constitute compliance with this chapter on the part of such motor carrier with respect to the requirements for a permit on such motor vehicle or trailer. * * *

"(3) The provisions of subsection (2) of this section shall not apply to any motor vehicle leased to or used by any private carrier who obtains a permit as required in subsection (1) of this section."

Sec. 194.01 (1), Stats., defines the words "motor vehicle" as used in ch. 194 to include trailers, as follows:

"(1) 'Motor vehicle' means any automobile, truck, trailer, semitrailer, tractor, motor bus or any self-propelled or motor driven vehicle, except a motor driven cycle or a vehicle operated on rails or trackless trolley car."

The words "private motor carrier," as defined by sec. 194.01 (14), Stats., do not apply to automobiles and trailers used therewith:

"(14) 'Private motor carrier' means any person except a common or contract motor carrier engaged in the transportation of property by motor vehicle other than an automobile or trailer used therewith, upon the public highways."

Sec. 194.44 (1), Stats., requires that a private motor carrier must obtain a private motor carrier permit for each motor vehicle, including trailers, which it operates on the public highway. This is done by registering the vehicle under sec. 341.25, Stats., and paying the registration fee. The permit is issued at the same time without additional charge. Vehicles under 3,000 pounds are exempt from registration under sec. 341.05 (13), Stats., but sec. 341.06 (1), Stats., provides for optional registration.

Sec. 194.44 (2), Stats., requires that a motor vehicle leasing company must obtain private motor carrier permits in its name for each of its motor vehicles leased to private motor carriers, regardless of the weight of the vehicle. A trailer to be hauled by an automobile is exempt from this

permit requirement because the definiton of private motor carrier in sec. 194.01 (14), Stats., specifically excludes an automobile or trailer used therewith. See also Wis. Adm. Code, §P.S.C. 65.02 (1). Such leasing company must also register all of its vehicles over 3,000 pounds.

Sec. 194.44 (3), Stats., provides that the provisions of subs. (2) do not apply to any motor vehicle leased to or used by any private carrier who obtains a permit as required in subs. (1). Thus, if the lessee obtains the permit, this relieves the lessor from his obligation to obtain the permit on the leased vehicle. The question raised is upon which vehicle must the lessee obtain such permit, the leased vehicle or the lessee's own truck. It has been suggested that it is sufficient that the lessee has a permit for its own truck. We do not agree. We conclude that the lessee must obtain the permit on the leased vehicle in order to relieve the lessor of its obligation under subsection (2).

Subs. (2) requires a leasing company to pay a $10.00 fee and obtain a permit for each of its vehicles leased to a private motor carrier. Subs. (3) exempts the lessor from this requirement if the lessee obtains the permit. We think it was the intention of the legislature that the lessor would be exempt from the permit requirement as to the leased vehicle, only if the lessee obtaind the permit on the leased vehicle. While the legislature did not specifically so state, we think it is clearly implied, and subs. (3) should be read as though it contained the words "for the leased vehicle" after the word "permit" therein. The intention of the legislature is the controlling factor in the interpretation of a statute. *Safeway Motor Coach Co. v. Two Rivers,* (1949) 256 Wis. 35, 39 N.W. 2d 847. *State ex rel. Mitchell v. Superior Court,* (1961) 14 Wis. 2d 77, 109 N.W. 2d 522. The first step in resolving an issue of statutory interpretation is to ascertain the legislative intent. *Heidersdorf v. State,* (1958) 5 Wis. 2d 120, 92 N.W. 2d 217. That which is within the intention of the legislature and by rules of construction can be read out of it is as much within the statute as if it were within the letter. Where obscurity exists the court may look to the purpose of a statute and to every part of the enactment and may reject words or read words in place which seem

to be there by necessary or reasonable inference. *Connell v. Luck,* (1953) 264 Wis. 282, 58 N.W. 2d 633.

In reaching this conclusion we have followed the statutory construction which was adopted by the bureau of law enforcement of the division of motor vehicles many years ago and which has been followed by that agency to the present time. The acquiescence of the legislature in such practical interpretation placed upon statutes by the administrative agency charged with enforcement is entitled to great weight in construing statutes. *Dunphy Boat Corp. v. W. E. R. B.,* (1954) 267 Wis. 316, 64 N.W. 2d 866; *State ex rel. West Allis v. Dieringer,* (1952) 275 Wis. 208, 81 N.W. 2d 533; *State ex rel. City Bank and Trust Co. v. Marshall and Ilsley Bank,* (1959) 8 Wis. 2d 301, 99 N.W. 2d 102. Administrative construction of a statute is of great weight and often decisive. *Trczyniewski v. Milwaukee,* (1961) 15 Wis. 2d 236, 112 N.W. 2d 725. Such construction is sometimes deemed controlling. *Frankenthal v. Wis. Real Estate Brokers Board,* (1958) 3 Wis. 2d 249, 88 N.W. 2d 352; *Department of Taxation v. O. H. Kindt Mfg. Co.,* (1961) 13 Wis. 2d 258, 108 N.W. 2d 535.

We have also relied on the rule of statutory construction that a tax exemption statute is to be construed strictly against the granting of the exemption. Subs. (3) of sec. 194.44, Stats., exempts a leasing company from the $10.00 permit fee requirement of subs. (2). Thus, it is in the nature of a tax exemption and subject to the well established rule of construction that tax exemptions are matters purely of legislative grace and are to be construed strictly against the granting of the same, and one who claims the exemptions must point to an express provision granting such exemption by language which clearly specifies the same and thus bring himself clearly within the terms thereof. *Comet Co. v. Department of Taxation,* (1943) 243 Wis. 117, 9 N.W. 2d 620; *Fall River Canning Co. v. Department of Taxation,* (1958) 3 Wis. 2d 632, 89 N.W. 2d 203; *Moore Motor Freight Lines v. Department of Taxation,* (1961) 14 Wis. 2d 377, 111 N.W. 2d 148. The leasing company here involved is not clearly within the terms of the exemption.

We conclude that under subs. (3) of sec. 194.44, Stats., the lessor is relieved of the obligation to comply with subs. (2) only if the lessee obtains the necessary permit on the leased vehicle. It is not enough that the lessee has a permit for his own truck.

RWW:AOH

State Debt—Dummy Corporations—The several propositions contained in the amendment to sec. 7, art. VIII, Wis. Const., are dependent upon or connected with each other and are all related to the single subject of authorizing limited state debt. Under such circumstances the several propositions were properly submitted to the people as a single amendment under the provisions of sec. 1, art. XII, Wis. Const.

December 2, 1969.

WAYNE F. MCGOWN, *Secretary*
Department of Administration

You have requested my opinion as to whether the amendment of sec. 7, art. VIII, Wis. Const., was consistent with sec. 1, art. XII, Wis. Const. The amendment in question authorizes the state to contract debt and borrow money for various public purposes. Additionally, the amendment placed a prohibition on state financing through the vehicle of the public building corporations which are commonly referred to as dummy corporations.

Sec. 1, art. XII, Wis. Const., sets forth at length the procedural requirements for amending the Constitution.

The amendment in question was first adopted by the legislature in the 1967 session as A. Jt. Res. 1. The amendment was again passed upon by the legislature in 1969 as A. Jt. Res. 1 and submitted to the electors in the spring election of 1969. There is apparently no question but that the amendment as acted upon by the legislature and as published complied with the constitutional provisions above referred to.

Your inquiry concerns the question of whether there was compliance with that part of sec. 1, art. XII, Wis. Const., which provides:

" * * * 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."

Pursuant to the dictates of sec. 1, art. XII, as quoted above, the legislature submitted the amendment to the voters in the following manner:

" 'Shall section 7 of article VIII of the constitution be amended to permit the state to contract public debt, limited in amount, in order to acquire, construct, develop, extend, enlarge or improve land, waters, property, highways, buildings, equipment or facilities for public purposes, and eliminate reliance on the present method of financing such expenditure through leases with dummy building corporations? (NOTE: Adoption of this amendment would end the practice of borrowing through "dummy" building corporations which, as of 12/1/67, had an outstanding indebtedness of $382,511,869. Beginning 1/1/71 borrowing through state public building corporations would be unconstitutional, and all bonds issued for the state building program would be backed by the full faith and credit of the state.)' "

The answer to your question depends on whether the elimination of the so-called dummy corporation financing and the authorization of direct straight borrowing constitutes a single constitutional amendment or is it in actuality two amendments requiring separate submission to the electorate.

The principle of law involved was first established in *State ex rel. Hudd v. Timme, Secretary of State,* (1882) 54 Wis. 318, 11 N.W. 785 and subsequently affirmed in *State ex rel. Thomson v. Zimmerman,* (1953) 264 Wis. 644, 60 N.W. 2d 416. This principle is:

"We think amendments to the constitution, which the section above quoted requires shall be submitted separately, must be construed to mean amendments which have different objects and purposes in view. In order to constitute

more than one amendment, the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes not dependent upon or connected with each other . . ." [*Timme, supra,* page 336]

While the rule is not particularly difficult to state, its application has been the subject matter of three prior opinions of this office, 48 OAG 188, 50 OAG 65 and 54 OAG 13.

In determining whether the several propositions contained in the amendment in question all tend to effect and carry out one general object or purpose, and are all connected with one subject, it is proper to consider whether separate submission could have resulted in an absurdity [*Timme, supra,* p. 336] or in disastrous results to the machinery of government [54 OAG 13].

Likewise, it must be considered, as stated in 54 OAG 13, whether the single submission forced the electors to vote for something they disapprove in order to approve of something they favored.

The purpose of the amendment in question is to allow state debt up to certain prescribed limits.

The state building corporations on the other hand were employed as a means of avoiding the debt limitations of Sec. 4, art. VIII, Wis. Const. Although the indebtedness of the various corporations is not legally considered as the debt of the state, such legal analysis is in a very practical sense a fiction.*

If the debt limitations of the amendment were to have any practical effect, the dummy corporations, at least as

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*The court has in numerous decisions [see for example, *Loomis v. Callahan,* (1928) 196 Wis. 518; *State ex rel. Wisconsin University Bldg. Corp. v. Bareis,* (1950) 257 Wis. 497; *State ex rel. Thomson v. Giessel,* (1953) 265 Wis. 185; *State ex rel. Thomson v. Giessel,* (1954) 267 Wis. 331; *State ex rel. Thomson v. Giessel,* (1955) 271 Wis. 15 and *Glendale Development v. Board of Regents of University of Wisconsin,* (1961) 12 Wis. 2d 120] held that the debts of the corporation are not state debts. Notwithstanding such indebtedness is amortized by the state making rental payments to the corporations which rental payments are the subject of legislative appropriations and for which the state may be subject to suit in the event of default in payment. [For example, see secs. 36.06 (6), 20.285 (9) (u) and 20.285 (9) (um).]

a means of financing, had to be removed for they could have been employed to avoid the state debt limitations in the new amendment as they were in the past.

It is obvious that the proposition in the amendment pertaining to the elimination of the building corporation financing program was necessary to effectuate the one general object of authorizing limited state debt.

Further, if the amendment propositions have been separately stated, it is conceivable that state debt would have been authorized and the elimination of the building corporations as a means of financing defeated. Such a result would have been an absurdity, for as a practical matter there would have been no debt limitation.

Nor were the voters forced to accept a proposition that they did not want in order to approve direct state financing. The building corporations are creatures of statute. The electorate could have defeated the amendment and retained this form of financing if they had preferred it to direct state financing. True, the electorate could not in the form of the submission have both state and corporate financing but this limitation is of no consequence, in my opinion, when compared with the possibility of the voters not approving either form of financing. If the electorate did not want any form of deficit financing they could have defeated the amendment and sought legislative action to repeal the statutes authorizing corporate financing.

In conclusion, it is my opinion that the several propositions of the amendment are all related to effectuate the general purpose of authorizing limited state indebtedness and are all connected with this one subject matter and necessary to give practical effect to this intent. Under such circumstances it was proper, in my opinion, to submit the several propositions of the amendment to the voters as one question.

RWW:CAB

Platting—Local Affairs and Development—Sec. 236.03 (2), Stats., sets forth the "applicable provisions" of secs. 236.15 and 236.20, Stats., with which assessors' plats must comply under sec. 70.27 (8), Stats. A determination by the head of the planning function in the Wisconsin department of local affairs and development that an assessor's plat does not comply with the applicable provisions of secs. 236.15 and 236.20, Stats., may be reviewed under ch. 227, Stats.

December 3, 1969.

D. G. WEIFORD, *Secretary*
Department of Local Affairs and Development

You have requested my opinion on two questions concerning the state level review of assessors' plats conducted by the head of the planning function in your department pursuant to sec. 70.27 (8), Stats.

As you point out, sec. 70.27 (8), Stats., requires assessors' plats to be submitted to the director of the planning function for review and prohibits approval of such plats by the local governing body until the director has certified on the face of the plat that it complies with the applicable provisions of secs. 236.15 and 236.20, Stats. You first ask: "What are the *applicable provisions* of secs. 236.15 and 236.20?"

Sec. 70.27 (8), Stats., provides in part, as follows:

"(8) PLAT FILED WITH GOVERNING BODY. Within 2 days after the assessor's plat is filed with the governing body, it shall be transmitted to the director of the planning function of the department of resource development [now the head of the planning function in the department of local affairs and development] by the clerk of the governing body which ordered the plat. The director of the planning function shall review the plat within 30 days of its receipt. No such plat shall be given final approval by the local governing body until the director of the planning function has certified on the face of the original plat that it complies with the applicable provisions of ss. 236.15 and 236.20. After the plat has been so certified by said director the

clerk shall promptly publish a class 3 notice thereof, under ch. 985. The plat shall remain on file in the clerk's office for 30 days after the first publication. At any time within such 30-day period any person or public body having an interest in any lands affected by the plat may bring a suit to have such plat corrected. * * * When recorded after approval by the governing body, the plat shall have the same effect for all purposes as if it were a land division plat made by the owners in full compliance with ch. 236. * * *"

The provisions of sec. 70.27 (6) and 236.03 (2), Stats., are also pertinent, and must be considered with sec. 70.27 (8), Stats., in reference to your question. Sec. 70.27 (6), Stats., provides as follows:

"(6) MONUMENTS, PLAT REQUIREMENTS. The provisions of s. 236.15 as to monuments, and the provisions of s. 236.20 as to form and procedure, insofar as they are applicable to purposes of assessors' plats, shall apply. Any stake or monument found and accepted as correct by a surveyor laying out an assessor's plat shall be indicated as 'stake found' or 'monument found' when mapping the plat and such stake or monument shall not be removed or replaced even though it is inconsistent with the standards of s. 236.15."

Sec. 236.03 (2), Stats., reads as follows:

"(2) This chapter does not apply to cemetery plats made under s. 157.07 and assessors' plats made under s. 70.27, but such assessors' plats shall, except in counties having a population of 500,000 or more, comply with ss. 236.15 (1) (a) to (g) and 236.20 (1) and (2) (a) to (e)."

You feel that *all* of the provisions of secs. 236.15 and 236.20 are applicable to assessors' plats except, perhaps, for sec. 236.20 (4) (d), the requirements of which are often impossible to meet on assessors' plats. You conclude that the reference in sec. 236.03 (2), Stats., to certain specific provisions of secs. 236.15 and 236.20, Stats., serves only to indicate minimum requirements and does not limit the applicability of the remaining provisions in these two sections to assessors' plats. I am unable to agree.

Sections of the statutes relating to the same subject matter should be considered together in determining their meaning, *State v. Langlade County,* (1931) 204 Wis. 311, 236 N.W. 125, and conflicts will not be determined to exist if the statutes may otherwise reasonably be construed. *State ex rel. McManman v. Thomas,* (1912) 150 Wis. 190, 136 N.W. 623; *Associated Hospital Service v. Milwaukee,* (1961) 13 Wis. 2d 447, 109 N.W. 2d 271, 88 A.L.R. 2d 1395.

In my opinion, the provisions of the statutes above quoted can be easily read together in harmony and without doing violence to their plain meaning. In fact, a careful consideration of the statutory language found therein leads necessarily to the conclusion that the *applicable provisions* of ss. 236.15 and 236.20, referred to in sec. 70.27 (6) and (8), are those specifically listed in sec. 236.03 (2), Stats.

The specific enumeration of those subsections of secs. 236.15 and 236.20, which apply to assessors' plats, as set forth in secs. 236.03 (2), clearly suggests that the remaining subsections of the two statutes do not apply to assessors' plats. A general analysis of the language used in sec. 70.27 is consistent with this view. Subs. (6) and (8) of sec. 70.27, refer to the *applicable* provisions of secs. 236.15 and 236.20. Such language certainly implies that some of the provisions of these two statutes are *inapplicable.* More specifically, it is noted that sec. 70.27 (6), requires assessors' plats to comply with the applicable provisions of secs. 236.15 "as to monuments" and with the applicable provisions of secs. 236.20 "as to form and procedures." The quoted statutory language in each instance is obviously intended to qualify and limit the application of the preceding statute. For instance, I note that all the provisions of sec. 236.15 specifically listed in secs. 236.03 (2) are directly concerned with monuments. On the other hand, sec. 236.15 (2), relating to the accuracy of the survey to be performed by a registered land surveyor, is not directly concerned with monuments, and therefore, does not appear among the provisions of sec. 236.15 listed in sec. 236.03 (2), Stats.

Thus, the descriptive phraseology utilized in sec. 70.27 (6), Stats., further fortifies the conclusion that the "ap-

plicable provisions of ss. 236.15 and 236.20," referred to in sec. 70.27 (8), Stats., are those set forth in sec. 236.03 (2), Stats.

This relationship between sec. 70.27 and sec. 236.03 (2), Stats., evident from the language utilized in the statutes, is further strongly supported by the legislative history of these two sections. Sec. 70.27 was originally enacted by ch. 384, Laws 1887. That law contained separate provisions where the lands were located outside of city limits (wherein the county clerk had authority to order an assessor's plat) and lands located within (where the authority was vested in the city council). These provisions appeared, respectively, as secs. 1047a and 1047b, Stats., 1889. They were renumbered by ch. 69, Laws 1921, as secs. 70.26 and 70.27, Stats., 1921. The application of both these statutes were limited, however, to "congressional subdivisions of 40 acres or less" or to "fractional governmental lots."

The first direct predecessor to our modern assessor's plat statute was enacted by ch. 187, Laws 1933. This amended 70.27 by removing the limitation to congressional subdivisions and governmental fractional lots while at the same time giving incorporated municipalities (cities and villages) the authority to order such assessors' plats when necessary on all lands located within their boundaries. In 1939, towns and counties were granted the same authority to order assessors' plats, limited, however, to *subdivisions* located outside of the corporated areas. Ch. 21, Laws 1939, sec. 70.27 (2), Stats., 1939.

The first modern comprehensive subdivision law (Ch. 236) was enacted by ch. 186, Laws 1935. In it, sec. 236.02, Stats., 1935, was created to read:

"236.02 CEMETERIES EXCLUDED. This chapter applies to all land-divisions except cemeteries."

Certain inconsistencies between secs. 70.26 and 70.27 created by ch. 186, Laws 1935, were not removed until the enactment of ch. 21, Laws 1939. Sec. 70.26 (the old "governmental subdivision" statute for counties) was amended to require plats made thereunder to conform with the newly

created secs. 236.04, 236.05 and 236.06, Stats., 1939. The latter sections contained detailed specifications as to placement of monuments and as to forms and procedures. At the same time, secs. 236.02 was amended to read as follows:

"This chapter applies to all land divisions except cemeteries and assessors' plats made under the provisions of section 70.27."

At that time sec. 70.27 contained no express requirements or standards whatsoever as to contents, form or procedures regarding monuments or assessors' plats (other than the general authorizing procedures), nor had any such requirements been a part of its predecessors from its earliest enactment as sec. 1047b, Stats., 1889.

The next major change, and the one most relevant to this opinion, was enacted by ch. 732, Laws 1951. This statute repealed the old sec. 70.26 and created 70.27 in almost its present form. The specific standards contained in old 70.26 as to monuments and plat requirements were now applied to 70.27 in the newly created 70.27 (6):

"MONUMENTS, PLAT REQUIREMENTS. The provisions of section 236.03 as to monuments, and the provisions of section 236.04 as to form and procedure, in so far as they are applicable to the purposes of assessors' plats, shall apply."

This is essentially the language contained in the first sentence of the present statute, although the ch. 236 sections have been renumbered.

Subs. (8) was also created by ch. 732, Laws 1951, in almost its present form, lacking only the review by the head of the planning function, which was not provided for until 1965. Ch. 457, Laws 1965. Finally, sec. 236.02 was amended to read as follows:

"This chapter applies to all land divisions and subdivisions except cemeteries and assessors' plats made under the provisions of section 70.27 but such assessors' plats shall comply with sections 236.03 (2) to (5) and 236.04 (2), (2a), (3) and (4) (a) to (k), except in counties of 500,000 populations or more." Sec. 236.02, Stats., 1951.

The above mentioned sections of the old ch. 236 contained the same kind of requirements relating to monuments and plats as are contained in the ch. 236 provisions referred to in the present sec. 236.03 (2).* Thus, the legislature in revising sec. 70.27, determined that certain provisions of ch. 236 containing requirements as to monuments and plats *should apply* to assessors' plats, and enacted two specific provisions to carry this out:

1. Sec. 70.27 (6), which referred directly to the applicable provisions of secs. 236.03, 236.04, Stats., 1951 (now secs. 236.15 and 236.20, Stats.); and

2. A provision in sec. 236.02 (now 236.03 (2)) making certain specific sections of ch. 236 applicable to assessors' plats.

The fact that these two provisions were enacted in the same law to apparently accomplish the same purpose lends convincing weight to the conclusions that they were intended by the legislature to be consistent in effect, and that the scope of sec. 70.27 (6) is identical to that of sec. 236.03 (2), Stats.

The background material accompanying your opinion request makes it evident that your second question was actually intended to elicit the opinion of this office as to the manner in which a person or a governing body may obtain judicial relief if aggrieved by virtue of the refusal of the head of the planning function to certify that an assessor's plat complies with the applicable provisions of secs. 236.15 and 236.20, Stats. Therefore, inasmuch as your original inquiry relates to the appeal procedure of ch. 236, Stats. (sec. 236.13 (5)), which is expressly made inapplicable to assessors' plats by sec. 236.03 (2), Stats., I will consider your second question as thus rephrased.

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*Ch. 236 underwent a second major revision in 1955 when the legislature enacted ch. 570, Laws 1955. The requirements as to monuments and plats contained in old 236.03 and 236.04 were rewritten and recreated as secs. 236.15 and 236.20, respectively. The references in sec. 70.27 (6) were changed accordingly. At the same time, sec. 236.02 of the old statute was repealed and its provisions were reenacted in essentially the same form as they appear today in the present sec. 236.03 (2), Stats.

Sec. 70.27, (8), Stats., does provide a procedure whereby suit may be instituted by "any person or public body having an interest in any lands affected" to have an assessor's plat corrected before it is finally approved by the governing body. Apparently, however, such a lawsuit cannot be brought until *after* an assessor's plat is approved by the head of the planning function and class 3 notice is given by the governing body. Furthermore, sec. 70.27 (8), Stats., does not make any specific provision for review of a decision by your department to refuse to certify a particular assessor's plat as complying with the applicable provisions of secs. 236.15 and 236.20, Stats.

There must be some judical review of administrative rulings. *Stacy v. Ashland County Dept. of Public Welfare,* (1968) 39 Wis. 2d 595, 601, 159 N. W. 2d 630; *Schmidt v. Local Affairs and Development Dept.,* (1968) 39 Wis. 2d 46, 57, 158 N.W. 2d 306.

Although sec. 70.27 (8), Stats., contains no specific reference to the availability of judicial review of a determination of the head of the planning function made pursuant to that statute, a right to such review appears to exist under ch. 227, Stats.

Sec. 227.15, Stats., which specifically provides for review of the administrative decisions of state agencies, reads, in part, as follows:

"227.15 Judicial review; orders reviewable. Administrative decisions, which directly affect the legal rights, duties or privileges of any person, whether affirmative or negative in form, * * * shall be subject to judicial review as provided in this chapter; * * *"

Sec. 227.15, Stats., further provides that the decisions of certain agencies are excepted from the application of the statute. The department of local affairs and development is not one of the agencies so expected. A decision by the head of the planning function under sec. 70.27 (8), Stats., therefore, clearly appears to fall within the provisions of ch. 227, Stats., since as indicated by the court in the *Stacy* case, supra, at page 602:

"* * * The general rule of the Administrative Act is to grant review of final rulings of administrative agencies and the statutory exceptions appearing outside that act should be as clear and expressive as the exceptions provided in sec. 227.15. * * *"

In order to be entitled to judicial review under ch. 227, Stats., the complaining party must be "aggrieved by a decision specified in section 227.15 and directly affected thereby." Sec. 227.16 (1), Stats. It is not always clear who are "aggrieved" and "directly affected" by an administrative decision and each such determination rests on the specific facts involved. However, I am satisfied that the governing body which orders an assessor's plat undoubtedly has the right to seek judicial review under ch. 227, Stats., where it is prevented from approving the plat under sec. 70.27 (8), Stats., because of a determination by the head of the planning function in your department that said plat does not comply with the applicable provisions of sec. 236.15 and 236.20, Stats. See *Ashwaubenon v. Public Service Comm.*, (1963) 22 Wis. 2d 38, 48, 125 N.W. 2d 647, 126 N.W. 2d 567.

RWW:JCM

Sewerage Districts — Metropolitan Commissions — The metropolitan sewerage districts organized or enlarged previous to the decision in *In re City of Fond du Lac,* 42 Wis. 2d 323, pursuant to ch. 442, Laws 1927, and all amendments thereto, including ch. 132, Laws 1969, are existing and valid metropolitan sewerage districts.

December 22, 1969.

L. P. VOIGT,
Secretary Department of Natural Resources

The Wisconsin Supreme Court, in the recent case of *In re City of Fond du Lac,* (1969) 42 Wis. 2d 323, 166 N.W. 2d 225, held that the statutory procedure whereby metropolitan sewerage commissions are established constituted an imper-

missible delegation of legislative authority to the judiciary, in violation of the Wisconsin Constitution. Subsequent to that decision, the legislature enacted ch. 132, Laws 1969, which created sec. 66.20 (3), Stats., purporting to validate any pre-existing districts organized under ch. 442, Laws 1927, and amendments thereto. You have requested an opinion on the legal status of the districts organized previous to the decision in the *Fond du Lac* case, and on the effects of ch. 132, Laws 1969.

In *In re City of Fond du Lac,* the court concluded that secs. 66.20 to 66.209, Stats., provided for an unconstitutional delegation of legislative authority to the judiciary because, pursuant to those sections, the county courts were to decide whether the creation of a metropolitan sewerage district would be in the best interests of the people therein, and were to establish the boundary lines of such districts. Thus, the formation of a new metropolitan sewerage district in the Fond du Lac area according to the provisions of secs. 66.20 to 66.209 was prohibited. The supreme court declined, however, to adjudicate the status of metropolitan sewerage districts previously organized pursuant to those sections, stating that:

"* * * We are aware that at least three metropolitan sewerage commissions have already been established. Since the challenge to constitutionality raised here is not a claimed lack of legislative authority to provide for the creation of metropolitan sewerage districts, but rather to the method by which legislative power has been exercised, our mandate is limited to the facts of this case." 42 Wis. 2d at 333-334.

In re City of Fond du Lac was decided on April 1, 1969. On August 1, 1969, ch. 132, Laws 1969, took effect. Ch. 132 created sec. 66.20 (3) of the Stats., which reads as follows:

"66.20 (3) VALIDATION. (a) Every metropolitan sewerage district as it is constituted as of the effective date of this subsection (1969), including all territory annexed to such district, which was attempted to be organized under chapter 442, Laws 1927, and amendments thereto, and purporting to exist on the effective date of this subsection (1969), shall be a lawfully organized district and shall have

the same powers as provided for in ss. 66.20 to 66.209, and every such district is declared to be legal and the district to be duly organized.

"(b) Each sewerage district validated under this subsection shall recognize and assume as a condition precedent to continued operation hereunder all of the obligations, liabilities, contracts, bonds, grants and conveyances of the metropolitan sewerage district organized under chapter 442, Laws of 1927, and amendments thereto, and purporting to exist on the effective date of this subsection, and upon such recognition and assumption of all obligations, liabilities, contracts, bonds, grants and conveyances, the same shall constitute legal and binding obligations of such validated district. All taxes and special assessments previously levied or collected by such metrolpolitan sewerage district organized under chapter 442, Laws of 1927, and amendments thereto, and purporting to exist on the effective date of this subsection (1969) are declared to be valid taxes and special assessments of the validated district."

In deciding the *Fond du Lac* case, the court relied on *In re Incorporation of Village of North Milwaukee,* (1896) 93 Wis. 616, 622, 67 N.W. 1033, where the village incorporation statutes were held to unconstitutionally delegate legislative authority to the county courts by requiring the courts to determine whether lands "ought justly to be included in the proposed village," and by allowing the courts to change boundaries "as justice may require." The supreme court found such language to be a legislative standard which could not constitutionally be applied by the judiciary. Seventy-three years later the court came to the same conclusion with respect to the language contained in sec. 66.202 under which metropolitan sewerage districts are created.

Quite a number of villages had been incorporated under the law held unconstitutional in *In re North Milwaukee.* The legislature acted quickly to validate all such villages by enacting a curative act, ch. 5, Laws 1897. The legal status of such villages was subsequently litigated, as was the effect of the curative act. In *Town of Winneconne v. Village of Winneconne,* (1901) 111 Wis. 10, 86 N.W. 589, the court

held that villages incorporated pursuant to the unconstitutional statute had no legal status whatsoever:

"* * * The complaint was dismissed, however, on the ground that at the time of the institution of the suit, * * * there existed no such thing, either *de facto* or *de jure,* as the village of *Winneconne* because the law under which it was attempted to be incorporated was unconstitutional. *In re North Milwaukee,* 93 Wis. 616. Leaving out of consideration for the moment the question of the effect of the supposed curative act of 1897 (ch. 5, Laws 1897), this position seems to be unassailable because there was not even a *de facto* corporation. This court has held that there can be no *de facto* corporation where there is no law authorizing the formation of a *de jure* corporation. * * *" 111 Wis. at p. 12.

The court discussed the effect of the validating law in a companion case, *Winneconne v. Winneconne,* (1901) 111 Wis. 13, 16. The court held that ch. 5, Laws 1897, created the villages for the first time, subject to the condition that such villages assume all previous obligations of the villages which had attempted to incorporate under the unconstitutional law:

"* * * The legislature has plenary power to provide for the organization of cities and villages by general law. Const. art. XI, sec. 3. It may, in the exercise of such power, attach such conditions or obligations to the grant of municipal powers and privileges as it sees fit, and may compel the recognition and assumption of obligations not binding in law, but which are just and equitable in their character. * * * The law in question is a law which, in substance, creates municipal corporations where there were none before, and which, as a part of the act of creation, provides that they shall pay certain obligations supposed to have been duly incurred by the voluntary and unauthorized bodies to whose property they succeed. * * * There was no corporation prior to the act. The legislature created one, and by the same act endowed it with the property and property rights of a preexisting voluntary organization, and required it to pay the

just debts and obligations of that organization. * * *" 111 Wis. at pp. 16-7.

The holding in these cases was followed in subsequent cases involving such villages. See *Milwaukee v. Milwaukee,* (1902) 114 Wis. 374, 90 N.W. 447; *Winneconne v. Winneconne,* (1904) 122 Wis. 348, 350-1, 99 N.W. 1055. The holding was applied to school districts in *State ex rel. Horton v. Brechler,* (1925) 185 Wis. 599, 606-9, 202 N.W. 144. The school districts, which had been reorganized under an unconstitutional law, were held to be void *ab initio,* although the supreme court then exercised its discretionary power to deny *mandamus* in order to give the legislature time to remedy the situation, and in order to allow the schools to finish out the school year.

The supreme court no doubt considered these above mentioned cases in reaching its decision in the *Fond du Lac* case, as they were cited to the court in the *amicus curiae* brief of the League of Wisconsin Municipalities. (*Brief of Amicus Curiae,* pp. 21-27) At the same time, the league requested the court to abstain from any consideration of the status of the existing metropolitan sewerage districts, in order to give the legislature time to act. The last paragraph of the opinion in the *Fond du Lac* case (quoted above) appears to be a direct, positive response to that request.

Similarly, ch. 132, Laws 1969, appears to be a direct legislative response to the legal problems raised by the *Fond du Lac* decision, and, in particular, to the possibility that previously established metropolitan sewerage districts lacked valid status. Thus, sec. 66.20 (3) (a) seeks to create or validate metropolitan sewerage districts previously organized or expanded according to the procedures held unconstitutional in the *Fond du Lac* case. Sub. (b) imposes the condition that any such metropolitan district created or validated under sec. 66.20 (3) assume all obligations previously entered into. Sub. (b) also seeks to validate all taxes and special assessments of such metropolitan districts made prior to the effective date of the act.

I find it unnecessary at this time to state an opinion as to whether the three metropolitan sewerage districts organ-

ized under secs. 66.20-66.209 existed or were valid prior to the enactment of ch. 132, Laws 1969.* I am of the opinion that the holding in *Winneconne v. Winneconne, surpra,* is fully applicable to ch. 132, Laws 1969, and that act constitutes either a creation of the districts if they did not previously exist or a cure of any defect within the power of the legislature to correct.

I, therefore, conclude that the metropolitan sewerage districts organized or whose boundaries were modified prior to the decision in the *Fond du Lac* case, pursuant to ch. 442, Laws 1927, and all amendments thereto, including ch. 132, Laws 1969, are existing and valid metropolitan sewerage districts under secs. 66.20 - 66.209, Stats.

You also asked me to comment as to the effect of the *Fond du Lac* case on the Milwaukee Metropolitan Sewerage District. That district is organized under sec. 59.96, Stats., rather than under secs. 66.20-66.209. Therefore, the decision in the *Fond du Lac* case does not directly affect the validity of that district. Furthermore, sec. 59.96 contains no provision similar to those found unconstitutional in secs. 66.20 - 66.209, whereby authority over the formation or boundaries of the district is delegated to any court. Thus, the decision in the *Fond du Lac* case in no way affects the validity of the Milwaukee Metropolitan Sewerage District.

RWW:SMS

Trading Stamps—Discussion of the constitutionality of A.B. 1137 regarding the prohibition of trading stamps and other similar devices.

December 23, 1969.

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*According to 136 A.L.R. 187-204, the majority rule is that a municipal corporation organized under an unconstitutional statute will *not* be held void *ab initio,* as it would be against public policy to do so. Although the Wisconsin Supreme Court has not followed the majority rule in the past, they have not, as yet, had to apply their rule to a long standing municipal corporation, such as may be involved here.

THE HONORABLE THE ASSEMBLY

You have requested my opinion as to the constitutionality of A. B. 1137, which would abolish the sale or distribution of all trading stamps and similar devices in Wisconsin other than those issued through newspapers and other publications and those within, attached to or part of a package or container packed by the original manufacturer and directly redeemed by such manufacturer.

It is my opinion that A.B. 1137, would be constitutional if enacted into law.

The question of the legislative power to regulate or prohibit trading stamps is not new. In *Rast v. Van Deman & Lewis,* (1916) 240 U.S. 342, 36 Sup.Ct. 370, 60 L.Ed. 679, and *Tanner v. Little,* (1916) 240 U.S. 369, 36 Sup.Ct. 379, 60 L.Ed. 691, the United States Supreme Court held that trading stamp schemes are not protected by the Federal Constitution from regulation or prohibition by the states. This rule was acknowledged in the *Trading Stamp Cases,* (1917) 16 Wis. 613, 624, 166 N.W. 54, where the Wisconsin Supreme Court stated:

"* * * There is manifestly a wide-spread belief that the scheme of conducting the trading-stamp busines has in it the lure which leads to deception and improvidence of the buyer, which are adverse and injurious to the public interests and general welfare. While the * * * schemes * * * differ * * * in their essential features they are identical in so far as they affect the public generally and *subject it to the general principles of legislative regulation and prohibition within the police power of the state.* * * *"

In *Ed Schuster & Co. v. Steffes,* (1941) 237 Wis. 41, 295 N.W. 737, the Wisconsin Supreme Court again addressed itself to the question of legislative control over trading stamps. The court stated [at 237 is. 53]:

" * * * It is evident from the federal supreme court cases and from the *Trading Stamp Cases* that the whole subject of trading stamps is a matter for legislative regulation within the police power; that while many of the evils which the legislature might suppose followed from the use of trading

stamps might be thought peculiar to those redeemable in merchandise, others listed by the *Rast Case* might be thought equally to attend the issuance of stamps redeemable in cash; and that the legislature may regulate and even prohibit entirely the use of these devices. * * * "

Opinions of former attorneys general also lead to the conclusion that A.B. 1137, would be constitutional. In 52 OAG 131 (1963) and 55 OAG 43 (1966) my predecessors concluded that bills which would prohibit giving trading stamps in connection with the sale of motor fuel would probably be held constitutional. The primary constitutional question discussed was whether the enactment of such bills would amount to a denial of equal protection of the laws to the motor fuel industry. That question is not involved in determining the constitutionality of A.B. 1137, however, since the exception for publications and original packages is necessary to avoid federal commerce clause objections. See *Lorain Journal Co. v. United States,* (1951) 342 U.S. 143, 72 Sup.Ct. 181, 96 L.Ed. 162; *State ex rel. Downey - Farrell Company v. Weigle,* (1918) 168 Wis. 19, 168 N.W. 385.

Thus, both case law and prior opinions of this office make it quite clear that the use of trading stamps may be limited or even prohibited entirely within the police power of the state. It is therefore my opinion that A.B. 1137, if enacted into law, would be constitutional.

RWW:JDJ

Amusement Tax—A county is not empowered, under secs. 77.70 to 77.77, Stats., or any other statute, to impose a tax upon admissions to amusements except as part of a general sales and use tax at the statutorily prescribed rate of one-half of 1%.

December 23, 1969.

ALLAN O. MAKI,
District Attorney, St. Croix County

You state that your county has been considering enactment of a 5% tax on the sale of admissions to places of amusement, such as automobile race tracks and rodeos, and you request an opinion whether the county is empowered to do so. You state that you have found nothing in the statutes which would specifically enable the county to impose such a tax, nor anything seeming to prohibit such a tax.

A county has only such powers as are expressly conferred by statute or necessarily implied therefrom. *Spaulding v. Wood County,* (1935) 218 Wis. 224, 260 N.W. 473, and *Maier v. Racine County,* (1957) 1 Wis. 2d 384, 84 N.W. 2d 86.

The only statutes expressly or by implication conferring upon counties power to impose taxes upon admissions to places of amusement are found in subch. V of ch. 77, Stats., as affected by ch. 154, Laws 1969. These statutes provide, so far as here material:

"77.70 ADOPTION BY COUNTY ORDINANCE. Any county desiring to impose a local sales tax under this subchapter may do so by the adoption of an ordinance, stating its purpose and referring to this subchapter. * * *

"77.71 IMPOSITION OF COUNTY SALES TAX. Any county may impose a tax at the rate of one-half of one per cent of the gross receipts for the privilege of selling, leasing or renting therein tangible personal property and for the privilege of selling, performing or furnishing therein of services, the gross receipts from which constitute the measure of state sales taxation under subch. III. The rate of such tax shall be added to the rate of the state sales tax. Such tax shall be administered, enforced and collected by the state on behalf of such county and subch. III and the rules adopted pursuant thereto shall be applicable to the levy and collection of such tax."

Sec. 77.76 provides that the department of revenue shall enforce and collect such local sales tax; that the state shall retain 3% of the taxes, interest and penalties so collected, to cover costs incurred in administering the tax; and that after deducting the amounts so retained, the depart-

ment shall distribute the collections from each county enacting such a tax to the cities, villages and towns in the county.

It is clear from the above provisions that a county's power to enact a sales or use tax is limited to the power to enact a one-half of 1% tax upon those sales and uses which are subject to state sales and use taxation. A county cannot select only certain objects for sales and use taxation, but must, if it adopts such a tax, tax all of the objects which are subjected to state sales and use taxes. Also, a county sales and use tax must be imposed at the rate prescribed by sec. 77.71, Stats.

RWW:EWW

Obscenity Bill—Constitutionality—S. Subst. Amend. 1 to S.B. 121, making it a crime to disseminate obscene materials to minors, setting separate classes of criminal penalties dependent upon the age of the minor, authorizing civil actions against obscene materials and establishing a variable obscenity standard, is constitutional insofar as it follows the New York Law upheld by the United States Supreme Court in *Ginsberg v. New York*, (1968) 390 U.S. 629; but to the extent that the bill penalizes the non-commercial transfer (from father to son, for example), and to the extent that its terms cover distribution to persons between the ages of 18 and 21, it would be unconstitutional if enacted into law.

December 29, 1969.

THE HONORABLE THE SENATE

By S. Res. 17 you have requested an opinion on the constitutionality of S. Subst. Amend. 1 to S.B. 121 (1969) relating to the dissemination of obscene materials to minors. The resolution also requests my opinion on the practicality of enforcement of the bill, should it be enacted into law.

By way of summary, the bill makes it unlawful to knowingly sell, exhibit or otherwise distribute to minors certain described materials, and prescribes a "sliding scale" of

penalties, based on the age of the minor, for violation thereof. The bill also provides for injunctive proceedings, commenced by the attorney general or district attorney, to enjoin violation of the proposed law and sets up an elaborate "reporting system" involving local law enforcement officials, district attorneys, the attorney general, the governor and the legislature.

Bill 121S, as amended, is one of several such bills introduced in the past few sessions of the legislature. In 1967, the then attorney general gave his opinion that S.B. 78 (1967), which was aimed at the same evils as 121S (1969), would be unconstitutional if enacted into law and indicated the apparent success of the state of New York in devising a constitutionally acceptable statute. 56 OAG. 112. Subsequent to the issuance of that opinion, the United States Supreme Court upheld the constitutionality of the New York law, in *Ginsberg vs. New York,* (1968) 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed. 2d 195.

The statement of legislative purpose appearing in 121S recites the *Ginsberg* case, and, with exceptions which will be discussed below, the bill adopts much of the language of the New York law upheld in *Ginsberg*. The injunctive and reporting sections of 121S do not appear in the New York law.

Bill 121S, as amended, would create secs. 944.24 (the "obscenity" provisions), 944.25 (the injunctive provisions) and 954.032 (the "reporting" provisions), and would repeal existing sec. 944.21 (1) (c), the present prohibition against dissemination of obscene materials to minors. The heart of the bill lies in the definition and prohibition sections.

I. THE DEFINITIONS

The definition section of the bill provides as follows:

"(2) DEFINITIONS. As used in this section:

"(a) 'Harmful to minors' means that quality of any description of[1] representation, in whatever form, of nudity,

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[1]This is apparently a clerical error. and should read: "or" as in the New York Law.

sexual conduct, sexual excitement or sado-masochistic abuse, when it:

"1. Predominantly appeals to the prurient or morbid interest of minors; and

"2. Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable materials for minors; and

"3. Is without redeeming social importance for minors.

"(b) 'Knowingly' means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

"1. The character and content of any material described herein which is reasonably susceptible of examination by the defendant;

"2. The age of the minor, except that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to acertain the true age of such minor.

"(c) 'Minor' means any person under the age of 21 years.

"(d) 'Nudity' means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a full opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

"(e) 'Sexual conduct' means acts of masturbation, homosexuality, sexual intercourse or physical contact with a person's clothed or unclothed genitals, pubic area, buttock or the breast of a female.

"(f) 'Sexual conduct' includes poses or presentations of one or more persons over the age of puberty depicted in such a manner as to appeal to lust of minors; or, such pose or presentation of one or more persons when shown in such posture manner that the viewer's attention or concentration is primarily focused on that person's or persons' genitals, pubic area, buttocks or female breast and which would

appeal to the lust of minors or to their curiosity as to sex or to the anatomical differences between the sexes and which are to be distinguished from the flat and actual presentation of the facts, causes, functions or purposes of the subject of the writing or presentation such as to be found in a bona fide medical or biological textbook.

"(g) 'Sexual excitement' means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

"(h) 'Sado-masochistic abuse' means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed."

Proposed secs. (2) (a) 1. and 3. vary slightly from the language of the *Ginsberg* statute,[2] but I do not regard these variations as affecting the constitutionality of the bill.

A second variation, that of the age cutoff, is of much greater significance and will be discussed in detail below.

Proposed subsection (f) above, which expands the definition of "sexual conduct" contained in the preceding subsection, is not found in the *Ginsberg* statute. Another New York law (§484-i, which was repealed in 1967), prohibited, among other things, the sale to minors of any magazines, films, etc., which contained any:

"Photograph, drawing . . . (etc.) . . . of any person, of the age of puberty or older, posed or presented in such a manner as to exploit lust for commercial gain and which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical difference between the sexes . . . ."

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[2]The companion sections of N. Y. Penal Law §484-h read as follows (emphasis supplied):

"(i) predominantly appeals to the prurient, *shameful* or morbid interest of minors . . .

"* * *

"(iii) is *utterly* without redeeming social importance for minors."

The U.S. Supreme Court held this to be unconstitutionally vaque in *Rabeck v. New York,* (1968) 391 U.S. 462, 463, 88 S.Ct. 1716, 20 L.Ed. 2d 741, stating:

" * * * §484-i in part prohibited the sale of 'any . . . magazines . . . which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes . . . .' That standard in our view is unconstitutionally vague. 'Nor is it an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary purpose of protecting children. The permissible extent of vagueness is not directly proportional to, or a fuction of, the extent of the power to regulate or control expression with respect to children.' Interstate Circuit, Inc. v. City of Dallas, 390 US 676, 689. * * *"

Because proposed sec. 944.24 (2) (f) contains language identical to that quoted above, and since this language is central to the definition therein contained, it is my opinion that this subsection would be unconstitutional if enacted into law. Even if this provision were to be held invalid, however, the remainder of the act would not necessarily fail. The test of whether an entire act or statute is invalidated because of the unconstitutionality of a part thereof was stated in *State ex rel. Wisconsin Telephone Co. v. Henry,* (1935) 218 Wis. 302, 316, 260 N.W. 486, 99 A.L.R. 1267, as follows:

" * * * It is well established that the elimination of even material provisions in an act as enacted, because of the invalidity of such provisions, does not render the remaining valid provisions thereof ineffective, if the part upheld constitutes, independently of the invalid portion, a complete law in some reasonable aspect, unless it appears from the act itself that the legislature intended it to be effective only as an entirety and would not have enacted the valid part alone. * * * "

See also *State ex rel. Broughton v. Zimmerman,* (1952), 261 Wis. 398, 409, 52 N.W. 2d 903; *Burke v. Madison,* (1962) 17 Wis. 2d 623, 636, 117 N.W. 2d 580.

In addition, sec. 990.001 (11), Stats., provides as follows:

"The provisions of the statutes are severable. The provisions of any session law are severable. If any provision of the statutes or of a session law is invalid, or if the application of either to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application."

Since even the total omission of proposed sec. 944.24 (2) (f) would leave an intact law—in fact, the precise law (with exceptions as noted herein) upheld in the *Ginsberg* case—it is my opinion the entire act would not fail because of the unconstitutionality of the described subsection.

II. THE PROHIBITION

Proposed secs. 944.24 (3) and (4) provide as follows:

"(3) PROHIBITION. It is unlawful for any person knowingly to sell, give away, display, exhibit, loan or otherwise distribute to a minor:

"(a) Any picture, photograph, drawing, sculpture, motion picture film or similar visual representation or image of a person or portion of a human body which depicts nuidity, sexual conduct or sado-masochistic abuse and which is harmful to minors; or

"(b) Any book, pamphlet, magazine, printed matter however reproduced or sound recording which contains any matter enumerated in par. (a), or explicit and detailed verbal descriptions or narrative accounts of sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors.

"(4) TICKET SALE OR ADMISSION PROHIBITED. It is unlawful for any person knowingly to exhibit for monetary consideration or otherwise to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for monetary consideration to premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts nudity,

sexual conduct or sado-masochistic abuse and which is harmful to minors."

The notable difference between this proposal and the New York law is that the latter is expressly made applicable only to sales or commercial exhibitions.[3] In 56 OAG. 112, 117-118 this office discussed the "commercial gain" concept and indicated that absence of such a qualification might prove to be a fatal defect in the bill then under consideration. This conclusion was based upon the possible application of the proposed law to a parent who might wish to permit his child access to materials. 56 OAG. 112, 117-118; see also *State v. Settle,* (1959) 90 R.I. 195, 156 A. 2d 921. As indicated above, the preamble to Bill 121S states that it is based upon *Ginsberg v. New York, supra,* the first case to expressly uphold the constitutionality of variable legal standards of obscenity for children and adults. The question decided by the court in *Ginsberg* was "whether it was constitutionally impermissible for New York, insofar as §484-h does so, to accord to minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see." 390 U.S. at pp. 636-637. The basis for the court's holding that the New York statute accomplished this end may be found in the following language (390 U.S. at p. 639):

"The well-being of its children is of course a subject within the state's constitutional power to regulate, and, in our view, two interests justify the limitations in §484-h upon the availability of sex material to minors under 17, at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful. First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 'It is cardinal with us that the custody, care and nurture of the child reside first in the

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[3]The pertinent language of §484-h, New York Penal Law, reads as follows: "It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor . . ."; and: "It shall be unlawful for any person knowingly to exhibit for monetary consideration to a minor . . ."

parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' * * * *Moreover, the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children.*"

In a footnote following the above statement, the court quotes as follows from 63 Col. L. Rev. 391, 413 (1963):

" '* * * While many of the constitutional arguments against morals legislation apply equally to legislation protecting the morals of children, one can well distinguish laws which do not impose a morality on children, but which support te right of parents to deal with the morals of children as they see fit.' "

In April of this year, the United States Supreme Court unanimously struck down a Georgia law making it a crime to "knowingly have possession of . . . obscene matter." *Stanley v. Georgia,* (1969) 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed. 2d 542. The court emphasized that *Roth* and the other obscenity cases dealth with "some form of public distribution or dissemination," and stated that "whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home." (22 L.Ed. 2d at p. 547) The care and custody of children resides first in the parents under the guarantees of the Fourteenth Amendment. *Meyer v. Nebraska,* (1923) 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042; *Prince v. Massachusetts,* (1943) 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645.

In *State v. Koohy,* (R.I., 1969) 250 A. 2d 711, the Rhode Island court overturned a conviction under that state's "Ginsberg" law on the grounds that there was insufficient proof that the defendant's possession and exhibition of obscene movies was for commercial purposes. An earlier Rhode Island case, *State v. Settle, supra,* had held that "commercial gain" was a required element of the offense in order to insure it did not embrace "the father who gives to a youthful member of his family a book which comes under the ban of the law." 156 A. 2d at p. 924. See also *State v. Pocras,* (1958) 166 Neb. 642, 90 N.W. 2d 263.

In view of the above authorities and the supreme court's rationale in *Ginsberg,* it is my opinion that Bill 121S, which clearly could penalize and prohibit noncommercial transfer—from father to son, for example—would be held unconstitutional if enacted into law. A brief amendment limiting the language of proposed sec. 944.24 (3) to commercial or "business" dissemination could easily remove this objection. In view of the fact that proposed sec. 944.24 (4), dealing with the admission of minors to an obscene "motion picture, show or other presentation" contains the "monetary consideration" requirement, imposition of a similar requirement in 944.23 (3) would not be a significant departure from the apparent purposes of the bill.

The remaining portions of the prohibition section are substantially identical to similar provisions of the New York law and are, in my opinion, constitutional.

III. THE PENALTIES

The penalty provisions of 121S are unique. As indicated earlier, proposed sec. 944.24 (2) (c) defines "minor" as "any person under the age of 21 years." Past opinions of this office have indicated that a 21-year age limit on such a bill might well render the resultant law unconstitutional. (See 56 OAG. 20, 33-34; 112, 115-116.

In an apparent effort to avoid this problem and still reach all persons under age 21, Bill 121S contains a sliding scale of penalties for the various age levels:

"(5) PENALTY WHERE MINOR IS UNDER AGE 17. Any person who violates this section when the minor to whom such harmful materials are sold, given away, displayed, exhibited, loaned or distributed is under 17 years of age may be fined not more than $2,000 or imprisoned not more than 2 years or both.

"(6) PENALTY WHERE MINOR IS BETWEEN THE AGE OF 17 AND 18. Any person who violates this section when the minor to whom such harmful materials are sold, given away, displayed, exhibited, loaned or distributed is at least 17 but less than 18 years of age may be fined not

more than $1,000 or imprisoned not more than one year or both.

"(7) PENALTY WHERE MINOR IS BETWEEN THE AGES OF 18 AND 21. Any person who violates this section when the minor to whom such harmful materials are sold, given away, displayed, exhibited, loaned or distributed is at least 18 but less than 21 years of age may be fined not more than $500 or imprisoned not more than 6 months or both."

The legislature's purpose in setting up the sliding scale is set forth as follows in sec. 1 of the bill:

"The legislature hereby sets forth the following statements of purpose relating to this act. It is enacted pursuant to the decision of the Supreme Court of the United States in the case of Sam Ginsberg versus State of New York, which was decided on April 22, 1968, and is reported in volume 390 of United States Reports starting on page 629, the opinion of the court in such case being that it is constitutionally permissible for a state to define obscene material which is harmful to minors under 17 and to prohibit the sale, distribution or exhibition of such material to them. It also is declared by the legislature that the creation of 3 different penalty provisions is to establish 3 separate and distinct categories of criminal offenses depending upon the age of the minor or minors to whom such harmful materials are sold, distributed or exhibited and to thus make 3 severable provisions of the act in accord with section 990.001 (11) of the statutes so that if any constitutional question is asserted with regard to one category of criminal offense it shall have no effect on the other 2 categories."

It is true, as this statement indicates, that the *Ginsberg* case permits a state to set a separate obscenity standard for persons under the age of 17. Bill 121S, however, defines minor as "any person under 21 years of age." Moreover, the standard itself and the definitions essential to its existence are drawn with repeated and specific references to "minors" (e. g., persons under 21). This represents a significant departure from the *Ginsberg* case, which is so carefully alluded to in the statement of legislative purpose, for, by so de-

fining "minors," it dfines the elements of the offense in terms of persons under age 21.

The decision in the *Ginsberg* case is quite clearly based upon "the power of the state to control the conduct of children." 390 U.S. at p. 638. This is made clear by the language quoted earlier in this opinion, and also by the following (390 U.S. at p. 640):

"The State also has an independent interest in the well-being of its youth. The New York Court of Appeals squarely bottomed its decision on that interest in Bookcase, Inc. v. Broderick, supra, at 75, 218 NE2d, at 671. Judge Fuld, now Chief Judge Fuld, also emphasized its significance in the earlier case of People v. Kahan, 15 NY2d 311, 206 NE2d 333, which had struck down the first version of §484-h on grounds of vagueness. In his concurring opinion, id, at 312, 206 NE2d, at 334, he said:

" 'While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults.'

"In Prince v. Massachusetts, supra, at 165, 88 L.Ed. at 652, this Court, too, recognized that the State has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.' The only question remaining, therefore, is whether the New York Legislature might rationally conclude, as it has, that exposure to the materials proscribed by §484-h constitutes such an 'abuse.' "

In an appendix to the *Ginsberg* case, the court lists several states with obscenity laws having some reference to minors or youth. Of 26 such states with ascertainable age

limitations, 3 set 21 years as the cutoff and 23 set either 16, 17 or 18 years.

Although the preamble to the bill indicates that the interest of its sponsors was to establish three separate offenses, proposed sec. 944.24 (2) (c), by defining "minor" as any person under the age of 21 years, clearly establishes a single offense—that of disseminating the proscribed materials to persons under 21—and the provisions quoted immediately above serve only to impose penalties of varying degrees of severity depending upon the age of the recipient. By so defining "minor," the offense is committed whenever someone gives, sells or exhibits the prohibited materials to any person under the age of 21. The crucial question facing any obscenity law is, of course, its effect on the freedom of speech. See *State v. Chobot,* (1960) 12 Wis. 2d 110, 112, 106 N.W. 2d 286; *McCauley v. Tropic of Cancer,* (1963) 20 Wis. 2d 134, 151, 121 N.W. 2d 545. The First Amendment effect is measured not by the severity of punishment imposed upon the distributor, but by the degree to which persons are denied access to written or other communicative materials. And, in *Interstate Circuit, Inc. v. City of Dallas,* (5th Cir., 1966) 366 Fed. 2d 590, 598-599, it was stated that:

"The interest of society in protecting children is a valid and necessary interest, but even a minor's freedom of speech is too precious to be subjected to the whim of the censor."

In striking down a Chicago city ordinance which would restrict certain motion pictures to persons over age 21, the court in *Paramount Film Distributing Corp. v. City of Chicago,* (D. C., Ill., 1959) 172 F.Supp. 69, 72, stated as follows:

" 'This section is invalid on another ground as well. Even if clearly drawn, it would be invalidated by the age limit of twenty-one years. A censorship statute is necessarily an invasion of the First Amendment right to freedom of expression. Although the City may under its police power limit that right to prevent an evil, any restrictive action must be reasonable, not capricious. *Assuming without deciding* that the City might correct the evil of exhibiting films unfit for "children" the present section is unsuitable for the

purpose. Under it, a twenty year old, married service man would be prevented from seeing a film that might not be suitable for a girl of twelve. As Justice Franfurter remarked in a similar situation, "Surely, this is to burn the house to roast the pig". As in the case just cited, the remedy is not appropriate for the end at which it is presumably aimed, and is an invalid exercise of police power.' "

As indicated above, the definition of "minor" is incorporated into every crucial portion of the bill ("harmful to minors," "suitable for minors," "distribute to a minor," etc.). The fact that the penalties decrease as the age of the "minor" increases does not alter the fact that the obscenity standards are based on age 21.

While courts will often go to great lengths to construe a law so as to be constitutional, it is extremely doubtful that they would go so far as to construe "21 years" to really mean "18 years." If it is determined that the 21-year cutoff is unconstitutional, its central importance to the definitions and standards in the bill would undoubtedly cause the entire law to fail, for the sliding scale of penalties does not alter the fact that the more restrictive standards authorized by the *Ginsberg* case for the purpose of protecting "children" 16 years of age or younger, are defined by the bill in terms of persons 20 years of age or younger. The exemption for married persons 18 or older is certainly desirable, but it does not cure the defect, for under the bill as it stands, "a twenty year old . . . serviceman would be prevented from seeing a film (or reading a book) that might not be suitable for a girl of twelve." *Paramount Film Distributing Corp. v. City of Chicago, supra.*

It is my opinion, therefore, that Bill 121S, in keying all its essential terms to persons "under the age of 21 years" would be unconstitutional if enacted into law in its present form. Because of the central importance of the definition of "minor" to the rest of the law, a court, in order to apply a saving construction, would have to substantially rewrite its terms. This the courts are loath to do, for in construing a statute, courts are not at liberty to disregard its clear

language. *State v. Pratt,* (1967) 36 Wis. 2d 312, 317, 153 N.W. 2d 18.

This constitutional defect could be remedied by relating the definition of minor (perhaps using instead "children" or "juveniles") to persons under the age of 18. The Children's Code, for example, defines "child" as "a person under 18 years of age." Sec. 48.02 (3), Stats.

IV. THE ENFORCEMENT MACHINERY

You have also requested my views on the practicality of the enforcement machinery proposed by sec. 5 of the bill. The first portion of this section would create sec. 944.25, Stats., and authorize the local district attorney, or the attorney general, upon complaint that any person "is violating" proposed 944.24, to commence action to enjoin the violation. Since the words "is violating" limit the injunctive proceedings to "after-the-fact" legal action, the problems of prior restraint discussed in 56 OAG. 20, 23-25, do not arise. Civil actions to suppress obscene materials are not new in Wisconsin. Sec. 269.565, Stats., authorizing a declaratory judgment against obscene matter has been on the books for several years. Such civil actions appear to have some advantages over criminal prosecutions in that they permit suppression on a lesser quantum of proof than a criminal prosecution and permit appeal by the state on questions of fact. On the other hand, similar civil remedies in Wisconsin and other states have proved to be infrequently used. See 1960 Wis. L. Rev. 309, 323-4.

Basically, however, I feel that authorization of such a civil action would be beneficial to law enforcement efforts in this area.

The bill also sets up a "reporting" system that would work as follows:

"954.032 *REPORTS ON OBSCENE OR INDECENT MATERIAL REQUIRED.* (1) Whenever any sheriff, undersheriff, deputy sheriff, constable or other municipal police officer who is authorized to enforce laws against obscene and indecent material knows, acquires information, has reason to believe or receives a signed complaint from any citizen stat-

ing that any person has knowingly suffered or permitted obscene or indecent material, particularly that material described in ss. 944.21, 944.22, 944.24 and 947.08, to be kept or displayed on premises open to or patronized by the public and controlled directly or indirectly by him, the officer shall, within 10 days after such material has come to his attention, submit a report to the district attorney of his county containing:

"(a) The name and address of such person;

"(b) The officer's knowledge of the facts and circumstances involved in his investigation, including the sources of publication and distribution of such material if known;

"(c) A copy of **any signed complaint; and**

"(d) Whenever practicable, a copy of such material.

"(2) The district attorney shall, within 10 days after the receipt of a report under sub. (1):

"(a) Seek a warrant charging a violation of s. 944.21, 944.22, 944.24 or 947.08; or

"(b) Submit a written report to the attorney general stating the reasons why such warrant has not been sought and containing the original or copies of materials and reports received under sub. (1). A summary of the officer's report under sub. (1) (a) and (b) may be submitted in place of the original or a copy thereof.

"(3) The attorney general may, upon receipt of the report specified in sub. (2) (b):

"(a) Direct the district attorney to seek a warrant charging a violation of s. 944.21, 944.22, 944.24 or 947.08, or

"(b) Seek such warrant himself, and prosecute the action. The attorney general is hereby empowered to act under this subsection.

"(4) The attorney general shall submit semi-annual reports under this section to the governor and the legislature if the legislature is in session, or, if the legislature is not in session or is recessed, to the governor and the legislative

council. Such reports shall be a compilation and a summary of all reports received by the attorney general under sub. (3). The attorney general shall submit his first report in January 1970."

The net result of all this is that if a local law enforcement officer "acquires information" that someone is keeping obscene or indecent material in a public place, that officer *must* file a report with the district attorney within 10 days. Within 10 days after receipt of the officer's report, the district attorney *must* either seek a warrant or report to the attorney general why he did not do so. Upon receipt of such a report, the attorney general *may* direct the district attorney to seek a warrant or seek the warrant himself. Use of the word "may" instead of "shall" appears also to give a third option to the attorney general which is not open to the local law enforcement officer or the district attorney—to do nothing. Since the officer is required to initiate this system on rather tenuous grounds (e. g., "acquires information," "receives a signed complaint," etc.), such an escape clause is essential.

There is an additional requirement that the attorney general submit semiannual reports to the governor and the legislature (or the legislative council, if the legislature is not in session) on all such reports received by him.

While I find no constitutional defects in this system, it can be easily initiated on unfounded complaints, and thus greatly increase the paperwork of the officers, the district attorneys and the attorney general's office, who presumably could better invest their time in enforcing the civil and criminal sanctions contained in the bill. I note that the Wisconsin District Attorneys Association went on record opposing similar provisions in a bill introduced during the 1965 session of the legislature. Their opposition was based upon a belief that it was an "awkward approach to the problem, (and) in fact it appears to create more paper work and provides little aid in . . . prosecution . . ." Minutes of the 1965 Summer Conference, Wisconsin District Attorneys Association, June 30-July 2, 1965, Resolution No. 5, pp. 4-5.

It would seem that the initiation of obscenity prosecutions (and the civil actions contemplated by the bill), like all other criminal actions, is properly a matter of prosecutorial judgment entrusted to the elected district attorneys. To the extent that the reporting features of the bill tend to force either prosecutions or written explanations of why the prosecutor determined not to prosecute a given complaint, they appear to encroach upon the discretion traditionally reposed in district attorneys (and, in this case, the attorney general). In view of the doubtful utility of such a system and the additional paperwork burdens it would impose, I do not feel that it would add anything to law enforcement efforts in this area. If the governor or the legislature should desire reports from time to time on the number of obscenity prosecutions undertaken throughout the state, they could be easily obtained without the elaborate requirements proposed by the bill.

If the reporting system is to remain, some analysis of possible additional fiscal and staff requirements of district attorney's offices and the attorney general's office would be advisable. My office alone receives three or four citizen complaints a week, and the number of complaints to district attorneys and local law enforcement officials, particularly in Milwaukee and other metropolitan areas, is inestimable.

RWW:WFE

Obscenity Bill—Constitutionality—S. Subst. Amend. 1 to S.B. 45, creating sec. 944.25, Stats., and providing for civil and criminal relief against persons selling, exhibiting, loaning, displaying or giving away obscene or harmful material to persons under 18, would be constitutional if enacted into law.

December 31, 1969.

THE HONORABLE THE ASSEMBLY

By A.Res. 46, you have requested my opinion on the constitutionality of S.B. 45, dealing with dissemination

of obscene or harmful materials to minors. The version of the bill that passed the senate is S.Subst. Amend. 1, as amended by S.Amends. 1, 2 and 3 thereto, and this opinion is directed to the substitute amendment.

The law proposed by the bill would authorize the attorney general or district attorney to seek prompt injunctive relief against the sale or exhibition of "harmful materials" to persons under the age of 18. Criminal proceedings are also provided for persons who regularly engage in such activity—that is, persons who have been previously enjoined under the civil sections of the bill, or persons who distribute material to minors that has been declared "harmful" in a prior civil proceeding.

I. *The Definitions*

As in all such legislation, the definitions are at the heart of the regulatory scheme. Both the civil and criminal sanctions of 45S are aimed at material that is "harmful to minors," and that term is defined as follows by proposed sec. 944.25 (1) (f):

" 'Harmful to minors' means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

"1. Predominantly appeals to the prurient, shameful or morbid interest of minors; and

"2. Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

"3. Is utterly without redeeming social importance for minors."

The essential terms, "nudity," "sexual conduct," "sexual excitement" and "sado-masochistic abuse" are individually defined in proposed secs. 944. 25 (1) (b), (c), (d) and (e). All these definitions are taken verbatim from the New York law which was upheld by the U.S. Supreme Court against a variety of constitutional challenges in *Ginsberg v. New*

York, (1968) 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed. 2d 195. As such, they present no constitutional problems.

In altering the form of the New York law (a criminal statute) to a civil remedy, Bill 45S adds another definition—"harmful material"— which is defined as follows in proposed sec. 944.25 (1) (j):

" 'Harmful material' means:

"1. Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sadomasochistic abuse, and which is harmful to minors, or

"2. Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in subd. 1, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse, and which, taken as a whole, is harmful to minors."

Although this definition does not appear as such in the *Ginsberg* law, its component parts are found in that law's delineation of the criminal offense, to wit:

"It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor:

"(a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors, or

"(b) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of subdivision two hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors." 20 L.Ed. 2d at p. 208.

After setting forth two separate and distinct definitions, "harmful to minors" and "harmful material," Bill 45S ap-

pears to use them interchangeably from that point on, and thereby opens the door to a certain amount of confusion in the administration and enforcement of the law. For example, proposed sec. 944.25 (2) provides as follows:

"Whenever the attorney general or a district attorney has reasonable cause to believe that any person is engaged in selling or exhibiting *harmful material* to minors, or may become engaged in selling or exhibiting *harmful material* to minors, the attorney general or the district attorney for the county in which *such material* is offered for sale or exhibition shall institute an action in the circuit court for that county for adjudication of the question of whether *such material* is *harmful to minors.*"

The criminal provisions of the bill (proposed sec. 944.25 (10)) also use the two terms interchangeably.

Since, however, both the civil and criminal remedies are dependent only upon a judicial finding that the material involved is "harmful to minors,"[1] the definition of "harmful material," for the most part, is surplusage. The individual terms contained in the definition of "harmful material" (e. g., pictures, sculpture, motion picture film, books, printed matter, etc.) which do not appear in the definition of "harmful to minors" appear to be merely examples of the general terms "any description or representation . . ." which are found in this latter definition.

Aside from the possible confusion caused by inclusion of these two definitions (and the bill's subsequent neglect of one of them), it is my opinion that they present no serious constitutional problems.

Since the criminal sections of the bill penalize anyone who, "with knowledge of the nature of the material and . . . of the minor's age" sells or exhibits to minors any material that is "harmful to minors," the sellers must be apprised of the standard of conduct necessary to avoid violation. The problem of scienter is covered by proposed secs. 944.25 (1) (g) and (h), which provide as follows:

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[1]See, for example, proposed secs. 944.25 (3) (d), (4) (c), (7), (8) (c), and (10) (d).

"(g) 'Knowledge of the nature of the material' means:

"1. Knowledge of the character or content of any material described herein, or

"2. Knowledge or information that the material described herein has been adjusted to be harmful to minors in a proceeding instituted under . . . (this section) . . . or is the subject of a pending proceeding under . . . (this section).

"(h) 'Knowledge of the minor's age' means:

"1. Knowledge or information that the person is a minor, or

"2. Reason to know, or a belief or ground for belief which warrants further inspection or inquiry of the age of the minor."

The scienter standard in the *Ginsberg* law is similarly stated (in terms of both the contents of the material and the minor's age) as "general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry . . ." N.Y. Penal Law §484-h (1) (g). The New York law also exempts an "honest mistake" with regard to the minor's age if the seller made "a reasonable bona fide attempt to ascertain the true age of the minor." N. Y. Penal Law, sec. 484-h (1) (g) (ii). Under sec. 944.25 (11) (a), as proposed by Bill 45S, an exemption from criminal liability is provided where the seller or exhibitor had reasonable cause to believe the minor was over 18, and the minor exhibited an "official or apparently official document purporting to establish that such minor was 18 years old or more." Proposed sec. 944.25 (11) (b) also exempts sales or exhibitions where the minor is accompanied by an adult whom the seller has no reason to believe is not the minor's parent or guardian.[2]

It is my opinion that there can be no valid constitutional objection to Bill 45S in terms of scienter, for a reading of the above provisions and the remainder of the bill, clearly

[2]A third exception covers schools, museums or libraries and their employees, and retail outlets affiliated with and serving the educational purposes of such organization.

indicates that only those who are in some manner aware of the character of the material they are distributing or exhibiting should be punished. *People v. Finkelstein,* (1961) 9 N.Y. 2d 342, 344-345, 174 N.E. 2d 470, 471-472; *Ginsberg v. New York, supra,* 20 L.Ed. 2d at pp. 206-207. In addition, the effort that must be made by the seller to determine the age of the minor is sufficiently definite to negate any claim of impermissible vagueness. See *Ginsberg v. New York, supra,* 20 L. Ed. 2d at p. 207.

The final element in the definitional sections of the bill is proposed sec. 944.25 (1) (a) which defines "minor" as "any person under the age of 18 years."[3] Past opinions of this office have expressed serious doubts as to a 21-year cutoff, based largely on *Paramount Film Distributing Corp. v. City of Chicago,* (D. C., Ill., 1959) 172 F. Supp. 69, which struck down an ordinance on this basis alone. It is my opinion, however, that the 18-year cutoff, given the exemptions described above, is constitutionally valid.

II. *The Injunction*

The heart of 45S lies in proposed secs. 944.25 (2) through (9), which provide for civil injunctive proceedings directed against the materials themselves.

The district attorneys and the attorney general are required to institute actions seeking an adjudication of whether certain materials are "harmful to minors" whenever there is reasonable cause to believe that any person "is engaged . . . or may become engaged in selling or exhibiting harmful materials to minors." The action is directed against the material by name or description, and designates as a respondent any person[4] in this state "preparing, selling or commercially distributing or exhibiting . . . or giving away or offering to give away . . . or possessing . . . with the apparent intent to sell or commercially distribute or give away or offer to give away such material to minors." Pro-

[3]The original Senate Substitute Amendment used "17 years," and State Amendment 1 thereto raised the age designation to 18.

[4]"Person" is defined earlier in the bill as "any individual, partnership, firm, association, corporation, or other legal entity."

posed sec. 944.25 (3) (e) also directs that the action seek a permanent injunction prohibiting the respondents from "selling, commercially distributing or exhibiting or giving away such material to minors or from permitting minors to inspect such material."

When the complaint is filed, the material is presented to the court for examination, and if the court finds probable cause to believe such material to be "harmful to minors," this fact is endorsed (and dated) on the complaint, "whereupon it shall be the responsibility of the attorney general or the district attorney, promptly to . . . (obtain) . . . the issuance of a summons" service of which is to be made on all named respondents.

At any time thereafter, on or before the return date of the summons (or within 15 days after receiving notice of the issuance of the summons), any person interested in causing the materials to be brought into the state (including the author, publisher, etc.), or any person in the state interested in distributing or exhibiting the material, may appear and intervene as a respondent.

If no person appears and files an answer on or before the return date of the summons, the court may "forthwith" adjudge whether the material is harmful to minors and enter an appropriate final judgment.

Every person appearing and answering is entitled (upon request) to an advisory jury, and the court, with the consent of all parties, may order a full trial of any issue to a jury. If the court (or jury) finds the material not to be "harmful to minors," the complaint is dismissed. If it is found to be harmful to minors, a judgment to that effect is entered and the court may enter a permanent injunction against any respondent prohibiting him from "selling, commercially distributing or giving away such material to minors or from permitting minors to inspect such material."

Proposed sec. 944.25 (8) provides that: "In any action in which an injunction is sought under this section,"[5] any respondent or intervenor "shall be entitled to a trial of the issues within one day after joinder of issue, and a decision shall be rendered by the court or jury within 2 days of the conclusion of the trial . . ." If a jury is unable to reach a decision "within 2 days of the conclusion of the trial," they are to be dismissed and a decision entered by the court "within two days of the conclusion of the trial."[6]

Two types of temporary orders are authorized by the bill. Under proposed sec. 944.25 (8) (b), a preliminary injunction is authorized on at least 2 days notice to the respondents. Proposed sec. 944.25 (8) (c) authorizes the entry of a temporary restraining order (prohibiting any respondent from selling, exhibiting, etc., the material to minors) at the initial stage of the proceedings when the materials are presented to the court and a finding of probable cause is made. The restraining order may only last for 3 days unless the respondent against whom it is issued consents to its extension. No temporary restraining order may be granted without notice to the respondents "unless it clearly appears from specific facts shown by affidavit or by the verified complaint that one or more of the respondents are engaged in the sale or exhibition of harmful material to minors and that immediate and irreparable injury to the morals and general welfare of minors in this state will result before notice can be served and a hearing held thereon." If a restraining order is granted without notice, a motion for a preliminary injunction must be set and heard within 2 days. If the prosecutor does not so proceed for a preliminary injunction, the temporary restraining order is dissolved.

Finally, any respondent (or his agent) who receives actual

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[5]Actually, all actions contemplated by 45S will be framed to seek an injunction, for proposed sec. 944.25 (3) requires that the complaint filed by the prosecutor "seek a permanent injunction against any respondent prohibiting him from selling . . . exhibiting . . . (etc.) such material to minors or from permitting minors to inspect such material.

[6]I assume that the identical "time limits" for the jury and the court in this subsection (proposed sec. 944.25 (8) (a)) are the result of a clerical error in the printing of the bill.

notice of the existence of any injunction or restraining order and who disobeys its terms "shall be guilty of contempt of court and upon conviction may be fined not more than $250 or imprisoned for not more than 6 months or both."

By way of summary, the civil actions seeking a determination that specific materials are "harmful to minors" and a permanent injunction restraining their sale, are commenced by the filing of a complaint together with the materials in question and presenting the documents to the court for examination. If the court makes a finding of probable cause, the complaint is served on the respondents. The prosecutor may seek a preliminary injunction at this point on at least 2 days notice. Under "extreme" conditions, he may obtain an *ex parte* temporary restraining order on a showing that the respondent is engaged in distributing the materials to minors and that immediate and irreparable harm to the morals and general welfare of minors in this state will result before notice and hearing can be perfected. Any temporary restraining order lasts for only three days, and the prosecutor must proceed for a preliminary injunction within two days after the order is issued. Any respondent may obtain trial of the issues within two days after joinder. An advisory jury is available upon request, and the court may order trial of all issues to a jury with the consent of both parties.

I have outlined these procedures in some detail because they are, of necessity, quite complicated.

Statutes providing civil remedies against the dissemination of certain harmful materials are not new. Sec. 269.565, Stats., which provides for injunctive proceedings against obscene material, has been in existence for several years and has been before the Wisconsin Supreme Court without objection to the constitutionality of the injunctive remedy. See *McCauley v. Tropic of Cancer*, (1963) 20 Wis. 2d 134, 121 N.W. 2d 545. Whether conduct sought to be prescribed is subjected to a criminal action, civil forfeiture proceedings or injunction—or some or all of these sanctions—is a matter within the legislature's range of choice. *Kingsley Books,*

Inc. v. Brown, (1957) 354 U.S. 436, 441, 77 S.Ct. 1325, 1 L.Ed. 2d 1469, 1474.

Because proposed sec. 944.25 (2), authorizes commencement of the civil proceedings whenever the prosecutor has reason to believe that any person "may become engaged" in selling or exhibiting harmful material to minors, the remedy may be invoked in advance of exhibition. When this is the case, the problem of prior restraint arises. Prior restraints in the field of obscenity regulation were discussed at length in 56 OAG 20 (1967). The cases indicate that the following procedural safeguards are necessary in order to overcome the "heavy presumption against . . . constitutional validity . . ."[1] borne by all laws involving a prior restraint of First Amendment rights: (1) the burden of proving that the materials involved are unprotected by the First Amendment must be on the state; (2) any final restraint must be imposed by judicial determination; (3) any restraint imposed prior to final judicial determination on the merits must be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial restraint; and (4) the procedure must assure a prompt final decision. *Freedom v. Maryland,* (1959) 380 U.S. 51, 57-58, 85 S.Ct. 734, 13 L.Ed. 2d 649, 654-5.

The procedures established by 45S meet these criteria. The state, as plaintiff, must prove that the materials are "harmful to minors," as well as the other items necessary to the action. The final restraint, and any temporary restraints, can be imposed only by judicial determination. The temporary restraining orders are valid for a maximum of three days, and the "promptness" of the final decision (and hence the extent of any preliminary injunction or temporary restraining order) is insured by the provision allowing any respondent (in any proceeding where an injunction is sought) to have a trial on the merits within one day of joinder of the issue, and a decision by the court or jury must come within two days of the conclusion of the trial.

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[1]*Bantam Books v. Sullivan* (1963), 372 U. S. 58, 70, 9 L. Ed. (2d) 584, 593, 83 S. Ct. 631.

It is my opinion that these provisions, together with the other protections provided by the bill assure due process of law to all respondents and are not invalid as a prior restraint.

The injunction authorized by 45S would restrain sale *or exhibition* to minors, and past attorneys general have warned against passage of similar criminal laws penalizing the "non-commercial transfer" of obscene materials. See 56 OAG 112, 117-8 (1967). We are dealing here, however, with civil injunctive proceedings rather than criminal penalties, and I have found no case striking down such a law on this basis.

As indicated above, any respondent is entitled to an advisory jury upon request, and the court may, with the consent of all parties, order the matter to be fully tried to a jury. Although the existing statute providing for injunctions against obscene material (sec. 269.565) grants a jury trial as a matter of right on the issue of obscenity, I do not find that the absence of such an absolute right in 45S affects its constitutionality in any way. The action is equitable in nature, and as such no right to a jury attaches. See *Upper Lakes Shipping, Ltd. v. Seafarers' Int. Union of Canada,* (1964) 23 Wis. 2d 494, 128 N.W. 2d 73.

III. *The Criminal Provisions*

Proposed sec. 944.25 (10) provides a penalty of not more than $500 fine, or imprisonment in the county jail for not more than one year, or both, for any one who "with knowledge of the nature of the material, and with knowledge of the minor's age, shall sell, exhibit or loan for monetary consideration to a minor any material which is harmful to minors." It is also provided that no criminal proceeding shall be commenced against any person unless, prior to the sale or loan involved, he had written notice that the material has been adjudged "harmful to minors," or unless he has been subject to an order prohibiting him from "selling, commercially distributing or exibiting to minors, or from permitting minors to inspect the harmful material which is the subject of such criminal proceeding, or any other harmful material."

The effect of this is that a person may be proceeded against criminally only if: (1) the material sold, loaned or exhibited had been formally adjudged "harmful" to minors, and he had written notice of such fact; or (2) if he himself has been subject to an injunction prohibiting him from distributing the subject material or other harmful material.

Although somewhat confusing because of the use of the terms "harmful material" and material that is "harmful to minors," I find no constitutional defect in the criminal provisions. The definitions of the essential terms have been discussed above, and follow the language approved by the court in *Ginsberg v. New York., supra.* As indicated above, there can be no objection on the basis of scienter, and since the criminal provisions are operable only after sale or exhibition, no problems of prior restraint arise. Finally, in view of the fact that the criminal sanctions apply only to sales, exhibitions or loans "for monetary consideration," and considering also the exceptions from civil and criminal liability discussed earlier in this opinion, there can be no objection to this bill based on the language of *Ginsberg v. New York, supra,* condemning the overbreadth of a law that penalizes transfers from father to son, etc.

It is my opinion that S. Subst. Amend 1 (as amended by S. Amends. 1, 2 and 3 thereto) to S. B. 45 (1969) would be constitutional if enacted into law.

RWW:WFE

Seat Belts—Constitutionality—S.B. 214, requiring the wearing of seat belts in motor vehicles, would be constitutional if enacted into law.

December 31, 1969.

THE HONORABLE THE SENATE

S. Res. 20 requests an opinion of the attorney general as to the constitutionality of 1969 S. B. 214. The principal

feature of this bill is the requirement that the driver and passenger of moving motor vehicles must fasten their safety belts.

S. B. 214 provides in part:

"347.48 (3) USE REQUIREMENT. (a) No person shall operate a motor vehicle equipped with safety belts or safety belts and shoulder harnesses unless such devices are properly fastened by all occupants, where such belts and harnesses are provided.

"(b) Passengers in moving motor vehicles shall properly fasten safety belts or safety belts and harnesses where provided.

"(c) Paragraphs (a) and (b) shall not apply to any person whose physical condition, as certified by a physical, prevents the use of safety belts or safety belts and shoulder harnesses or to any child under the age of 6, but such child shall, if practical, be restrained by another mechanical device developed for that purpose.

"(d) Not more than one person shall occupy a single safety belt or safety belt and shoulder harness.

"(e) Whenever safety belts or safety belts and shoulder harnesses are not properly fastened in a motor vehicle upon a highway by the operator or any passenger for whom such devices are provided, or if such belts or harnesses are positioned in such a way as to make it improbable that they were in use, such fact shall be presumptive evidence of a violation of paragraph (a) or (b).

"(f) In this section 'properly fastened' means fastened in a manner to act as a body restraint for which the devices are intended."

There are a number of legal ramifications to this proposal which merit consideration. For example, this bill may establish prima facie contributory negligence on the part of an injured party who was not using a safety belt and thus lessen the damages recoverable from the wrongdoer. Also, the question could arise, as to what interpretation should be given where only one safety belt is available

and there are two passengers but neither uses the safety restraint. A question of legal liability might arise if a safety belt and shoulder harness are available but only the belt is utilized.

Since S. Res. 20 requests my opinion as to the constitutionality of S. B. 214, my opinion deals only with that issue.

In 1961, Wisconsin became the first state in the nation to require that seat belts be installed in the front seats of all automobiles beginning with the 1962 models. Since that time, the public has become familiar with the fact that all new cars contain seat belts. A great deal of promotional work has been done to encourage the public to use such belts.

The constitutionality of a law requiring seat belt use may be challenged on the ground that it is not a proper exercise of the police power for the state to require persons to take safety precautions to protect themselves. In the motorcycle helmet law cases, it has been argued that a similar law requiring the wearing of crash helmets constitutes an unreasonable interference with the constitutionally protected right of privacy, and that each person may determine for himself what risks he will take so long as this conduct endangers no one but himself. In *American Motorcycle Club v. Davids,* (Mich. App. 1968) 158 N.W. 2d 72, the court pointed out that the test of the legitimacy of the exercise of the police power is whether there is a real and substantial relationship between the exercise of the power in a particular manner in a given case and the public health, safety, morals, or the general welfare. There the court held that the mandatory motorcycle helmet law was unconstitutional because it had a direct relationship to the protection of the individual motorcyclist, but not to the public health, safety, and welfare generally. A similar result was reached in *People v. Fries,* (1969) ____ Ill. ____, 250 N.E. 2d 149. However, the supreme courts of five states have upheld the constitutionality of the motorcycle helmet laws on the ground that they do promote public safety. *Commonwealth v. Howie,* (1968) ____ Mass. ____, 238 N.E. 2d 373; *State ex rel. Colvin v. Lombardi,*

(1968) ____ R.I. ____, 241 A. 2d 625; *Everhardt v. New Orleans*, (1968), ____ La. 217 So. 2d 400; *State v. Odegaard*, (1969) ____ N.D. ____, 165 N.W. 2d 677; *Bisenius v. Karns*, (1969) 42 Wis. 2d 42, ____ N.W. 2d ____.

In the *Bisenius* case, the court conceded that the mandatory helmet law is intended primarily to diminish the severity of the accident upon the victim, himself, but concluded that the public is also benefited because the helmet could protect the rider from being struck on the head by flying gravel, which could cause loss of control and collision with other highway users. Then, at page 50, the court said:

"Over and above the interest the state has in protecting other users of the highways from the danger of involvement in an accident, we further hold that other users of the highway have a definite and legitimate interest in seriousness of the consequences of accidents as well as in the frequency of such mishaps. Testimony in this record, not in dispute, establishes that a serious factor contributing to death and injury in motorcycle accidents is the absence of protective equipment such as helmets and goggles. In the record is the result of an Australian survey concluding that when a helmet is worn, the risk of fatality to a motorcyclist in an accident is reduced to about one third of what the risk would be without a helmet. Are these statistics of concern only to the driver or rider whose life may be lost? Of course not. Certainly all users of a highway have a legitimate concern in not being involved in an accident at all. They also have, and are entitled to have, a definite interest in how serious are the consequences, not only to themselves but to others, of any accident in which they may become involved. Promoting highway safety is not to be limited to the prevention of accidents alone. It can include efforts to reduce the serious consequences of accidents. There is a difference between a fender-bender and an accident causing permanent injuries or death—a difference to the victim, to other drivers involved in the accident and to the community. If not, there would be no reason for requiring automobiles to be equipped with bumpers. They do not help avoid impacts, but they do cushion impacts and lessen

the consequences of impact. In a comparative negligence state, with heavy responsibilities as to lookout and control placed upon all vehicle operators, the very real possibility of being held at least partially responsible for an accident gives every user an interest, on other than humanitarian concerns, in provisions that lessen the probabilities of death or disability as an outcome of a highway encounter. At least they are affected, and that is the test. Therefore, the police power of the state may be exercised to minimize the consequences of collisions and accidents as well as to decrease the number of such collisions and accidents."

Thus, the Wisconsin Supreme Court has taken a clear stand that the police power is not to be limited to the prevention of accidents alone, but it may be exercised to reduce the serious consequences of such accidents.

Many studies, as to the beneficial effects of seat belts, have been undertaken by the American Medical Association, the National Safety Council, Cornell University, and others. The Federal Aviation Administration has long recognized the value of seat belts in preventing injuries as a result of aircraft accidents. Our supreme court has accepted the validity of such studies and has concluded that it could be negligence for an occupant of a motor vehicle to fail to use seat belts. *Bentzler v. Braun,* (1967) 34 Wis. 2d 362, 149 N.W. 2d 626. Statistics, available from the Wisconsin Division of Motor Vehicles, show that use of seat belts can reduce fatalities between 30% and 60%, and can reduce serious injuries by 20%. However, a 1968 survey by the Wisconsin Survey Research Laboratory shows many people do not use the seat belts. Thus, the legislature could conclude that the wearing of seat belts should be made mandatory.

However, some people may feel that safety belts are dangerous in that a person held in the vehicle may be injured, drowned, or burned; whereas, if he had been thrown free, he might have been saved. The answer to such fears seems to be clear. Experience has shown a far greater likelihood of injury to a person thrown out of a vehicle, than to one held within the protective steel

shell of the vehicle. Also, studies have shown that a very low percentage of accidents result in fire or submersion of the vehicle in water. Experts feel that the use of the belt reduces the risk of serious injury and increases the chance of remaining conscious and being able to get out of the burning or submerged vehicle. See *Seat Belts Save Lives*, published by the American Medical Association. In this respect, the decision of the legislature, as to the beneficial or harmful effects of seat belts, cannot be challenged in the courts. The wisdom of the law is for the legislature and not for the courts. In the *Bisenius* case, at pages 45-46, the court said:

"We do not deal here with the wisdom or lack of wisdom of these three legislative enactments. The legislative history of these laws, in this state and others, demonstrates that they have dedicated proponents and equally dedicated opponents. The question before us is not what a legislature should do, but what the legislature can do. As has been said:

" ' Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . .'

"In reviewing statutes such as these, we begin with a strong presumption of their validity. We are not to sit in judgment on the merits of such legislation. If the statutes here challenged do not contravene significant constitutional or inherent rights of individuals, if the classification on which they are based is reasonable, if they are within the scope of the police powers of the state, if they are appropriately related to a proper purpose of such police power, the three statutes are not to be invalidated by the judicial arm of government. Indeed, the laws are to be upheld by the courts if it is at all possible so to do."

It is therefore my opinion that, if called upon, our supreme court would hold the mandatory seat belt law constitutional as a reasonable exercise of the police power designed to promote the safety of the motoring public.

RWW:AOH

This index includes the list of all formal Attorney General's opinions issued prior to January 1, 1970, dealing with compatibility of offices, including the list published in 52 OAG 449 (1963). In addition, informal opinions issued between January 1, 1960 and January 1, 1970, dealing with the subject of compatibility of offices are incorporated into this index and are referred to by the date they were issued. While informal opinions are not published in a bound volume and are not in general circulation, copies of specific informal opinions may be obtained by writing the Attorney General's Office.

The index is arranged alphabetically according to the titles of the offices discussed in the opinion. The titles of the offices are sometimes followed by the conclusion reached in the opinion, that the offices are either compatible or incompatible. However, persons using the index should be cautioned not to rely solely on the conclusion stated in this index, but rather to refer to the opinions themselves. Many of the questions are not so clearly resolved as such a conclusion would indicate. Earlier opinions may have been based on statutes which have subsequently been modified.

Public offices may be made incompatible by statute or they may be incompatible according to well-settled principles of common law. In some instances, offices which appear to be incompatible because of a possible conflict of duties or power of one over the other as to appointment, supervision, and pay, may be designated as compatible by statute.

Public policy requires, that an office holder discharge his duties with undivided loyalty, therefore, in general terms, two offices are incompatible if there is a conflict of interest or duties, so that the incumbent of one office cannot discharge with fidelity and propriety the duties of both. Incompatibility is not simply a physical impossibility to discharge the duties of both offices at the same time, but is an inconsistency in the functions of the two offices. This might arise, for example, where one office is subordinate to the other, or where a contrariety and antagonism would result in the attempt by one person to discharge faithfully and impartially the duties of both.

The doctrine of incompatibility of offices applies only to public offices and not to positions of employment. Generally, an individual employed by a government is an officer thereof if, in the performance of his duties, he is invested with some portions of the sovereign functions of government to be exercised by him for the benefit of the public.

The problem of dual office holding is primarily for the electorate or the appointing authority where the statutes do not establish incompatibility or where conflict of duties is not readily apparent.

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On Compatibility of Offices and Eligibility to Two or More Offices or Positions

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