may perform any act which his principal may perform. *Dorr* v. *Clark* (1859), 7 Mich 310; *Andres* v. *Ottawa Circuit Judge* (1889), 77 Mich 85 (6 LRA 238); *Tower* v. *Welker* (1892), 93 Mich 332; *Yale State Bank* v. *Fletcher* (1913), 173 Mich 585. It was doubtless well understood by the legislature that the township clerk could not always be at his office to serve the public in his official capacity, and by reason thereof, he was authorized to appoint a deputy clerk to act in his stead in order to expedite public business, *with no limitations on his powers to represent his principal.* In view of this we must hold that the deputy clerk was qualified to sit as a member of the township board * * *.' (Emphasis supplied.)"

It is therefore my opinion that a deputy city treasurer may attend meetings of the Police and Fire Pension Board and act in his stead. However, the duties and responsibilities of the city treasurer may not be supplanted or substituted by those of his deputy; rather, ultimate responsibility remains with the city treasurer and his deputy acts as his agent in his absence.

FRANK J. KELLEY,
Attorney General.

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STATE OF MICHIGAN: Upper Peninsula

STATES: Process for Obtaining Statehood

UNITED STATES CONSTITUTION: Process for Obtaining Statehood

The procedure by which the Upper Peninsula became part of the State of Michigan was valid and constitutional.

The decision of Congress to include the Upper Peninsula within the boundaries of the State of Michigan is not subject to challenge.

A portion of an existing state of the Union may achieve separate statehood if:

1. **The state legislature agrees to separation of a designated area.**
2. **Residents of the area consent to the separation.**
3. **Representatives of the area adopt a constitution and petition the United States Congress for admission.**
4. **The Congress, by majority vote, admits the new state into the Union.**

Opinion No. 4911 January 22, 1976.

Hon. Robert W. Davis
State Senator
Capitol Building
Lansing, MI 48902

Hon. Dominic J. Jacobetti
State Representative
Capitol Building
Lansing, MI 48902

Collectively, you have requested my opinion on the following two questions:

(1) "Were there any constitutional or legal deficiencies in the way in which the Upper Peninsula became a part of the State of Michigan?"

(2) "What are the procedural steps by which the Upper Peninsula could be established as a separate state?"

The Northwest Ordinance of 1787, § 14, Art V sets forth the boundaries of the Northwest territory and the number of states that were to be formed from that territory. Section 14, Art V states:

> "There shall be formed in the said territory not less than three nor more than five States; and the boundaries of the States, as soon as Virginia shall alter her Act of cession, and consent to the same, shall become fixed and established as follows, to wit: The western State, in the said territory, shall be bounded by the Mississippi, the Ohio, and the Wabash rivers; a direct line drawn from the Wabash and Post Vincents, due north, to the territorial line between the United States and Canada; and by the said territorial line to the Lake of the Woods and Mississippi. The middle States shall be bounded by the said direct line, the Wabash from Post Vincents to the Ohio, by the Ohio, by a direct line drawn due north from the mouth of the Great Miami to the said territorial line, and by the said territorial line. The eastern State shall be bounded by the last mentioned direct line, the Ohio, Pennsylvania, and the said territorial line: *Provided, however,* and it is further understood and declared, that the boundaries of these three States shall be subject so far to be altered, that, if Congress shall hereafter find it expedient, they shall have authority to form one or two States in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan. And whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States, in all respects whatever; and shall be at liberty to form a permanent Constitution and State government: *Provided,* the Constitution and government, so to be formed, shall be republican, and in conformity to the principles contained in these Articles, and, so far as it can be consistent with the general interest of the Confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the State than sixty thousand."

In 1802, Ohio entered the Union with the ordinance lines of 1787 as its northern border with the following proviso:

> ". . . , That the said state shall consist of all the territory included within the following boundaries, to wit: bounded on the east by the Pennsylvania line, on the south by the Ohio river, to the mouth of the Great Miami river, on the west by the line drawn due north from the mouth of the Great Miami, aforesaid, and on the north by an east and west line, drawn through the southerly extreme of Lake Michigan, running east after intersecting the due north line aforesaid, from the mouth of the Great Miami, until it shall intersect Lake Erie, or the territorial line, . . ." 2 Stat 173, Ch 39, § 2 (1802)

This proviso was not acquiesced in by the congressional committee to whom the matter was referred and subsequently, in 1805, Congress estab-

lished the Michigan Territory with the Ordinance line of 1787 as its southern boundary.

After several years of conflict and after three surveys produced three different borders, the Fulton line, the Talcott line, and the Harris line, Michigan and Ohio continued to claim a tapering piece of land 70 miles long, which was 5 miles wide at the Indiana border and 8 miles wide at Lake Erie. This parcel, which became known as the Toledo Strip because of the town's location at the mouth of the Miami River, did lie north of the southern most extremity of Lake Michigan.

As Michigan attempted to gain admission to the Union, the question became inseparable from the border conflict. Ohio insisted that the border conflict was a question which should be settled by Congress before Michigan was to be admitted to the Union while Michigan was equally insistent that she should be granted statehood and that the question of boundary was the proper subject of judicial inquiry of the United States Supreme Court. Although Ohio based its claim on an appeal to what it termed "plenary, equitable and political discretion" of Congress, it was quite discernable that it faced the prospect of a more favorable decision from Congress rather than from the Supreme Court.

After Michigan's initial demand for admission, Ohio proposed a bill to establish her northly boundary on the "Harris line". Although the bill was passed by the United States Senate, it failed in the House and drew caustic comments from the Territorial Council of Michigan. The House committee responsible for the bill for the admission of Michigan received an exhaustive argument from a Michigan Territorial delegate on the boundary question.

Although the residents of Michigan Territory were deeply troubled by the border dispute, they attempted to proceed with achieving statehood by the taking of a census to reflect the fact that the Territory possessed the requisite population for admittance to the Union, 60,000 inhabitants. It also proceeded to call a convention for the formation of a state government and the election of a representative and senators to Congress. It was felt by residents of the Territory that the State of Michigan would then have a right to demand admission to the Union and it was not anticipated that the Congress of the United States would hesitate to yield as a matter of right what had heretofore been refused by the Congress as a favor.

On November 11, 1834, the Michigan Territory Council reconvened and on November 18, 1834, the returns of the census of the counties east of Lake Michigan revealed that the lower peninsula had a population of 85,856, a number almost ⅓ greater than that which the Ordinance of 1787 had fixed as a prerequisite for statehood and admission into the Union, a number which was much larger than that possessed by any of the states that had previously been admitted to statehood from the Northwest. It was then felt that Michigan was in a position to then avail herself of the Ordinance provision which cited that:

> "Such State [possessing adequate population] *shall* be admitted by its delegates into the Congress of the United States on an equal footing with the original States, in all respects whatever, and *shall* be at liberty to form a permanent Constitution and State government."

However, the Territory of Michigan, in its contest with Ohio, faced a difficult dilemma inasmuch as Ohio was the recipient of the sympathy of Indiana and Illinois in her cause, for they also had projected their northern boundaries much further north of the Ordinance line than Ohio was attempting to secure.

By early 1835, public interest in the contest was at a high point. The press of the country was giving extended coverage to the controversy and the President of the United States was becoming impressed by the gravity of the situation. In March of 1835, the President laid the matter before Benjamin F. Butler, the Attorney General, for his opinion relative to the power and duties of the Executive to interfere with the matter. The United States Attorney General, after a careful examination of the question, rendered an opinion which practically sustained the position of the Territory of Michigan and denied the right of Ohio to exercise jurisdiction north of the Fulton line, which was the closest to the Northwest Ordinance line, until Congress or some competent tribunal should extend the boundary to the line desired by Ohio. The Attorney General did suggest that the President might seek recourse to persuasion and remonstrance with Ohio, which was somewhat difficult to fulfill in view of the fact that Ohio, Indiana and Illinois had 35 electoral votes. The President did, however, try to use persuasion by appointing two individuals as mediators between the contending parties.

Acting Governor Mason, upon receipt of this information, made it known that he would surrender no portion of Michigan's rightful jurisdiction and that he only sought a proper determination of the controversy. In such an atmosphere, their attempts proved to be unsuccessful.

In April 1835, an election for delegates to the State Constitutional Convention was held and on May 11, 1835, the Convention assembled. The Convention, after drafting the Constitution, adjourned on June 24, 1835, without day after having been in session 38 days. By the schedule of the Constitution, the instrument was to be submitted for ratification or rejection by the people on the first Monday of October next ensuing and on the succeeding day, there was to be elected a Governor, Lieutenant Governor, members of the State Legislature and a representative in the Congress of the United States. The legislature was to meet on the first of November and the Governor and Lieutenant Governor were to hold their respective offices until January 1, 1838.

It is significant to note that the situation in Michigan was becoming embarrassing for the President and his administration. The proposed State of Michigan had every lawful and constitutional claim for admission. Its population was already more than sufficient and most prominent lawyers in Congress had already declared the subject of the southern boundary to be a question for the courts rather than Congress. The Attorney General had given his opinion that Michigan was correct in its assertion of the proper boundary and consequently it was within the laws of the Territory to forbid the exercise of foreign jurisdiction; namely, the attempts by Ohio to exercise jurisdiction over the area in question.

However, the assertion of these rights by Michigan in their detail meant the humiliation of Ohio with a precedent to be used against the states of Indiana and Illinois. Expediency therefore dictated that the matter be adjusted by Congress and until that could be done, Michigan should be the one to yield on the questions in point.

In September, 1835, an Ohio act created the County of Lucas, which fixed a date for the holding of the Court of Common Pleas in Toledo. This action was juxtaposed by the determination in Michigan that Ohio should neither hold the court nor exercise any other act of jurisdiction within the contested territory. In Washington, the President was faced with a decision as to which side he would back and that was done in the form of replacing Acting Governor Mason after the President concluded that "zeal for what you deem the rights of Michigan has overcome that spirit of moderation and forbearance which in the present irritated state of feeling prevailing in Ohio and Michigan is necessary to the preservation of the public peace."

However, Michigan and its young Governor were already moving the militia towards Toledo with the serious purpose of putting their previously expressed declarations into active execution. The Ohio militia was expected to give support to the Ohio authorities in organizing and holding the court mentioned above.

The Michigan troops were preparing to oppose it. By Sunday, September 6, 1835, about 1,000 officers and men were quartered in and about Toledo. On the south side of the Miami were stationed the invading forces, although fewer in number. Since none of the officers or men were anxious to force a contest that had every aspect of seriousness, the Ohio authorities resolved to be satisfied with a *form* of jurisdiction in view of the difficulties of obtaining the substance. This form of jurisdiction was achieved by sending a small body of horsemen towards Toledo, being composed of a judge, the officers of the proposed court, and a military escort. In the middle of the night they entered the village and before the hour of three o'clock, the court had been organized and adjourned and the clerk had written a meager record in the darkened surroundings.

Acting Governor Mason and the Michigan militia were still in Toledo when a letter from General Cass bearing condolence to the Governor arrived at Detroit ahead of the notice of dismissal from the United States Secretary of State. After the message was delivered to the Governor, he announced to the troops that he was no longer the commander-in-chief and the troops were disbanded. The war was seemingly over even if peace had not been declared.

On October 5 and 6, 1835, the people of Michigan adopted a Constitution submitted for approval and elected Stevens T. Mason to the Governorship.

On December 7, 1835, the United States Congress convened and the questions of the southern boundary of Michigan and the admission of the state, being inseparably connected, were addressed. The President and others in authority gave encouragement to the belief that it would be only a matter of weeks to extend the laws of the United States over Michigan. On December 9, 1835, the President sent a message to Congress accom-

panied with a copy of the Constitution adopted by the people of Michigan and other documents necessary to make complete the record of their right to admission. However, the prospect of statehood became less promising when one of Michigan's two elected Senators wrote that it was doubtful whether the state would be admitted before the next June or perhaps even longer.

Since the Presidential election was now near at hand, each of the parties was taking political advantage of the boundary controversy in order to court the electorate support of Ohio. While the boundary question was the main issue, the admission of each state in those days was complicated by the slave issue. As in previous years, the bill for the admission of Michigan and one to settle the northern boundary of Ohio was given to the judiciary committee in the House of Representatives. The questions were contested in committees and all arguments were reiterated and all evidence was produced anew. The admission of both Michigan and Arkansas was examined by select committees and they canvassed the situation with every outward appearance of a sincere desire to reach a decision that would be in accord with the legal rights of the parties.

This relevant passage from the *Life and Times of Stevens Thomson Mason,* Lawton T. Hemans, Michigan Historical Commission, Lansing (1920), accurately describes the scenario of the boundary issue and the attempt of Michigan not to lose any territory:

> "The credit for obtaining the Upper Peninsula to Michigan has been accorded to Mr. Preston, of South Carolina; but, unquestionably, the honor in larger degree belongs to Lucius Lyon. As early as February 4, answering a suggestion of like import from Daniel Goodwin of Detroit he had said, that if Congress should break up the southern boundary, 'I for one shall go in for all the country Congress will give us west of the Lakes.' 'If that doctrine is to prevail,' he says later, 'we will take advantage of it and let the "Devil take the hindmost" as gamesters say.' Two weeks later the proposition had taken such form that the Senator could say with a certain degree of assurance, that 'the Committee will probably give us a strip of country along the south shore of Lake Superior, where we can raise our own Indians in all time to come and supply ourselves now and then with a little bear meat for delicacy.' But this facetious statement was far from representing the Senator's true estimate of the value of the Upper Peninsula. Lewis Cass and Henry R. Schoolcraft, each of whom knew the upper country with a fairly intimate knowledge, were then in Washington and there is reason to presume that the Senator availed himself of their more extensive information. At any rate three days after the Senator had written of the Upper Peninsula as a land of bears and Indians, he wrote to Colonel Andrew Mack of the possible accession, saying, 'My opinion is that within twenty years the addition here proposed will be valued by Michigan at more than forty million of dollars, and that even after ten years the State would not think of selling it for that sum.' On the same day he wrote to Hon. Charles C. Hascall, a member of the Michigan State Senate, saying, among other things, 'This will give Michigan about twenty thousand square miles of land,

together with three-fourths of the American shore of Lake Superior, which may at some future time be esteemed very valuable. A considerable tract of country between Lake Michigan and Lake Superior is known to be fertile and this, with the fisheries on Lake Superior and the copper mines, supposed to exist there, may hereafter be worth to us many millions of dollars.' " [pp 195-196]

This passage, also from the *Life and Times of Stevens Thomson Mason, supra,* is reflective of the conclusion of the issue:

"On the 1st of March, the Committee of the Senate, and a day later the Committee of the House, made reports on the boundary question which confirmed every fear that the people of Michigan had entertained. Ohio was conceded her full demands. The news of this action was speedily transmitted to Detroit, where a considerable excitement at once followed. A public meeting was at once called, which assembled on the evening of March 8. The veteran Colonel Andrew Mack was chosen president, John S. Barry and General John Stockton vice-presidents, and Jacob M. Howard and George B. Martin secretaries. Stirring addresses were made by John Biddle and Benjamin F. H. Witherell. A numerous committee was appointed to solicit signatures to a memorial against the proposed congressional action; while lengthy resolutions were adopted to the effect that, 'the people of Michigan have given to no man or body of men authority to alter by bargain or compromise the boundaries to which they have uniformly asserted a right;' asserting that the evils of the proposed legislation were not 'to be remedied by attaching to Michigan any extent, however great, of the sterile region on the shores of Lake Superior, destined by soil and climate to remain forever a wilderness.'

"For weeks the controversy in one form or another was before Congress. Thomas Benton in the Senate and John Quincy Adams in the House led the fight for Michigan, but their efforts, although masterly and vigorous, were of no avail when urged against the exigencies of politics. At times it seemed that even if the State obtained admission, it would be without the addition of the Upper Peninsula, and as week succeeded week with no result, even Senator Lyon at times was persuaded that Congress would adjourn without providing for admission upon any terms; but the end was near at hand. On June 15, 1835, Acts for the admission of both Arkansas and Michigan were approved, Arkansas being admitted unconditionally, while the admission of Michigan was made to depend upon the assent of a duly elected convention to a change in boundary whereby the territory in dispute was given to Ohio while compensation was given upon the north by fixing the boundary between Michigan and Wisconsin in that region by a line drawn through Green Bay, the Menominee River, Lake of the Desert, and Montreal River. The news of this action, although no surprise to the people of Michigan, was anything but agreeable to them. There were loud cries of tyranny and oppression. Much eloquence was expended and ink wasted upon the desirability of the State's remaining out of the Union rather than to enter it 'mutilated, humbled and de-

graded.' Few men had made more effort to retain the disputed territory to Michigan than had Governor Mason; but now, realizing that they were defeated he took no part in the campaign of denunciation which followed, although his declarations were not such as to drive from him friends who had followed his lead, but were now less inclined than he to acknowledge the wisdom of submission. His influence, nevertheless, was discreetly used in favor of accepting the terms imposed, a position the wisdom of which was to be demonstrated in the development of future years and the details in the attainment of which were to form another chapter in the history of the commonwealth." [pp 198-200]

From the aforementioned it can be seen that the United States Congress, as part of the settlement of the Michigan-Ohio border controversy, agreed to provide, as compensation to the State of Michigan, the Upper Peninsula.

Although the procedure of "compensating" the State of Michigan with the addition of the Upper Peninsula for loss of the Toledo Strip might appear to be questionable, the United States Congress made a policy decision which cannot be challenged. The United States Congress has sole authority to admit states to the Union and its judgment as to borders is dispositive of any challenge that might arise. In this instance, the addition of the Upper Peninsula to the State of Michigan was designed as a compromise which brought to rest a long and bitter controversy. The action of Congress on June 15, 1836, clearly recognized the then existing boundaries of the State of Michigan which included the Upper Peninsula. Hence, your first question must be answered in the negative.

Your second question reads:

"What are the procedural steps by which the Upper Peninsula could be established as a separate state?"

Prior to directly responding to this inquiry, it must initially be determined whether a new state can be formed within the jurisdiction of an existing state. US Const, art IV, § 3, cl 1, provides:

"New States may be admitted by the Congress into this union: *but no new State shall be formed or erected within the jurisdiction of any other State;* nor any State be formed by the Junction of two or more States, or Parts of States, without the consent of the Legislatures of the State concerned as well as of the Congress." [Emphasis added]

A plain reading of US Const, art IV, § 3, cl 1, would suggest that no new state can be formed within the jurisdiction of an existing state. If precedent is to be used as a guide, however, it appears that the punctuation of US Const, art IV, § 3, cl 1, is incorrect as it would normally be applied. If a comma appeared after the phrase, "but no new State shall be formed or erected within the jurisdiction of any other State," then it would be clear that the intent of the qualifying phrase, requiring the consent of the Legislatures of the States concerned, as well as of Congress, would apply to all three situations provided in US Const, art IV, § 3, cl 1. This conclusion is supported by dicta in the case of *Coyle* v *Smith, Secretary of the State of*

Oklahoma, 221 US 559, 566; 31 S Ct 688; 55 L Ed 853 (1911), where the Supreme Court stated:

> "The power of Congress in respect to the admission of new States is found in the third section of the fourth Article of the Constitution. That provision is that, 'new States may be admitted by the Congress into this union.' The only expressed restriction upon this power is that no new State shall be formed within the jurisdiction of any other State, nor by the junction of two or more States, or parts of States, without the consent of such States, as well as of the Congress."

Since March 4, 1789, the effective date of the United States Constitution, five states have been formed from existing states; Vermont was formed from New York, 1 Stat 191 (1791), Kentucky from Virginia, 1 Stat 189 (1791), Tennessee from North Carolina, 1 Stat 491 (1796), Maine from Massachusetts, 3 Stat 544 (1820) and West Virginia from Virginia, 12 Stat 633 (1862).

The procedures by which the first four states were formed from existing states were by no means uniform or helpful to the question raised in your inquiry. For example, Vermont, which was originally part of New York, adopted a declaration of independence and later a state constitution. However, it was only when Vermont agreed to pay $30,000 that New York conceded the independence of Vermont. In January, 1791, Vermont adopted the United States Constitution and it was admitted as the fourteenth state on March 4, 1791.

Kentucky, originally a part of Virginia, was created as Kentucky County by the Virginia Assembly in 1776. With the influx of thousands of immigrants from Virginia, Maryland, Pennsylvania and the Carolinas, the question of separation and independence flourished and in early 1792, a state constitution was drafted. On June 1, 1792, Congress admitted it to the Union.

Tennessee was originally part of North Carolina. In 1784, the state legislature offered to cede the territory now known as Tennessee to the federal government, provided that the offer be accepted in two years. With this news, the residents of the territory attempted to organize their own government. North Carolina then rescinded the act of cession and simultaneously placed the area in question under its direct control. After experiencing continued attempts by the residents of the area to form their own government, North Carolina again ceded the land in question to the federal government in 1789. In 1796 a state convention met to draft a constitution, which was proclaimed without submission to a popular vote of the people. On June 1, 1796, the United States Congress admitted Tennessee to the Union.

Maine originally was part of Massachusetts. It was not until after the War of 1812 that independence became the subject of serious discussion of its residents. In 1816, Massachusetts authorized the separation of Maine from it if five-ninths of the voters approved the separation. The initial vote did not achieve the standard established by Massachusetts but separation was ultimately approved in 1819. After a state constitution was prepared, the

people formally adopted it in December, 1819. Maine was admitted to the Union on May 15, 1820 as part of the Missouri Compromise which declared Maine a free state and Missouri a slave state.

Undoubtedly, the most exhaustive review of the question of a new state acquiring portions of another state is available in *Virginia* v *West Virginia*, 78 US 39; 20 L Ed 67 (1871). Therein the United States Supreme Court, on an original bill to settle the boundary between the States of Virginia and West Virginia, reviewed the facts behind the creation of the latter. The record reveals the following argument against West Virginia's attempt to include two counties from Virginia after it was admitted to the Union:

> ". . . among other things, that a State was incapable under the Constitution of making any contract with another State; that States might negotiate with each other, might express a mutual willingness to do the same thing, but that this was all; that Congress by the act of 1862, assenting to the admission of a State composed of but forty-eight counties, had not given its assent to a State having in it the counties of Berkeley and Jefferson; that Congress had never assented to the admission of those counties until its joint resolution of 1866; that previous to that time Virginia had withdrawn, as she had a right to do, her once offered assent to what Congress could alone complete; that the transfer could exist only by the concurrent assent of all these parties; that therefore no transfer had been made by the joint resolution. Even if this were not so, and if fair elections under the acts of 1863 would be sufficient, the allegations of the bill as to the character of the elections relied on—allegations of partial and fraudulent elections—which allegations on a demurrer were to be taken as true—concluded the matter; for if *no* elections had ever taken place, then even the condition upon which as between the two States the counties were to pass to West Virginia, had never taken effect." [78 US 39, 51]

West Virginia countered by the use of the following arguments in favor of the demurrer it put in to the Court:

> ". . . [T]hat although this court had jurisdiction over 'controversies between two states,' it was only over controveries in which some question in its nature judicial was involved. *This court could not settle a controversy of arms, or force, such as came near arising between Ohio and Michigan, on the matter of their boundary; nor would it settle a political one. Georgia* v. *Stanton* [6 Wallace, 50] decided that. Now, the main question here involved was the political jurisdiction over two counties, and their inhabitants. There was no land that Virginia claims as her individual land. *The question then was a political question; one for Congress.* Of the disputed questions of boundary which had arisen in this country, Congress had settled most. In the few cases, where this court had acted, including the case of *Rhode Island* v. *Massachusetts*, [12 Peters, 724] where there was an old colonial agreement of 1710, there had always been some proper subject of *judicial* action involved; a question of the specific performance of contract, a question of property, or the like. Even in the great English case of *Penn* v. *Lord Baltimore*, A.D. 1750, [1 Vesey, 444] before Lord Hardwicke,

to settle the lines between Delaware and Maryland, there was an agreement for settling the boundary; a proper head of equitable jurisdiction. . . ." [Emphasis added] [78 US 39, 52]

Justice Miller, who delivered the opinion of the Court, said:

"The first proposition on which counsel [for West Virginia] insist, in support of the demurrer is, that this court has no jurisdiction of the case, because it involves the consideration of questions purely political; that is to say, that the main question to be decided is the conflicting claims of the two States to the exercise of political jurisdiction and sovereignty over the territory and inhabitants of the two counties which are the subject of dispute.

"This proposition cannot be sustained without reversing the settled course of decision in this court and overturning the principles on which several well-considered cases have been decided. Without entering into the argument by which those decisions are supported, we shall content ourselves with showing what is the established doctrine of the court.

"In the case of *Rhode Island* v. *Massachusetts,* [12 Peters, 724] this question was raised, and Chief Justice Taney dissented from the judgment of the court by which the jurisdiction was affirmed, on the precise ground taken here. The subject is elaborately discussed in the opinion of the court, delivered by Mr. Justice Baldwin, and the jurisdiction, we think, satisfactorily sustained. That case, in all important features, was like this. It involved a question of boundary and of the jurisdiction of the States over the territory and people of the disputed region. The bill of Rhode Island denied that she had ever consented to a line run by certain commissioners. The plea of Massachusetts averred that she had consented. A question of fraudulent representation in obtaining certain action of the State of Rhode Island was also made in the pleadings.

"It is said in that opinion that, 'title jurisdiction, sovereignty, are (therefore) dependent questions, necessarily settled when boundary is ascertained, which being the line of territory, is the line of power over it, so that great as questions of jurisdiction and sovereignty may be, they depend on facts.' And it is held that as the court has jurisdiction of the question of boundary, the fact that is decision on that subject settles the territorial limits of the jurisdiction of the States, does not defeat the jurisdiction of the court.

"The next reported case, is that of *Missouri* v. *Iowa,* [7 Howard, 660] in which the complaint is that the State of Missouri is unjustly ousted of her jurisdiction, and obstructed from governing a part of her territory on her northern boundary, about ten miles wide, by the State of Iowa, which exercises such jurisdiction, contrary to the rights of the State of Missouri, and in defiance of her authority. Although the jurisdictional question is thus broadly stated, no objection on this point was raised, and the opinion which settled the line in dispute, delivered by Judge Catron, declares that it was the unanimous opinion of all

the judges of the court. The Chief Justice must, therefore, have abandoned his dissenting doctrine in the previous case.

"That this is so is made still more clear by the opinion of the court delivered by himself in the case of *Florida* v. *Georgia* [17 Id. 478] in which he says that 'it is settled, by repeated decisions, that a question of boundary between States, is within the jurisdiction conferred by the Constitution on this court.' A subsequent expression that opinion shows that he understood this as including the political question, for he says 'that a question of boundary between States is necessarily a political question to be settled by compact made by the political departments of the government. . . . But under our form of government a boundary between two States may become a judicial question to be decided by this court.'

"In the subsequent case of *Alabama* v. *Georgia,* [28 Howard, 505] all the judges concurred, and no question of the jurisdiction was raised.

"We consider, therefore, the established doctrine of this court to be, that it has jurisdiction of questions of boundary between two States of this Union, and that this jurisdiction is not defeated, because in deciding that question it becomes necessary to examine into and construe compacts or agreements between those States, or because the decree which the court may render, affects the territorial limits of the political jurisdiction and sovereignty of the States which are parties to the proceeding." [78 US 39, 53-55]

The opinion continued by stating:

"The first step in this matter was taken by the *organic convention of the State of Virginia, which in 1861 reorganized that State* [West Virginia], and formed for it what was known as the Pierpont government—*an organization which was recognized by the President and by Congress as the State of Virginia, and which passed the four statutes set forth as exhibits in the bill of complainant.* This convention passed an ordinance, August 30, 1861, calling a convention of delegates from certain designated counties of the State of Virginia to form a constitution for a new State to be called Kanawha." [78 US 39, 56] [Emphasis added]

Although the question before the Supreme Court was the ability of two counties in Virginia to subsequently join West Virginia, *it is important to note that the Court found no prohibition against a segment of a state forming a new state, when the present state and residents of the new state authorized its creation.*

As the Supreme Court's opinion noted:

"The schedule of [the] constitution arranged for its submission to a vote of the people on the first Thursday in April, 1862.

"This vote was taken and the constitution ratified by the people; but it does not appear that either of the three counties of Jefferson, Berkely, and Frederick, took any vote at that time.

"Next in order of this legislative history is the act of the Virginia legislature of May 13, 1862, passed shortly after the vote above mentioned had been taken. *This act gives the consent of the State of Virginia to the formation of the State of West Virginia out of certain counties named under the provisions set forth in its constitution,* and by its second section it is declared that the consent of the legislature of Virginia is also given that the counties of Berkeley, Jefferson, and Frederick, shall be included in said State, '*whenever* the voters of said counties shall ratify and assent to said constitution, at an election held for that purpose, at such time and under such regulations as the commissioners named in the said schedule may prescribe.'

"This act was directed to be sent to the senators and representatives of Virginia in Congress, with instructions to obtain the consent of Congress to the admission of the State of West Virginia into the Union.

"Accordingly on the 31st of December, 1862, Congress acted on these matters, and reciting the proceedings of the convention of West Virginia, and that both that convention and the legislature of the State of Virginia had requested that the new State should be admitted into the Union, it passed an act for the admission of said State, with certain provisions not material to our purpose." [78 US 39, 57.58] [Emphasis added]

The Court then concluded that not only did Congress authorize the admission of the new state to the Union, but that it also consented to contingent boundaries, theretofore agreed to by each of the party states. Hence, Virginia's attempt to limit the counties that could join West Virginia was denied.

The Supreme Court decision obviously supports the position that portions of existing states may, with the consent of the state from which the new state desires to depart, and the consent of the people of the proposed state, depart and form new states which would qualify for admission to the Union. See also: 18 CJS, States, § 11, p 907. However, the procedure recited in the West Virginia case appears to be a minimal standard; namely, consent of the existing state and a favorable vote of the electorate in the area desiring to form a new state and other procedures to insure the voluntariness of the creation of a new state seem desirable.

If the following steps would occur, it is my opinion that the Upper Peninsula could attempt to achieve statehood, with the final decision being reposed in the hands of the United States Congress:

(1) The legislature of the State of Michigan would first have to agree to recession of the Upper Peninsula;

(2) Residents of the area of the proposed state would have to consent to the creation of a new state;

(3) Representatives of the area of the proposed state would then have to adopt a constitution and petition Congress for admission to the Union; and

(4) Congress would then have to pass by majority vote an act admitting the new state into the Union.

FRANK J. KELLEY,
Attorney General.

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CITIES, HOME RULE: Charter Revision

A change in a home rule city charter that constitutes a change in the form of government may only be accomplished by a revision of the charter and may not be accomplished by a charter amendment.

A proposal to change a home rule city charter from a city-manager form of government to one in which the office of mayor will be a full-time office with power to appoint all department heads, including the city manager, is a charter revision rather than a charter amendment.

Opinion No. 4916 January 22, 1976.

Honorable Charles O. Zollar
State Senator, 22nd District
P. O. Box 240
Lansing, Michigan 48902

You have requested an opinion of this office on the following question:

> "May the charter of the City of Benton Harbor be amended, without revision through a charter commission, to provide a strong mayor form of government where presently there is a council-manager form of government, pursuant to an 'Initiatory Petition' (enclosed) which purports to affect this change?"

The initiatory petition states:

> "We, the undersigned registered and qualified voters of the City of Benton Harbor in the County of Berrien, and State of Michigan, hereby propose that the Charter of the City of Benton Harbor, Michigan, adopted June 21, 1921, Amended September 4, 1923, Revised April 5, 1945, be amended to make the position of Mayor a FULL-TIME salaried position; and to make the Office of the Mayor responsible for the proper administration of the affairs of the City and to that end the Mayor shall have power to appoint the heads of all Departments, including the City Manager; all such appointments by the Mayor must be confirmed by the Commission, however, the heads of any Department, including the City Manager, may be dismissed for cause at anytime at the will of the Mayor or at such time as otherwise provided by Civil Service ordinance to be voted for at the Primary Election to be held on the *5th* day of *August* 1975."

Your letter also refers to several pieces of correspondence which pertain to the issue. This correspondence indicates that an opinion to the city attorney and an opinion of the city attorney advise that further action should not be taken by city officials in furtherance of the petitions.