

OPINIONS  
OF THE  
ATTORNEY GENERAL

OF THE  
STATE OF WISCONSIN

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VOL. I.  
BANCROFT-OWEN  
July 1, 1912, to April 1, 1913

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LEVI H. BANCROFT  
Attorney General to January 6, 1913

WALTER C. OWEN  
Attorney General from January 6, 1913

## ATTORNEY GENERAL'S OFFICE

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LEVI H. BANCROFT (To Jan. 6, 1913).....Attorney General  
WALTER C. OWEN (From Jan. 6, 1913).....Attorney General  
RUSSELL JACKSON (To Mar. 1, 1913).....Deputy Attorney General  
WALTER DREW (From Mar. 1, 1913).....Deputy Attorney General  
BYRON H. STEBBINS.....Assistant Attorney General  
WINFIELD W. GILMAN.....Assistant Attorney General  
JOSEPH E. MESSERSCHMIDT.....Assistant Attorney General

# ATTORNEYS-GENERAL OF WISCONSIN

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## FROM THE ORGANIZATION OF THE STATE.

JAMES S. BROWN, Milwaukee.....from June 7, 1848, to Jan. 7, 1850  
S. PARK COON, Milwaukee.....from Jan. 7, 1850, to Jan. 5, 1852  
EXPERIENCE ESTABROOK, Geneva... ..from Jan. 5, 1852, to Jan. 2, 1854  
GEORGE B. SMITH, Madison.....from Jan. 2, 1854, to Jan. 7, 1856  
WILLIAM R. SMITH, Mineral Point.....from Jan. 7, 1856, to Jan. 4, 1858  
GABRIEL BOUCK, Oshkosh.....from Jan. 4, 1858, to Jan. 2, 1860  
JAMES E. HOWE, Green Bay.....from Jan. 2, 1860, to Oct. 7, 1862  
WINFIELD SMITH, Milwaukee.....from Oct. 7, 1862, to Jan. 1, 1866  
CHARLES R. GILL, Watertown.....from Jan. 1, 1866, to Jan. 3, 1870  
STEPHEN S. BARLOW, Dellona.....from Jan. 3, 1870, to Jan. 5, 1874  
A. SCOTT SLOAN, Beaver Dam.....from Jan. 5, 1874, to Jan. 7, 1878  
ALEXANDER WILSON, Mineral Point....from Jan. 7, 1878, to Jan. 2, 1882  
LEANDER F. FRISBY, West Bend.....from Jan. 2, 1882, to Jan. 3, 1887  
CHARLES E. ESTABROOK, Manitowoc...from Jan. 3, 1887, to Jan. 5, 1891  
JAMES L. O'CONNOR, Madison.....from Jan. 5, 1891, to Jan. 7, 1895  
WILLIAM H. MYLREA, Wausau.....from Jan. 7, 1895, to Jan. 2, 1899  
EMMETT 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

# TABLE OF CONTENTS

	Page
REQUISITIONS, RULES OF EXECUTIVE OFFICE.....	ix
OPINIONS	
Appropriations and Expenditures.....	1
Automobiles .....	31
Banks and Banking.....	35
Bridges and Highways.....	41
Building and Loan Associations.....	76
Constitutional Law .....	89
Contracts .....	113
Corporations .....	119
Counties .....	147
Criminal Law .....	155
Education .....	198
Elections .....	207
Fish and Game.....	283
Indigent, Insane, etc.....	300
Insurance .....	314
Intoxicating Liquors .....	332
Live Stock and Live Stock Sanitary Board.....	363
Loans from Trust Funds.....	370
Miscellaneous .....	393
Municipal Corporations .....	399
Oil Inspection .....	406
Peddlers .....	417
Public Health .....	422
Public Officers .....	433
Public Printing .....	551
Public Utilities .....	559
Requisitions .....	565
Railroads .....	573
State Lands .....	577
Taxation .....	586
University of Wisconsin.....	607
Weights and Measures.....	613
INDEX .....	621

## PREFACE

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When the undersigned assumed the office of attorney general, he was impressed with the thought that there was too much delay in the matter of the publication of the opinions of this department. A policy was adopted of issuing a volume of such opinions about every nine months, and shortly after April 1, 1913, the manuscript for this volume was sent to the printer. An insufficient clerical force has resulted in this volume being unduly delayed, and enough material has accumulated for two additional volumes, which will be forthcoming at an early date.

The plan of supplying the opinions of the attorney general in pamphlet form each month has just been inaugurated and from now on the delay heretofore occurring in the matter of supplying the opinions of this department to those interested therein will be reduced almost to a minimum.

The plan of publishing frequent volumes of these opinions has made it necessary to adopt some other matter of designation and it is thought that no better plan can be adopted than numbering them consecutively. This volume will be known as Volume No. 1 of the Opinions of the Attorney General, and subsequent volumes will be similarly numbered.

W. C. OWEN,  
*Attorney General.*

## REQUISITIONS

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### RULES OF THE EXECUTIVE OFFICE RELATING TO APPLICATIONS FOR REQUISITIONS.

The following are the rules adopted by the Executive Department pertaining to applications for requisitions for fugitives from justice.

#### RULES.

1. Every application to the Governor for a requisition must be made in writing by the District Attorney or other prosecuting officer of the county in which the crime was committed; *provided*, that if in any case such District Attorney or other officer shall refuse to make the application, it may be made by any other person, but must then be accompanied by the affidavit of at least two credible persons, stating, so far as can be ascertained, the reason of such refusal, and all the circumstances connected therewith.

2. The district attorney or other prosecuting officer must, in addition to the requirements of the statute, certify that he is content that said fugitive shall be brought back to the state for trial at the public expense, that such expense shall be a county charge, and that he believes he has within his reach and will be able to produce at the trial the evidence necessary to secure a conviction.

3. Such officer must name in the application a proper person to whom the warrant may issue as Agent of the State, and must certify that such person has no private interest in the arrest of the fugitive.

4. The facts and circumstances constituting the offense charged must appear by affidavit and must be sufficient to es-

establish *prima facie* evidence of guilt against the party accused.

5. Statements made on information and belief should be distinctly defined and the sources of information and grounds of belief must be set forth in detail.

6. If the crime charged be forgery, the affidavit of the person whose name is alleged to be forged must be produced or a sufficient reason given for its absence.

7. It must appear satisfactorily that the object in seeking a Requisition is not to collect a debt nor for any private end, but that the application is made in good faith, and with a view to enforce the charge of crime against the offender. This rule will be applied with especial strictness in all cases of false pretenses, embezzlement, and like crimes.

8. It must be affirmatively stated, whether any application for a requisition for the same person for an offense arising out of the same transaction has been previously made, and, if a prior application has been made and denied, any new facts appearing in the papers must be specially pointed out.

9. If the application is based on an information, it must be accompanied by an affidavit containing a detailed statement of the facts and circumstances constituting the offense charged.

10. It must appear by affidavit that the accused was in this State at the time the offense is charged to have been committed, and that he *subsequently* fled therefrom, and the time and circumstances of his departure must be shown as particularly as may be. It must also appear where the accused is, or is believed to be, at the time the application is made.

11. If known, it must appear whether the fugitive has ever been a resident of this State, or has only been transiently here; and if transiently here, for what length of time and on what business, and under what circumstances he departed.

12. If the offense was not of recent occurrence, satisfactory reasons must be given why the application has been delayed.

13. The magistrate before whom the affidavits are taken must certify whether, in his opinion, the parties making the same are to be believed.

14. The official character of the officer before whom the affidavits are taken must be certified to by the clerk of the Circuit Court.

15. All papers should be *duplicate originals*, except the complaint and warrant, which should be certified copies. Duplicate originals, or certified copies of all papers necessary upon the application must be furnished to the Governor, that one set may be retained in this Department and the other attached to the Requisition. This requirement is designed to embrace *all* the papers in the case, including the formal application. In case the application is for a Requisition upon the Governor of Ohio, *triplicate* originals or certified copies of all the papers must be furnished. When certified copies of papers are given, they must be authenticated as prescribed in Section 4140 of the Revised Statutes.

16. It having been decided that Notaries Public are not "Magistrates" within the meaning of Federal Law, no Requisition based upon affidavits made before a Notary Public will be granted.

17. No Requisition will be granted for a fugitive who has taken refuge in the British Provinces.

18. As bastardy is not sufficiently well defined by the laws of this State as a crime within the meaning of Chapter 7 of the Act of Congress of February 12, 1793, no Requisition will be granted for the surrender of a fugitive charged with this offense.

19. No Requisition will be granted in a case in which the offense is of such trivial character as to leave a doubt of the granting a mandate thereon by the Executive authority in other States and Territories.

20. If a Requisition shall have been improperly or unadvisedly granted, there will be no hesitation in revoking it.

21. Any application not complying with the requirements of law and these rules will be rejected, without inquiring into its intrinsic merit, unless noncompliance is satisfactorily explained.

22. In all cases of rejected applications for Requisitions, the papers will be retained in this Department.

The following are the provisions of the U. S. statutes on the subject:

Sec. 5278. **Fugitives from justice of a state or territory.** Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the

executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent, when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the state or territory making such demand, shall be paid by such state or territory.

## OPINIONS RELATING TO APPROPRIATIONS AND EXPENDITURES.

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*Appropriations and Expenditures—Public Officers*—Commissioner of labor has authority to purchase appliances which are necessary to carry out provisions of laws relating to his department.

January 12, 1911.

HON. J. D. BECK,

*Commissioner of Labor & Industrial Statistics.*

Replying to your favor of January 9th, concerning the construction to be placed upon section 1636—43 and 1636—39 of the Wisconsin statutes, relative to appliances to be used by your department in carrying out the provisions of these sections, I give it as my opinion that such appliances as are actually necessary to enforce the provisions of the statute may be purchased by the Superintendent of Public Property or by your own department in accordance with the established custom, notwithstanding the fact that a most specific appropriation is made for the purchase of such articles. It is not within the province of this department, of course, to determine what appliances may be necessary but when certain appliances are made necessary by the provisions of the act in order to make the law effectual, the statute, by implication, carries the right to purchase such appliances.

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*Appropriations and Expenditures—Public Officers*—Governor has no authority to appoint delegate to National Conference of Sealers of Weights and Measures under ch. 297, Laws of 1909, except for the years therein specified.

March 16, 1911.

HON. FRANCIS E. MCGOVERN,

*Governor of Wisconsin.*

Mr. Thurber, your executive clerk, has this morning handed to me the bill of Fred C. Jensen for \$66.90 with the oral state-

ment that the bill is for expenses incurred by Mr. Jensen as Sealer of Weights and Measures in attending at the National Conference on Weights and Measures held in Washington in February, 1911. Mr. Thurber further requests the opinion of this department as to whether this expense is authorized under the provisions of ch. 297 of the Laws of 1909.

Inasmuch as the request for an opinion concerning this claim is oral I find it necessary to make the foregoing statement of facts upon which the statement is based. Clearly the bill does not come within the provisions of the law above indicated. Chapter 297 of the Laws of 1909 is a special act authorizing the Governor to "appoint a delegate to represent the State of Wisconsin at the national conference on weights and measures to be held in Washington in 1909." The act also makes a special appropriation of one hundred dollars to cover the expense of "such delegate" incurred "in attending such conference." This act does not authorize the Governor to appoint any delegate to attend the National Conference to be held in 1911 nor does it authorize the payment of the expenses of any such delegate, and assuming the foregoing statement of facts to be correct, the bill is unauthorized.

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*Appropriations and Expenditures*—Expenditures for furniture, fixtures, decorations etc., not included in \$800,000.00 limit for "construction" of each wing of the capitol.

May 1, 1911.

HON. JAS. A. FREAR,

*Secretary of State.*

Your favor of May 1st, enclosing report of the Capitol Commission together with certain comments thereon by Mr. Lew F. Porter, secretary of the Capitol Commission, and also a detailed statement of certain expenditures aggregating \$60,337.04 which your department has included in the construction account of the east wing of the capitol building and which items of account are objected to by the Capitol Commission as not being properly included in the construction cost of the east wing and asking for the opinion of this department concerning the interpretation of ch. 537 of the Laws of 1907 with reference to these particular items of cost, is received.

You state that the question has been raised as to whether or not certain paintings, sculpture or carvings and decorations are properly a part of the construction item and whether or not these particular items of account may properly be charged to the construction account of the east wing and included in the \$800,000 appropriation made for the construction of such wing. The items of account included in your communication concerning which this question has been raised are as follows:

September 5th, 1908, Karl Bitter, carving pediment West Wing .....	\$5,000.00
September 5th, 1908, E. H. Blashfield, mural painting Assembly chamber .....	5,000.00
November 23, 1908, Elmer E. Garnsey, decorations, in Assembly chamber .....	2,635.00
December 24th, 1908, Elmer E. Garnsey, decorations, rooms and corridors .....	6,213.50
January 9th, 1909, E. H. Blashfield, mural painting, Assembly chamber .....	10,000.00
January 26th, Elmer E. Garnsey, decorating rooms and corridors .....	2,201.50
Feb. 20, 1909, Elmer E. Garnsey, decorating rooms and corridors .....	5,250.00
Feb. 25, 1910, Art Metal Construction Co., metal fix- tures for vaults .....	7,500.00
April 13, 1910, J. H. Findorf, shed for covering over stone for carving .....	352.83
August 9, 1910, Herring, Hall, Marvin Safe Co., safety deposit vault Treasurer's office .....	2,068.00
September 24, 1910, Herring, Hall, Marvin Safe Co., safety deposit vault Treasurer's office .....	2,068.00
October 25, 1910, Karl Bitter, carving pediment....	5,000.00
December 29, 1910, J. H. Findorf, scaffold for ped- iment .....	62.48
February 13, 1911, Art Metal Construction Co., vault fixtures .....	158.00
February 27, 1911, Karl Bitter, carving pediment..	6,500.00

Sec. 4 of ch. 537, Laws of 1907, provides:

"No contract for the construction of such plant or warehouse, or of any wing, or the central portion of the capitol, shall be valid until the same shall have been approved by the governor as being within the limits of the appropriations herein made, properly apportioned, provided that the total cost of construction of any wing of such capitol shall not exceed \$800,000."

The word "construction" is defined by Webster as:

"1. The act of constructing; the act of building or of devising and forming. 2. The manner of putting together the parts

of anything so as to give to the whole its peculiar form, structure or conformation."

The language of section 4 of ch. 537 of the Laws of 1907 is significant in that it provides that "No contract for the construction . . . of any wing, or the central portion of the capitol, shall be valid until the same shall have been approved by the Governor as being within the limits of the appropriations herein made, properly apportioned, provided that the total cost of construction of any wing of such capitol shall not exceed \$800,000."

The contract for construction as approved by the Governor does not include any interior decorations, mural paintings or the placing of any fixtures and the language of the law as applied to these contracts and the interpretation of the word "construction" used therein as defined by Webster make it very clear that the \$800,000 appropriated for the construction work of any wing was not intended to include interior decorations, mural paintings, fixtures or furniture. It is also evident that this is the construction placed upon section 4, Laws of 1907, by the legislature since section 4 is retained in chapter 316 of the Laws of 1909 in exactly the same form, which chapter was enacted by the legislature following the report of the Capitol Commission made to the legislature in 1909 in which the Capitol Commission expressly interpreted the law as limiting the Commission to \$800,000 for construction work only and that this appropriation did not include interior decorations, mural paintings, furniture and fixtures or the laying out and completion of the terraces and capitol grounds.

Applying this interpretation of the law to the several items above mentioned it is my opinion that the following items included in the above statement are not properly chargeable to the construction account, to wit:

Total amount paid E. H. Blashfield for mural painting in Assembly chamber . . . . .	\$15,000.00
Total amount paid Elmer E. Garnsey for decorations in Assembly chamber, rooms and corridors . . . . .	16,300.00
Total amount paid Art Metal Construction Co. for metal fixtures in vaults . . . . .	7,658.00

making a total of \$38,958 of the \$60,337.04 which clearly should not be included in the construction account. The other items included in the \$60,337.04, to wit:

Karl Bitter, Total amount paid for carving pediment in West wing .....	\$16,500.00
Total amount paid J. H. Findorf for scaffolding, etc.	743.04
Total amount paid Herring, Hall, Marvin Safe Co. for safety deposit vault in Treasurer's office...	4,136.00

in all the sum of \$21,379.04, would, in my opinion, be a proper charge to the construction account for the reason that independent of any other consideration these items are in payment for labor and material included in the permanent structure and without which the building would be unfinished and incomplete.

You state in your letter of inquiry that after deducting the item of \$60,337.04 from the \$800,000 the Capitol Commission has a balance due on the construction account for the west wing of the Capitol amounting to \$11,173.65. I am of the opinion that no more than \$21,379.04 of the \$60,337.04 can properly be charged to the construction account. This would leave \$38,958 to be added to the \$11,173.65 making a total balance still due the Commission upon the construction account of \$50,131.65.

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*Appropriations and Expenditures—Public Officers—Concerning expenses of Members of State Board of Control while attending convention without the State of Wisconsin.*

June 7, 1911.

HON. FRANCIS E. MCGOVERN,  
*Governor of Wisconsin.*

I am in receipt of the communication from Mr. Wilbur, your executive clerk, enclosing a letter from Hon. W. H. Graebner, president of the State Board of Control, and requesting an opinion from this department as to the authority of the Governor to authorize the expenditure of Oscar Kustermann, Superintendent of the Wisconsin Workshop for the Blind, to attend a meeting of the American Association Workers for the Blind to be held at Philadelphia, Pa., on June 20th to 23rd, 1911.

Mr. Graebner's letter suggests that these expenses be charged to the current expense fund of the Wisconsin Workshop for the Blind.

Section 145 of the Wisconsin statutes as amended by chapter 523 of the Laws of 1909 provides in part:

“No item shall be audited for expenses of any officer or employe of the state or university while attending any convention or other meeting held outside of the state, unless such expense shall be authorized by the governor or specific statutory authority exist therefor.”

Under the provisions of this section I am of the opinion that provided the Governor authorizes Mr. Kusterman to attend the meeting of the American Association Workers for the Blind to be held at Philadelphia on June 20th to 23rd, his expenses will be a proper matter for audit and payment. As there is no specific statutory authority for Mr. Kusterman to attend this meeting it will be necessary to have the permission of the Governor before doing so.

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*Appropriations and Expenditures*—Disbursement of Appropriation made to Wisconsin Naval Militia.

July 7, 1911.

HON. C. R. BOARDMAN,  
*Adjutant General.*

In reply to the oral request made to-day by your department through Col. John G. Salsman, Assistant Adjutant General, relative to the construction of ch. 78 of the Laws of 1909 as amended by ch. 161 of the Laws of 1911, relating to the organization of the Wisconsin Naval Militia and making an appropriation therefor, it seems to me very clear that the appropriation of four thousand dollars per annum can only be expended when the necessity arises and upon the approval of the Governor and the Adjutant General and then only for the specific purposes enumerated in the act. The act authorizing the organization, ch. 78 of the Laws of 1909, provides for the organization of four divisions of companies of naval militia or one division consisting of four companies which, by the terms of the act, shall constitute a battalion to be known as the Wisconsin Naval Militia. I understand that only one company or division has as yet been organized.

Chapter 78 further specifically provides that where not otherwise provided for in the act the government of the naval

militia shall be controlled by the provisions of the military code of the State of Wisconsin and that the naval militia shall be under the control of the Adjutant General under the Commander-in-Chief and all reports shall be made to him through proper channels. The act further provides that it is passed upon condition that the state does not and shall not in the future make any appropriation in connection therewith nor be liable for any expense incurred in carrying out the provisions of this act except when the men and officers are called into active service by the Governor in time of war, riot, insurrection, etc. This act is amended by ch. 161 of the Laws of 1911 which act specifically reiterates the provisions of ch. 78 of the Laws of 1909 to the effect that the act is passed upon condition that the state does not and shall not in the future make any appropriation in connection therewith nor be liable for any expense incurred in carrying out the provisions of the act except when the officers and men are called into active service by the Governor in time of war, riot, insurrection, etc. This act, however, further provides as follows: "Provided, nevertheless, that a sum not exceeding four thousand dollars per annum may be expended for travel, subsistence, pay and maintenance of armory or armories subject to the approval of the Governor and the Adjutant General." The appropriation is evidently intended to cover the entire expenses which may be incurred by the Wisconsin Naval Militia at any time whether the same consists of one company or division or whether the organization is completed by the organization of four companies or divisions and can only be used for the specific purposes enumerated in the act, to wit, "travel, subsistence, pay and maintenance of armory or armories" and these expenses are subject to the approval of the Governor and the Adjutant General. The Wisconsin Naval Militia, as organized under these acts, becomes in effect a part of the military organization of the state and would be under the command of the Adjutant General acting under the Commander-in-Chief, and no expenses can be incurred except upon the approval of the Adjutant General and the Governor and it therefore follows that only such portion of the annual appropriation may be used as may be required to cover the necessary expenses incurred upon the order and subject to the approval of the Governor and the Adjutant General.

*Appropriations and Expenditures*—Delegates to congresses and conventions, appointed by Governor, not entitled to expenses.

August 28, 1911.

HON. FRANCIS E. MCGOVERN,  
*Governor of Wisconsin.*

Hon. Duncan McGregor, Private Secretary to your Excellency, has handed to me a communication received by him from Mr. George Curtis, Jr., who was appointed by your Excellency as a delegate to the National Tax Conference to be held at Richmond, Virginia, in September 1911.

In his communication Mr. Curtis makes inquiry as to whether or not his expenses will be paid by the State in case of his attendance at the Conference and Mr. McGregor has requested from this department an opinion as to whether or not such expense can be allowed.

In reply to your inquiry I beg to state that I know of no statute in the state of Wisconsin which authorizes the payment of expenses for individuals appointed by the Governor as delegates to the various conferences and conventions except in the case of Heads of departments, or any officer or officers and employes of the state or the University, mentioned in sec. 145, Wis. Stats, as amended by ch. 523, Laws of 1909.

In my opinion the expenses of delegates to the National Tax Conference would not be a proper charge to be paid by the state under any circumstances.

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*Appropriations and Expenditures*—What Fire Departments entitled to participate in Insurance Fund.

September 5, 1911.

Mr. T. M. PURTELL,  
*State Fire Marshal.*

Your favor of September 1, 1911, is received.

I have carefully examined the same and do not see that this department can render any opinion which would be of service in the matter since it seems to involve a question of fact more than a question of law.

Section 1926 provides the equipment of a fire department which must be maintained in order to entitle such fire department to receive any portion of the fire tax there imposed. From the language of the statute it appears that the legislature did not intend to include chemical engines since chemical engines do not require five-hundred feet of hose or in fact, any hose whatever and the law expressly provides that five hundred feet of hose, in addition to the equipment there mentioned, must be kept by the department to entitle it to the tax.

Chapter 578, Laws of 1911, provides in part:

“The state fire marshal shall annually on or before the first day of October file with the Commissioner of Insurance a statement containing the name of every city, village or town entitled to fire department dues under section 1926.”

This is not a question of law but a question of fact to be determined by the Fire Marshal upon investigation and no department is entitled to receive the fire department dues provided for in section 1926 unless they are maintaining the organized fire department furnished with the equipment therein provided. If they maintain such department they are entitled to the dues. If not, they are not entitled to them, and whether or not they maintain such a department is a question of fact to be determined by the Fire Marshal in every instance.

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*Appropriations and Expenditures*—In re payment of amount due to Construction Co., from State of Wisconsin, for erecting Bridge at St. Croix Falls.

May 21, 1912.

HON. FRANCIS E. MCGOVERN,  
*Governor of Wisconsin.*

I have, at the request of Secretary Frear, gone over the papers and correspondence in the matter of the bridge across the St. Croix river from St. Croix Falls, Wisconsin, to Taylor Falls, Minnesota, and have examined the original contracts and modifications thereto made with A. W. Bayne & Company, the firm which erected the bridge, and have also gone over the matter in company with Mr. G. A. Will, attorney for the bridge company, and examined the correspondence passing be-

tween the supervising engineer and the bridge company, and other correspondence connected with the transaction.

From my examination, the following facts appear to be established: That at the time of entering into the original contract there was a penalty clause providing a penalty of \$10 a day for failure to complete the bridge within the time specified. Afterwards, because of conditions for which the Bayne Company were not responsible, the time for completing the bridge was extended to May 15, 1911 and the penalty clause was expressly waived upon certain conditions to be complied with by the bridge company. It clearly appears that Mr. L. P. Wolf was to have supervision of the construction as consulting engineer, and that a delay of some two months or more was occasioned after the waiver of the penalty clause and the extension of time for completing the construction of the bridge on account of some alterations made in the dimensions of the structural steel by the consulting engineer, and that these changes are at least in part responsible for the inability of the company to comply with certain minor conditions, to wit, the getting of the structure ready and placing a temporary plank floor thereon by January 1, 1911. The bridge was, in fact, completed and opened for public travel on May 15, 1911 as provided for in the contract last entered into, and it appears that no fault whatever is found with the construction or with the quality of the work or material entering into the same; that the bridge in its present condition is entirely satisfactory and that it supplies to the village of St. Croix Falls and the village of Taylor Falls a free bridge, whereas before the construction they had only a toll bridge owned by private parties. For some reason the village authorities in St. Croix Falls still insist upon exacting a pro rata proportion of the original penalty clause of the contract, amounting to \$206.00 on the part of the village and \$206.00 on the part of the state of Wisconsin. The Wisconsin commissioners have signified their entire approval of the construction and they executed their voucher for the full amount due to the bridge company without deducting a penalty or damage. It further appears that no claim whatever is made by the bridge company for extra work and that the bridge actually cost the company more money than the original contract price.

Under these circumstances it seems to me too trivial a matter for the state of Wisconsin to be withholding its proportionate share of the payment because of any difference of opinion which may exist between the bridge company and the village authorities of the village of St. Croix Falls. I am clearly of the opinion that the penalty clause has been waived, but even if not waived, it must be considered a penalty clause and not liquidated damages. If the authorities of the village of St. Croix Falls desire to litigate this point it is a matter of their own concern and not one in which the state of Wisconsin should take any issue, and I therefore recommend that the voucher executed by the Wisconsin State Park Commissioners be allowed to go through and full payment made on the part of the state of its proportionate share of the contract.

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*Appropriations—Memorial Arch Commission—Chapter 567, Laws 1911, does not authorize the payment from the public treasury of expenses incident to the dedication ceremonies of the Memorial arch at Camp Randall.*

August 14, 1912.

HON. J. A. FREAR,  
*Secretary of State.*

In your letter of the 12th you inclose a voucher, properly sworn to, in favor of W. J. McKay, Secretary of Memorial Arch Commission.

This voucher is for dedication purposes, being miscellaneous expense and dedication address, the total amount being \$65.62.

You inclose also a letter sent by Mr. McKay upon your request that he point out the section of the law under which he considered such expense might be incurred. Mr. McKay's letter states:

“The authority for the item designated as the dedication address comes from the Commission on the Arch which met July 25th, at 10 A. M., and authorized this item to be drawn from the appropriation. I supposed this to be authority enough and, if it is not, I suppose the Commission can be held for the responsibility which they have assumed as being part of the expenses to be paid out of the appropriation made by the State.”

You ask whether, in my opinion, this voucher can be audited under chapter 567 of the Laws of 1911.

The said voucher is headed "For dedication expenses." Then follow the several items which, omitting the amounts, are:

"Printing of Dedication Programs.

Trousdale M. E. Choir for music furnished.

Yawkey-Crowley Lumber Co. for use of lumber.

Rev. Bishop Fallows, Dedication Address."

The Memorial Arch Commission was created by ch. 567 of the Laws of 1911. Section 2 of said chapter provides:

"It shall be the duty of, and said commission is authorized to set aside a portion of Camp Randall to be used as a memorial park. Such park shall include a portion of Camp Randall not to exceed twenty-five rods square and shall be located within said Camp Randall as near as possible to the Dayton street entrance thereto."

Section 3 provides:

"Said commission shall provide for, and shall have constructed an appropriate entrance way to said memorial park, upon which said commission shall have placed an inscription befitting the memory of the Wisconsin soldiers who served in the Civil War and who camped upon said grounds prior to their departure for the front."

Section 4 provides:

"The said commissioners shall serve without compensation, provided that the necessary expenses incurred by them and each of them in the performance of their duties as such commissioners shall be paid out of moneys appropriated by this act upon presentation to the secretary of state of proper vouchers."

The act also appropriates \$25,000 for the purpose of carrying out the provisions of the act. I do not find anything in the act which requires the Commission to have any dedication ceremonies. Article VIII, sec. 2, of the Const. provides in part:

"No money shall be paid out of the treasury except in pursuance of an appropriation by law."

I fail to find any appropriation for the purpose of such dedication ceremonies. I am therefore of the opinion that the voucher in question cannot legally be allowed.

*Appropriations—Public Officers—Bonds*—The premium upon a surety company bond, given by a public officer to secure the performance of the duties of his office, cannot be paid out of the public funds, in the absence of express statutory authority.

August 16, 1912.

Miss M. A. CASTLE,

*Chief Clerk, State Board of Forestry.*

In your letter of August 14th you refer to subsection 3 of sec. 1494—43 of the Stats., as created by ch. 638 of the Laws of 1911, which reads as follows:

“The state treasurer is hereby authorized to appoint the state forester as a special fiscal agent of the treasury department. When the state forester shall have deposited satisfactory security with the state treasurer, there shall be advanced to the state forester from the forest reserve fund not to exceed five hundred dollars, and at no one time shall such advances amount to more than five hundred dollars. The state forester shall use such advances only in paying temporary laborers upon the forest reserve, and upon the presentation of receipts properly executed, the state treasurer shall relieve the state forester from all liability for the amounts covered by such receipts.”

You state that, pursuant to this provision, the State Forester has secured a surety-company bond and deposited the same with the State Treasurer; that it would seem that the Department of Forestry reaps the entire advantage of the arrangement by which temporary laborers are paid promptly and directly and are therefore more easily secured, and that the premium on the bond of the State Forester as special fiscal agent would be a proper charge against the forest reserve fund; that the State Forester personally receives no advantage from the arrangement; and you ask for my opinion as to whether or not the premium on the bond may properly be charged to the administrative expenses of the Department of Forestry, instead of to the State Forester personally.

The statute in question contains no provision for the auditing of such accounts by the Secretary of State. Article VI, sec. 2, of the Const. provides that the Secretary of State “shall be *ex officio* auditor.” In *State ex rel. v. Hastings*, 10 Wis. 525, the duties of the auditor under this constitutional

provision are discussed and among other things the court say:

“In one sense, the entire moneys of the state are under his control. None can be paid out, no disbursement made, without his sanction. All claims and demands against the state must be submitted to his decision.”

The same case holds that the duties of the Secretary of State as auditor cannot be delegated to any other person. While the provision makes no mention of the auditing of the claims by the Secretary of State, I presume that the court would construe it as being made with reference to the constitutional provision, and that it would therefore be upheld, as was the provision under consideration in the case of *Wadhams Oil Co. v. Tracy*, 141 Wis. 150, where the court said:

“It must be read in harmony with the fundamental requirement that, notwithstanding executive approval, . . . there must be an auditing by the Secretary of State before the State Treasurer can rightfully pay out money entrusted to his custody.”

Article VIII, sec. 2, of the Const. provides in part:

“No money shall be paid out of the treasury except in pursuance of an appropriation by law.”

It follows that, unless there has been some appropriation that can be said to cover the expense of the bond, the same cannot be paid for out of any of the funds of the state. Section 1494—62 of the Stats., as amended by ch. 638 of the Laws of 1911, makes an annual appropriation of \$35,000 to pay the annual salaries provided by the terms of sections 1494—41 to 1494—64, inclusive, of the statutes, and for carrying out the provision of such sections of the statutes.

As the subsection referred to in your communication does not expressly require that the security to be deposited with the State Treasurer shall be in any particular form, it appears to me that this appropriation can hardly be said to cover the expense of procuring such a bond. The Legislature has given a practical construction to similar provisions by expressly providing in a number of instances that certain bonds to be given by public officials shall be paid for by the State. In view of such practical construction, it is my opin-

ion that the court would hold that such general language as is used in section 1494—62 could not be construed as authorizing the payment from the state funds of the premium on such a bond. I realize the justice of having such premium paid for from the state funds and may be permitted to suggest that if the matter is brought to the attention of the Legislature, it is very likely that they will provide for reimbursement of such expense as has been incurred by the State Forester in procuring such bonds and will authorize the payment of future premiums from the public funds.

*Appropriations—Industrial Commission*—Appropriation made by Sec. 1021t (ch. 524, Laws 1907) not available but that made by ch. 453, Laws 1911 is available for Industrial Commission.

Sec. 1021d is impliedly repealed so far as inconsistent with ch. 485 Laws 1911 or made inapplicable thereby but to no greater extent.

August 17, 1912.

INDUSTRIAL COMMISSION OF WISCONSIN:

In your favor of August 8th you request my opinion as to whether the appropriations made by section 1021t (ch. 524, Laws of 1907) and ch. 453, Laws of 1911, are available for your commission. You also ask whether sec. 1021d is impliedly repealed by ch. 485, Laws of 1911.

By section 1021t, "The Commissioner of Labor and Industrial Statistics is authorized to employ for his office such extra assistants as he may from time to time deem necessary and fix their compensation" etc., provided that the total amount expended for such extra assistants shall not in any year exceed \$2,500. In the absence of this section the number of assistants that such commissioner might employ was definitely limited. Sec. 1021d, Wis. Stats.

Subsection 1 of sec. 2394—54 (ch. 485, Laws 1911) confers upon the Industrial Commission all authority, etc., heretofore conferred upon the Commissioner of Labor and Industrial Statistics, and sec. 2394—71 appropriates \$75,000 to carry out the provisions of sections 2394—41 to 2394—71. Ch. 485, Laws of 1911, also repealed sections 1021c, 1021e and many

other sections applicable to the Commissioner of Labor, but did not repeal sections 1021d or 1021t.

Paragraph 1 of sec. 2394—52 gives the Industrial Commission power to employ "deputies, clerks and other assistants as needed", and "to retain and to assign to their duties any or all the officers, subordinates and clerks of the Bureau of Labor and Industrial Statistics" etc., "provided that the number of employes of said commission shall not be increased to exceed the number now employed in the Bureau of Labor and Industrial Statistics, except upon the certificate of the governor to be filed with the secretary of state before any such additional employe shall be appointed, certifying that any such additional employe is necessary to the work of this commission and approving the amount of salary to be paid to any such additional employe."

I am of the opinion that these provisions in ch. 485, Laws of 1911, with reference to the employment of assistants by the Industrial Commission supersedes the provisions of sec. 1021t and that sec. 2394—52 controls as to the manner of appointment of extra assistants within the appropriation made by sec. 2394—71. The number of assistants that the commission may employ being without express limit, the reason for such a section as 1021t ceases and it seems inevitable that the appropriation for extra assistants made by sec. 1021t is no longer necessary or available in the face of the provisions for all necessary assistants made by ch. 485.

The appropriation made by ch. 453, Laws of 1911, is for a special purpose and I think is available to your commission for that purpose since your commission is now charged with the performance of the duties imposed by that chapter.

As to sec. 1021d, I think that it must be regarded as impliedly repealed to the extent that ch. 485, Laws of 1911, covers the same subject, and insofar as the latter law makes the provisions of the earlier one inapplicable. Thus the provision that the Commissioner of Labor may appoint a deputy is now inapplicable since there is no longer any such commissioner, but I see no reason why the provisions of sec. 1021d which are not inconsistent with ch. 485, Laws of 1911, are not still in effect since the section has not been expressly repealed.

*Appropriations—Industrial Commission*—Appropriation made by sec. 1021t (ch. 524, Laws 1907) is not available to the Industrial Commission.

August 30, 1912.

Hon. C. H. CROWNHART,

*Chairman, Industrial Commission.*

Your favor of August 23rd, requesting a reconsideration of the construction of section 1021t and chapter 485, Laws of 1911, made in my opinion of August 17th, at hand.

You state that other work than that imposed by ch. 485, Laws of 1911, is imposed on your commission by other sections of the statutes; that such extra work requires extra help for short periods of time; that section 1021t provided for such emergencies in the case of the Bureau of Labor; that in putting the duties of that bureau upon your commission the legislature left section 1021t unrepealed, presumably for some purpose; and that, therefore, you think the provisions of that section are still available for your commission.

That fact that section 1021t was not expressly repealed by chapter 485 is not conclusive that its effect may not have been materially changed by the subsequent law. You will note that section 1021b, providing quarters in the capitol, printing, supplies, etc. for the Bureau of Labor and Industrial Statistics, is also unrepealed, although section 1021b—4 of chapter 485 is practically a duplication thereof and provides the same things for your commission which has superseded the Bureau of Labor. You will also note that the provision for the repeal of section 1021c relating to the appointment of the Commissioner of Labor was inserted in chapter 485 only just prior to the passage of the law on June 28, 1911 by amendment No. 1, S., (see senate journal, page 1179), although the bill had been before the legislature since March 22, 1911. While, therefore, the failure to expressly repeal section 1021t is important, it is not of controlling significance.

The fact that by statutes other than chapter 485 other work is imposed upon your commission, which requires extra help for short periods, does not make it essential for you to have the benefit of section 1021t, since subsection 1 of section 1021b—12 gives your commission power to "employ deputies, clerks, and other assistants *as needed*". In the face of this provi-

sion it is difficult to see how the provisions of section 1021t are anything but superfluous as its language seems to me no more, if as much, adapted to the hiring of mere *temporary* employes as that of section 1021b—12.

The fact stated in your letter that your commission did not use within \$20,000 last year of your appropriation seems to indicate that the appropriation made by section 2394—71 was intended as it has proven to be, large enough to cover all the expenses made necessary by the duties imposed upon your body, except, of course, where a special appropriation has been made for a special purpose.

In view of the decision of the supreme court that where there is any doubt as to a claim made to state funds this department should "resolve that doubt in favor of the state" and leave the result to be dealt with by the courts, (*State ex rel v. Frear*, 138 Wis. 536, 541), I feel that I must adhere to my former opinion that the appropriation made by section 1021t is not available to your commission.

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*Appropriations—Salaries—Public Officers*—It is not necessary that a statute use the words "there is hereby appropriated" in order to constitute an appropriation.

Sec. 172 is prospective and covers all disbursements, etc., within its terms although authorized by subsequently enacted laws.

September 10, 1912.

STATE BOARD OF PUBLIC AFFAIRS:

In your favor of August 28th, you state that there are many sections in the statutes and session laws which stipulate the amount of salary to be paid certain employes, or which provide that various expenditures shall be made, but that in many cases the statutes do not specifically state that there is "hereby appropriated" etc. You ask my opinion as to whether section 172 of the statutes makes the necessary appropriation for all expenditures which other various laws provide shall be made but as to which there is no specific appropriation.

Sec. 2 of art. VIII of the Const. provides, in part, "No money shall be paid out of the treasury except in pursuance of

an appropriation by law." I do not think that the words "there is hereby appropriated" are the only words that will constitute an appropriation within the above quoted constitutional provision. The supreme court has said that an expenditure of state funds can only be made "by some reasonable proper way of appropriating the same so that the legislative action can be referred to as authorizing payment of the money out of the public treasury." *C. & N. W. Ry. Co. v. State*, 128 Wis. 553, 633.

The essentials of an appropriation are discussed in an opinion by Attorney-General Sturdevant (see Biennial Report and Opinions for 1904, page 148), and he quotes several California cases to the effect that "To an appropriation, within the meaning of the constitution, nothing more is requisite than a designation of the amount and the fund out of which it shall be paid."

Sec. 172 of the statutes provides: "There is hereby annually appropriated out of the general fund a sum sufficient to pay all salaries, compensations and other disbursements authorized by these statutes to be made and to be paid out of the state treasury and not directed to be paid out of some other fund." I do not think that the words "these statutes" in such section necessarily restrict the appropriation to amounts authorized to be paid by then existing laws. The statute is prospective by its very terms and it has been given a legislative construction that it was intended to cover disbursements from the state treasury authorized to be made subsequent to its enactment, for several sections of the statutes of 1898 fixing salaries of public officers but not making appropriations therefor have been amended since the revision of 1898 by increasing the salaries of some officers and adding new ones, evidently on the assumption that sec. 172 constituted the appropriation therefor. I am therefore of the opinion that such legislative construction should prevail and that sec. 172 should be held to be an appropriation covering all disbursements, etc., within its terms, whether authorized at the time sec. 172 was enacted or subsequently thereto.

*Appropriations—Extra Help*—Sec. 169b provides for extra help for departments in the capitol and is applicable to departments entitled by law to quarters in the capitol even though temporarily quartered elsewhere.

Sec. 172 makes an appropriation for such extra help.

September 10, 1912.

STATE BOARD OF PUBLIC AFFAIRS:

In your favor of August 28th, you call attention to the fact that par. 2 of sec. 169b, as amended by ch. 609, Laws of 1911, provides for additional help when written request is made therefor "by any state officer or head of department in the capitol", and you ask whether this paragraph would authorize such additional help for departments located in the Washington Building or in other locations outside the capitol building.

The temporary removal of a particular department which is by law entitled to an office in the capitol, to quarters outside the capitol, should not and, in my opinion, does not deprive them of the benefit of section 169b. The words "department in the capitol" must include all such departments as are entitled by law to have their offices therein, even though due to its repairs or rebuilding they are temporarily located outside the capitol.

You further request my opinion as to whether or not section 169b makes an appropriation for the purposes of the section, and whether the secretary of state and state treasurer have sufficient authority by this section to audit and pay out money from the state treasury for the purposes of such section. In accordance with the opinion submitted herewith, I am of the opinion that sec. 172 of the statutes contains an appropriation for the salaries authorized by sec. 169b.

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*Appropriation and Expenditures—Highways—Counties—Towns—Public Officers*—County officers cannot bind the county by incurring expense beyond the amount of the appropriation.

Where a town appropriates money for the permanent improvement of a highway under sec. 1317m—4, and the county highway commissioner incurs expense in making such im-

provement in excess of the total appropriations by the town, county and state for that purpose, the county cannot upon appropriating a sum to pay such deficit, charge any part thereof to the town.

December 10, 1912.

MR. GAD JONES,

*District Attorney,*

Wautoma, Wisconsin.

In your letter of the 30th ult., you say that during August, 1911, fifteen towns, acting under ch. 337, Laws of 1911, voted special taxes for the improvement of portions of the system of prospective state highways, as provided in subsec. 1, of sec. 1317m—4, and each petitioned the county for aid, pursuant to subsec. 5, sec. 1317m—4; that the county board, at its November meeting, granted all these petitions, appropriating a sum greatly in excess of the money allotted to the county by the State, but that it neglected to determine what per cent of the total cost of such improvements should be borne by the county, as provided in subsec. 4 of sec. 1317m—3; that a county highway commissioner was appointed to take charge of the work; that in four of the towns the cost of the work greatly exceeded the money available for the improvements; and you ask whether the county is primarily liable for the payment of this indebtedness.

Under subsec. 4, of sec. 1317m—3 Stats., as amended:

“The percentage of the total cost paid by the town shall in no case exceed that paid by the county.”

It would appear to me that, where the county board fails to determine the percentage of cost to be borne by it, the town and county should each pay an equal share. This, however, does not determine your question. If I correctly understand you, the town and county have each appropriated an equal amount of money for the improvement of the highway, but that work has been done in making such improvement costing more than the amount appropriated.

The town selects the portion of the system of state highways to be improved. (Subsec. 1, sec. 1317m—4). But the money raised by the town is paid into the county treasury (*ib.*) and then paid out by the county treasurer. (Subsec. 4,

sec. 1317m—6), and the construction of such highways and their maintenance is under the charge of the county highway commissioner. (Subsec. 4, sec. 1317m—6.) All contracts for the construction or improvement of such highways are between the county board and the contractor. (Subsec. 3, sec. 1317m—6.)

These several provisions seem to indicate that it is the county, rather than the town, that is liable for such permanent improvements, although the town may set the necessary machinery in motion for such improvement. However, I do not believe that the county or the town is, either of them, liable for the excess cost above the amount appropriated. No officer has any authority to bind either the county or the town beyond that amount. The appropriation fixes the limit upon the authority of such officer. When he goes beyond that he exceeds his authority, and the municipality is not bound. Thus, this department has held that the State Park Board "have no authority to bind the State beyond the appropriation provided for by the Legislature." (Biennial Report and Opinions of Attorney-General for 1910, p. 811.) Bills in excess of the amount appropriated are illegal. (Biennial Report and Opinions Attorney-General, 1908, p. 62.) Contracts for state buildings cannot legally exceed the amount appropriated. (*ib.* p. 79.) The Regents of the University cannot bind the State as to any indebtedness beyond the appropriations. (Biennial Report and Opinions Attorney-General, p. 587.)

"The powers of a county as a body corporate can only be exercised by the county board thereof, or in pursuance of a resolution or ordinance by them adopted." Sec. 652, Stats.

The county clerk \* \* \* "shall in no case sign, or issue any county order except upon a recorded vote or resolution of the board authorizing the same." Subsec. 3, sec. 709 Stats. *State ex rel. v. Mulholland v. County Clerk*, 48 Wis. 112.

Here the county board certainly has not authorized the issuing of orders beyond the amount of the appropriation. Until the board has, by its vote, authorized the issuing of the orders and that authority has been certified by the chairman and county clerk, the treasurer is not authorized to pay out any money. Subsec. 2, sec. 715 Stats. *State ex rel. v. Nelson*, 105 Wis. 111, 116.

I am therefore of the opinion that neither the county nor the town is liable for this excess cost. However, as the town might have, in the first instance, appropriated a larger amount, and as the county might have appropriated a sufficient amount to cover all of the expense, the town may now appropriate its share of the deficit and the county an equal amount; or the county may appropriate an amount sufficient to pay the entire deficit. The obligation to make such an appropriation by either municipality, if there be any, is moral, not legal. It follows that, if the county appropriate the entire amount, it has no authority by reason thereof to make any deduction from the amount allotted the town for highway improvements the coming year.

You also ask whether, under sec. 4052d, as amended by ch. 125, Laws of 1909, the reporter for a county court is entitled to ten dollars per day for time spent in preparing typewritten transcripts of testimony to be filed in court, or whether he should receive his per diem only for the time spent in court, taking testimony, and who has authority to determine whether he shall receive ten dollars per day or less.

In an opinion given the district attorney of Calumet county under date of October 20th, 1911, and which will appear in the forthcoming Report and Opinions of the Attorney-General for 1912, I held that "County court reporters are entitled to a per diem compensation for all work done by them for the county, including the making of transcripts of testimony taken," and that "The county board may fix the compensation at such sum as is reasonable and right, not exceeding the amount stated in the statute."

I see no reason at this time for reaching a different conclusion.

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*Appropriations and Expenditures*—Money from the special fund created from the charges for examining applicants for registration, as registered nurses, may be expended in employing a special investigator of training schools for nurses, if, in order to pass upon the reputability of such schools, or to pass upon proposed courses of study, such an expenditure is reasonably necessary.

December 14th, 1912.

Dr. C. A. HARPER,

*Secretary Wisconsin State Board of Health.*

In your letter of the 11th you state that the Committee of Examiners of Registered Nurses is outlining the courses of study in the training schools of the state and as a result the various training schools have asked that a member of this committee or some one selected by this committee, or the State Board of Health, make personal investigations and assist in the organization of such schools by personal inspection and visits; that the question arises whether the money paid in by the nurses can be used to employ an inspector and assist the training schools in proper organization; that ch. 346 of the Laws of 1911 pertains to the registration of nurses and that sec. 1409a—11 provides in part:

“All moneys shall be kept as a special fund to meet the expenses of carrying out and enforcing this act;” that it appears from your investigation that, in order to successfully carry out the provisions of this act, some person should be selected to make personal investigations and assist in the establishment of such schools; that the law limits the amount to be paid to any member of the committee, in one year, to \$75, and that it is impossible, under this limitation, to make the necessary personal investigations; that the funds now in will meet, for a considerable time at least, the expenses of such an inspector: and you ask for my opinion as to your authority in the matter.

Chapter 346, Laws of 1911, creates several new sections of the statutes relating to registered nurses. It provides for a committee of examiners (sec. 1409a—6), whose duty it shall be to meet for the purpose of holding examinations of applicants for registration as registered nurses (sec. 1409a—8). Each applicant is required to pay a fee (ib.) and, to be registered, must pass the required examination (ib.). This latter is subject to some exceptions (sec. 1409a—5). If application is made after September 1st, 1914, the applicant must have graduated from a reputable training school or have been registered in another state having requirements equivalent to the requirements here (sec. 1409a—5).

These examiners “may recommend courses of instruction for the guidance of training schools.” Sec. 1409a—7, par. 2.

Each member "shall receive a compensation of five dollars, and expenses for each day in which such member is actually engaged in attendance upon the meetings of the committee, but not exceeding in all fifteen days in any one year." See. 1409a—7, par. 3.

"All moneys shall be kept as a special fund to meet the expenses of carrying out and enforcing" the law in question, "and of prosecuting violations thereof," and no part of the expenses or compensation thereunder shall be paid out of the state treasury (sec. 1409a—11).

It is evident that the only service for which the members of the examining committee can legally be compensated is attendance upon meetings of the committee and that limited, as quoted above.

It is the duty of the board to determine what training schools are reputable, but the burden of showing that any particular training school is reputable is upon the applicant making such claim. *State ex rel. Coffey v. Chittenden*, 112 Wis. 569.

It is no part of the duty of the examining committee to assist in organizing such schools and no expense can be legitimately incurred by it for that purpose. It is authorized to recommend courses of study for such schools. Whatever expense is reasonably necessary to enable them to pass upon such proposed courses of study would be a legitimate expense. The same is true as to expenses reasonably necessary to enable them to determine what training schools are reputable. This would include the expense of employing a special investigator if such employment is reasonably necessary for either of these purposes.

See Biennial Report and Opinions Attorney General 1906, p. 394, and for 1904, p. 100.

Of course, no expense can be incurred beyond the amount of the special fund.

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*Appropriations and Expenditures—University contracts*—The transaction herein considered does not constitute either a loan or an advance by the Board of Regents of the University, but a contract of subscription.

Where funds are paid from a special fund on the faith of a subscription in the form of a note the note is an asset of

such fund and payments thereon should be credited to such fund.

December 16th, 1912.

M. CERE,

*Auditor, State Board of Public Affairs.*

In your letter of October 17th last you inclosed papers from which it appears that under date of July 11th, 1911, the Regents of the University of Wisconsin adopted the following resolution:

“Resolved, That the Board of Regents advance the sum of \$15,000 for the erection of the gymnasium annex as proposed by the plans and specifications submitted by Architect Peabody and approved by Architects Laird and Cret.

“Provided, That for such advance of \$15,000 by the Board of Regents the Athletic Council shall give to the Board of Regents its note for \$15,000 payable in instalments of \$3,000 annually after January 1st, 1912, out of the permanent improvements fund of the Council.”

That under date of July 27th, 1911, the Athletic Council, by unanimous vote of those present and voting, adopted a motion:

“That the chairman of the Athletic Council be authorized to execute a note for \$15,000, payable to the Regents of the University of Wisconsin out of the Improvement Funds of the Athletic Council, at the rate of \$3,000 per year after January 1st, 1912, for the purpose of reimbursing the University for the appropriation of \$15,000 for the erection of an Athletic Annex to the Gymnasium building.”

That thereafter, and under date of August 2nd, 1911, a note was duly executed pursuant to said motion and the Gymnasium Annex was constructed by the Regents and payment therefor made out of the special appropriation for buildings provided by chapter 631, Laws of 1911.

Your first inquiry is:

“Whether the resolution of the Board of Regents dated July 11, 1911, is to be construed as meaning that the \$15,000 was loaned by the Regents of the University to the Athletic Council?”

Owing to the lack of information as to important facts, this cannot be answered definitely. Presumably, however, the resolution was a proposal to build the Gymnasium Annex on con-

dition that the Athletic Council make a contribution, or subscription, in the manner provided by the resolution. This offer was accepted by the vote of the Council and the execution and delivery of the note.

There may well be some question as to the validity of this subscription, because of lack of authority in the Athletic Council to make it. I cannot pass upon that question, however, because I have been unable to obtain the necessary information regarding the Athletic Council. If, however, the Council possesses the necessary authority and it was exercised in accordance with the charter or other authority governing the Council, there can be no question, I believe, as to the binding effect of such a subscription. Our Supreme Court has upheld the validity of subscriptions made to induce the erection of buildings, acted upon by so erecting such buildings, in several cases. *Eyclesheimer v. Van Antwerp*, 13 Wis. 546; *Gibbons v. Grinsel*, 79 Wis. 365; *Lafayette Co. Monument Corp. v. Magoon*, 73 Wis. 627; *Lafayette Co. Monument Corp. v. Ryland*, 80 Wis. 29.

In my opinion, no loan was made to the Athletic Council.

You next ask:

“Is the money expended for the construction of the Gymnasium Annex to be considered as an advance by the Regents on behalf of the Athletic Council?”

In my opinion, it cannot be so considered.

Your third and fourth questions relate to the authority of the Regents to make either a loan or an advance. In view of my answer to your first two questions, it is not necessary that I give any opinion as to such authority.

Your fifth question is:

“In whom does the title to the Gymnasium Annex rest?”

As is true of the other questions asked by you, there are a number of facts with which I have not been furnished which I should know, in order to answer this question intelligently. Assuming, however, that this was merely a subscription to induce the erection of the Gymnasium Annex, and that it was built upon land owned by the State and held by the Regents as trustees for the State, in my opinion the title to the building also rests in the State.

In your sixth question you ask:

“Is the note of the Athletic Council to be considered as an asset belonging to the special appropriation from which the money was disbursed for the construction of the University Annex?”

Section 3, ch. 631, Laws of 1911, appropriates certain money to the University fund income from the general fund of the state

“to be used for the construction and equipment, in the order of the greatest need therefor, of such additional buildings and the enlargement and repairs of buildings, as in the judgment of the regents shall be absolutely required, and as shall be approved by the governor, and can be completed within the appropriation herein made.”

Presumably, the Regents determined that there was great need of this Gymnasium Annex, but that, in view of other needed buildings, they would not be justified in building it from this fund at the time it was built unless a subscription was made.

If this be true, it would seem that the note in question should be considered an asset of this fund, from which expenditures have been made in reliance thereon. Our court has held that accretions to, or increment upon, a fund become a part of it. *State v. McFetridge*, 84 Wis. 473, 525.

This seems to me to be in the nature of an accretion to the special building fund, and should therefore be considered an asset of it.

Your seventh inquiry is:

“When payments are made on the note, what shall be done with the moneys so received?”

It follows from my answer to the previous question that these moneys should be credited as a part of this special building fund.

Your eighth question is:

“Is the note to be considered as an asset of value or as a memorandum of a moral obligation?”

That depends so much upon facts not in my possession that I cannot answer the question. I believe that it was intended

as a binding obligation. If it be such, then it is more than a mere memorandum of a moral obligation. Whether it have a value and, if so, what that value is, even if it be a valid and binding obligation, is purely a question of fact, upon which it is not within the province of this department to pass.

*Appropriations and Expenditures—Perry's Victory Centennial Commission*—The Secretary of State may audit and draw a warrant for \$300 to be used by the commission for incidental expenses, on the statement signed by president and secretary and approved by the Governor, and paid to the treasurer of the commission to be paid as expenses occur.

January 28th, 1913.

HON. JOHN S. DONALD,  
*Secretary of State.*

In your communication of today you have called my attention to ch. 467 of the Laws of 1911, in which an appropriation was made and the Wisconsin Perry's Victory Centennial Commission was created.

You state this Commission has passed a resolution that the sum of \$300.00 be turned over to its treasurer to meet the incidental bills of the Commission and you inquire whether said Commission can draw a warrant on the state treasurer for the sum of money to be placed in the hands of its treasurer to be used for incidental purposes. You state that the Commission has elected a treasurer in accordance with the act.

Said ch. 467 contains the following as part of subsec. 8 of sec. 1:

“The Commission from time to time shall cause to be made statements of its expenses and outlays, and of the particular appropriations to the payment of which money hereby appropriated may lawfully be applied. It may include also the actual disbursements of any member of the former commission hereby discontinued, and provide for the payment thereof. The same shall be signed by the chairman and attested by the secretary and filed with the governor. If the governor approve thereof he shall endorse his approval thereon and file the same with the secretary of state and thereupon the secretary of state shall audit the same, draw his warrant upon the state treasurer for the payment thereof to the treasurer of the commission, and

the same shall thereupon be paid by the state treasurer in the same manner in which other warrants against the state treasury duly approved, audited, and authorized to be paid, are paid."

Under this provision, the Commission can file a statement of the particular appropriation to the payment of which the money appropriated may lawfully be applied. A statement that \$300.00 is required for incidental purposes, if signed by the chairman, attested by the secretary and filed with the governor, and if the governor approves the same and endorses his approval thereon and files the same in your office, it will be your duty as secretary of state to audit the same and draw your warrant upon the state treasurer for the payment of the said amount of money to the treasurer of the Commission.

It seems to me that the statute is very clear that money may be so audited upon the statement of the Commission before the indebtedness has actually been incurred. The legislature undoubtedly had in mind that in performing the duties for which they were appointed, the Commission would find it necessary to expend money for small items, and it would be impracticable to present them to the state to be audited separately, nor would it be fair to ask the Commission to advance the money for them.

In subdivision 2 of section 3, it is provided

"any part of the appropriation remaining in the hands of the treasurer of the Commission at the time of such final report, shall be returned, and, with whatever may yet remain in the state treasury, be merged in the general fund."

To your question as to whether the said Commission can draw a warrant on the state treasurer, I must give a negative answer for the reason that the warrant must be drawn by you after a statement has been filed with you by said Commission, duly approved by the governor and you have duly audited the same.

## OPINIONS RELATING TO AUTOMOBILES.

*Automobiles*—Nonresident automobile owners who have complied with the registration laws of their own state, are not required to register in Wisconsin under ch. 600 Laws of 1911. See sec. 1636—53.

June 6, 1912.

HON. JAS. A. FREAR,  
*Secretary of State.*

You enclose a communication from Mr. Jas. Cronin, Chief of Police, Lake Geneva, Wisconsin, asking whether or not summer residents who remain in this state for a period of five or six months who are residents of the State of Illinois and who have automobiles licensed under the Illinois law are required to take out a license in Wisconsin, and you ask for the opinion of this department as to whether or not in this or in similar cases a Wisconsin license must be procured.

In reply to your inquiry would say that Wisconsin, in common with many other states, has a reciprocity statute concerning the licensing of automobiles from other states. The statute referred to is sec. 1636—53 being ch. 305 of the Laws of 1905 and provides as follows:

“The provisions of section 1 of this act shall not apply to automobiles or other similar motor vehicles owned by nonresidents of this state, provided the owners thereof have complied with any law requiring the registration of such automobile or other similar motor vehicle, or its owner, in force in the state, territory or federal district of their respective residence, and the registration number of such state, territory or federal district shall be displayed on the rear of such automobile or other similar motor vehicle substantially as provided in section 1 of this act. Nonresidents passing through this state from states having no registration, as provided in section 1 of this act, shall comply with all the provisions of this act.”

Sec. 1 above referred to is sec. 1636—47 of the Wisconsin Stats. being sec. 1 of ch. 600 of the Laws of 1911, which provides as follows:

“No automobile, motor cycle or other similar motor vehicle shall be operated, ridden or driven along or upon any public highway of the state unless the same shall have been registered in accordance with the provisions of this act.”

It will be observed that the owners of automobiles, motor cycles and other similar motor vehicles who have registered under the law of the state, or territory where the owners reside are not required to register in accordance with the provisions of ch. 600 of the Laws of 1911 except in cases where the owner resides in a state which has no similar statute requiring registration, in which case the owner is required to comply with the Wisconsin law. It follows that the inquiry made by the chief of police of Lake Geneva should be answered in the negative as Illinois has a registration law applicable to automobiles and similar vehicles and where the resident of the State of Illinois has complied with the Illinois law, as provided in sec. 1636—53 above quoted, such owner is not required to register in the State of Wisconsin.

The Wisconsin Statute makes no provision concerning the length of time such nonresident may remain within the State of Wisconsin and it follows that such automobile owners are not required to register even though they may remain in the state for an indefinite period.

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*Automobiles—Municipal Corporations—Ordinances*—A city ordinance fixing a lower maximum rate of speed for automobiles than that fixed by statute is invalid.

August 17, 1912.

HON. JAMES A. FREAR,  
*Secretary of State.*

In your favor of August 13th you request my opinion as to whether or not a city has the right to pass and enforce an ordinance limiting the speed of automobiles within such city to eight miles an hour or any other speed less than that pre-

scribed by section 1636—49 of the statutes as the maximum speed.

This question was ruled in the negative in an opinion rendered by this department to Mr. F. J. Rooney, District Attorney, Appleton, Wisconsin, under date of August 12, 1911. A reëxamination of the question confirms the conclusion there reached on the following grounds:

“It is well established that a common council of a city cannot in the exercise of its legislative grant enact ordinances which are in conflict with the laws of the state.” *Morgenroth v. Milwaukee*, 125 Wis. 663, 9; *Platteville v. McKernan*, 54 Wis. 487, 490.

Thus it has been held that where the statutes limited the speed of railway trains in cities to six miles an hour, an ordinance limiting the speed of such trains in a particular city to five miles an hour is invalid. *Horn v. C. & N. W. Ry. Co.*, 38 Wis. 463, 470.

In addition, the statute regulating the speed of automobiles itself provides that its provisions “shall be uniform in operation throughout the state and no city, village, county, town, park board or other local authorities shall have power to enact, pass, enforce or maintain any ordinance, resolution, rule or regulation requiring local registration or other requirements inconsistent herewith,” etc. Sec. 1636—55.

The legislature seems to have recognized the fact that the different cities of the state were enforcing different speed ordinances and that such difference caused unnecessary annoyance to the users of automobiles who could not be familiar with the special regulations of each city. The legislative intent to do away with this confusion and to establish a uniform rule for all cities seems clear, and with this purpose in view it seems to me that an ordinance limiting the speed of automobiles to eight miles an hour is necessarily inconsistent with a statute prohibiting a speed exceeding fifteen miles an hour, especially as the statute makes provision for a lesser speed where the particular conditions render that necessary to safety in that it prohibits “speed greater than is reasonable and proper, having regard to the width, traffic and use of the highways and the general and usual rules of the road.” Sec. 1636—49 Wis. Stats., as amended by ch. 600, Laws of 1911.

Certainly the law cannot be "uniform in operation throughout the state" if each city may fix a maximum speed rate less than that fixed by the legislature. I am, therefore, of the opinion that an ordinance fixing a lower rate of speed for automobiles than that fixed by statute is invalid.

*Eichman v. Buchert*, 128 Wis. 385, is not contrary to this conclusion. There an ordinance limiting the speed of automobiles to six miles an hour was held not unreasonable. The question of its conflict with the state law was not involved, since the date of the occurrences there in question was prior to the enactment of the statute.

## OPINIONS RELATING TO BANKS AND BANKING.

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*Banks—State Depositories*—State deposits may not exceed amount of paid up capital of a bank, such capital meaning its paid up capital stock, not including its surplus and undivided profits.

August 28, 1912.

HON. HENRY JOHNSON,

*Assistant State Treasurer.*

In your favor of August 22nd, you ask whether a bank which is designated as a state depository may add its surplus and undivided profits to its capital stock to determine the amount of state money that may be deposited with it.

Sec. 160d Wisconsin Stats. ch. 233, Laws of 1903, provides: "The amount at any time on deposit with any depository shall not exceed the actual paid up capital" etc.

While it may be argued that the "capital" of a bank is its net assets, i. e. its capital stock together with its surplus and undivided profits, I do not think that the words "paid up capital" in sec. 160d can be given such meaning. It seems to me that the word "capital" is here used in the sense of authorized capital stock,—the "capital" which by sec. 2024—10 must be "paid in" before the bank may be authorized to transact business.

Sec. 2024—32 provides that loans by a bank to a single person shall not exceed 30% of the "capital and surplus", indicating that the word "capital" used alone does not include surplus. Cogent reasons confirm the foregoing construction. The amount limited by sec. 160d should be a fixed amount—one definitely known to the state treasurer and not subject to fluctuation with the profits and losses of the bank; otherwise the state treasurer would be obliged to keep careful watch of

the business of every bank in order to avoid violating the law by permitting it to receive state deposits in excess of the amount limited. So also the liability of a stockholder to depositors to an amount equal to the capital stock owned by him (sec. 2024—44) would be a reason for the limit of sec. 160d that state deposits shall not exceed the amount of such capital stock.

All together, it seems very plain that the surplus and undivided profits of a bank may not be added to its capital stock in order to ascertain the amount of its "paid up capital" within sec. 160d.

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*Banks and Banking—Joint Ownership of Stock.*

Stock in a State Bank may be held by husband and wife jointly with right of survivorship.

October 9, 1912.

HON. A. E. KUOLT,

*Commissioner of Banking.*

In your favor of September 30th you ask whether a stockholder in a state bank can assign his stock so that it can be held by him and his wife with right of survivorship.

There may be a joint tenancy of personal property with right of survivorship as between the beneficiaries of a mutual benefit insurance certificate. *Farr v. Trustees*, 83 Wis. 446. So also as to a note and mortgage running to husband and wife. *Fiedler v. Howard*, 99 Wis. 388.

Sec. 2024—45 of the banking law provides: "The shares of stock of an incorporated bank shall be deemed personal property" etc. I find no provision that would prevent a married woman from being a stockholder, or that would prevent bank stock from being held in joint tenancy like any other personal property.

Under the decisions in *Citizens L. & T. Co. v. Witte*, 116 Wis. 60, and *Wallace v. St. John*, 119 Wis. 585, it seems that while a grant to husband and wife would create a joint tenancy with right of survivorship, either party would have the right to terminate such tenancy by making a transfer of his or her interest to a stranger, thus defeating the right of survivorship. Perhaps the grant could be so worded as to prevent

such a transfer, but it would seem to be no part of your duty, nor of mine, to advise how this should be done. I therefore confine myself to advising you that there is nothing in the laws of this state to prevent an assignment of bank stock to husband and wife.

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*Banks and Banking*—State Banks cannot invest in bonds secured by liens on real estate located in other than this and adjoining states.

February 24, 1913.

HON. A. E. KUOLT,

*Commissioner of Banking.*

Under date of February 24th you request my opinion as to whether bonds issued by the California Delta Farms, Incorporated, are a lawful investment for Wisconsin banks, inasmuch as these bonds are based upon real estate located entirely in the state of California and in view of the limitation placed by sec. 2024—35 and 2024—68 of the Wisconsin Stats., pertaining to state banks and to mutual savings banks.

You also inclose a circular descriptive of these bonds, by which it appears that they purport to be first-mortgage six per cent gold bonds of the California Delta Farms, Incorporated: i. e., they are bonds issued by the California Delta Farms, Incorporated, and secured by a mortgage upon certain lands owned by said company.

It is very plain that these bonds amount to nothing more or less than a real estate mortgage and, under that provision of sec. 2024—35 that:

“No bank shall lend any part of its capital, surplus or deposits upon real estate mortgages or on any other form of real estate security, directly or as collateral, except in this and adjoining states.”

State banks of this state are prohibited from investing in these bonds. Sec. 2024—68, after providing that mutual savings banks may employ not exceeding one-half of their deposits in the purchase of certain bonds therein described, provides that:

“All other loans shall be secured by mortgage on unincumbered real estate lying and being in the state of Wisconsin and

states immediately adjoining the state of Wisconsin, to wit: Michigan, Illinois, Iowa and Minnesota."

Under this section it is very clear that mutual savings banks in the state of Wisconsin are prohibited from investing in the bonds of the California Delta Farms, Incorporated.

I am inclined to the opinion, however, that trust company banks are not prohibited from investing in these bonds. Sec. 2024—77i provides:

"Trust company banks may be organized pursuant to the provisions of subchapter II, entitled 'State Banks,' and shall be subject to all the provisions, requirements and liabilities of subchapters I and II so far as applicable, except sections 2024—32 and 2024—35, and except as otherwise hereinafter provided."

It is very plain that the limitation imposed by section 2024—35, which prohibits state banks from investing in these bonds, does not apply to trust company banks. Par. 11 of sec. 2024—77k provides that:

"Such corporation (trust company banks) may loan money upon real estate and upon securities other than personal notes or commercial paper or obligations secured solely thereby."

This latter section seems to give such banks authority to loan upon real estate, without any limitation as to the location of said real estate, and the fact that trust companies are exempted from the provisions of sec. 2024—35 clearly indicates an intention on the part of the legislature that trust company banks should not be limited to the states adjacent to Wisconsin in making loans upon real estate security.

I am therefore of the opinion that state banks and mutual savings banks cannot invest in the bonds mentioned, but that trust company banks are permitted to do so under the laws of this state.

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*Banks and Banking—Loan & Trust Companies—Trust Company Banks*—Trust company banks have no power to issue debentures secured by pledging some of the assets of the company.

February 25th, 1913.

HON. A. E. KUOLT,

*Commissioner of Banking.*

In your favor of February 17th you submit a sample debenture proposed to be issued by a trust company of this state, and ask my opinion as to the power of a trust company to issue such a debenture.

The debenture acknowledges receipt by the trust company of a sum of money to be placed in a Mortgage Loan Fund to be invested by the company in first mortgage loans on real estate; the company agreeing to pay to the owner of the debenture five per cent per annum payable monthly; the principal and interest being secured by the transfer to the company's Trust Officer as trustee notes and mortgages equal to the amount of debentures outstanding; the owner to be entitled to have the debenture redeemed on six months' notice, from moneys in the fund obtained from the interest and principal payments of said notes and mortgages; the trustee being obliged to keep in cash five per cent of the amount of the outstanding debentures; the debenture to be redeemable by the company on six months' notice to the owner and to be due twenty years from date; in case of default the deficiency arising after realizing on the notes and mortgages to be paid out of the general assets of the company.

By subdivision 11th of sec. 2024—77k, it is provided:

“Such corporation (a trust company bank) may loan money upon real estate and \* \* \* may receive time deposits, and issue its notes, certificates, debentures, and other obligations therefor, \* \* \* ”

Similar language has been held sufficient to authorize the borrowing of money and the pledging of certain assets as security therefor upon a plan very similar to that outlined in the debenture you have submitted. *Ward v. Johnson*, 95 Ill. 215, 237-9. *Curtis v. Leavitt*, 15 N. Y. 9.

But sec. 2024—36 provides with reference to state banks that:

“No bank, banker, or bank officer shall give preference to any depositor or creditor by pledging the assets of the bank as collateral security; provided, that any bank may borrow money for temporary purposes and may pledge assets of the bank not

exceeding fifty per cent in excess of the amount borrowed as collateral security therefor; provided further, that whenever it shall appear that the bank is borrowing habitually for the purpose of reloaning, the Commissioner of Banking may require such bank to pay off such borrowed money."

And sec. 2024—77i provides that:

"Trust company banks may be organized pursuant to the provisions of subchapter II, entitled 'State Banks,' and shall be subject to all the provisions, requirements and liabilities of subchapters I and II, so far as applicable, except Sections 2024—32 and 2024—35, and except as otherwise hereinafter provided."

This language obviously makes the prohibition contained in sec. 2024—36 above quoted applicable to trust company banks "except as otherwise \* \* \* provided." I do not think that it is otherwise provided by the quoted provision "eleventh" from sec. 2024—77k, as the two sections may be construed together to permit the issuance of only such "debentures" etc., as are not secured "by pledging the assets of the bank as collateral security."

I am, therefore, of the opinion that trust company banks have no power to issue debentures on the plan proposed.

## OPINIONS RELATING TO BRIDGES AND HIGHWAYS.

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*Bridges and Highways*—Bridges already constructed can be repaired. Provisions of ch. 642, Laws 1911, relate to bridges which are to be constructed after passage of act.

October 7, 1911.

### WISCONSIN HIGHWAY COMMISSION:

You call my attention to the provisions of ch. 642 of the Laws of 1911 which provides that no iron, steel or concrete bridges of more than four feet span shall be constructed upon any highway unless designed to carry a load of fifteen tons. It also further provides that "No such bridge or culvert shall be repaired unless such repairs shall leave such bridge or culvert in such condition that it shall have sufficient strength according to standard engineering practice to carry without planking any load that may be driven or propelled upon, on or along such bridge or culvert of not more than fifteen tons." You ask for the opinion of this department concerning the proper interpretation of this statute. You also state that there are various kinds of bridges in the State of Wisconsin combining iron and steel with wood floors, etc., and ask what would be the distinction between the wooden bridge and that of a steel bridge, and you further suggest that the plank floors of many bridges and culverts require frequent renewals and that these bridges were not originally designed for a load of fifteen tons and are built in such a manner as to make it impracticable to repair them in such a way as to leave them of sufficient strength to carry fifteen tons. Concerning this proposition you ask whether the renewal of the plank floor in such a case constitutes repairing the bridge within the meaning of the statute even though this be no more than the plac-

ing of a single new plank where the old one is unsafe. You also suggest that wooden bridges are excepted from the requirements of the statute which specifies only iron, steel or concrete bridges.

In reply to your inquiry I am convinced, upon an examination of the statute in question, that the legislature did not intend by the passage of this act that the measure should be so sweeping and comprehensive in its effect as to preclude repairs to bridges already in existence. Such an interpretation of the law would necessitate the reconstruction of practically every bridge or culvert in the State of Wisconsin and it cannot be assumed that the legislature intended any such sweeping enactment. In my opinion the act does not apply to bridges or culverts already constructed whether of iron, steel, concrete or wood and in my opinion all such bridges may be repaired within reasonable limits without regard to the provisions of the statute requiring such structures to support a weight of fifteen tons according to standard engineering practice which I understand to mean a safe margin over and above the actual weight required to be carried. In short, I think the law means exactly what it says and should be so construed, to wit, that "From and after the passage and publication of this act no iron, steel or concrete bridge or culvert of more than four feet in length of span shall be constructed in any highway in this state unless it shall be designed, according to standard engineering practice, to have sufficient strength to carry without planking any load that may be driven or propelled upon, on or along such bridge or culvert of not more than fifteen tons and *no such bridge* or culvert shall be repaired unless such repairs shall leave such bridge or culvert in such condition that it shall have sufficient strength according to standard engineering practice to carry without planking any load that may be driven or propelled upon, on or along such bridge or culvert of not more than fifteen tons."

From the language of the act I am of the opinion that it applies to bridges to be constructed from and after the passage and publication of the act and that no repairs shall be made upon such bridges or culverts thereafter constructed unless such repairs leave the bridge in the original condition capable of sustaining a weight of fifteen tons according to

good engineering practice. The act relates to future bridge building and road construction and not to bridges already in existence. It follows therefore that bridges and culverts now in existence may have reasonable repairs made thereon such as the insertion of a single plank or perhaps the entire replanking of the bridge or culvert without regard to the provisions of the statute, but in any case where such old bridge or culvert is replaced by a new structure subsequent to the passage and publication of this act it must conform to the conditions there prescribed.

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*Bridges & Highways*—Payment of Highway Taxes in money. Resolution must be passed by majority of "all the members of the county board".

Construction of sec. 1260 R. S. as amended by ch. 599, Laws of 1911.

November 22, 1911.

MR. JOHN A. MALONE,

*District Attorney,*

Baraboo, Wisconsin.

You state that the county board of Sauk county consists of thirty-five members; that at a session of said board twenty-seven members were present, three being absent on leave from the chairman, and five being absent without permission; that at such session of the board a resolution was introduced in compliance with section 1260 of the revised statutes, being chapter 599 of the Laws of 1911, providing that the highway taxes in all the towns of Sauk county should hereafter be payable in money and that upon this resolution the vote stood seventeen ayes and ten noes. You ask for the opinion of this department as to whether or not this resolution is binding upon the several towns of the county or, in short, whether such resolution was legally passed.

Sec. 1260 of the revised statutes, as amended by ch. 599 of the Laws of 1911, provides:

"The town clerk shall add the amount of highway taxes to the tax roll of the town and the same shall be collected by the town treasurer as other town taxes are collected and when collected shall be paid out by him on orders issued by the town

board. This act shall apply only to towns in counties wherein the county board at any annual meeting shall have adopted a resolution by a majority vote of all members, determining that this act shall so apply to such county."

Upon your statement of fact the only question for consideration is whether or not the resolution was legally adopted.

At common law:

"A legal assembly of the members of a definite municipal governing body like a city council or county board is made up of a majority of all the members of such body. Such number constitutes a working quorum and a majority thereof for or against a proposition is a determination of the whole body in regard to it."

Sec. 665 of the Wisconsin Stats. of 1898 provides:

"A majority of the supervisors entitled to a seat in the county board shall constitute a quorum for the transaction of business; \* \* \*. All questions shall be determined by a majority of the supervisors present unless otherwise provided."

In the case of *St. Aemilianus Orphan Asylum v. Milwaukee County*, 107 Wis. p. 80, the Supreme Court have laid down the rule that:

"In the absence of a clearly expressed intent to the contrary the will of a majority of a quorum of the members of a county board regularly expressed by their votes is the will of the whole board,"

unless it clearly appears that the legislature intended to displace the general law on the subject and that the statute in question clearly expresses such intention. The court there defines what language in its opinion would express such legislative intent as for example where a statute used the language "a majority of all the members entitled to seats in the county board," "a majority of all the members thereof," etc., in which case the court say there is very little room for judicial construction as such language clearly expresses the intention of the legislature to change the common law rule.

In my opinion the provisions of sec. 1260 are equally expressive of the intention of the legislature that the resolution there referred to must be passed "by a majority vote of all members" of the county board.

From your statement of the case the resolution was not passed by a majority vote of all the members of the Sauk county board since only seventeen members voted for the resolution and the board consists of thirty-five members. Such being the case I am of the opinion that the resolution was not legally passed and is ineffective.

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*Bridges and Highways—Dams—Towns—Municipal Corporations*—A town may build a bridge over a stream, with reference to the natural condition of the stream only, although an act of the legislature authorizes the building of a dam below the proposed site of the bridge, where no condemnation proceedings to secure the right of overflow have been commenced.

If the erection of a dam causes the overflow or destruction of a public highway, the owners of the dam are liable for all moneys necessarily expended in restoring such highway to its former condition of usefulness.

July 11, 1912.

WISCONSIN HIGHWAY COMMISSION:

In your letter of the 1st, you state that the town of Weirgor, Sawyer county, expects to build two bridges across the Chipewewa river, one in section 24 and the other in section 14, both in town 37, range 7; that the John Arpin Lumber Co., has a charter to build a dam across the river in section 36 in the same town and range which will raise the water at the sites of the proposed bridges seventeen feet and eleven feet respectively, but has not yet begun active construction; that without the dam the floors of these bridges could safely be built about nine feet above ordinary low water level but with the dam in, these floors should be about fourteen feet and eight feet respectively higher than this, thus greatly increasing the cost of building. You state further that it is thought that the charter to build the dam was granted before the roads at the bridge sites were laid out and you ask if the town will be obliged to build the bridges to be of service with the dam built or if the bridges can be built with reference only to the river in its natural or present condition. I have also had some conversation with you regarding this inquiry from all

of which, for the purposes of this opinion, I am assuming that the act of the legislature, under which the John Arpin Lumber Co. claims, was enacted and in force prior to the laying out of the highways of which these bridges are to form a part; that none of the rights granted by such act have been forfeited by said company, that no proceedings have been started by said company for the condemnation of the land over which such highways are laid for the right of flowage; that the said highways are legally laid out.

The Arpin Lumber Co. gained no rights in the land by the passage of the act in question except the right to obtain an easement for flowage purposes by proper condemnation proceedings. Until such proceedings are taken the title and rights of the owner are unimpaired and he may improve such land or dispose of it to others as he sees fit. The rights and obligations of the company do not attach or become fixed until there has been a "taking" of the land. *Driver v. W. U. R. R. Co.*, 32 Wis. 569; *Lyon v. Green Bay & Minn. Ry. Co.*, 42 Wis. 538; *Feiten v. City of Milwaukee*, 47 Wis. 494; *West v. Milwaukee L. S. & W. Ry. Co.*, 56 Wis. 318; *Krier v. Milwaukee Northern Ry. Co.*, 139 Wis., 207; *Marsh v. Milwaukee L. H. & T. Co.*, 134 Wis. 384; 1 Elliott on Roads & Streets (3rd Ed.) Sec. 294.

It would seem to me to follow that, no condemnation proceedings having ever been commenced by the Lumber company, the town is justified in building the bridges with reference only to the present or natural condition of the stream. The fact that the act authorizing the dam was passed prior to the laying out of the highway, in my opinion, does not affect the question. Both the company and the town having authority to obtain an easement by the exercise of the power of eminent domain, the one first perfecting that right has the preference. *Indiana Power Co. v. St. Joseph & E. Power Co.*, 63 N. E. 304; 159 Ind. 42; Lewis on Eminent Domain (3rd Ed.) Sec. 503; *Milwaukee L. H. & T. Co. v. Milwaukee Northern Ry. Co.*, 132 Wis. 313.

The further question then arises as to the rights and liabilities of the company when condemnation proceedings are instituted to secure an easement for flowage under the act authorizing the construction of the dam. In the absence of a stat-

ute expressly providing therefor municipal corporations are not entitled to damages for lands taken under the power of eminent domain. However, the act in question does not authorize the overflowing of a public highway. Such an overflowing would be a public nuisance. *State v. Phipps*, 4 Ind. 515; *Venard v. Cross*, 8 Kas. 259; *State v. Raypholtz*, 32 Kas. 450; *Commonwealth v. Stevens*, 10 Pick. (Mass.) 247; *Cheshire v. Adams & Cheshire Reservoir Co.*; 119 Mass. 356; *Wing v. Fair Haven*, 62 Mass. (8 Cush.) 363; *Ex parte Manhattan Co.*, 22 Wendell (N. Y.) 653.

As said by Justice Brewer in *Venard v. Cross*, *supra*,

“The right thus acquired of flowing certain lands would not carry with it the right to obstruct a highway. The party obtaining the right of flowage takes nothing by implication. He is held to the letter of the bond. . . . The purely public use of a highway is paramount to the quasi-public purpose of a mill.”

In *Commonwealth v. Stevens*, *supra*, the court say:

“There being no provision made for an indemnity to the public it seems manifest that no encroachment on the public rights was intended to be sanctioned.”

It will be the duty of the company to restore the highway to its former condition of usefulness and in case of its failure so to do the town may recover from it whatever it has been obliged to expend to repair the highway and put it in a safe condition for use. *Town of Levis v. Black River Improvement Co.*, 105 Wis. 391, and cases cited; *Cheshire v. Adams & Cheshire Reservoir Co.*, *supra*; *Venard v. Cross*, *supra*; Lewis on Eminent Domain (3rd Ed.) Sec. 175.

Of course if, in fact, the company actually obtained the flowage rights in this land prior to the laying out of the highway my answer to your questions would have to be changed. It is, of course, possible that if the matter is taken into court my position may not be sustained, but I believe it will be. It would seem to me that the matter could be taken up with the Arpin Company and an agreement reached by which the matter could be adjusted now and the bridges so built as not to necessitate a change when the dam is put in and thus save expense for both parties.

*Bridges and Highways—Counties*—When the county board of supervisors has adopted a highway as a part of the county road system, it has power to alter or discontinue such highway.

Chap. 337, Laws 1911 did not change the power of town boards to alter or discontinue highways.

August 5, 1912.

DAVID BOGUE,

*District Attorney,*

Portage, Wisconsin.

In yours of the 2nd you state:

“The County of Columbia in the year 1910 received a petition from the Town of M. to place a certain section of the road in the said town on the prospective county highway system. The county board acts upon this petition favorably and places this road, two miles in length, upon the prospective county highway system. The repairs are not made upon the road, only a short distance, on account of lack of funds and in July, 1912, and before any further steps have been taken by the county to repair the said highway or to rebuild it, a petition properly signed by six resident freeholders of the town is presented to the town board asking that part of said highway so adopted into the county system be altered by the discontinuing of part of it and the building of a new section to take the place of the section discontinued;”

and you ask:

“1. Under the above statements of facts, have the rights and the powers of the town board to alter and discontinue and adopt a new (road) been in any wise changed by the amendments to the road law?

“2. Has the county any control over the above, and if so, by virtue of what law?”

When you speak of the amendments to the road law I assume that you refer to ch. 337 of the Laws of 1911, which provides for state aid for building highways. I do not understand that this chapter changes the law with reference to laying out, altering or discontinuing highways except that sec. 1317m—7, par. 2, provides:

“Whenever it is necessary for the proper construction of any road or bridge to change or relocate a portion of the system of prospective state highways, the town in which such por-

tion lies shall provide the right of way of such width as is approved by the state highway commission."

Sec. 1317m—9, par. 6, provides for an appeal from an order of the town board, laying out, widening, altering or discontinuing a highway, which appeal is taken to the county highway commission.

These are the only changes that have come to my attention made by this chapter to the law relating to the laying out, widening, altering or discontinuing of highways. It may be that I have overlooked some provision and, if so, I shall be very glad to have my attention called to it.

In answer to your second question I will call your attention to sec. 1300 of the Stats. providing in part as follows:

"The county boards of supervisors in their respective counties are authorized to lay out highways extending through or into two or more towns or along or near the town line between two or more towns in their county, and to widen, alter or discontinue state roads and any highway or part thereof laid out by such board . . . upon the petition of not less than thirty resident freeholders of their county and not less than fifteen from each town in which such highway or any part thereof shall be proposed to be laid out, or from each town in which the part of such road or highway proposed to be widened, altered or discontinued shall be. . . . The county board may, in any case, adopt as a part of any such highway any highway or part thereof previously laid by town supervisors."

I assume from your letter that the particular highway in question was adopted by the county board under the provisions of this section. That being true, in my opinion the county board, upon proper petition being made to it, has power to alter or discontinue the highway.

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*Bridges and Highways*—County is not compelled to aid village in the construction of a bridge wholly within the limits of the village.

August 10, 1912.

E. P. GORMAN,

*District Attorney,*

Wausau, Wisconsin.

Yours of August 1st has been received. You state that during a recent flood the bridge in the village of Schofield, an in-

corporated village, was washed entirely away, making a total loss; that the village lies wholly within the town of Weston and that the bridge was quite an expensive one; that the village wishes to make the county assist toward the construction of the new bridge and also wishes the town of Weston to contribute to its cost. You state that the bridge lay entirely within the said village of Schofield.

You inquire whether the county must extend aid to the village, under the statutes of this state.

In answer I will say that, under sec. 1319 of ch. 397, Laws of 1909, the county must extend aid for building bridges, to towns wholly or partly within such county, within which towns the bridges are situated.

In an opinion rendered by this department to M. W. Torkelson, Bridge Engineer of the Wisconsin Highway Commission, under date of December 26th, 1911, it was held that under this statute and under sec. 894a of ch. 284, Laws of 1899, the county is liable to aid the town in paying its share of the cost of a bridge crossing a navigable stream within an incorporated village where such bridge is part of a town road and situated wholly within such village.

Said section 894a provides as follows:

“Every village in this state, whether such village be incorporated under general or special law or both, shall constitute a separate road district. No part of the streets or highway of any such village shall be in any road district established by the town board nor under the control of the town officers, provided, that bridges across navigable streams on town roads shall be built, maintained and repaired by the town and village jointly, the expense to be borne by each in proportion to their equalized valuation as fixed by the county board.”

I find no provision in the law, however, making it the duty of the county board to aid the village in paying its share of such bridge construction.

I am therefore of the opinion that the county is not compelled to aid the village in paying its share of such cost.

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*Bridges and Highways—Counties*—County board may not appropriate money to aid in the construction of a highway within the limits of an incorporated city.

October 15, 1912.

MR. JOHN B. CHASE,  
*District Attorney,*  
Oconto, Wisconsin.

In your favor of October 14th, you state that at the last meeting of the county board of Oconto county a resolution was presented, which provides for the appropriation of \$10,000 out of the funds of the county to construct or aid in the construction of a highway within the city of Oconto, extending from Main street in that city to a dock within the limits of the city at which vessels discharge their cargoes and receive freight. You state that your advice as to the legality of such an appropriation has been asked, and you request my opinion in the matter.

Sec. 1317m—5 of ch. 337, Laws of 1911, does not, in the opinion of this department, authorize the county board to improve or aid in improving a road lying within the corporate limits of a city. See opinion of Attorney-General to James Thompson, District Attorney, under date of September 8, 1911, copy enclosed.

As confirming the intent of the legislature in this regard, I call your attention to the language contained in the report of the special legislative committee on highways, with reference to the bill which ultimately became ch. 337, Laws of 1911, as follows:

“The committee is glad to report that the incorporated villages and cities are more enthusiastic, if possible, than the farming communities in favor of state aid in the improvement of rural highways, notwithstanding the fact that it is generally understood that no part of state or county money shall be expended within the limits of any incorporated city or village.”

Apart from ch. 337, I do not find that there is any statute which would authorize a county board to make such an appropriation. Sec. 1304a expressly limited the power of counties in this regard, and that section was repealed by ch. 337, Laws of 1911. In the pamphlet entitled “Bulletin No. 1” issued by the Wisconsin Highway Commission, and containing the new state aid highway law with notes, I find, on page 36, this note under section 2, that being the section repealing

section 1304a and many other sections with reference to highways:

“This section repeals all laws which have heretofore forced or allowed counties to construct or assist towns in constructing roads, and in the future if any county board should desire to construct or assist in constructing any road it must act in conformity with this law.”

I am, therefore, of the opinion that there is no authority either in ch. 337, Laws of 1911, nor in any other section of the statutes, that I can find, which would authorize the county board to make an appropriation for the construction of a highway within the limits of an incorporated city.

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*Bridges and Highways—Highway Commission—Sec. 1317m—9, subdiv. 6, does not give a right of appeal to an individual but only to the petitioners for a highway or the town board.*

October 29, 1912.

WISCONSIN HIGHWAY COMMISSION:

In your favor of October 23rd you state that under subsec. 6 of sec. 1317m—9, of ch. 337, Laws of 1911, the county highway commissioner ordered the laying out of a certain highway in La Crosse county; that on October 19th you received from a certain land owner, who considered himself aggrieved by the order laying out the highway, an appeal from the decision of the county highway commissioner; that you have assumed that the right of appeal under this section is limited to either the original petitioners or the town board of the town; and you ask for my opinion as to your powers and duties in the matter.

“The proceeding (for the laying out of a highway) is an adversary one, purely a creature of statute, and the statute must be strictly followed. Jurisdiction can only be obtained and retained by compliance with the requirements of the statute.” *State ex rel. v. Graves*, 120 Wis. 607, 609; *Fraser v. Mullaney*, 129 Wis. 377, 381.

In such proceeding “an appeal is purely a statutory right and unless given by the statute the right does not exist.”

*W. U. R. Co. v. Dickson*, 30 Wis. 389, 392; *State ex rel. v. Oshkosh*, 84 Wis. 548, 566; *State ex rel. v. Wallman*, 110 Wis. 312, 315.

Since no appeal at all need be provided, the right of appeal, when granted, may be limited in any way that the legislature sees fit. 37 Cyc. 731—2. The steps prescribed by statute for such appeal must therefore be strictly complied with. *State ex rel. v. Hoelz*, 69 Wis. 84, 88.

Subdivision 6 of sec. 1317m—9 gives the right of appeal to the "group of freeholders who have lawfully petitioned a town board according to sec. 1265." That section permits "six or more freeholders" to institute a proceeding before the town board to have a highway laid out or altered, etc. It scarcely needs a rule of strict construction to make it apparent that subdivision 6, above quoted, gives no right of appeal to an individual but only to "the petitioners or the town board". Such appeal seems to be in addition to and different from that given by sec. 1276 to "any person who shall consider himself aggrieved". Such a person is not, in my opinion, within the terms of subdivision 6, and I am therefore convinced that he cannot take an appeal thereunder, and that your commission would be without jurisdiction to proceed in such an appeal.

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*Bridges and Highways—Public Officers*—The state highway commission has supervision of the construction of all state highways.

October 31, 1912.

MR. A. R. HIRST,

*State Highway Engineer.*

In your letter of October 26th, you submit the following questions for my official opinion:

1. When a county votes for the improvement of the prospective system of state highways with its own funds and does not accept any money from the state to apply toward the improvement, must the state highway commission approve the plans and specifications and the completed construction just as if the improvement were petitioned for under state aid and the state put money into the work?

2. When a town bonds itself in accordance with sec. 1317m—13, and the county bonds itself in accordance with sec. 1317m

—12, and no state aid is requested, can the county make such improvement as it sees fit with the joint funds without the plans and construction being approved by the state highway commission?

You state that the general scope of the law would seem to indicate that the Wisconsin Highway Commission was to supervise all the construction upon the system of prospective state highways, but that several of the sections put in limiting clauses, such as "built under state aid", which might indicate that roads not built with state aid could be constructed by the counties as they see fit.

Subsec. 4 of sec. 1317m—6 provides as follows:

"The county highway commissioner shall have charge, under the direction of the state highway commission, of the construction of all highways built with state or county aid, and of the maintenance of all state highways."

As all state highways receive aid from the counties under the express provision of this statute, the state highway commission has the right to direct and supervise the construction of all state highways.

Subsec. 4 of sec. 1317m—2 provides as follows:

"The commission shall make suitable regulations for the adequate surveying, planning, constructing, maintaining and inspecting of all roads and bridges constructed under this act. These regulations must be observed by the counties to make them eligible to receive benefit from the state highway fund."

When the county issues bonds to build highways it thereby gives aid for the construction of the highways and comes within the provision of subsec. 4 of said sec. 1317m—6, as above quoted, and when the town issues bonds to aid in the construction of a part of state highways the money so obtained is deposited with the county treasurer and cannot be used except with county money.

Both of your questions must, therefore, be answered in the affirmative. The fact that a few sections of the statutes contain limiting clauses such as "built under state aid", etc., and such as is found in subsec. 4 of sec. 1317m—2, that the

regulations must be observed by the counties to make them eligible to receive benefit from the state highway funds, is for the purpose of making the law self-operating and holding out an incentive to the counties of the state to comply with its provisions in order to get the state aid. It is not to be construed as impliedly authorizing the counties in cases where no state aid is desired or asked for, to build or construct the highways as the counties may see fit and without the supervision of the state highway commission.

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*Bridges and Highways*—A highway adopted by a village pursuant to ch. 298, Laws 1893, remains a village highway after that law was repealed, and the town in which such highway is located cannot be required to either maintain or repair the same.

November 13, 1912.

EDGAR EWERS,

*District Attorney,*

Richland Center, Wisconsin.

In your letter of the 7th, you state substantially the following:

On July 6th, 1896, the village board of Lone Rock, Richland county, adopted a certain highway without the limits of said village, pursuant to chapter 298 of the laws of 1893. Thereafter chapter 298 of the laws of 1893 was repealed by section 4978 of the statutes and section 912 added. Such highway is within the limits of the town of Buena Vista. On August 13th last a petition signed by a group of freeholders of Richland county was filed with the town clerk of the town of Buena Vista requesting the levying of a tax for the permanent improvement of such highway, pursuant to sub-sections 3 and 5 of section 1317m—4 of chapter 337, laws of 1911; that said petitioners paid to the town treasurer of said town the sum of \$800, pursuant to sub-section 3 of section 1317m—4 of chapter 337, laws of 1911. Said highway has been adopted by the Richland county board as a part of the system of prospective state highways; and you ask whether the town board of the town of Buena Vista is required to accept the said sum of \$800 paid to the town treasurer and whether the town board is required to levy the tax in accordance with said petition; also whether the town of Buena Vista and Richland county will have to ap-

propriate aid in repairing said highway, or whether said appropriation has to be made by the village of Lone Rock, in Richland county.

Chapter 298 of the Laws of 1893 provides for the adoption of a highway by a village, as was done in this case, and that the village so adopting said highway:

“May thereafter exercise police powers, make rules and regulations for the government of the same, and be liable for the maintenance and repair thereof in the same manner, and to the same extent, as if such highway or bridge were within the corporate limits of such village.”

This chapter was repealed by section 4978 of the statutes of 1898. Section 4980 of the statutes provides:

“The repeal of said acts shall not affect any act done or right accrued or established, or any proceeding, suit or prosecution had or commenced in any civil case previous to the time when such repeal shall take effect; but every such act, right or proceeding shall remain as valid and effectual as if the provision so repealed had remained in force.”

The village of Lone Rock having legally acquired this highway prior to the repeal of the law, under sec. 4980 just quoted the rights and liabilities are the same as if that law had not been repealed. That is, it is the duty of the village of Lone Rock to maintain and keep in repair said highway.

Sec. 1317m—4 of ch. 337, Laws of 1911, has no reference to highways in villages or highways which it is the duty of a village to maintain and repair.

I am therefore of the opinion that the town of Buena Vista is not required to levy a tax for the purpose of permanently improving this highway, and that Richland county cannot be required to appropriate aid for that purpose.

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*Bridges and Highways*—Payments made by a town to make up a deficiency in the expense of construction of a bridge or highway may be used as a basis for obtaining state and county aid.

November 22, 1912.

WISCONSIN HIGHWAY COMMISSION:

In your letter of November 18th, you direct my attention to former opinions rendered by this department relating to the building of a bridge in the village of Amery, Wisconsin.

These former opinions were to the effect that the town of Lincoln was entitled to state aid, based upon its share of the expense of constructing this bridge and that it could not obtain any aid toward the building of the approach to the bridge.

You state that the cost of this bridge was \$3,300, of which the village was due to pay \$897 and the town of Lincoln, Polk county, \$2403; that the amount of funds available for this \$2403 was, \$800 from the town, \$800 from the county and \$400 from the State, leaving, therefore, a deficit of \$403; that the town of Lincoln has asked that the State contribute toward making up this deficit, and you ask my opinion upon the following questions:

“1. Is it lawful to use a sufficient amount of the 1913 state aid allotment to make up twenty per cent of this \$403, or \$80.60, the balance being paid by the town and county?”

“2. An allotment from the 1912 state highway fund of \$300 was made for bridge work in the town of Clayton, Polk county. Of this only \$129.40 was used, leaving \$170.60 of the state allotment to Polk county unused. Would it be lawful to use \$80.60 of this money to assist the town of Lincoln in making up the deficit already mentioned?”

Sec. 1317m—4, par. 1, of the Stats. as amended by ch. 337 of the Laws of 1911, provides for the raising by tax in any town, of money for building bridges on prospective state highways. Par. 2 provides that such special tax may be expended to pay the town's share of the cost of constructing bridges on a prospective state highway. Subsec. 5 provides that:

“Whenever it has been determined in accordance with subsections 1, 3 or 4 of this section that funds will be available, the town board shall, on or before the first day of the following September, through the county clerk, petition the county board to allot and appropriate the proper amount to cover the county's share of the improvement.”

Sec. 1317m—5, par. 2, of the Statutes, as amended by ch. 337 of the Laws of 1911, provides that, upon receiving a petition from a town, the county board shall appropriate its share of the cost of constructing the improvements, providing that the amount allotted to the county from the state highway fund is sufficient to pay the State's share of the cost.

Sec. 1317m—7, par. 10, of the Stats. provides:

“After final payment is made according to subsection 8 of this section, the county treasurer shall return to the state treasurer and to the town treasurer any sums remaining in his hands belonging to the state highway fund or to the town and not required to be spent for the payment of the state’s and town’s proper share of the cost of construction. Such amounts shall be accompanied by a full itemized statement of all sums expended in the construction of the road or bridge in question, signed by the county highway commissioner or other person in charge of such construction.”

Apparently, no provision is made for the payment of any deficit in the expense of making these highway improvements. However, it has been held by this department that, under sections 1317m—12 and 1317m—13, bonds may be issued for the improvement of highways and that the installments thereof as they become due and are paid may be used as a basis for appropriations from the highway fund.

In giving this construction to these sections, the whole purpose and spirit of the law was looked to and it was held that such a construction was carrying out the purpose of the law. It would appear to me to be equally carrying out the purpose of the law, where a town has met with a deficit in the making of road improvements in one year and is therefore called upon the next year to appropriate money to make up such deficit, that the amount so appropriated the second year for such deficit may be used as a basis for obtaining state and county aid.

This, I believe, answers your first question.

Sec. 1317m—7, par. 10, already quoted, seems to answer your second question. The amount allotted to the town of Clayton and not used for highway purposes should be returned to the funds from which it was allotted: that is, that portion thereof that was appropriated by the State to the state treasurer and that part appropriated by the town to the town treasurer.

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*Bridges and Highways—County Board*—Sec. 1317m—5 (ch. 337 L. 1911) imposes an absolute duty on a county board to appropriate money and levy a tax to cover the county’s share

of a highway improvement, which duty may be enforced by mandamus. The costs in such action would go against the supervisors personally.

December 3, 1912.

WISCONSIN HIGHWAY COMMISSION:

In your favor of November 27th, you state that the county board of Calumet county has neglected and refused to take any action under the new state aid highway law, ch. 337, Laws of 1911; that in the fall of 1911, no town in the county voted any money for state aid or applied to the county for county aid under this law, but that four towns in the county have voted appropriations for state aid work in 1913 and have petitioned the county board for county aid as provided by law; that the state highway commission has also allotted state aid in the manner prescribed by the act, but that in spite of all this the county board has refused absolutely to take any action under the law; and you ask my opinion as to what course should be pursued, and particularly, first, whether the law is mandatory, second, what form of legal proceedings should be brought, and third, who would be liable for the costs of such proceeding in case it is decided that the county board must comply with the law.

Subsec. 2 of sec. 1317m-5, of ch. 337, Laws of 1911, provides that upon receiving a petition from a town board "the county board shall appropriate a sum to cover its share of the costs of constructing the improvements and cause such sum to be levied on all the taxable property in the county." That the word "shall" in this section is mandatory and imposes an absolute duty on the county board, which may be enforced by mandamus on the relation of one of the petitioning towns, seems clear beyond dispute. The supreme court has so held as to a law providing for the building of bridges, the language of which was substantially similar to that of the law here in question, saying:

"While we are not inclined to hold that the county board will be bound to appropriate the sum asked for upon every petition presented in proper form, whether it be true or false, we entertain no doubt but that as to certain matters of fact the decision of the town must be held to be final and conclusive. We think that the town has the power to decide when public

safety demands that a bridge be repaired or rebuilt, and to determine the general character of such repairs or rebuilding, and to fix and determine the amount necessary to be spent for the purpose; also to determine the location within the limits of highways where new bridges shall be built and the character and cost thereof. In these respects we think clearly the action of the town is final and conclusive and cannot be controverted or questioned by the county board." *State, ex rel. Town of Star Prairie v. Board of Supervisors of St. Croix County*, 83 Wis. 340, 346.

The law involved in the above case has been expressly held to be valid and constitutional as to the right of the legislature to compel the levying of a tax by a county upon a town's petitioning therefor. *State ex rel. v. Sauk County*, 70 Wis. 485; *Battles v. Doll*, 113 Wis. 357, 360; *Bloomer v. Bloomer*, 128 Wis. 297, 310.

On the question of costs, the supreme court has also spoken in a recent case as follows:

"A mandamus proceeding is regarded as an action respecting the right to costs, the relator for that purpose being treated as the party plaintiff in a case like this. *State ex rel. Risch v. Trustees*, 121 Wis. 44. That costs, upon the relator's recovering go against the persons committing the wrong, as the supervisors in this case, is ruled by *State ex rel. School District v. Wulfrem*, 25 Wis. 468." *State ex rel. Wunderlich v. Kalhofen*, 134 Wis. 74, 80; *State ex rel. Gordon v. McNay*, 90 Wis. 104, 6.

I am, therefore, of the opinion that each of the petitioning towns may commence a proceeding by mandamus to compel the county board to appropriate and levy its share of the cost of the improvements, and that if such action be successfully maintained the cost thereof would be chargeable against the supervisors personally and not against the county.

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*Bridges and Highways*—A county is liable for the maintenance of highways which have been adopted by the county board as state highways together with such as have been permanently improved pursuant to subsec. 8 of sec. 1317m—7.

January 8, 1913.

MR. ALEXANDER WILEY,  
*District Attorney,*

Chippewa Falls, Wisconsin.

In your favor of December 27th, you call my attention to the provisions of ch. 337, Laws of 1911, the State Aid Highway law, and state that:

“The county of Chippewa by proper action of the board came within the provisions of said chapter and selected a system of prospective state highways; that a certain portion of said system of said prospective state highways within Chippewa County was improved with macadam. This portion was an isolated hill in one of our towns not over a quarter of a mile in length on one of the roads comprising part of the prospective system of state highways. The county board did not adopt this part of the prospective system as a state highway. The improving was made pursuant to the statute whereby the town appropriated its amount and received from the county and state an additional like amount of money. This fall some officers of the State Highway Commission inspected said portion of work on the prospective state highway and found it satisfactory.”

You ask my opinion as to whose duty it is to maintain this stretch of road, the county's or the town's.

Subsection 9 of section 1317m—7 provides:

“All state highways shall be maintained at the expense of the county in which they lie and the county board shall make adequate provision therefor. Other roads constructed with the assistance of the state shall be maintained by the towns in which they are situated.”

Subsection 3 of section 1317m—3 provides that:

“The county board may adopt any part of the prospective system \* \* \* as a state highway.”

Subsection 8 of section 1317m—7 provides in part that:

“If the road has been improved with a surface of stone, gravel or other material approved by the State Highway Commission as giving a hard durable surface, upon its final acceptance, it shall become a state highway. The term state highway as used in this act shall be construed to mean only such permanently improved highways and the bridges and culverts thereon, and those adopted by the county board according to subsec. 3 of sec. 1317m—3 of this act.”

Reading these provisions together it seems clear to me that the state highways which must be maintained at the expense of the county consist of such parts of the system of prospective state highways as may have been adopted by the county board as state highways together with such as have been improved as provided in subsection 8 as above quoted. The latter automatically become state highways without any action of the county board. This is the construction that has been adopted by the Highway Commission and I am convinced that it is correct.

While it may seem somewhat incongruous to call a strip of road only a quarter of a mile in length a highway (see *Maine v. Kruse*, 85 Wis. 302; *Herrick v. Geneva*, 92 Wis. 114), yet it is evident that the legislature may include under that name a part only of a highway and it seems to me that that is what it has done by subdivision 8 of sec. 1317m—7. Prior to the enactment of ch. 337, Laws 1911, it was possible for a county to be liable for the repair of a part only of a highway (see 1308 Wis. Stats.) so that the construction here adopted does not bring into the law any new principle as to the maintenance of parts of a highway.

From the facts stated in your letter it would appear that the portion of highway in question upon its final acceptance will become a state highway under the provisions of subsec. 8 of sec. 1317m—7 and that, therefore, it is the duty of the county to maintain the same.

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*Bridges and Highways—Counties*—Where a petition for county aid in building a bridge under sec. 1319, Stats., was filed prior to the publication of ch. 435, Laws 1911, amending said section, the amount of aid to be granted is governed by the provisions of said section as it stood prior to the passage of said ch. 435, Laws 1911.

January 9, 1913.

L. OLSON ELLIS,

*District Attorney,*

Black River Falls, Wisconsin.

In your letter of the 8th inst., you state that the chairman of the town of Garfield, under date of April 6th, 1911, peti-

tioned the county board of Jackson county for bridge aid, under ch. 397 of the Laws of 1909, coming under subsec. 2 of said chapter, and that the county chairman, under date of July 6th, 1911, appointed a committee to act with the said town according to the provisions of said chapter, and that said committee reported to the county board at the November, 1912, session, stating the amount paid for said bridge, or the costs thereof, and recommended to said board that the county pay half of the costs, as provided under subsec. 2 of ch. 435, Laws of 1911; that said chapter 435 was not approved until June 24th, 1911, and was published June 26th, 1911; and you ask whether the county board is authorized to pay the proportion of costs as fixed by chapter 435 of the Laws of 1911, or whether the proportion to be paid by the county is that fixed by ch. 397 of the Laws of 1909.

You do not state when this petition was filed, but I am assuming that it was filed prior to the publication of ch. 435, Laws of 1911.

Chapter 397 of the Laws of 1909 amends section 1319 of the statutes, so that subsection 1 of that section reads in part as follows:

“Whenever any town board shall file its petition with the proper county board, setting forth the fact that said town has voted to construct or repair any bridge wholly or partly within such town, designating as near as may be the location of such bridge, and further stating that such town has provided for the payment of such proportion of the cost of such construction or repairs as is required by this section, the said county board shall appropriate such sum as is required by this section to be paid by the county and shall cause such sum to be levied upon the taxable property of the county as will, with the amount provided by said town, be sufficient to defray the expense of erecting or repairing such bridge so petitioned for,” etc.

This subsection was not amended by chapter 435 of the Laws of 1911. Subsection 2 of section 1319, as amended by chapter 397, Laws of 1909, provides that when such bridge is located within a town coming within that subsection the county shall pay the cost of such bridge in excess of \$600 until the cost is \$1200, and that, when the cost exceeds \$1200, the town and county shall each pay one half the cost.

This subsection was amended by chapter 435, Laws of 1911, by providing that the county shall pay the cost in excess of \$200 until the cost is \$400 and that, when the cost exceeds \$400, the county and town shall each pay one-half the cost.

You will note that under subsection 1 of section 1319 the county board is absolutely obligated to appropriate its proportion when the petition is filed. This being the case, in my opinion, if the petition of the town of Garfield was filed prior to the 26th day of June, 1911, the town is only entitled to receive the aid provided for by ch. 397, Laws of 1909. The mere fact that the county board did not act until after that date does not change the respective liabilities of the two municipalities.

Another reason for reaching this conclusion, too, is that the town must have provided its share before filing the petition and, in making such provision, of course, acted under the 1909 law.

Again, in construing statutes of this nature, calling for appropriations from the public treasury, all doubts should be resolved in favor of the treasury.

Supplemented by opinion of January 15.

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*Bridges and Highways—Counties—Towns*—Where the petition for aid under sec. 1319, Wis. Stats., was fully prepared and ready for filing, prior to the passage of ch. 435, Laws 1911, the failure or neglect of the town clerk to file such petition until after the going into effect of such chapter would not entitle the town to additional aid provided by that amendment.

January 15, 1913.

L. OLSON ELLIS,

*District Attorney,*

Black River Falls, Wisconsin.

In your letter of the 10th, you refer to my opinion dated January 9th, relating to the amount of aid to be given a town by a county in building a bridge under section 1319 Stats.

You state that in fact the petition in question was not filed until after the publication of ch. 435 of the Laws of 1911, and

you ask whether that fact would change or affect my former opinion.

The town board took action and prepared the petition on or before April 6th, 1911, if I correctly understand your statement of facts. This petition must state, not only that the town has voted to construct the bridge, but also that the town has provided for the payment of its share of the cost. It is evident from this that the town took its action under the law as it stood prior to the passage of the 1911 law. It voted a tax upon the basis of the former law. It made its petition at least two months before the passage of the amendment. The only thing remaining to be done to fix the proportionate liability of the county was the mere clerical act of filing the petition. In my opinion the mere neglect of the town clerk to file the petition promptly, as he should have done, does not change the proportionate shares to be paid by the county and town. In other words, for the purpose of fixing the proportion of cost to be paid by each, a court would regard that which ought to have been done as having been done and would fix such shares as though the clerk had in fact filed the petition immediately upon its execution in April.

Supplementing opinion of January 9th.

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#### TAXATION

*Bridges and Highways—Towns—Counties*—Tax levy of town of Reserve for 1912 may be valid. If illegal a compromise may be effected under sec. 1210g.

All money for highway construction must be paid out of county treasury. No money is disbursed by town treasurer.

February 10, 1913.

SAM J. WILLIAMS,

*District Attorney,*

Hayward, Wisconsin.

In your letter of January 29th, you state that the town of Reserve, in Sawyer county, had an assessed valuation for the year 1911 of \$160,813, that in the year 1912 the levy in said town for town purposes was over \$6,000 and for school purposes, exclusive of county school tax, the sum of \$3,000. You

inquire whether this tax is legal and, if the same is illegal, whether it can be settled under section 1210g of the statutes.

You also state that the county board of Sawyer county, at its annual meeting in November, 1912, granted aid to the town of Reserve in the sum of \$1,500, to assist said town in building roads, which sum, by resolution of the county board, is to be turned over to the town of Reserve March 15th, 1913. You inquire whether the county treasurer is obliged to turn over the \$1,500 before the state and county tax levied upon the town of Reserve for the year 1912 has been settled for.

In answer to your first question I will call your attention to section 776, which provides as follows:

“The qualified electors of each town shall have power at any annual town meeting:

“(1) To vote to raise money for the repair and building of roads or bridges, or either; for the support of the poor and defraying of all other charges and expenses of the town; provided, however, that the total taxes levied in any town for any one year for all town purposes, exclusive of school taxes and liabilities heretofore lawfully incurred, shall not exceed in the whole, one and one-half per centum of the total assessed valuation of such town for the preceding year, as equalized by the town board of equalization, unless a larger sum is needed for the building or repairing of highways or bridges, in which case the electors may vote and the proper authorities may levy, not to exceed one-half of one per centum in addition to the aforesaid one and one-half per centum; provided, further, that not exceeding two per centum additional may be levied for school purposes when under the township system of school government.”

You do not state sufficient facts to enable me to give you a definite answer to your first question. The \$6,000 is more than two per centum of the valuation as given in your letter; but you will notice that under the section quoted, in making the limitation, the law expressly excludes “liabilities heretofore lawfully incurred.” The town of Reserve may have incurred liabilities by way of bond issue or other liabilities that would raise the tax considerably above two per centum, and would be legal.

Without more facts it is impossible for me to say whether such tax is illegal or not. \$3,000 is less than two per centum for school purposes and I see no reason why they should be illegal.

Under section 1210g any illegal tax may be compromised by the officers therein mentioned and, if this tax should be illegal, I see no reason why a compromise could not be effected, if it be thought best for the interest of the county by the officers designated.

In answer to your second question I will say that under ch. 337 of the Laws of 1911, and especially sec. 1317m—7, the money raised for the construction of highways for which state aid is received must be paid into the county treasury and must be disbursed by the county treasurer to the contractors. No money is disbursed by the town treasurer for such highways. In subsec. 2 of sec. 1317m—15 of ch. 337, all sections of the law that had formerly forced and allowed counties to construct or assist towns in the building of roads are expressly repealed and, if any county at the present time should desire to construct or assist in constructing any road in any town, it must be done in conformity to said chapter 337, known as the State Aid Highway Law.

You have not sent me a copy of the resolution passed by the county board, but I find no authority in the law for the payment by the county treasurer of any money to the town treasurer for the construction and improvement of highways.

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*Bridges and Highways*—Liquor license money may not be used as a basis for state aid.

February 19, 1913.

MR. D. S. LAW,

*District Attorney,*

La Crosse, Wisconsin.

In your letter of February 15th, you state:

“The town of Campbell in this county received license money from several saloons, and it was proposed by this town to use this license money as part payment for its share of the highways constructed pursuant to sec. 1317m.”

You request my opinion as to whether license money may be used by a town as a basis for state and county aid in building highways.

Subsec. 2 of sec. 1317m—5 provides in part:

“Upon receiving a petition in accordance with subsec. 5 of section 1317m—4 of this act, the county board shall appropriate a sum to cover its share of the cost of constructing the improvements and cause such sum to be levied on all the taxable property in the county.”

Subsec. 5 of sec. 1317m—4 provides in part:

“Whenever it has been determined in accordance with subsections 1, 3 or 4 of this section that funds will be available, the town board shall \* \* \* petition the county board to allot and appropriate the proper amount to cover the county’s share of the improvement. Such petition shall state \* \* \* the subsections of this section under which the funds will be available, and the total sum which the town will have available for the work.”

Subsecs. 1, 3 and 4 of the same section provide (1) for the voting of a special tax by the town which “shall be collected in money and paid into the county treasury after the petition of the town for the improvement of the road or bridge specified has been granted by the county board”, etc. Subsec. 1 of sec. 1317m—4. (2) For a donation of freeholders of a town whereupon “the town board shall then levy a tax sufficient to cover the remainder of the cost to the town of the improvement.” Subsec. 3 of sec. 1317m—4. (3) “Any sum of money bequeathed to a town, or collected and donated to a town, for the purpose of securing the improvement \* \* \* of any portion of the system of prospective state highways lying in the town, may be accepted by the town board, and the subsequent procedure shall be the same as if a tax of like amount had been voted,” etc. Subsec. 4 of sec. 1317m—4.

It is obvious that the license moneys are not special taxes or donations within (1) or (2) above. Neither are they sums of money bequeathed or “collected and donated to a town”. The county board is required to appropriate money from the county treasury only in case a petition is received showing that the town has obtained available funds in one of the three ways mentioned. While it may seem to be unimportant as to how the town obtained the money, still the county board is not compelled to act except on a petition in compliance with the statute. The whole proceeding is statutory—out of the course

of the common law—and the rule is, therefore, applicable that “exact compliance with the course of proceedings prescribed by law, at least in all substantial matters, is essential to \* \* \* jurisdiction.” *Fraser v. Mulany*, 129 Wis. 377, 381. In specifying the three ways that money may be obtained as a basis for state aid, the legislature has impliedly excluded other ways.

I am, therefore, of the opinion that the statute does not permit the use of license moneys by a town as a basis of a claim for state aid.

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*Bridges and Highways*—Duty of town board under sec. 1317m—4 to levy tax may be enforced by mandamus.

February 25th, 1913.

MR. FRANCIS J. ROONEY,  
*District Attorney,*  
Appleton, Wis.

In your letter of February 20th you state,

“The residents along the public highway in the town of Grand Chute, known as the Asylum Road, in 1911 contributed \$825 for the purpose of improving the road in compliance with the above cited section, and filed a petition with the town clerk and paid the money and got a receipt for the same, as the statute provides; but it was after the annual town meeting in 1911, the town board not having had an opportunity to vote upon appropriation, the town board refused to take any action notwithstanding the fact the county and state had appropriated the money as the law provides.

In 1912 the receipt for the \$825 contributed by the inhabitants along the highway was refiled with the town clerk, and on said receipt a minute was made saying the same was filed in compliance with the petition that was filed the year before and which remained on file. No petition was made asking for the appropriation of 1912. In the spring of 1912 the people voted down the resolution to appropriate the money as provided by law, and the town board of said town has refused and neglected and still refuses to make the levy for the money as provided by said section.

The question that I am in doubt about is whether or not the law would require a new petition to be filed in 1912 at the time the receipt was refiled, for the money contributed by the settlers along the road. The question is: What can be done, if anything, to compel the town board to make the levy, under the circum-

stances? It appears to me that the law is defective, as there appears to be no remedy or way to compel the town board to make the levy."

Subsec. 3 of sec. 1317m—4 Wis. Stats. provides that on the filing of a petition for the improvement of a highway showing a certain state of facts "the town board shall then levy a tax sufficient to cover the remainder of the cost to the town of the improvement."

This language is obviously mandatory and the duty thus imposed may therefore be enforced by mandamus.

*State ex rel. v. Beloit*, 20 Wis. 79, 85; *Joint Free High School District v. Green Grove*, 77 Wis. 532, 7.

It may be a question whether the town board can now be compelled to act on the petition filed in 1911, but since no money can now be raised by taxation to be available for use this coming summer, in that a levy made now would not be collected until next January, it seems to me that this question is unimportant. If the town fails to appropriate at its annual meeting this coming April "a sum requiring a tax of three mills on the dollar of its assessed valuation" etc., the filing of a new petition showing the facts required by the statute and the failure of the board to levy a tax in compliance therewith, would avoid the question suggested and quite plainly make a case where mandamus would lie.

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*Bridges and Highways—Towns*—The vote to raise money for the improvement of the prospective system of state highways need not be by ballot.

March 28th, 1913.

MR. JAMES KIRWAN,  
*District Attorney,*  
Chilton, Wis.

In your letter of the 26th you state that at the last spring election, four towns in your county, by an oral vote of a few voters present at the noon hour, voted under ch. 337 of the Laws of 1911, taxes for the county system of public highways; that the petition and notice therefor was by each town duly filed with the county clerk and that the county board levied an equal amount of money under the provisions of the chapter

referred to, and you in your capacity as district attorney of the county, ask several questions as to such action.

First you ask "Is such oral vote by a few voters at the noon hour to levy such special highway taxes legal and in compliance with the laws of Wisconsin, or should such question have been submitted at such election and the vote taken by ballot?"

Sec. 776 Wis. Stats. 1911 relates to the powers of town meetings. It expressly provides that as to some matters no vote shall be taken unless notice of the intention to submit such question has been previously given (authorizing the issue of bonds to build bridges or authorizing the issue of bonds to build highways, paragraph 7; paying highway taxes in money, paragraph 9; raising money to build a town hall or other building for use of the town, paragraph 10). As to other matters, it provides that the vote must be by ballot (establishing a town library, paragraph 4; erecting land marks, paragraph 8; raising money to build a town hall or other building for the use of the town, paragraph 10).

Paragraph 1 of that section, states as one of the powers of the meeting "to vote to raise money for the repair and building of roads or bridges or either."

Paragraph 1 of sec. 1317m—4 also gives power to town meetings to raise money for improving a portion of the system of prospective state highways, with no requirement that the vote be by ballot.

The course of procedure to be pursued in town meetings, when not specified in the statute, is that applicable to deliberative bodies in general under the rules of parliamentary law.

Where the statute does not require a vote by ballot it need not be taken in that manner. *State ex rel. Bruce v. Davidson*, 32 Wis. 113; *State ex rel Rochester v. Racine County*, 70 Wis. 543.

In my opinion, the levying of taxes for the improvement of a portion of the prospective system of state highways may be taken by viva voce vote.

Your next question is "Must not all said highway taxes so levied and collected by each town be paid into the county treasury?"

If you will read paragraph 1 of sec. 1317m—4 Wis. Stats. 1911, you will find your question answered in the affirmative.

Your next question is "How is the portion of such money furnished by the state paid out,—is it sent to the county treasurer and if so, how and when?"

Sec. 1317m—7, paragraph 6, answers this question. That paragraph reads as follows:

"On the written statement of the state highway commission to the state treasurer that any improvement of a highway or bridge for which state aid has been granted has been started in a proper and energetic manner, and at least half completed, the state treasurer shall pay over to the treasurer of the county in which the improvement is being made the proper sum to cover the state's share of the estimated cost of the improvement as stated to him by the state highway commission."

Your next question is "Upon whose order and in what way and manner is all of said money spent?"

Paragraph 7 of sec. 1317m—7 provides:

"When construction or improvement of any highway or bridge for which state aid has been granted is begun under contract, the county treasurer shall make payments to the contractor in the manner provided in the contract and specifications approved by the state highway commission. If such highway or bridge is improved without letting a contract, the money shall be paid to the county highway commissioner or other person in charge in the manner provided in subsection 4 of this section."

Paragraph 4 of the section provides that where the work is not done under contract, the county highway commissioner or other person in charge may use such methods of paying out the funds in the county treasury available for the work, as may be authorized by the county board and approved by the state highway commission. I believe this is a complete answer to this question.

Your next question is "What, if anything, have the different town boards to say or do in the paying out of said money?"

They have nothing whatever to say.

Your next question is "If the county furnishes one set of machinery under said law, to do said county highway work and such set of machinery is only sufficient to do the work in one town this year, must the other towns wait until next year or the year thereafter, or must the county under said law, furnish a sufficient number of outfits so that each town apply-

ing for aid may have its work performed in the year for which such aid is asked?"

Sec. 1317m—5, paragraph 5, provides:

"The county shall provide the necessary machinery for the construction and maintenance of state highways and the county board shall levy the necessary taxes for the purchase or rental of such machinery."

Under this it is the duty of the county to provide such machinery as may be necessary for performing the work. What amount of machinery is necessary is probably to be determined by the county board in the reasonable exercise of its judgment and discretion. Whether or not the county board could be compelled to furnish a greater amount of machinery than it had provided for if it had not provided a sufficient amount to do the work within a reasonable length of time, is a question I do not care to pass upon until it actually arises.

You also ask "Do not such county highway taxes, being \$390,000 a year, exceed the constitutional limitation as to the percentage of taxes which can be levied each year for any one purpose?"

Kindly give me a reference to the particular constitutional provision you have in mind and possibly I may be able to answer this question. It appears to me that as you state it, it would be impossible to answer, as you do not state the assessed valuation of the county. I do not have in mind any provision of the constitution, containing such a limitation as you refer to.

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*Bridges and Highways—Taxation*—Where a town has voted money for a highway improvement in a part of the town which becomes part of a city before the improvement work is begun, the work should be carried on just as though no change had taken place in the boundaries of the town.

March 31st, 1913.

WISCONSIN HIGHWAY COMMISSION:

In your favor of March 27th you submit three questions for my official opinion, which questions you state as follows:

"The town of Blooming Grove, Dane county, in the year 1911 legally voted a sum of money under the state aid law to

improve the south side of Atwood Avenue, which lies within the town. This construction was supposed to have been done in 1912, but for various reasons, the County Highway Commissioner did not construct, or cause the road to be constructed in that year.

“The part of the town of Blooming Grove in which this particular section of the county highway lies has voted to make itself a part of the city of Madison, which union will be effective May 1, 1913. The questions which present themselves are these:

“(1) If the County Highway Commissioner entered into a contract approved by this Commission previous to May 1st for the construction of this road and construction was not completed, (as it probably would not be) until after May 1st, could the county treasurer make the payments to the contractor out of the joint funds in accordance with subsection 7 of section 1317m—7 of the statutes?

“(2) Would it be possible to make a contract for the improvement of this road after the street had become a part of the city of Madison, and to make payments as above?

“(3) In the financial settlement between the withdrawn part of the town of Blooming Grove and that remaining after May 1st, would the former's portion voted in 1911 and 1912 be payable to it and thus deducted from the amount raised for state aid purposes by the town in those two years?”

I assume that the town of Blooming Grove duly petitioned “the county board to allot and appropriate the proper amount to cover the county's share of the improvement,” pursuant to subsec. 5 of sec. 1317m—4; that the county board did appropriate such sum and cause a county tax to be levied therefor, pursuant to subsec. 2 of sec. 1317m—5; and that both the county's share and the town's share were raised and paid into the county treasury. (Subsec. 1 of sec. 1317m—4).

It seems clear that the electors of the town (or the town board in certain cases) determine the portion of prospective state highway on which the tax voted is to be expended. Subsec. 1 of sec. 1317m—4. The petition to the county board must state “the location of the bridge or road to be improved, the character of the improvement desired,” etc. Subsec. 5 of sec. 1317m—4. Upon receiving such petition, the “county board shall appropriate a sum to cover its share of the cost of constructing the improvements.” Subsec. 2 of sec. 1317m—5.

The highway commission has in its bulletin appended a note to this section as follows:

“This subsection is mandatory and when a town applies for county aid the county board has no option but must grant it if the state's share of the cost of *the improvement petitioned for* is available.”

From all this it appears that the town and county taxes are raised to make a particular improvement and when such taxes have been so raised, I think they must be held to be pledged for that particular purpose and may not be used for any other purpose. It follows that it can make no difference that the territory where the improvement was to be made subsequently becomes a part of an incorporated city. If this were not so, much confusion would result in that it would be very difficult, if not impossible, to reapportion the money allotted from the state highway fund, the county tax and the town tax.

In view of these considerations, the answer to your first and second questions is plain, i. e., that the county highway commissioner may proceed to contract for the construction of the particular improvement in question and the county treasurer may make payments therefor, just as though no change had been made in the boundaries of the town and city.

As to your third question, I find on talking the matter over with the State Highway Engineer that you are only interested in the question in so far as it may affect proceedings under the State Aid Highway Law. As to this, it seems clear that, whatever may be the rights of the two parts of the town as to being credited with or charged with some part or all of the taxes so raised, it can have no effect on the doing of the work. As previously stated, the money has been raised to construct a particular improvement and may be used for nothing else. Consequently, the division of the town does not affect the proceedings under the highway law but has a bearing only on the adjustment of the rights of the two parts of the town to the joint property and credits.

## OPINIONS RELATING TO BUILDING AND LOAN ASSOCIATIONS.

*Building and Loan Associations—Corporations*—Providing in the by-laws of a loan and building association that the rate of interest to be paid on paid-up stock shall not exceed a certain per cent is not a compliance with sec. 2014—11, requiring the by-laws to specify the rate of interest.

Under sec. 2012 of the Stats., there is no authority to provide by the by-laws that paid-up stock shall be retired “when-ever the board of directors deem it expedient.”

July 10, 1912.

HON. W. H. RICHARDS,

*Deputy Commissioner of Banking.*

I have examined and return herewith the amendments to the by-laws of the Northwestern Mutual Building and Loan Association of Milwaukee, submitted to me in your communication of this date.

Article III, section 2, as proposed to be amended, provides in part as follows:

“The rate of interest to be paid on ‘C’ (paid-up) stock shall not exceed five per cent per annum payable semi-annually at the office of the association.”

As I wrote you under date of June 27th, the law requires that the by-laws specify

“the time and manner of paying and the amount of \* \* \* interest \* \* \*; what, if any, interest shall be allowed on dues paid in advance.”

It has been held in a number of cases relating to the issuance of bonds, where the statute requires the notice of special election to state either the amount of bonds proposed to be voted or the rate of interest to be paid on said bonds, that a notice stating that the question of issuing bonds to an amount not exceeding a certain definite amount or drawing interest

at a rate not to exceed a certain rate, is not a compliance with such a requirement. *State ex rel. Lexington etc. R. R. Co. v. Saline County Ct.*, 45 Mo. 242; *Hillsboro Co. v. Henderson*, 33 Sou. 997; 45 Fla. 356; *Stern v. Fargo* (N. D.), 122 N. W. 403; *Mercer Co. v. Pittsburg & E. R. R. Co.*, 27 Pa. St. 389; *Cincinnati W. & M. R. R. Co. v. Wells*, 39 Ind. 539; *Detroit E. R. & I. R. R. Co. v. Bearss*, 39 Ind. 598; *Schultze v. Manchester Twp.*, 40 Atl. 589; 61 N. J. L. 515.

It appears to me that this amendment is not a compliance with the statute—that the by-laws ought to fix definitely the amount of interest that will be paid.

The amendment also provides:

“Such stock to be retired whenever the board of directors deem it expedient.”

Sec. 2012 of the Stats. provides as to the payment of paid-up stock:

“When such association shall accumulate funds in excess of its requirements for loans, then such paid-up stock shall be retired in such manner as the by-laws provide or as the board of directors may determine.”

In other words, such stock should be retired whenever the funds on hand are in excess of the amount required for loans, and the only thing that should be left for the board of directors to determine is the manner of retirement of the stock.

It appears that these amendments were adopted at a special meeting. It seems to me that they should be accompanied by an affidavit showing how the meeting was called, so that your department may have something before it from which it can be determined that the special meeting was a legal one.

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*Building and Loan Associations*—A provision that no shareholder in arrears to the association shall be allowed to vote is in conflict with sec. 2014—8 Stats., and void.

November 21st, 1912.

HON. A. E. KUOLT,

*Commissioner of Banking.*

I have examined and return herewith the articles of organization and by-laws of the Integrity Savings, Building and Loan Association of Milwaukee, Wisconsin.

Article V of the articles of organization contains a provision that:

“No shareholder shall be allowed to vote who is in arrears to the association, until such arrears are paid up.”

Article IV, section 4, of the by-laws contains a provision substantially to the same effect.

Section 2014—8 Stats. provides in part:

“Each member shall have one vote for each share held.”

Under somewhat similar statutes it has been held that a clause in the articles of incorporation limiting or curtailing the right to vote is not prohibited, it being argued that the articles constitute an agreement among all subscribers to the stock and that they may, by such an agreement, waive the statutory provision made for their benefit. *State ex rel. v. Swanger*, 190 Mo. 561; 89 S. W. 872; *People v. Koenig*, 118 N. Y. Supp. 136; *Miller v. Ratterman*, 47 Ohio St. 141; *State ex rel. v. Brooks* (Del.), 74 Atl. 37.

A provision in the by-laws that only certain stock carries with it the voting privilege, or otherwise limiting such privilege, in the absence of either statutory or charter authority therefor, is quite generally held invalid. *Kinman v. Sullivan Co. Club*, 26 N. Y. Appellate Div. 213; 50 N. Y. Supp. 95; *In re Lighthall Mfg. Co.*, 47 Hun 258; *White v. N. Y. State Agr. Society*, 45 Hun 580; 10 N. Y. St. 594; *Price v. Holcomb*, 89 Iowa 123; 56 N. W. 407; *Haskell v. Read* (Nebr.), 93 N. W. 997; 10 Cyc. 336, 340; Endlich on Building Associations (2nd ed.) sec. 266.

Our own court has held that a provision in the articles of organization and printed on each certificate of stock that shares were not transferable except in pursuance of a vote of two-thirds of all outstanding shares, and that this majority of shareholders might either consent to the transfer or themselves take up the shares by paying their par value, and that, if they did neither, the holder was at liberty to transfer, does not conflict with sec. 1751 Stats., providing that shares are personal property and “may” be transferred by the method therein prescribed. The court refer to such provision as an agreement between the shareholders.

*Farmers M. & S. Co. v. Laun*, 146 Wis. 252.

Sec. 1760 Stats. formerly contained a provision as to corporations in general that

“Every stockholder of any corporation shall be entitled to one vote for each share of stock held and owned by him at every meeting of the stockholders and every election of the officers thereof.”

Regarding a resolution passed at the first meeting of stockholders that only those who had paid 25 per cent of their subscriptions should have a vote at the meeting, our court say:

“But a meeting of the accepted stockholders of a corporation has no right to place any such restriction upon the franchise. A subscriber for stock who has been so accepted is completely a stockholder, whether he has paid his subscription or not. \* \* \* And our statutes prescribe that in the meeting of stockholders each shall be entitled to vote according to the stock held by him.” *Smith v. Burns Boiler & Mfg. Co.* 132 Wis. 177.

This department has held that, under sec. 1760 Stats., the right of stockholders to vote may not be abridged by an amendment to its articles and that it is very doubtful whether it may be done by a provision in the original articles.

Report and Opinions of Attorney-General for 1910, p. 201.

As an amendment may “provide anything which might have been originally provided,” in the articles, except that “no corporation without stock shall change substantially the original purposes of its organization” (sec. 1774 Stats.), it is not easy to see how such a provision would be valid in the original articles, in view of the opinion referred to. That such has been the view of the Legislature is very evident. By ch. 576, Laws of 1907, they authorized provisions in either the original articles or an amendment denying or restricting the voting power of preferred stock. By ch. 532, Laws of 1911, they amended sec. 1760 Stats. so that the part heretofore referred to now reads:

“Unless a provision to the contrary is inserted in the articles of incorporation and recited in each certificate for any share of stock issued by the corporation, every stockholder of any corporation shall be entitled to one vote for each share of stock held and owned by him,” etc.

If, under sec. 1760 as originally enacted the voting power could be in any way abrogated by a provision in the articles

of incorporation, then both of these latter laws would be utterly without meaning. In view of this practical construction by the Legislature given to a similar statute, in my opinion the provisions referred to in the articles and by-laws are in conflict with sec. 2014—8 Stats. Even if this were not true, the language used is broad enough to forbid voting by a member in arrears as to some shares, even though he might own other shares as to which he was not in arrears and as to which he should, in all equity and good conscience, be allowed to cast the corresponding number of votes, regardless of the right of the corporation to forbid his casting votes based upon shares as to which he was in arrears.

In article IV, section 13, of the by-laws, occurs this phrase: "his shares, at the option of the directors, shall be declared forfeited." This relates to forfeiture for nonpayment of dues, fines, etc. Manifestly, the language used should be "such shares," instead of "his shares." Only the shares as to which there are arrearages should be subject to forfeiture, and not all shares owned by the member.

In this connection it might not be out of place to suggest that the Legislature may well have deemed the statutory provisions as to forfeiture of stock a sufficient penalty for nonpayment of dues, without authorizing the forfeiture of the voting privilege for that reason before the forfeiture of the stock itself.

Article VIII, section 8, of the by-laws still appears to be in conflict with sec. 2014—11 Stats., in that it attempts to leave to the discretion of the directors, matters that the statute says must be specified in the by-laws. If the directors, by the articles, are given power to amend the by-laws at any time, it would seem that no harm could be done by the omission of this section.

Article X, section 4, of the by-laws, provides that "Each share of stock shall be charged with all amounts owing from the member to the association," etc. It would seem to me that this should read substantially: "Each share of stock shall be charged with all amounts owing from the member to the association for or on account of such share." In other words, the member might be owing the association amounts

not properly chargeable to the particular share, but for which other shares owned by him would be liable.

For the reasons indicated I cannot approve said articles and by-laws.

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*Building & Loan Associations*—An amendment to the by-laws should be accompanied by an affidavit of the proper officers showing that it has been adopted in the manner prescribed by law and the by-laws.

February 14, 1912.

HON. A. E. KUOLT,

*Commissioner of Banking.*

In your letter of February 12th, you enclose verified copy of amendment to by-laws of the South Side Mutual Loan & Building Association, of Milwaukee, for my approval pursuant to section 2010 of the statutes. You also enclose the original by-laws of the association.

Section 153 of the original by-laws provides that "one-third of the stockholders shall constitute a quorum." Section 155 of the by-laws provides that the by-laws may be amended by a resolution in writing accepted "by a majority vote of all the shares of stock."

The paper submitted purports to be a statement that "the following resolution has been unanimously adopted at the annual meeting of the share-holders of the South Side Mutual Loan and Building Association," etc., and is signed and acknowledged by the president and secretary of the association. There is no statement that notice of the meeting was given as required by section 39 of the by-laws; that the quorum was present as provided for by section 153 of the by-laws; or that the resolution was adopted by a majority of all the shares of stock outstanding as required by section 155 of the by-laws. All these facts should be made to appear before it can be determined whether the amendments to the by-laws have been validly adopted. And such facts should preferably appear by affidavit of the proper officers rather than in the form of a mere statement even though signed and acknowledged by them.

*Building and Loan Associations*—Amendments to articles that conflict with the statutes will not be approved.

February 19, 1913.

HON. A. E. KUOLT,  
*Commissioner of Banking,*

In your favor of February 15th, you submit draft of proposed amendments to the Articles of Incorporation of the Mutual Loan & Building Association of Appleton, with the request that I examine the same and state whether there is any objection to their being adopted.

While I doubt whether it is any part of my duty to advise you on moot questions—such as may possibly arise but have not as yet come before you for official action—and will thus not consider myself bound by anything said herein, I have examined the proposed amendments and make the following suggestions:

The amendments would be in better form if after providing for the change in a particular article, the article as amended was quoted in full. Amendments by reference to lines of the original articles are unsatisfactory, as the numbering of the lines in the original articles that you submitted seem not to correspond with those of the copy which the person drafting the amendments used. Thus amendment No. 3 which strikes out lines 37, 38, 39, 40, 41, 42, 43 and 45 of sec. 7 of the original articles, is ambiguous in that such lines contain parts of sentences. The part intended to be stricken out should be quoted. Similarly amendment No. 7 strikes out the word “may” in the fourth line of sec. 14 in the articles. In the original articles there is no word “may” in the fourth line of Article 14.

Several of the proposed amendments are evidently intended to quote the statute, but do so inaccurately. See Amendment No. 4 evidently intended to quote sec. 2014—8. Other provisions such as those contained in Amendments No. 6 and 9 might well be contained in the by-laws instead of in the articles, as they will have to be contained in the by-laws anyway, pursuant to the provisions of sec. 2014—11.

It seems to me that the provision in Amendment No. 5 that “any member in good standing present at any annual or spe-

cial meeting in person or by proxy shall be entitled to one vote" etc., is in conflict with the final sentence of sec. 2014—8 of the Stats., which provides that

"Each member shall have one vote for each share held" etc. It seems to me doubtful whether the statutory right to vote can be limited to members "in good standing."

The attempt of Amendment No. 8 to limit the amount to be loaned to a member to eighty per cent of the amount paid in on his stock seems in conflict with that part of sec. 2015—5 which provides that the directors may loan on a member's stock "when the withdrawal value of the shares borrowed upon shall exceed the amount borrowed and interest thereon for six months."

In general, I suggest a careful examination of the statutes pertaining to building and loan associations (secs. 2009 to 2014—16), with special reference to sec. 2010 making applicable sec. 1772 which provides what should be contained in the articles of incorporation and also sec. 2014—11, which provides what the by-laws must specify.

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*Building and Loan Associations—Corporations*—A by-law in conflict with Articles of Incorporation not approved.

February 24, 1913.

HON. A. E. KUOLT,

*Commissioner of Banking.*

You have submitted for my approval pursuant to sec. 2010 of the statutes, an amendment to the by-laws of the South Side Mutual Loan & Building Association, of Milwaukee.

Assuming that mailing notices of the annual meeting is a sufficient compliance with sec. 39 of the by-laws, I note that the last amendment purports to amend sec. 92 of the by-laws to change the date of the annual meeting from the first Saturday of February in each year to the fourth Monday of January in each year. Article 8 of the Articles of Incorporation fixes the date of the annual meeting "on the first Saturday of February in each and every year." The by-laws as amended will thus be inconsistent with the articles and is for that reason improper.

*Building and Loan Associations*—Copy of amendment to by-laws sent to Commissioner of Banking should be verified.

March 1, 1913.

HON. A. E. KUOLT,

*Commissioner of Banking.*

You have submitted for my approval pursuant to sec. 2010 of the statutes, an amendment to the by-laws of the South Milwaukee Mutual Loan & Building Association.

Sec. 2010 provides in part that the certificate of incorporation of a building and loan association "shall not issue until a *verified* copy of the by-laws adopted by the association shall be filed" with the Commissioner of Banking; and further that "only such by-laws, alterations and amendments thereof as shall have been *so* filed \* \* \* shall be deemed operative."

Under this language I am of the opinion that an amendment to the by-laws should be verified, i. e. there should be an affidavit showing that the copy filed is a true copy of the original amendment. The copy of the amendment offered for filing is accompanied by a certificate merely of the president and secretary of the association. This is clearly not a verification.

In addition, I think that the affidavit should state the facts from which it can be determined that the meeting of the association at which the amendment was adopted was legally held and the amendment legally adopted. The certificate attached to the proposed amendment merely shows that the meeting was "duly" held and the amendment "duly" adopted. Facts should be set forth showing that sec. 5 of art. 4 of the by-laws and sec. 1 of art. 10 have been complied with.

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*Building and Loan Associations*—Amendment to by-laws of association organized prior to enactment of ch. 368, Laws of 1897, must be made in manner prescribed by sec. 2010, pursuant to sec. 21 of ch. 368, Laws of 1897.

March 14, 1913.

HON. ALBERT E. KUOLT,

*Commissioner of Banking.*

You have submitted for my approval under sec. 2010 of the statutes, an amendment to the by-laws of the Twin City Build-

ing, Loan & Savings Association, of Neenah, Wisconsin, the same constituting a revision of the by-laws of such association.

It appears that the association was incorporated in 1893 under the revised statutes of 1878. The present building and loan association law was enacted by ch. 368, Laws 1897, sec. 21 of which provides:

“On or before June 1, 1897, every mutual building and loan corporation, now existing and heretofore incorporated under the laws of this state relating thereto, shall file in the office of the bank examiner a copy of its articles of incorporation and of its by-laws, in force at the time of the passage and publication of this act, the force and effect of which said articles and by-laws shall not be affected nor invalidated by this act; but after said last mentioned date no amendment to said articles, nor to said by-laws, shall be valid, unless the same be filed and approved as in section 2, of this act provided.”

Although this section is not printed in the Wisconsin Statutes of 1911 nor in the Revised Statutes of 1898, it was expressly left unrepealed by the revision of 1898 (sec. 4978 Wis. Stats. 1898). It has not been since repealed and is therefore still in force.

Sec. 2 of ch. 368 Laws 1897 referred to in sec. 21 thereof provided that the certificate of incorporation

“shall not issue until a verified copy of the by-laws adopted by the association, shall be filed with said bank examiner, and not until the articles and by-laws shall have been examined by the attorney-general, and approved by him *as conforming to the requirements of this act*. And \* \* \* only such by-laws and alterations, and amendments thereof, as shall have been filed and approved as herein provided, shall be deemed operative.”

This section was carried into the revision of 1898 as sec. 2010 thereof, but with changes so that it now reads that the certificate of incorporation

“shall not issue until a verified copy of the by-laws adopted by the association shall be filed with him (the bank examiner) nor until the articles and by-laws shall have been approved by the attorney-general; and \* \* \* only such by-laws, alterations and amendments thereof as shall have been so filed and approved shall be deemed operative.”

Since the revision of 1898, the right of the attorney-general to approve the by-laws and amendments thereof is no longer expressly conditioned upon their "conforming to the requirements of this act" (ch. 368 Laws 1897), but I think that the provisions of law as to what the by-laws of a newly organized association must contain is the best guide for this department in approving or disapproving of a proposed amendment to the by-laws of an association organized prior to 1897. With this rule in mind, I come to a consideration of the proposed revision.

The copy of the amended by-laws submitted is not "a verified copy", because it is not "proved or confirmed by \* \* \* oath." *State ex rel. v. Day*, 57 Wis. 655, 661.

The revised by-laws fail to conform in several particulars to the requirements of sec. 2014—11, which section provides what the by-laws "must specify." Without attempting an exhaustive enumeration, I note that the revised by-laws do not specify the form of certificates of shares; nor "the manner of renewing lost or destroyed certificates and fees therefor;" nor "what, if any, interest shall be allowed on dues paid in advance." In addition the provision of sec. 5 of art. 2 that the board of directors "shall fix the salaries or compensation of all officers and employees" is not a compliance with the requirement that the by-laws must fix the remuneration of officers. The provision of sec. 4 of art. 7 for a fine "in a sum of not less than \$2.00 nor more than \$7.00 at the option of the committee of managers" is not a compliance with the requirement that the by-laws "must specify" "the fines for non-payment of any sum due or for other defaults or violation of rules."

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*Building and Loan Associations*—Associations organized prior to passage of ch. 368, Laws of 1897 may amend articles pursuant to sec. 1774.

March 15th, 1913.

HON. A. E. KUOLT,

*Commissioner of Banking.*

In your favor of March 14th, you have submitted for my approval pursuant to sec. 2010 of the statutes, an amendment

to the articles of incorporation of the Skarb Sobieski Building & Loan Association, of Milwaukee.

Sec. 2010 of the Stats. which was enacted by sec. 2, ch. 368 Laws 1897 and was made applicable to associations organized prior to its passage by sec. 21 of that chapter, provides that such "associations may be organized and conducted under the general laws relating to corporations" etc. This evidently makes applicable the provisions of sec. 1774 of the Stats. with reference to the amendment of articles of incorporation. That section provides in part that duplicate copies of an amendment

"with a certificate thereto affixed \* \* \* stating the fact and date of adoption of such amendment, and, \* \* \* the total number of shares voting in favor of such amendment, \* \* \* shall be forwarded" etc.

The proposed amendment has not been filed in duplicate and the certificate attached to the single copy that has been filed fails to comply in several particulars with the requirements of sec. 1774, notably in that it does not state "the total number of shares voting in favor of such amendment" etc.

It is necessary, therefore, for me to withhold my approval of the amendment in question.

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*Building and Loan Associations*—An amendment to the articles of incorporation must be adopted by a vote of two-thirds of the outstanding stock.

An amendment to the by-laws that conflicts with the articles cannot be approved.

March 26th, 1913.

HON. A. E. KUOLT,

*Commissioner of Banking.*

In your favor of March 24th, you submit for my approval pursuant to sec. 2010 of the Stats. an amendment to the articles of incorporation of the South Side Mutual Loan & Building Association of Milwaukee.

The amendment is to change the date of the annual meeting from the first Saturday of February to the fourth Monday of January. Article Seventh of the original articles of in-

corporation provides that an amendment thereof shall be adopted "by a vote of at least two-thirds of all the stock of said corporation then outstanding." The certificate of the president and secretary states that there are 5820 shares outstanding and that 3336 voted in favor of the amendment. 3336 is not two-thirds of 5820. The amendment is, therefore, not legally adopted.

You also submit amendment to the by-laws of this association, sec. 92 of which changes the date of the annual meeting from the first Saturday in February in each year to the fourth Monday in January of each year. In the absence of a change in the original articles, this is plainly inconsistent with such articles, as pointed out in my letter of February 24th.

For the reasons stated, I cannot approve of either the amendment to the articles or the by-laws.

OPINIONS RELATING TO CONSTITUTIONAL  
LAW.

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*Constitutional Law—State Lands*—State lands south of township 33 north are subject to sale, without limitation as to the number of acres that may be purchased.

Chap. 452, Laws 1911, in so far as it provides for credits being allowed the purchaser of school lands for improvements made by him, is unconstitutional.

It is also invalid in so far as it reserves to the public any portion of the school lands.

September 25, 1911.

HON. W. H. BENNETT,

*Chief Clerk Commissioners of Public Lands.*

I am in receipt of your favor of August 22nd, in which you ask for the opinion of this department upon two propositions as follows: first, Does chapter 452 of the laws of 1911 repeal or affect section 210 of the Wisconsin Statutes as amended by section 16 of chapter 450 of the Laws of 1903 which restricted the quantity of state lands that might be sold to one person to 160 acres; second, Does chapter 452 of the Laws of 1911 in providing that a portion of the balance due on contracts for the purchase of lands thereunder shall be credited for improvements that may be made upon the land by the purchaser or his assigns operate to divert, in the case of school lands, a portion of the school fund and if so does chapter 452 conflict with section 2 of Art. X of the state constitution?

In answer to your first question it appears that sec. 23 of ch. 264 of the Laws of 1905 expressly repeals ch. 450 of the Laws of 1903. As sec. 210 is contained in said ch. 450, being section 16 thereof, it appears that said sec. 210 is expressly repealed and the limitation therein imposed upon the amount

of land which may be sold to one individual for agricultural purposes is removed. Chapter 452 of the Laws of 1911 was evidently enacted by the Legislature in ignorance of this fact, since it is provided by subdivision 4 of sec. 209 as amended by ch. 452 of the Laws of 1911 that "the provisions of this act and the provisions of sec. 210 of the Stats. shall be interpreted to cover the sale of all state lands that may be classified as agricultural lands." From this it is evident that at the time of the passage of ch. 452 of the Laws of 1911 the legislature understood that the provisions of chapter 210 were still in force. It is evident from the language above quoted that the legislature intended to restrict the sale of agricultural lands as provided in sec. 210 of the Stats. being sec. 16 of ch. 450 of the Laws of 1903, but whatever may have been the legislative intention the fact remains that sec. 210 was expressly repealed by sec. 23 of ch. 264 of the Laws of 1905. Notwithstanding the evident intent of the legislature here manifested, to restrict the sale of agricultural lands to tracts not exceeding 160 acres in extent, the fact remains that there is no express law limiting the amount. Sec. 3 of ch. 264 of the Laws of 1905 provides that the sale of all lands belonging to the state north of township 33 shall cease from and after the passage of the act and that such lands shall constitute the state forest reserve. There being no provision in the statute prohibiting the sale of lands south of township 33 it necessarily follows that such lands are still subject to sale.

In answer to your second question I will say that under said ch. 452 of the Laws of 1911 it is provided that public lands valuable for agricultural purposes may be sold on terms, the first payment to be not less than 15% of the purchase price with interest on the unpaid balance in advance to February 1st of the following year provided that in no case shall the payment be less than the value of the timber, if any, on such lands.

It is also provided that the balance of the purchase price of such lands shall be payable at any time within twenty years after the date of the sale at the option of the purchaser with interest at the rate of 7% per annum payable annually in advance on February 1st of each year. It is also provided that the land commissioners shall insert in every contract of sale

of such lands a clause providing that the vendee, his heirs, administrators and assigns shall at the time of the completion of all payments required under said contract be entitled to a credit for improvements made on said land, the credit to be determined by the amount of improvements made on the land and the amount of the purchase price. There is also a provision that on all contracts of more than three thousand dollars a credit of twenty-five dollars for each one hundred dollars worth of improvements made shall be given but that such credit shall not exceed the sum of nine hundred dollars. It is further provided that the vendee shall file with the land commissioners a notice at least thirty days before the time when he desires to make final payment and that the land commissioner shall cause an appraisal of said premises to be made by three disinterested persons for the purpose of ascertaining the actual value of the improvements made.

Sec. 2 of art. X of the Const. of the State of Wisconsin provides in part:

“The proceeds of all lands that have been or hereafter may be granted by the United States to this state for educational purposes (except the lands heretofore granted for the purposes of a university) . . . shall be set apart as a separate fund to be called ‘the school fund’ the interest of which and all other revenues derived from the school lands shall be exclusively applied to the following objects, to wit:

1. The support and maintenance of common schools in each school district and the purchase of suitable libraries and apparatus therefor.

2. The residue shall be appropriated to the support and maintenance of academies and normal schools and suitable libraries and apparatus therefor.”

The intention of the framers of the Constitution as manifested by sec. 2 of art. X thereof to create and effectually safeguard the trust fund designated as a school fund to be used for educational purposes has been scrupulously guarded by the courts. *Dutton v. Fowler*, 27 Wis. 427; *Lynch v. Steamer Economy*, 27 Wis. 69; *State v. Miller*, 52 Wis. 488; *State v. DeLano*, 80 Wis. 259; *State v. Cunningham*, 88 Wis. 81.

The provisions of ch. 452 of the Laws of 1911, so far as they apply to the credits to be allowed to the vendee for improvements made thereon, are clearly in violation of the pro-

visions of the constitution relative to school funds and are, in my opinion, invalid.

It is further provided by subdivision 6 of ch. 452 of the Laws of 1911 that every contract, certificate of sale or grant thereunder of public lands shall be subject to the continued ownership by the state of the fee to all lands bordering on any meandered or nonmeandered stream, river, pond or lake navigable in fact for any purpose whatever to the extent of one chain on all sides thereof and which reserves to the people the right of access to such lands and all rights necessary to the full enjoyment of such waters, etc. This provision of the act is also clearly invalid so far as it relates to the school lands for the reason that under our state constitution the proceeds of all lands that have been granted by the United States to this state for school purposes are set apart as a separate fund to be called the "school fund" and the interest on which and all other revenues derived from the school lands shall be *exclusively applied to the support and maintenance of the common schools*, etc. (See sec. 2, art. X of the State Constitution.)

The provision reserving to the public lands bordering on any meandered or nonmeandered stream, river, pond or lake navigable, in fact, for any purpose whatever to the extent of one chain on either side thereof, cannot be carried out so far as these school lands are concerned for the reason that the Legislature has no power to set apart or appropriate the school lands or any portion thereof for state park or for any other purpose other than that contemplated by the constitution; neither can the legislature withhold such lands from sale. See *State v. Cunningham*, 88 Wis. 81.

To give credit for improvement made on agricultural lands where such lands are a part of the school lands would be a diversion of the school fund to the extent to which such credit is given and is clearly in violation of the provisions above quoted.

*Constitutional Law—Taxation—Education—Industrial Schools*  
—The industrial school law, ch. 616, Laws 1911, is constitutional.

October 23, 1912.

MR. DANIEL E. McDONALD,  
*District Attorney,*  
Oshkosh, Wisconsin.

In your favor of October 16th you enclose a copy of an opinion of Mr. R. A. Hollister, Corporation Counsel of the City of Oshkosh, to the effect that "Ch. 616, Laws of 1911, or so much thereof as confers upon the local board the power to determine how much money shall be appropriated or levied for a certain purpose, is void as in contravention of our constitution." You ask my opinion on the question and also as to the means of enforcing a compliance with the law if constitutional.

The matter of education, like the preservation of peace and the public health and the construction of highways, is a matter of state-wide interest, and therefore one which the state may itself maintain through its own agencies, or which it may compel the municipalities to support by local taxation. *State, ex rel. v. Freeman*, 61 Kans. 90, 91; 2 Cooley on Taxation 3rd Ed.; 1294, 1295, 1299, 1303.

Section 4, art. X, of the Wisconsin Constitution provides that

"Each town and city shall be required to raise by tax annually for the support of the common schools therein a certain minimum amount."

Judge Cooley says that

"It may be affirmed that in any case in which compulsory taxation is found necessary in order to compel a municipal corporation \* \* \* to perform properly and justly any of its duties as an agency in state government \* \* \* the state has ample power to direct and levy such compulsory taxation and the people to be taxed have no absolute right to a voice in determining whether it shall be levied except as they may be heard through their representatives in the legislature of the state." 2 Cooley on Taxation, 3rd Ed., 1903.

There can thus be no dispute but that the state may compel a municipality to provide schools and pay for their maintenance. By chapter 616 it is enacted that when there are twenty-five persons wishing industrial education in any city, a school must be furnished. A special board is provided as

the state's agency to determine what the structures and appliances shall be and to ascertain the amount required to support such school, and the law directs the levy of the necessary tax just as it may direct the levy of any other tax for its scheme of education. The tax being for a general state purpose, the legislature may itself determine the amount directly, or it may do so by its own agency and may therefore provide this special board to determine the amount without affecting any function of local self-government. I Cooley on Taxation, 3rd Ed., 558, 559.

Of course, the legislature may not delegate legislative power to a local administrative board, but the state, having a right to decide when there shall be industrial education, may employ the usual agencies to determine when the conditions on which it shall be instituted exist. It would be impossible for the legislature to do so directly, and so the law provides a board to ascertain the fact as to the existence of such conditions. Similarly, the legislature cannot directly determine what provisions are necessary for such education in the various municipalities, or the expense necessary to meet the provisions. It must do all this by some agency, and the one it has adopted is a local board. It being a matter of general state concern, the legislature was not obliged to make its action subject to the approval of the local legislative body—the common council. It might have levied the tax directly. Instead, it created another body which is its agent and imposed on it the duty of ascertaining the amount required to maintain the schools. Such duty is administrative—to ascertain facts for the execution of the law.

The language in *C. & N. W. Ry. Co. v. State*, 128 Wis. 553, 629, to the effect that the legislative power to determine the amount of a tax may not be delegated, was obviously used with reference to the power to so determine by legislative, not administrative action. Plainly, such language was not intended to include power to determine the amount by the ascertainment of facts and a computation therefrom. Such construction would have defeated the ad valorem taxation law which was sustained by the very decision in which the language referred to was used. Chapter 616 delegates to the local board of education the duty of ascertainment of the facts

of the necessities of a particular city and the demand for industrial education, and of determining from such facts the amount required to support an industrial school therein. The levy is by the legislature of the amount required, i. e. such amount as not exceeding one-half mill may be necessary to support the industrial school in the particular city, and the ascertainment merely—the finding or computation of such amount—is delegated to the local board.

In *McCabe v. Carpenter*, 102 Calif. 469, a similar law was held unconstitutional on the ground that it either delegated legislative power to a nonlegislative body or was a levy by the legislature itself. There the latter construction equally with the former would have made the law invalid, because a special constitutional provision vested in the local authorities the power of imposing such taxes. But the court said: "The legislature imposes the tax when it requires an officer to make certain computations, the result of which must fix the amount to be raised." This language is quoted by the Wisconsin supreme court in *C & N. W. Ry. Co. v. State*, 128 Wis. 553, 630.

Chapter 616 no more delegates the legislative power of taxation by delegating the power to determine the amount required to support a school, than the railroad commission law delegates the legislative power to fix rates by declaring that railway rates shall be reasonable and delegating to the railroad commission the power to investigate and determine such reasonable rates. In sustaining the latter law the court said: "The legislature may delegate any power not legislative, which it may itself rightfully exercise. \* \* \* This power to ascertain facts is such a power as may be delegated." *M. St. P. & S. S. M. Ry. v. Railroad Commission*, 136 Wis. 146. See also *Adams v. Beloit*, 105 Wis. 363, 369; *State ex rel, v. Frear*, 142 Wis. 320, 325; *State, ex rel, v. Hunkle*, 131 Wis. 103, 108. It is no objection that the board must exercise some judgment and discretion. *State, ex rel, Buell v. Frear*, 146 Wis. 291, 304—6. The power to ascertain the amount required to maintain a school seems in no wise different in kind or in degree than the power to ascertain reasonable rates or the power to prescribe rules, classify offices, determine exemptions, etc., a delegation of which was held lawful in the cases cited.

Furthermore, laws almost identical with this feature of chapter 616 have long been among the statutes of this state, and though frequently before the courts, their constitutionality has never been denied. Thus the supreme court said in an early case:

“The charter of the city of Beaver Dam in effect requires that the city council shall raise by taxation, in addition to the amount of school moneys appropriated or provided by law for common schools in said city, such sums as may be determined and certified by the board of education to be necessary and proper for the educational purposes therein designated. \* \* \* The charter vests in the board of education the power of determining within its limitations the sums in their opinion necessary to be raised under this section. In the present case, the board, keeping themselves within the limitations of the charter, determined and certified what sums were required for the purposes therein mentioned, and the common council should have provided to raise these various amounts of taxation. The common council could not revise the action of the board or refuse to carry out their recommendations so long as the board kept within the provisions of the charter.” *State ex rel. v. Smith*, 11 Wis. 65, 67.

This case is cited in *State ex rel. v. Burke*, 140 Wis. 524, 525, to the proposition that

“Under the special charter of the city of Beaver Dam \* \* \* the power was vested in the school board to determine and certify to the common council by July first in each year the amount of money necessary to support the schools of the city for the ensuing year, and it was made incumbent on the common council to levy the amount so certified for school purposes.”

Other similar enactments are ch. 162, Laws of 1868, now sec. 437, Wisconsin Statutes; ch. 336, Laws of 1901; ch. 122, Laws of 1907; ch. 493 and 502, Laws of 1909; and ch. 97, Laws of 1911.

Chapter 616, like other acts of the legislature, “must have such construction as will save it from infringing the constitution if it will bear such construction.” *State ex rel. v. Railroad Commission*, 140 Wis. 145, 162. Again, “It is only when the unconstitutional purpose is clear beyond a reasonable doubt that a court can be justified in declaring void an act of the legislature.” *Nash v. Fries*, 129 Wis. 120, 124. With these rules in

mind, I am convinced that until the courts have held the law unconstitutional, it is the duty of all administrative officers to treat it as valid and to perform the duties that it imposes on them. They should not assume the burden of denying its validity and refuse to act under it, particularly where, as here, the parts of the law claimed to be unconstitutional might fall without affecting the rest of the law, (*State, ex rel. v. Sawyer County*, 140 Wis. 634, 638) as the common council would undoubtedly have ample power, aside from ch. 616, to levy in its discretion a tax to support industrial schools. It appears to be a matter of considerable importance to any city to take advantage of the law this year, in that only thirty schools may receive state aid under the law, and I am informed that more than that number have petitioned for such aid, so that the schools not established this year will be unable to get such aid in the future unless some school receiving aid is abandoned.

The remedy in case of failure to levy the tax would seem to be by mandamus against the common council to compel such levy. *Joint District v. Green Grove*, 77 Wis. 532; *State ex rel v. Lamont* 86 Wis. 563; *State ex rel, v. Hunter*, 111 Wis. 582; *State ex rel, v. Hunter*, 119 Wis. 450.

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*Constitutional Law—Elections*—Ch. 326, Laws of 1911, permitting cities of the fourth class to vote at one central polling place, is constitutional.

October 25, 1912.

FRANCIS J. ROONEY, ESQ.,

*District Attorney,*

Appleton, Wisconsin.

In your letter of the 19th, you say: "The city of New London is situated upon the county line between Waupaca and Outagamie counties, one ward lying in Outagamie county and the remaining four wards in Waupaca county. I have been asked for an official opinion as to whether, under the authority of ch. 326, Laws of Wisconsin, and any other laws that may be in existence upon the subject in this state, the common council of New London have legal authority to establish a central polling place where the electors of the various wards may vote on general and primary election matters." And you

ask for my opinion upon the matter. You do not state what the population of New London is.

Ch. 326, Laws of 1911, amends section 926—132 of the statutes, so that it provides in substance that in cities of the fourth class the polling places of all wards may be in one building, each ward having a separate room. It also creates section 926—133 of the statutes, which provides in substance that in cities having a population of 5,000 or less all wards may use a common polling place, each ward having its own separate ballot box, but there being only one set of election officers.

The only sections of the Constitution I have in mind as possibly prohibiting such a provision as that of sec. 926—132 are sec. 1 of art. III, providing in part:

“Every male person, of the age of 21 years or upwards, belonging to either of the following classes, who shall have resided within the state for one year next preceding any election, *and in the election district where he offers to vote* such time as may be prescribed by the legislature, not exceeding thirty days, shall be deemed a qualified elector at such election.”

And sec. 5 of art. XIII, providing:

“All persons residing upon Indian lands, within any county of the state, and qualified to exercise the right of suffrage under this constitution, shall be entitled to vote at the polls which may be held nearest their residence, for state, United States, or county officers. Provided, that no person shall vote for county officers out of the county in which he resides.”

*In State ex rel, Chandler v. Main*, 16 Wis. 422, the court held that this latter provision was not intended to prohibit a person from voting in a county other than that of his residence for county officers of the county in which he resided, but was “clearly to prevent him \* \* \* from voting for the county officers of the county where he voted, but in which he did not reside.” This would seem to dispose of this constitutional provision as an obstacle to the validity of the law in question. Many states have constitutional provisions similar to section 1, art. III, of our constitution. The questions that have arisen most frequently under it are as to the validity of the so-called soldier voting acts authorizing a canvassing and counting of votes cast by soldiers in the field far from the polling places

of the election districts in which they resided and often beyond the boundaries of the state itself. Such laws have generally been held invalid in states having such constitutional restrictions. *Chase v. Miller*, 41 Pa. St. 403; *Thompson v. Ewing*, 1 Brew. 67; 5 Phila. 102, 19 Legal Int., 348; *Bourland v. Hildreth*, 23 Cal. 161; *Day v. Jones*, 31 Cal. 261; Opinions of Judges, 37 Vt. 665; Opinions of Judges, 30 Conn. 591; *Twitchel v. Blodgett*, 13 Mich. 127; 15 Cyc. 301; McCreary on Elections (4th Ed.) Sec. 156.

In the case of *Chase v. Miller*, *supra*, which appears to be the leading case on this question, the constitution required a residence for a certain time "in the election district where he offers to vote." The court, *inter alia* say:

"To 'offer to vote' by ballot, is to present oneself, with proper qualifications, at the time and place appointed, and to make manual delivery of the ballot to the officers appointed by law to receive it. \* \* \* The constitution meant \* \* \* that the voter, in *propria persona*, should offer his vote in an appropriate election district in order that his neighbors might be at hand to establish his right to vote if it were challenged, or to challenge him if it were doubtful."

In the case of *Morrison v. Springer*, 15 Ia. 304, the court upheld the validity of such a law under a constitutional provision requiring residence in "the county in which he claims his vote" for sixty days. This case is contrary to the weight of authority and the reasoning of the court does not appeal to me as being sound.

In the case of *State ex rel, Chandler v. Main*, *supra*, our supreme court upheld the validity of a similar law, but it is to be noted that at that time our constitutional provision did not contain the clause "and in the election district where he offers to vote" etc. Furthermore, in *Bound v. Wisconsin Central Railroad Company*, 45 Wis. 543, Ryan, C. J., criticises this part of the decision, saying it has "long been made a reproach to the court," as a judgment "proceeding upon policy rather than upon principle." I believe, therefore, that it is safe to say that any law which attempts to authorize the canvassing of votes cast elsewhere than at the polling place of the election district in which the voter resides is unconstitutional. This law, however, does not attempt to do this, but provides for polling

places without the boundaries of the election district. Such laws have frequently been held valid. *Kinnear's Contested Election*, 2 Pa. Co. Ct. Rep. 666; *Metzger's Case*, 2 Pa. Dist. Rep. 301; *Election Instructions*, 2 Pa. Dist. Rep. 299, *Davis v. State*, 75 Tex. 420; *Bell v. Faulkner*, 84 Tex. 187; *Ex Parte White*, 33 Tex. Crim. Rep. 594; *In re Contested Election of Prothonatary*, 5 Kulp. (Pa.) 179; *Lane v. Otis*, 68 N. J. Law 656; *State ex rel. Brown v. Town of Westport (Mo.)* 22 S. W. 888; *Lebanon Light etc. Co. v. City of Lebanon (Mo.)* 63 S. W. 809; *State v. Allen (Mo.)* 77 S. W. 868; *Peard v. State*, 34 Neb. 372.

In *Kinnear's Contested Election*, *supra*, the court, among other things, say:

“The subject matter of this portion of the constitution is the qualifications of the voter, and not his standing ground at the time he deposits his ballot. The mischief against which it is directed is the danger of fraudulent or illegal voting, if a person is permitted to vote at a distance from his residence and among strangers. The remedy is the constitutional requirement that he shall vote among his neighbors by whom he is most likely to be known, at a ballot box presided over by the sworn officials of the election district of his residence, and where his right may be easily determined. We think the mischief, in view of the convention that framed the constitution, and of the people who ratified it, is effectually guarded against when it is held that the paragraph in question means merely that the voter shall reside in the election district, at the polls of which he shall offer to vote, for two months immediately preceding the election. We do not think it was meant to deprive the citizens of a rural township of the privilege of having the place of election fixed by law, within the boundaries of another election district, whenever such location is most convenient for its voters.”

Similar laws have, in some instances, been held in violation of a constitutional requirement. *People v. Carson*, 155 N. Y. 491; *Bean v. Barton Co. Ct.* 33 Mo. App. 635; *Smith v. Higbee*, 12 Pa. Co. Ct. Rep. 423; 2 Pa. Dist. Rep. 311; *Yonkins Contested Elec.* 2 Pa. Co. Ct. Rep. 550; *In re Contested Election of McNeill*, 111 Pa. St. 235. The cases from Pennsylvania, just cited, are all referred to in *Metzger's Case*, *supra*, where the court say that they are based upon *Chase v. Miller*, *supra*, and have misapplied the rule there laid down,—That it is not essential that the polling place be within the limits of the district, but that the elec-

tor must have resided in the district at the polls of which he offers to vote the requisite length of time. The other cases cited are also based in large part upon *Chase v. Miller, supra*. The court in the case of *Roper v. Scurlock*, 69 S. W. 456, 29 Tex. Civ. App. 464, expressly declined to pass on the question, basing their decision on other grounds. In *State, ex rel, Wannemaker v. Alder*, 87 Wis. 554, the votes of an incorporated village were cast at the polling place of the town of which such village had formerly been a part, and it was held illegal. No law attempted to authorize this commingling of the votes of the town and village.

Under sec. 926—132, the votes of each precinct are kept separate and each precinct has its own election officials. In my opinion it does not violate any provision of our constitution. The validity of sec. 926—133 does not appear to me to be quite as clear. The votes of each precinct are kept separate, but there is only one set of election officials provided for all the precincts of the city. In the particular case of the city of New London, if it comes within the provisions of this section, it will result in election officials, residents of one county, certifying results in another county. However, as said in *People v. Carson, supra*, "An arrangement made by law for enabling the citizen to vote should not be invalidated by the courts unless the arguments against it are so clear and conclusive as to be unanswerable. Every presumption is in favor of the validity of such a law, and it is only when the courts are compelled by force of reason and argument that they will declare such a law invalid." It not appearing clear and conclusive to me that this section is in conflict with any of the provisions of our constitution, I believe it to be my duty to regard it as constitutional until the court has declared otherwise.

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*Constitutional Law—Veterinary License Law—Ch. 298, Laws 1909, is constitutional. The board may revoke a license obtained by fraud even though granted prior to 1909.*

January 10, 1913.

MR. L. A. WRIGHT,  
*Secretary Wisconsin State Board  
of Veterinary Examiners,  
Columbus, Wisconsin.*

In your favor of December 21st, you state that pursuant to sec. 1492e—8a (ch. 298 Laws of 1909) your board served a notice upon Frank Voss to the effect that (1) a petition representing that he obtained a license to practice as a veterinary surgeon by falsely and fraudulently representing to the board that he had been practicing as a veterinary for at least ten years prior to January 1, 1909, had been filed with your board; that (2) the board would meet at a certain time and place to consider said petition; and that (3) if the facts stated in said petition are established said license would be revoked unless cause be shown to the contrary. You state further that upon the hearing Mr. Voss appeared specially by attorney and filed written objection to "the jurisdiction, power and authority of the board" in the matter for the reasons that (1) the "board has no right or authority \* \* \* to revoke a license duly granted and issued \* \* \* in 1909 upon the grounds and reasons set forth;" (2) that the board did not give Voss due legal notice; (3) that the Wisconsin Veterinary law contravenes section 1, article 14 of the amendments to the United States Constitution; (4) that said law contravenes section 1, article 1 and section 2, article 7 of the Wisconsin Constitution. You ask my opinion as to the constitutionality of the law in question in the light of the objections filed and for any other reasons that may appear.

Considering the objections in order:

I. By sec. 1492e—8a the board of examiners is expressly "authorized and empowered to revoke any license heretofore existing or granted." Such a provision is valid though retroactive. *State v. Schaeffer* 129 Wis., 459, 465.

II. You concede that the second objection is well taken "as notice was served only nineteen days before the hearing and by mail."

III. The statute is not invalid as in conflict with sec. 1, art. 14 of the amendments to the Constitution of the United States which prohibits "any law which shall abridge the privileges or immunities of citizens of the United States," etc. Stat-

utes licensing physicians "have been held constitutional as a proper exercise of the police power of the state in nearly every state of the union and in the Supreme Court of the United States." *State ex rel v. Webster* 50 N. E. (Ind.) 750, 3; *State Board v. Roy* 48 Atl. (R. I.) 802, 3; *State v. Schaeffer* 129, Wis. 459, 467; *State ex rel v. Currens* 111 Wis. 431, 433—442.

The same is true as to the practice of dentistry, pharmacy, plumbing, engineers, lawyers, etc., (see cases cited in *State v. Webster, supra*) and no reason occurs to me why the practice of veterinary surgery may not be similarly licensed.

IV. The same considerations show that such a law is not in conflict with sec. 1 of art. 1 of the Wisconsin Constitution. Nor is the law in conflict with sec. 2, art. 7 of such constitution vesting the judicial power of the state in the courts. 30 Cyc. 1555; *State ex rel v. Thorne* 112 Wis. 81, 7; *State ex rel v. Chittenden* 127 Wis. 468, 502.

The law authorizes your board to revoke a license "for any professional misconduct or breach of duty by any licensed practitioner." Misrepresentation and fraud in obtaining a certificate entitling one to practice medicine have been held to constitute "gross unprofessional conduct of a character likely to deceive or defraud the public" *State Board v. Roy*, 48 Atl. (R. I.) 502, 3, and it seems to me that the false and fraudulent representations charged in the instant case will equally constitute "professional misconduct," etc.

It has been held in several cases that statutes authorizing the revocation of licenses on grounds similar to those stated in sec. 1492e—8a are void for uncertainty in that the words "professional misconduct or breach of duty" have no common or generally accepted significance so that there is no standard by which to determine what acts were and what were not intended to be made unlawful. *Czarra v. Board*, 25 App. Cas. 443, 450; 30 Cyc. 1555-6.

However, many cases have sustained boards in revoking licenses under laws similarly quoted but where this precise question has not been raised and I am unwilling to pronounce the Wisconsin law invalid on this point until the supreme court has so declared it, especially as this point is not raised against it in the case under consideration.

But independent of the statutory grounds for revocation I think that you may revoke a license obtained by fraud. It has been so held in a somewhat similar case in Oregon where the court said that

“where the record is admittedly fraudulent as it is here, a court of justice will not intercede to reinstate it even though it was vacated without notice to the party affected by the order. If the court could see that plaintiff had been deprived of any substantial right without an opportunity to be heard the case would be different, but he is insisting upon a privilege vouchsafed to him by a license or record which he concedes to have been obtained through his own wilful and fraudulent act and the court will not thus intercede to permit him to enjoy the fruits of his own wrong.” *Volp v. Saylor*, 71 Pac. (Ore.) 980, 2; see also *Burrows v. Rutledge*, 76 Wis. 22, 26.

Even if your board has no power to revoke a license for fraud in obtaining it the circuit court would seem to have such power in an action brought by your board. *State v. Schaefer*, 129 Wis. 459, 464.

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*Constitutional Law—State Fair Grounds*—Bill No. 205, A., creating a commission to select a site for the State Fair grounds is not unconstitutional. It does not delegate legislative power.

February 13th, 1913.

HON. GEORGE CARPENTER,  
*Member of Assembly.*

In your favor of February 11th, you state that some question has arisen as to the constitutionality of Bill No. 205, A., entitled a bill “To create a temporary commission to select a new site for the state fair grounds” etc., because the bill delegates to the commission the power to select a new site instead of such selection being made by the legislature itself. You request my opinion on this point.

“One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority.” *Cooley’s Constitutional Limitations*, (5th Edition) page 139. But there is a distinction “between the delegation of power to make the law, which necessarily involves discretion as to what it shall be, and conferring authority or discretion

as to its execution, to be exercised under and in pursuance of the law. The first cannot be done. To the latter, no valid objection can be made." *State ex rel v. Chittenden*, 127 Wis. 468, 515.

Laws like the proposed bill have been held to be laws of the latter kind and not subject to the objection that they delegate legislative power. Thus a law of California, giving a board of trustees power to select a site for a home for the care and training of feeble-minded children, was held to be valid, the court saying:

"To hold that such a power could not be vested in the persons named in the act, would be an unreasonably strict application of the rule that legislative functions cannot be delegated. The mere act of selecting a site to be purchased was not a legislative act." *People v. Dunn*, 80 Calif. 211.

Similarly the power to select a site for a territorial capitol has been held to be the delegation of an administrative, not legislative, function, the court saying that "the actual selection of a suitable location and the erection of buildings and improvements thereon are clearly \* \* \* acts of administrative character." *Territory v. Scott*, 20 N. W. (Dak.) 401, 411.

And an act that authorized a commission to determine the location of the university of the state of Florida has been held valid. *State v. Bryan*, 39 So. (Fla.) 929, 953.

I find no authority to the contrary and am, therefore, of the opinion that the bill is not subject to the objection that it delegates legislative power.

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*Constitutional Law—Highways*—Power of the legislature to make appropriations under Sec. 10, Art. VIII, Const., not limited.

Constitutional Amendment—Amendment Ch. 514 Laws 1909, relating to forests and water power and limiting appropriations under Sec. 10, Art. VIII, not validly adopted.

February 18th, 1913.

Honorable GEORGE E. SCOTT,  
Senate Chamber.

This department is in receipt of your communication under

date of the 13th inst., wherein you request an opinion in behalf of the joint committee on Finance on the following question:

“Section 10 of Article 8 of the Constitution covers the subject of the state contracting debts for internal improvements, and also provides that it may appropriate money in the treasury or to be thereafter raised by taxation for the construction or improvement of public highways. Then comes a provision authorizing the appropriation of moneys for preserving and developing water power and forests, and then a limitation that the amount appropriated under this section in any one year shall not exceed two-tenths of one mill of the taxable property of the state, as determined by the last preceding state assessment. The provision for the construction and improvement of highways was an amendment which was voted on by the people in 1908. The provision with reference to conservation was a later amendment and that amendment contained the limitation. The question is, whether the whole section as it now stands limits the power of the legislature to appropriate moneys for highways *and* conservation purposes to two-tenths of one mill of the taxable property of the state in any one year, or does this limitation merely apply to the amount which can be raised for the purposes of conservation?

“The committee would like your opinion as to the proper construction of this section at your earliest convenience as it is very important in the consideration of certain appropriation bills for highway purposes which are now pending before it.”

In reply I respectfully submit the following:

Section 10, Article VIII, of the Constitution as purported to have been amended in the years 1908 and 1910 reads as follows:

“The state shall never contract any debt for works of internal improvement, or be a party in carrying on such works, but whenever grants of land or other property shall have been made to the state, especially dedicated by the grant to particular works of internal improvement, the state may carry on such particular works, and shall devote thereto the avails of such grants, and may pledge or appropriate the revenues derived from such works in aid of their completion.

*“Provided that the state may appropriate money in the treasury or to be thereafter raised by taxation for the construction or improvement of public highways.*

“Provided that the state may appropriate moneys for the purpose of acquiring, preserving and developing the water power and the forests of the state; but there shall not be appropriated under the authority of this section in any one year an amount to exceed two-tenths of one mill of the taxable property of the state as determined by the last preceding state assessment.”

The last paragraph of the section, as above set forth, was sought to be incorporated into the constitution pursuant to an amendment proposed by the legislature of 1907, which, as appears from the legislative journals of that year, was duly passed by both houses.

It appears, however, upon an investigation of the journals and the records of the legislature of 1909 that the resolution providing for the amendment was not acted upon, otherwise than by chapter 514 of the laws of that year which by preamble, merely recites that:

“At the biennial session of the legislature in the year 1907 an amendment to the constitution was proposed and agreed to by a majority of the members elected to each of the two houses, which amendment was in the following language:

“*Resolved by the senate, the assembly concurring*, That section 10 of Article VIII of the Constitution be amended by adding at the end of said section the following: “Provided that the state may appropriate moneys for the purpose of acquiring, preserving and developing the water power and the forests of the state; but there shall not be appropriated under the authority of *this section* in any one year an amount to exceed two-tenths of one mill of the taxable property of the state as determined by the last preceding state assessment.”

“Whereas, The foregoing proposed amendment to the Constitution was duly ratified and agreed to by the legislature at the biennial session in 1909, by a majority of all the members elected to each of the two houses, therefore,

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

“Section 1. The foregoing proposed amendment to the Constitution of this state shall be submitted to the people at a general election to be held,” etc.

Upon referring to the legislative journals of the 1909 session, it appears that the resolution providing for the adoption of the proposed amendment was indefinitely postponed (Assembly Journal 1909 page 1207); that no roll call was had in either house upon the bill (No. 553, S.), afterwards designated as Chapter 514 (Senate Journal 1909 page 872 and Index page 1203; Assembly, 1909, page 1278, Index 1407), which would eliminate the possibility of that act being regarded as sufficient action by the legislature of 1909 in agreeing to the proposed amendment.

Article XII of the Constitution, relating to amendments thereof, reads as follows:

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

“Section 2. If at any time a majority of the Senate and Assembly shall deem it necessary to call a convention to revise or change this Constitution, they shall recommend to the electors to vote for or against a convention at the next election for members of the Legislature. And if it shall appear that a majority of the electors voting thereon, have voted for a convention, the Legislature shall, at its next session, provide for calling such convention.”

It, therefore, appears that the proposed amendment, in relation to state appropriations for the acquiring, preserving and developing of water power, etc., was duly acted upon by the legislature of 1907; but that it was not agreed to by the next succeeding legislature which merely, without a vote “by yeas and nays taken thereon,” provided for the submission of the proposed amendment to the electors at the next succeeding general election.

It is thus clearly apparent that the proposed amendment in reference to appropriations for the acquiring, preserving and developing of the water power and forests of the state, has not been so acted upon as to comply with the requirements of Section 1, Article XII of the Constitution, relating to amendments thereof, in that the legislature of 1909 failed to agree to the amendment as proposed by the legislature of 1907; that the submission of the proposed amendment to the people was pre-

mature, as the Constitution clearly contemplates the agreement of the next succeeding legislature, evidenced by a majority vote, as a condition precedent to the submission of the proposed amendment to the people.

It is well established that

“Provisions of a constitution regulating its own amendment, otherwise than by a convention, are generally to be considered mandatory rather than directory; and a strict observance of every substantial requirement is essential to the validity of the proposed amendment. These provisions are as binding on the people as on the legislature, and the former are powerless by their vote of acceptance to give legal sanction to an amendment the submission of which was made in disregard of the limitations contained in the constitution.” *Am. & Eng. Ency. of Law*, 2nd ed., Vol. 6, page 904, and cases cited in notes.

It has accordingly been held that:

“As preliminary to the submission to the people for ratification of a proposed constitutional amendment it is, therefore, imperative that there be due compliance on the part of the general assembly with all constitutional requirements, including such formal steps as the reading of the proposed amendment before each chamber, the entry of such amendments on the journal, the approval by the required number of votes, usually more than a mere majority, and ratification by a succeeding legislature. And, of course, an omission of one of these steps cannot be overlooked on account of any inconvenience that may result through failure to adopt the proposed amendment.” *Supra*, page 904-5.

“Where a state Constitution requires a proposed amendment thereto to be agreed to by two succeeding legislatures before its submission to the people, *a declaration of the succeeding legislature as to the contents of the proposition voted on by the preceding legislature is without effect.*” *Koehler vs. Hill*, 60 Iowa, 543.

It is, therefore, my opinion that the proposed amendment in respect to appropriating money for the acquiring, etc., of the water power and forests of the state, has never been properly adopted as an amendment to the Constitution and accordingly imposes no limitation upon the legislature in appropriating money for the construction or improvement of public highways as specifically authorized by the amendment to Section 10, Article VIII of the Constitution in respect thereto.

*Constitutional Law—Public Officers—Appropriations and Expenditures*—Many of the duties imposed upon the state forester and his subordinates are for legitimate public purposes, independent of the question of the constitutionality of the appropriation for the purchase of forest reserve lands, and their salaries may legally be paid.

March 3d, 1913.

HON. J. S. DONALD,

*Secretary of State.*

In your letter of the 3d you ask whether or not the salaries of the State Forestry Department may legally be paid, i. e., is that part of the law creating the State Board of Forestry and a Forestry Department, which provides for the payment of salaries and expenses, constitutional?

Sec. 1494—41 Wisconsin Stats. 1911 creates the Board of Forestry. Sec. 1494—42 creates the office of State Forester and subsec. 3 of that section provides that his duties shall be, under the supervision of the State Board of Forestry, to

“execute all matters pertaining to forestry within the jurisdiction of the state, direct the management of the state forest reserve, depute one of his assistants to act during his absence or disability, collect data relative to forest destruction and conditions, take such action as is authorized by law to prevent and extinguish forest fires and to prevent forest trespass; coöperate in forestry as provided under sec. 1494—45 of the statutes; and advance as he may deem wise, by the issuing of publications and by lectures, the cause of forestry within the state; and may coöperate with the university of Wisconsin in the instruction and training of forest rangers.”

Sec. 1494—47 gives the Forestry Department supervision over town fire wardens and makes the State Forester, State Fire Warden. Sec. 1494—62 makes an appropriation to pay the salaries of the department.

Very clearly, all these duties relate to matters of great public interest. Appropriations to pay these salaries are for a public purpose. I understand the claim is being made that the purchase of lands for a forest reserve and the carrying on of scientific lumbering operations thereon are in violation of art. VIII, sec. 10, of the Const. prohibiting the State from being a party to or carrying on works of internal improvement. I have been unable to find any authority holding that a forest

reserve is a work of internal improvement but, without passing on that question, it is sufficient at this time to say that whether it is or is not, the duties of the Forestry Department are in large part wholly independent of any forest reserve. Even if that part of the law relating to the purchase of lands should be held unconstitutional, the part providing other duties for the department and appropriating money for the payment of salaries and expenses not being dependent upon such other part, but separate and distinct therefrom, is therefore valid. *McDermott v. State*, 143 Wis. 18, 35; *Kiley v. C. M. & St. P. Ry. Co.*, 138 Wis. 215, 227; *State ex rel. Williams v. Sawyer Co.*, 140 Wis. 634, 637.

In this connection it might not be out of place to suggest that a part of the forest reserve comes to the State by grant from Congress, especially dedicated to forestry and reforestation and that, by the express terms of the constitution, the avails of such grant and revenues derived from such work may be appropriated for the purposes expressed in the grant, even though it be a work of internal improvement.

In my opinion the payment of such salaries is a valid expenditure.

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*Constitutional Law—Interstate Commerce—Interference with interstate commerce by proposed state law affecting railroads. An act requiring railroad companies to install and maintain a thermometer in each passenger car while said car is used for the carriage of passengers between points in this state, would not be unconstitutional as an interference with interstate commerce.*

March 3d, 1913.

HON. A. E. FREDERICK,

*Member of Assembly.*

Replying to your letter of the 28th ult., in which you ask me whether your bill No. 409, A., if it became a law, would be unconstitutional, as an interference with interstate commerce, I beg to advise:

This bill, if it became a law, would doubtless be construed as intended for the benefit of the public traveling between points within this state, as in the case of the "Upper Berth

Law," ch. 272 of the Laws of 1911, *State v. C. M. & St. P. Ry. Co.*, 152 Wis. 341. It would be advisable, however, to amend the bill in this respect, so as to avoid the opportunity for this question to be raised, by expressly limiting its application to cars while used for the transportation of passengers between points within this state.

As so construed or as so amended, the act would not be invalid, as an interference with interstate commerce. Its interference with interstate commerce, if any, would be held to be indirect only, and therefore within the power of the State to legislate for the public health and convenience. The act would come within the rule declared by the United States Supreme Court in *New York, New Haven & Hartford R. R. Co. v. New York*, 165 U. S. 629, and, in the absence of conflicting legislation by Congress, would be held valid. *Western Union Tel. Co. v. James*, 162 U. S. 650; *Mo. Kas. & Tex. Ry. Co. v. Haber*, 169 U. S. 613; *McDermott v. State*, 143 Wis. 18.

## OPINIONS RELATING TO CONTRACTS.

*Contracts—Bonds—Public Buildings*—Contract of Dunphy-Fridstein Co. with Wisconsin State Board of Agriculture, for erection of grand stand, and bond accompanying same, examined.

Every contract for the erection of any building for the state must contain the eight hour clause.

The bond accompanying such contract must secure payment of all claims for labor performed and materials furnished.

July 9, 1912.

HON. J. C. MCKENZIE,

*Secretary State Board of Agriculture.*

I have examined and return herewith the contract of the Dunphy Fridstein Company with the Wisconsin State Board of Agriculture for the erection and completion of a grand stand at the state fair grounds and the bond to secure the performance of such contract.

The contract recites that the drawings and specifications are identified by the signatures of the parties and become a part of the contract. I have not the specifications before me, but call your attention to this clause of the contract. Under this it will be necessary that you have such drawings and specifications identified in the manner stated.

The contract also contains the following provision:

“If at any time there shall be evidence of any lien or claim for which, if established, the owner of the said premises might become liable, and which is chargeable to the contractor, the owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify it against such lien or claim. Should there prove to be any such claim after all payments are made, the contractor shall refund to the owner all moneys that the latter

may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the contractor default."

As the State Board of Agriculture is merely a branch of the state government, it is at least doubtful whether there could be any lien or claim for which it could become liable. Furthermore, this matter is one that should be covered by the bond, as will appear later on in this letter.

Article XI of the contract is one requiring that the Board keep the grandstand insured, for the protection of the contractor, during the progress of the work.

This is a clause that is not generally included in contracts with the State and, in my opinion, it would be better if this were omitted.

Sec. 1729m of the Stats. as amended by ch. 171 of the Laws of 1911, provides in part as follows:

"Each and every contract hereafter made for the erection, construction, remodeling or repairing of any public building or works, to which the state or any officer or agent thereof is party, which may involve the employment of laborers, workmen or mechanics, shall contain a stipulation that no laborer, workman or mechanic in the employ of the contractor, subcontractor, agent or other person, doing or contracting to do all or a part of the work contemplated by the contract, shall be permitted to work more than eight hours in any one calendar day, except in cases of extraordinary emergencies."

The clause required by this section does not appear in the contract submitted.

The bond submitted has not been signed by the contractor. It should be signed by the contractor, as well as by the surety.

This bond contains a number of conditions which, in my opinion, ought not to appear in the bond. Possibly some of them might be permissible, but the greater part of them are merely such as to render it uncertain whether or not the surety would be liable in case of a failure on the part of the contractor to perform the work.

Sec. 3327a of the Stats. being a part of ch. 292 of the Laws of 1899, provides in part as follows:

"All contracts hereafter let for the erection, construction, equipment, repairs, protection or removal of any building of the state shall contain a provision for the payment by the con-

tractor of all claims for labor and material and no contract shall hereafter be let for the erection, construction, equipment, repairs, protection or removal of any building of the state, unless the contractor shall give a good and sufficient bond, to be approved by the governor, conditioned for the faithful performance of the contract and the payment of all the claims for work or labor performed and material furnished in and about the erection, construction, equipment, repairs, protection or removal of such building to each and every person entitled thereto."

This bond does not contain the provisions referred to. It cannot be approved without such provision.

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*Contracts—Liens—Laborers—Subrogation—Principal and Surety*—Where a contractor for work upon a public building, who has given the bond required by Sec. 3327a, fails to pay the laborers and material men and the proper officers are notified by the surety not to pay the balance due to such contractor, but to hold it for the payment of claims for labor and material, and a general creditor makes claim to such fund under an assignment from such contractor, the money should not be paid to either claimant, but held for determination of their respective claims by the court.

September 27, 1912.

HON. M. E. McCAFFREY,

*Secretary Board of Regents University of Wisconsin.*

I have had under consideration your letter of July 9th, in which you inclosed the contract of the Madison Engineering and Construction Company with the Board of Regents for the construction of the foundation for the Agricultural Chemistry Building, the specifications accompanying the contract, the bond signed by The Title Guaranty and Surety Company of Scranton, Pennsylvania, to secure the performance of said contract, the letter from The Title Guaranty and Surety Company to the Regents dated July 3rd, 1912, in which they offer to settle outstanding claims, etc., and the order of the Madison Engineering and Construction Company dated June 1st, 1912, for the delivery of \$493.50 to the First National Bank of Madison, with Mr. Proudfit's letter of June 1st, 1912, attached.

It appears from the several papers inclosed that the contract in question was entered into on the 23d day of October, 1911; that the Madison Engineering and Construction Company entered upon the performance of said work and that said work has been fully completed; that there still remains due the Madison Engineering and Construction Company the following sums:

Estimate .....	\$493.50
Final Estimate .....	316.50
Extras .....	117.50

that there are outstanding claims for labor performed and materials furnished in the construction of this building amounting in all to \$1160.51; that The Title Guaranty and Surety Company are proceeding upon the assumption that the Madison Engineering and Construction Company will not pay these claims and that, therefore, they are liable upon their bond for the same.

The First National Bank of Madison holds the order signed by the Madison Engineering and Construction Company, for \$493.50, and is claiming that amount from the Regents, to be paid from the balance due said Engineering Company. The Title Guaranty and Surety Company proposes to pay the several claims for labor performed and materials furnished if the balance due the Madison Engineering and Construction Company upon said contract is paid to them. They deny any liability to pay the amount due the First National Bank, and you ask me to advise you as to what action should be taken as to the offer of the surety company, and also what should be done with reference to the order in favor of the First National Bank of Madison.

I have had this matter under consideration for a long time and have talked it over with Mr. Bagley, representing the First National Bank, and with Mr. Dunn, representing the Surety Company.

It would appear that the First National Bank has no claim against the Regents upon the order referred to. See *Skobis v. Ferge*, 102 Wis. 122; *Cook v. City of Menasha*, 103 Wis. 6; *Dugan v. Knapp*, 105 Wis. 320; *Raesser v. Nat. Exch. Bank*, 112 Wis. 591; *Thiel v. John Week Lumber Co.*, 137 Wis. 272.

In the first case cited the court say:

“A debt cannot, at the will of the creditor, without consent of the debtor, be split up, and several suits maintained thereon, whether by assignment or otherwise. The debtor has a right to pay his debt *in solido*, and to refuse to be subjected to suits by several claimants; and no notice of an assignment of a part of a debt, no matter how complete in equity as between the assignor and assignee, can destroy the right of the original debtor, without his consent.”

It appears, however, that the First National Bank now has a further order signed by the Madison Engineering and Construction Company, authorizing them to collect the full amount remaining due upon the contract.

In one of my interviews with Mr. Bagley he produced what purported to be such an order.

In the case of *Richards Brick Co. v. Rothwell*, 18 App. Cases Dist. of Columbia 516, it appears that a firm of building contractors made an assignment of balances due them from the government for building life-saving stations to a trustee in trust, to apply part of the proceeds to their general creditors. It was held that sureties who had signed the bonds of the contractors required by law conditioned for the payment of all persons supplying labor and materials might maintain a bill in chancery to prevent the application of such amounts due to the payment of general creditors until all claims for which recourse might be had to the sureties had been fully paid, and that a receiver would be appointed to prevent such misapplication. Among other things the court say:

“The statute just recited makes provision that is intended practically to serve the same beneficent purpose of a mechanic’s lien law. . . .

“That is to say, the bond is liable rather than the building upon which labor and materials are used in construction; and if the sureties should pay claims for such labor and materials for which they may be responsible on the bond, they have a right, upon well settled principles, of substitution of such claims as against the contract price of the work remaining due to the contractor. And having such right of substitution, the sureties have a right to interpose to prevent the diversion or misapplication of the fund, and to require it to be paid out to the parties entitled to receive it in the first instance by virtue of the lien and preference given by operation of the statute.”

It appears to me that it is not so clear which one of the two claimants in question is entitled to the balance due upon this contract as to justify payment to either without the consent of the other. I would advise the withholding of payment to either until the matter has been determined by proper proceeding in court, unless the two claimants file with you a written agreement authorizing such payment to one or the other. Should either of the claimants start a proceeding in court, the proper procedure then would be to deposit the money in court, together with a proper statement of the facts, when the claimants may fight the matter out between themselves.

## OPINIONS RELATING TO CORPORATIONS.

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*Corporations*—Concerning the manner of filing articles of incorporation by Secretary of State.

June 1, 1911.

HON. JAMES A. FREAR,  
*Secretary of State.*

Your communication of the 31st ult., concerning the matter of the filing of articles of incorporation by the Globe Hotel Company of Milwaukee, stating that the original articles of incorporation were filed Feb. 14th, 1906, but that no certified copy of same has ever been filed with the register of deeds as required by law, and asking whether or not in my opinion there is any objection at this time to your certifying to a copy of said articles to be recorded with the register of deeds and whether there is any objection to your issuing certificate of incorporation upon receipt of certificate from the register of deeds certifying to the recording of a copy of said articles in his office, is received.

In reply thereto would say that in my opinion the statute requiring the filing of certified copies in the office of the register of deeds is directory and that the failure to file such certificate of incorporation does not invalidate the act of incorporation by the company and that there is no legal objection to your certifying a copy of the original articles to the register of deeds at this time and upon receipt of the certificate from the register of deeds certifying to the recording of such copy you can issue a certificate of incorporation.

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*Corporations*—Right of Stockholders to limit or deny voting power of preferred stock in certain cases.

July 19, 1911.

HON. JAMES A. FREAR,  
*Secretary of State.*

I am in receipt of your favor of the 19th inst., enclosing letter from Geo. P. Hambrecht concerning the proposed articles

of incorporation of Gleue Brothers, incorporated. In his letter Mr. Hambrecht quotes what purports to be art. VII of the articles of incorporation of said company and you ask whether or not the articles may be accepted for filing with art. VII in the form quoted in his letter.

Art. VII as quoted by Mr. Hambrecht in his letter is as follows:

“These Articles may be amended by resolution setting forth such amendment or amendments, adopted at any meeting of the stockholders by a vote of at least two-thirds of all the common stock of said corporation then outstanding.”

Sec. 1759a of the Wisconsin Stats. as amended by ch. 576 of the Laws of 1907 provides in part as follows:

“Any corporation may provide for preferred stock in its original articles of organization or by amendment thereto adopted by the unanimous vote of the stockholders and may in such original articles or by such amendment thereto adopted by the unanimous vote of the stockholders provide for the payment of dividends on such preferred stock out of the profits at a specified rate before dividends are paid upon the common stock; for the accumulation of such dividends; for a preference of such preferred stock, not, however, exceeding the par value thereof, over the common stock in the distribution of the corporate assets other than profits; for the redemption of such preferred stock, and *for denying or restricting the voting power of such preferred stock.*”

I have not the original articles of incorporation of this company before me but assuming that all of the other articles are in conformity with law I see nothing in art. VII which would conflict with the provisions of the statute above quoted. Art. VII in effect provides that articles may be amended at any meeting of the stockholders by a vote of at least two-thirds of all the common stock of said corporation then outstanding. This in effect simply restricts the voting of preferred stock in case any preferred stock should be issued by such company. Inasmuch as sec. 1759a as amended expressly provides that the preferred stock issued by any corporation may be restricted or even denied any voting power, I am of the opinion that art. VII as quoted in Mr. Hambrecht's letter is not in conflict with the statute and that the articles may be accepted for filing in the form quoted in his letter.

*Corporations—Amendment of Articles—Filing Fee*—A corporation may amend its articles changing it from a nonstock to a stock corporation.

Where such corporation was originally a stock corporation, the filing fee is \$10.00 for the amendment and \$1.00 for each \$1,000.00 of its capital stock in excess of \$25,000.00.

July 15, 1912.

HON. JAMES A. FREAR,

*Secretary of State.*

In your favor of July 11th, you enclose articles of incorporation of the Grant County Telephone Co. and amendment to such articles changing the company from a stock to a nonstock company. You state that the company now desires to change back to a stock company and ask my opinion as to whether this is permissible and if so, what the filing fee will be.

Section 1774, Wisconsin Statutes, provides that the articles of any corporation organized under chapter 86 may be amended to "provide anything which might have been originally provided in such articles, but no corporation without stock shall change substantially the original purposes of its organization."

Since the articles might originally have provided, as they did, that the corporation should be one with stock, I see no reason why they may not now be reamended to so provide. Such an amendment is not a change in the original purposes of the corporation but merely a change in the method of its ownership and its control.

As to the proper filing fee to be charged, section 1772 (9) (c) (ch. 341, Laws 1911) provides for the payment by such corporation of "twenty-five dollars for the articles and ten dollars for each subsequent amendment thereof together with a further fee of one dollar for each one thousand dollars of its authorized capital stock in excess of twenty-five thousand dollars." In the case of an amendment changing from a nonstock to a stock corporation, if the capital stock be placed at less than twenty-five thousand dollars, a strict reading of the statute would permit the injustice of allowing a corporation to organize as a nonstock corporation without the payment of any filing fee and then by amendment and the payment of

merely a ten dollar fee evade the payment of the additional sum it would have been required to pay had it been originally incorporated as a stock corporation. "Such a discrimination would be so highly unreasonable that it would be absurd to claim that any such intent was in the legislative mind." (*State ex rel v. Railroad Commission*, 137 Wis. 80, 90). But in view of the fact that the corporation here desiring to amend its articles was originally a stock company and presumably paid the incorporation fee required of such companies, I think that as applied to it, the statute can and should be construed to require it to pay "ten dollars for each . . . amendment . . . together with a further fee of one dollar for each one thousand dollars of its authorized capital stock in excess of twenty-five thousand dollars." (ch. 341, Laws of 1911).

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*Corporations—Proxies*—An irrevocable proxy is not against public policy.

Such a proxy should not be included in the articles of organization.

August 9, 1912.

HON. JAMES A. FREAR,

*Secretary of State.*

In your letter of August 9th you inclose proposed articles of incorporation of the Power-Stevens Fan Devices Company and ask whether, in my opinion, there is any objection to filing the articles because of the provisions contained in article IV.

The article in question reads as follows:

"It is understood and agreed that the preferred stock shall have no preference excepting in the matter of the election of two of the directors as herein provided. All of the common stock of the company, by whomsoever owned or held, shall for the term of five years from the date of the organization of this company, be voted at the stockholders' meeting by Joseph C. Schubert of Madison, Wisconsin, and in case of his death or refusal to act, by some person elected by a majority of the preferred stock outstanding, for the sole purpose of electing two directors who shall be recommended to said Joseph C. Schubert or his successor by a majority of the preferred stock outstanding. After which said trust shall be released and the owners of said common stock shall be free to use the same in such elec-

tion and otherwise as they see fit. After the expiration of said term of five years, said common stock shall be relieved of said trust."

The statutory provision relating to preferred stock is found in sec. 1759a of the Stats., as amended by ch. 576 of the Laws of 1907, reading as follows:

"Any corporation may provide for preferred stock in its original articles of organization, or by amendment thereto adopted by unanimous vote of the stockholders, and may, in such original articles or by such amendment thereto adopted by the unanimous vote of the stockholders, provide for the payment of dividends on such preferred stock out of the profits at a specified rate before dividends are paid upon the common stock; for the accumulation of such dividends; for a preference of such preferred stock, not, however, exceeding the par value thereof, over the common stock in the distribution of the corporate assets other than profits; for the redemption of such preferred stock, and for denying or restricting the voting power of such preferred stock. Neither preferred nor common stock shall bear interest. Certificates of preferred stock and common stock shall state, on the face thereof, all privileges accorded to and all restrictions imposed upon preferred stock. No change or amendment in relation to such preferred stock shall be made, except by way of amendment to the articles of organization adopted by the unanimous vote of the holders of all the outstanding stock, both preferred and common."

In my opinion, the only preferences that may be given to preferred stock are those enumerated in this statute. I am therefore of the opinion that the stock referred to in the article in question is not properly preferred stock. The article in question, if it has any validity at all, is in effect an agreement by which is created an irrevocable proxy for the term therein named for the voting by said Joseph C. Schubert of all the common stock for the purpose therein enumerated.

Section 1760 of the statutes, provides in part:

"Every stockholder of any corporation shall be entitled to one vote for each share of stock held and owned by him at every meeting of the stockholders and at every election of the officers thereof, and may vote either in person or by proxy at such elections, and by proxy at other meetings when so provided by the by-laws of the corporation."

An irrevocable proxy is not against public policy. *Browning v. Pacific Mail Steamship Co.*, 5 Blatch, 525; Fed. Cases No.

2025; 23 Am. and Eng. Ency. of Law. (2nd ed.) p. 300, and cases there cited.

This raises the question of whether or not such irrevocable proxy may properly be made a part of the articles of organization. Sec. 1772 of the Stats., as amended, enumerates certain things that must be included in the articles. Subdivision 7 of said section, as amended by ch. 355 of the Laws of 1909, provides in part as to what shall be contained in such articles:

“Such other provisions or articles, if any, not inconsistent with law, as they may deem proper to be therein inserted for the interests of such corporation or the accomplishment of the purposes thereof, including, if desired, the duration of its existence.”

Within the liberal construction that would undoubtedly be placed upon this provision, it is my opinion that the article in question would probably be construed as within the discretion of the framers to include in the articles, and its inclusion would not justify you in refusing to file them, although I believe that such provisions ought to be included in the by-laws or in an independent contract, rather than in the articles of organization.

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*Corporations*—A foreign corporation whose articles authorize it to do the business of a casualty company, and also to do the business of a trust company bank, and to engage in all kinds of business that a natural person may engage in in any part of the world, should not be licensed to do business in this state.

October 30, 1912.

HON. JAMES A. FREAR,

*Secretary of State.*

I am in receipt of your letter of October 25th, together with a letter addressed to you by Mr. John W. Burdette, of Chicago, dated October 21st, setting forth the purposes of the International Guaranty Company, an Arizona corporation. You state that said Burdette desires to obtain a license to do business in this state, and inquire whether it will be in order for your department to issue license to said company. Mr. Burdette sets forth in his letter that, under the charter of the International

Guaranty Company, it is authorized to transact the following business:

“To make contracts of guaranty and surety bonds, to act, as agent, trustee or attorney in fact in any transaction or negotiation; to contract for services of attorneys at law for the prosecution or defense of any matter or proceeding before any court of law or chancery, or other tribunal; to collect, adjust and settle claims on commercial or other accounts, and for damages for breach of contract, or personal injuries, or any demand of any nature whatever; to furnish commercial reports, so-called, and to investigate and furnish information upon any and all matters as required; to buy, own and sell shares of capital stock in incorporation companies, including its own stock; to buy, own and sell patent rights, bonds, mortgages, notes and other securities; to enter into contracts with attorneys at law, physicians, dentists, merchants, professional and business men of all kinds, for mutual service; to buy and forward goods and merchandise of every description, and to engage in the mail order business, so-called, and to engage in any and all kinds of business that a natural person might or could in the United States or any part of the world.”

It is very evident that the purposes set forth in the articles of this corporation are too broad to permit it to be authorized to do business in this state. The first line, as quoted above, authorizes the corporation to make contracts of guaranty and surety bonds. This would make it a foreign casualty company, and under section 1966—32 of the statutes, application for license should be made to the insurance commissioner, and other provisions in said section must be complied with. The second line authorized the corporation to act as agent, trustee, or attorney in fact in any transaction or negotiation. This is a power given to trust company banks in this state under ch. 86 of the Laws of 1909. Another provision sets forth that the corporation is authorized to buy, own and sell shares of capital stock, including its own, etc. In order to do this in this state it would be required that the corporation comply with the provisions of sec. 1775 of our Statutes. The last clause authorizes the corporation to engage in any and all kinds of business that a natural person might or could in the United States or in any part of the world. It is very evident that natural persons are permitted to do acts in other parts of the world which are illegal in this state, and even in other states or territories

in the United States natural persons might do acts which the laws of this state prohibit. It is not necessary to enumerate any such, but it is very evident for the reasons stated that this company should not be licensed to do business in this state, and I must advise you that it is your duty to refuse to issue a license for said company to do business in the state of Wisconsin.

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*Corporations—Foreign Corporations*—Whether the making and performing of a contract by a foreign corporation to furnish and install the light fixtures for the capitol is doing business in the state so that a license is necessary questioned.

November 6, 1912.

HON. JAMES A. FREAR,  
*Secretary of State.*

In your favor of November 4th you enclose letters from Curtis, Mallett-Prevost & Colt, with reference to the Mitchell-Vance Company, a foreign corporation, from which it appears that such company obtained the contract for furnishing and installing the light fixtures for the capitol, and you ask whether the company should obtain a license to do business in this state.

There is much force in the argument that the company is not within the terms of our statute requiring foreign corporations to obtain a license, because it is engaged in interstate commerce and that it is doing no business in this state except such as is incidental to and involved in such interstate commerce. In addition to the cases cited in counsel's letter, see *Wolf Co. v. Kutch*, 147 Wis. 209, 214—15, where the court stated that "The fact that plaintiff agreed to furnish a millwright to assist the vendee in putting the machinery in place was a mere incident to the contract and did not deprive it of its interstate character."

It should be noted, however, that our court has held contrary to counsel's contention that "a single contract falls within the ban of the statute." *Southwestern Slate Co. v. Stevens*, 139 Wis. 616.

I feel, however, that I should not definitely decide this question at this time, since neither your department nor this one is

at present required to take any official action in the matter. Should a dispute arise later between the Mitchell-Vance Company and the State of Wisconsin, it might become my duty to defend the state's refusal to pay on the ground that the contract is void because the company has not complied with the statute in obtaining a license. It certainly seems that you have done your full duty in calling the attention of the company to the provisions of our statutes and the decision as to whether the company will apply for a license thereunder is for them and their attorneys.

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*Corporations—Insurance*—A corporation “to conduct the business of a general agency for insurance” is not an insurance corporation within sec. 1897f Wis. Stats.

November 14, 1912.

HON. HERMAN L. EKERN,

*Commissioner of Insurance.*

In your favor of November 13th, you enclose copy of articles of association of the U. S. Operating Company, and request my opinion as to whether this company may sell its stock in this state without complying with sec. 1897f of the Statutes. That section provides in part:

“No person shall, for the purpose of organizing or promoting any insurance corporation \* \* \* sell or agree or attempt to sell within this state any stock in such insurance corporation unless the contract of subscription or of sale shall be in writing and contain a provision in the following language:” etc.

The copy of the articles show that the U. S. Operating Company is a corporation organized under the laws of the State of Maine “to conduct the business of a general agency for insurance” etc. It does not seem to me that this company is an “insurance corporation” within the meaning of those words as used in sec. 1897f. Sec. 1895m provides that the word “company” when used in any statute relating to insurance shall include “all corporations, associations, partnerships or individuals engaged as principals in the business of insurance, except mutual benefit societies.” I think the word “corpora-

tion" in sec. 1897f should be given substantially the same meaning and it is thus inapplicable to a company organized merely "to conduct the business of a general agency for insurance."

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*Corporations*—Sec. 1771 authorizes the incorporation of corporations without capital stock.

November 14, 1912.

HON. JAMES A. FREAR,  
*Secretary of State.*

In your favor of November 13th, you enclose articles of incorporation of the Milwaukee Automobile Dealers Association, together with letter from W. A. Jones, Treasurer of the Whitehead & Hoag Company of Newark, N. J., in which he asks whether

"the laws of Wisconsin permit the organization of a corporation without capital and with no personal liability of the directors and incorporators and allow such an organization to do business and obtain credit without any resources whatever."

Section 1771 of the statutes provides in part that a corporation "may be formed to have a capital stock divisible into shares or without any capital stock upon such plan as may be agreed upon." Since it appears from Mr. Jones' letter that there is or may be litigation concerning the corporation in question and since the matter does not seem to come before your department nor this one for official action at this time I refrain from expressing any opinion as to the personal liability of the directors and incorporators for the debts of such a corporation.

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*Corporations—Insurance*—Capital stock of insurance corporation may be diminished as provided in sec. 1774.

November 22, 1912.

HON. GEORGE E. BEEDLE,  
*Deputy Commissioner of Insurance.*

In your favor of November 18th, you state that you are in receipt of a letter from the Milwaukee German Fire Insurance Company, reading as follows:

“On July 1st, 1912, the Milwaukee German Fire Insurance Company reinsured all of its outstanding liabilities in the New Hampshire Fire Insurance Company of Manchester, N. H., of which you hold a copy of the contract. I beg to advise you that the Milwaukee German Fire Insurance Company stockholders contemplate reducing the capital to \$50,000, and the surplus to \$10,000. Our capital is now \$220,000, and our surplus somewhere in the neighborhood of \$70,000. I wish to inquire if this is in compliance with the law. An early reply will greatly oblige.”

You request my opinion as to whether the company may be permitted to reduce its capital stock for the assumed purpose of dividing same among its stockholders.

Section 1896 provides for the organization of insurance corporations and for the amendment of their articles “in the manner provided in chapter 86 of the statutes, except that such articles and amendments shall be filed in the office of the commissioner of insurance instead of being filed in the office of the secretary of state,” etc.

This obviously makes applicable the provisions of sec. 1774, which provide that a corporation may amend its articles so as to “increase or diminish its capital stock.” If the capital or surplus be reduced below the amounts specified in sec. 1897g, the company is, by the terms of that section, prohibited from transacting the business of insurance. Sec. 1897i prohibits the transaction of business by a domestic insurance corporation “other than the dissolution and winding up of its affairs at any time after its risks outstanding for a period of one year shall have been below the minimum prescribed by sec. 1898d.” If there be no violation of these sections I see no reason why the proposed reduction in the capital stock may not be made, though the stockholders participating in such reduction might incur the liabilities imposed by secs. 1906 and 1906a and also those imposed by sec. 1755 as construed in *Killen v. Barnes*, 106 Wis. 546, 569 and *Thies v. Durr*, 125 Wis. 651.

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*Corporations—Rescinding forfeiture of franchise*—No authority is given the secretary of state to rescind a forfeiture of a corporation's franchise, on account of failure to file an annual report, except on presentation of an affidavit of the president

and secretary thereof. An affidavit by one styling himself "liquidation agent" is not sufficient.

December 10, 1912.

HON. JAMES A. FREAR,  
*Secretary of State.*

In your favor of December 9th, you enclose affidavit signed by Walter H. Wright, in which he sets forth that he is "liquidation agent" of the Smith Paint & Varnish Company, a Wisconsin corporation organized on or about November 15, 1900; that said corporation failed to file its annual report for the years 1909, 1910 and 1911, and that said corporation has not suspended its ordinary and lawful business since its organization or since the date of forfeiture. You also submit annual report of said corporation, in which its location is stated to be 1121 Wells Building, Milwaukee, and the name of its president as Franklin T. Smith, address unknown, and in which it is also stated that said corporation was not engaged in actual business during the past year and the nature of the business during the past year is stated to be collection of accounts. You request my opinion as to whether the forfeiture of its corporate rights and privileges which has been declared by reason of failure to file the annual reports required, may be rescinded.

Sec. 1774a provides for such rescission "on presentation of an affidavit signed by the president and secretary of a corporation to the effect that such corporation has not suspended its ordinary and lawful business since its organization or since the date of forfeiture." Without considering the discrepancy between the affidavit filed and the proposed annual report as to whether the corporation has suspended its ordinary and lawful business, you will note that no authority is given you to rescind a forfeiture except on presentation of an affidavit signed by the president and secretary. "The general rule governing the organization of corporations is that the procedure prescribed by statute must be substantially and strictly complied with." *Slocum v. Head*, 105 Wis. 431, 433.

It seems to me that the same rule must be applied to a restoration of corporate rights and privileges, and that in the absence of the affidavit specified you have no authority to act.

*Corporations*—Since the passage of ch. 612, Laws 1911, a street and electric railway may be organized with power to purchase and operate gas plants.

January 13th, 1913.

HON. JOHN S. DONALD,

*Secretary of State.*

Replying to the request of your predecessor, Honorable James A. Frear, dated December 27th last, for an opinion upon the proposed articles of organization of the Wisconsin Railway, Light and Power Company, permit me to say; Since this request was received the provision in the proposed articles as to the purposes of the corporation has been changed by Honorable E. S. Mack, one of the attorneys for the corporation, by striking out the words "mail, express, merchandise" from the subjects of transportation, so as to avoid the objection pointed out in the opinion of my predecessor under date of April 1st, 1912, rendered to your department, as to similar phraseology.

Mr. Mack also made one other change in the reading of the articles, at my suggestion.

The articles still retain as a part of the purposes of the proposed corporation, "the manufacturing, distribution, selling and furnishing of light, heat and power by gas or other means," as well as the holding and operating of street and electric railways.

In an opinion found on page 235 of the Biennial Report and Opinions of the Attorney-General for 1908, it was held that a corporation organized to operate a street and electric railway could not legally include in its articles as another purpose the purchasing of the property of gas light companies, water companies and heating companies. A similar opinion is found on page 260 of the same report, and another on page 141 of the Biennial Report and Opinions for 1906.

Based upon these, other opinions, not yet published, have held the same.

Sec. 1862 Stats., as amended by ch. 39, Laws of 1911, provides in part:

"Corporations for constructing, maintaining and operating street railways may be formed *under chapter 86, and shall have powers and be governed accordingly.*"

Sec. 1771 Stats., being part of ch. 86, provides in part:

“Three or more adult persons, residents of this state, may form a corporation in the manner provided in this chapter to conduct, pursue, promote or maintain *any one or more* of the following named purposes, the same being of a lawful nature: [Here follow a list of purposes.]

Or for any lawful business or purpose whatever, whether similar to the purposes herein mentioned or not, except the business of banking, insurance (other than title insurance), building or operating public railroads or plank or turnpike roads or other cases otherwise specially provided for.”

As corporations to operate street railways are to be organized under chapter 86 and “have powers and be governed accordingly,” it might well be claimed that they are authorized to form for any additional “lawful business or purpose whatever” not “otherwise specially provided for.” The former opinion, however, relied very largely upon the language used in section 1862a Stats., authorizing an electric railway to purchase

“all or any part of the real and personal property, rights, privileges, ordinances and franchises of any other street railway company, foreign or domestic, operating or to operate a street railway by *electric* power or of any corporation, foreign or domestic, now or hereafter existing, formed for the purpose of manufacturing, creating or generating *electricity* for power, light or heat or any other purpose,” etc.

Under the doctrine of *noscitur a sociis* it was held that this excluded the acquiring or purchasing of property, etc., of corporations not relying upon electricity for power, light, etc. The legislature of 1911, however, seemed to have placed a practical construction upon the purposes that may be combined in the articles of such a corporation.

Subsec. 3 of sec. 1222—2 Stats., relating to taxation, formerly provided:

“Any corporation organized under the laws of this state for manufacturing, generating or furnishing light, heat, power, signals or *other service by electricity*, with the power of accepting and operating under franchises granted by municipalities, and *wholly operated by a street railway company*, and operated in connection with the railway property of such company as owner, lessee or otherwise, shall be deemed a light, heat and power company within the meaning of this act.”

By ch. 612 of the Laws of 1911 the words "by electricity" were stricken out.

As pointed out by Mr. Mack, the only practicable method for a public service company of furnishing light, heat, etc., otherwise than by electricity at the present time is by gas. The conclusion would seem to follow that the Legislature itself understood that gas and electric plants for furnishing light, heat, power, etc., may be operated in connection with each other and in connection with electric railways. While it is not entirely clear that the court would interpret these sections as permitting such combinations, yet, in view of the fact that the filing by the Secretary of State of articles combining purposes that the law does not authorize the combination of does not add anything to the actual authority of the corporation, I would advise you that these articles be accepted and filed.

Another reason for feeling that no great harm can come from such combinations is that all of these public utilities are under the supervision of the Railroad Commission.

I am informed by Mr. Mack that there are a number of public service corporations in this state operating combined plants of this nature.

The opinions rendered since the passage of ch. 612 of the Laws of 1911, which followed the earlier opinions herein referred to, were written without having that chapter called to the attention of the writer.

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*Corporations*—The articles of association of a corporation organized under ch. 86, Wis. Stats., 1911, may include any or all of the purposes stated in sec. 1771, Wis. Stats., 1911, and any other lawful purpose, or purpose not "otherwise specially provided for".

February 4th, 1913.

HON. J. S. DONALD,

*Secretary of State.*

In your letter of January 29th, you enclose a proposed amendment to the Articles of Incorporation of the Central Wisconsin Construction Company, and ask if in my opinion an amendment containing the combination of purposes as set

forth therein should be accepted and filed in your office. You also send the original Articles of Organization.

The purposes of the organization as stated in the original articles are:

“to build, erect, construct, equip railroads, bridges, viaducts, tunnels, dams, dykes, culverts, buildings of all kinds, gravel road turnpikes, streets, alleys, telephone and telegraph lines, power plants, depots, walls, embankments, ditches, drains, sewers, canals, and artificial waterways, flumes, hydrants, water tanks, archways, fences and monuments, and to hold and own real estate and buildings for its own use and business and to perform and execute for profit all such works as are usually done by a general contractor.”

The amendment seeks to add to these purposes the following:

“to engage in agricultural pursuits, any lawful business or purpose connected therewith; to engage in a general chemical, mechanical, commission or storage business; to engage in drainage and reclaiming of wet, submerged and overflowed lands, and the maintenance and operation of drains, canals and ditches; to engage in and carry on a general lumber and coal business; to drive logs, timber and lumber; to buy, sell, lease, own and deal in and with railway cars, locomotives, engines and all kinds of railway equipment and supplies; to furnish light, heat and power by electricity, gas and steam or otherwise; to purchase, lease, own, and hold and construct, manage and maintain hotels, restaurants, inns and eating houses; to buy, sell, own, hold, lease, sell and dispose of real estate, lots and townsites and to mortgage and encumber the same and to guarantee the title thereto, or of any person, firm or corporation; to buy, own, lease, hold Letters Patent, copyrights and trademarks, to buy, sell, own, hold and equip, maintain, operate and dispose of electric light, gas, and power plants; to engage in the loaning of money on real or personal security, or otherwise; to buy, own, hold, sell, exchange, deal in and with notes, bonds, bills of exchange, commercial paper and personal property of every kind, nature and description; to improve rivers, harbors and streams; to buy, sell, lease, own, hold and operate boats and ships of all kinds and to conduct and carry on a general shipping and forwarding transportation business; to construct, buy, sell, lease, operate and maintain telegraph and telephone lines, and do a general telephone and telegraph business; to construct, maintain and operate theaters and places of amusement; to buy, sell, lease, own, hold and construct, maintain and oper-

ate water works and all utilities of a public or private nature; to engage in a general mercantile and manufacturing business, and to prepare for market and market any article or product in the manufacture of which any mineral, vegetable or animal matter may be or become a factor; to furnish mutual aid, benefits, maintenance and support to the members of this corporation, their families, or kindred in case of sickness, misfortune, poverty or death; to mortgage and encumber any part or all of its property of every kind, nature and description; to buy, sell, own and hold in its own name the capital stock of any person, firm or corporation or corporations, and to vote the same and each share thereof by and through its proper officers at any and all stockholders meeting or meetings of the corporation in which this corporation may own or hold such capital stock."

It would appear that the following language found in the opinion in *Dancy v. Clark*, 24 Appeal Cases District of Columbia, 487, might well be applied to the articles as so amended:

"This certificate is quite remarkable for its verbosity and repetitions. It would seem that no term or expression within the remotest degree connected with the science of civil engineering has been omitted, and that there was an effort in it to take in and cover all the vast area of the extensive realm of mining, manufacturing, mercantile, mechanical and transportation industry from the matter of taking any and every mineral, coal, iron, copper, and all the rest of them, out of the earth, to that of the purchase and sale of patents and patent rights and the operation of great railway systems. It may be doubted whether ever before there has been a more ambitious attempt to take in a wider range of human industry for one small corporation."

This, however, has little bearing on the question you submit. Sec. 1771, Wis. Stats. 1911, provides that corporations may be formed to conduct, pursue, promote or maintain any one or more of a number of purposes therein enumerated stated in separate paragraphs, and at the end the section provides:

"Or for any lawful business or purpose whatever, whether similar to the purposes herein mentioned or not, except the business of banking, insurance (other than title insurance), building or operating public railroads or plank or turnpike roads or other cases otherwise specially provided for."

Most of the purposes specifically named in the statute, as well as a number of others, have been included in the proposed amendment.

So far as I have been able to ascertain, no one of the purposes named in the proposed amendment is unlawful. Among such purposes, I find the following: "to improve rivers, harbors and streams." The similar purposes named in the statute are "improvement of logging streams." "Rivers and streams, the improvement thereof for the purpose of log driving." "Streams and rivers, the improvement thereof for logging purposes." It will be noted that the purpose stated in the amendment is much broader than that specifically authorized by the statute. Further, sec. 1786g Wis. Stats. makes special provision for the organization of corporations "for the improvement, for purposes of navigation, of any stream in this state not used for logging purposes," etc.

This section requires five signers to the articles of corporation, while sec. 1771, Wis. Stats. 1911, requires only three signers. As corporations for this purpose are "otherwise specially provided for," I am of the opinion that the purpose stated in the amendment and herein referred to, cannot legally be combined with the other purposes stated therein.

May the other purposes stated in such amendment legally be combined? In the case of *State ex rel. v. Minchan Building Co.*, 141 Wis. 400, the relator strongly contended that only those purposes stated in any one paragraph of section 1771 can legally be combined. The court, however, did not pass upon that question. I am indebted to the briefs in that case for most of the citations hereinafter given.

"Where the statute permits corporations to be formed for several purposes named in the alternative, separated by the disjunctive conjunction 'or', it is held that a single corporation cannot be organized for more than one of such purposes, and that articles of incorporation which include more than one of them are void, and that incorporation under such articles will be refused." 10 Cyc. 161 and cases cited. See also *Williams v. Cit. Enterprise Co.*, 153 Ind. 496, 57 N. E. 581.

Again where the purposes for which corporations may be organized are stated in separate subchapters, a corporation cannot be organized for the purposes stated in more than one of such subchapters. *Dancy v. Clark, supra.*

Where the statute requires the articles to state "the purpose for which it is formed," the use of the word "purpose" instead

of "purposes" indicates that a corporation may not be formed for more than the purposes stated in any one subdivision. *Ramsey v. Todd*, 95 Tex. 614, 69 S. W. 133, 93 Am. State Rep. 875. In some states, the statutes expressly forbid a corporation for works of public improvement engaging in mercantile business and in such states a corporation cannot be formed for both purposes. *Bayou Cook Navigation & Fisheries Co. v. Doullut*, 111 La. 517, 35 So. 729.

In view of these decisions an examination of the history of sec. 1771 becomes important. By sec. 2 ch. 73 Stats. 1858, corporations could be formed "for the purpose of engaging in and carrying on any kind of manufacturing, mechanical, mining or quarrying business, or any other lawful business." Here we find the disjunctive "or" used. This same provision is continued in Taylor's Statutes of 1871. Ch. 144, Laws of 1872, authorized the formation of corporations "for the purpose of engaging in and carrying on the business of mining, smelting or manufacturing any kind of metal, or quarrying and marketing any ore, stone, slate or other mineral substance, or constructing, leasing or operating docks, warehouses, elevators or hotels, or any kind of manufacturing, lumbering, agricultural, mechanical, chemical, mercantile, transportation or other lawful business, except that of banking, insurance and operating railroads."

Ch. 146, Laws 1872, authorized the formation of corporations for a number of different purposes other than manufacturing, mercantile, insurance, banking, transportation or trading purposes stated in separate paragraphs, but without using the disjunctive "or".

By the revision of 1878, substantially the present language was adopted. It seems to me reasonably certain that the legislature intended some change by this change in language, by which the word "or" as it had previously been used for twenty years, was dropped from this section of the statutes. Our statute has required the articles to state the "purposes" for which organized ever since 1858.

In Illinois, corporations may combine several different purposes. *In re Advertising Company*, 177 Fed. 187, 101 C. C. A. 1.

Where the purposes are stated conjunctively in the statute any number may be combined. *Louisiana Nav. & Fisheries Co. v. Doullut*, 114 La. 906, 38 So. 613.

“The mere fact that the adventurers, in drawing their articles of association, claim greater powers or privileges than the governing statute allows, will not necessarily prevent them from becoming incorporate, since the law will reject the excessive claim as surplusage.” 1 Thompson’s Commentaries on the Law of Corporation, section 229.

I am, therefore, of the opinion that if the clause as to improving rivers, harbors and streams is eliminated, the amendment containing the combination of other purposes stated should be accepted and filed in your office.

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*Corporations—Coöperative Associations—Telephones—Papers submitted do not show that the Freedom Mutual Telephone Co. attempted to organize as a coöperative association so as to be entitled to be within sec. 1786e—16.*

February 5, 1913.

HON. J. S. DONALD,

*Secretary of State.*

In your favor of January 28th, you state that the affidavit which you enclose has been presented to you to be filed for the purpose of securing for the Freedom Mutual Telephone Company, the benefits of sections 1786e—1 to 1786e—17 of the statutes, and you request my opinion as to whether it meets the requirements of section 1786e—16.

Section 1786e—16 provides in part

“All coöperative corporations, companies or associations heretofore organized and doing business under prior statutes, or which have attempted to so organize and do business, shall have the benefit of all of the provisions of section 1786e—1 to 1786e—17, inclusive, and be bound thereby on filing with the secretary of state a written declaration, signed and sworn to by the president and secretary, to the effect that said coöperative company or association has by a majority vote of its stockholders decided to accept the benefits of and to be bound by the provisions of sections 1786e—1 to 1786e—17, inclusive.”

The affidavit submitted states

“That in January, 1911, a number of residents of the town of Freedom, numbering in excess of five, undertook to organize as a

body corporate for the purpose of building a telephone line; that they constructed coöperatively a short line and then hired service and connection with the Wisconsin Telephone Company; that no stock was provided for; that no profits are made; that repairs to the line are provided by contributions from the co-operators; that at the annual meeting of the association it was determined by a unanimous vote of the stockholders to accept the benefits of and to be bound by the provisions of sections 1786e—1 to 1786e—17 inclusive; that a copy of the articles of association as agreed to in the attempted organization under section 1786e statutes of 1898 is hereto attached."

You state further that there is no record in your department of the Freedom Mutual Telephone Company ever having been incorporated. In the copy of the articles attached to the affidavit referred to, it is stated that the signers "do hereby associate together for the purpose of forming a Mutual Telephone Company to buy, sell, lease, contract, operate and maintain a telephone line and to furnish telephone service therewith." After providing that "the name of this company shall be known as The Freedom Mutual Telephone Company," etc., the articles provide that "Third, The payment of all construction material, including poles, wire, brackets, arms, glass, guy rods, telephones and all other necessary material shall be paid for share and share alike." Other sections of the articles provide for the time and place of the annual meeting; for "the officers of the company;" for the directors who "shall have full charge of the affairs and property of the company subject to the by-laws;" and for the duties, etc., of the officers.

Although the affidavit states that there was an attempt to organize a corporation under section 1786e of the statutes of 1898, it seems to me doubtful whether the articles of association submitted show an attempt to organize a corporation at all. Without passing on the questions as to whether there could be an attempted organization under a statute which had been expressly repealed (section 1786e was repealed by chapter 562, laws 1907) or whether there could be such an attempt without going so far as to file the articles with the secretary of state or register of deeds. I am of the opinion that the "articles of association" do not show an attempt to organize a coöperative association. They certainly fall far short of the requirements of sec. 1772 in many respects, primarily in that

there is no "declaration that they associate for the purpose of forming a corporation." The signers may well have intended to form a partnership and the articles have been intended to be partnership articles of association merely, but even if the purpose was to form a corporation as is stated in the affidavit, I do not think that it sufficiently appears that there was a purpose to form a coöperative association. There is in the articles absolutely nothing to indicate such a purpose unless it be found in article Third previously quoted. That only is obviously insufficient since the payment for construction material "share and share alike" might be provided for in the articles of association of a partnership or of an ordinary corporation as well as in those of a coöperative association.

I am, therefore, of the opinion that the affidavit submitted does not show that the company in question is entitled to obtain the benefit of sections 1786e—1 to 1786e—17 of the statutes in the manner provided by section 1786e—16.

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*Corporations—Coöperative Associations*—Sec. 1773, prohibiting corporations from transacting business until 50 per cent of its capital stock has been subscribed and 20 per cent thereof paid in, is not applicable to coöperative associations.

February 5, 1913.

HON. J. S. DONALD,

*Secretary of State.*

In your favor of January 29th, you request my opinion as to whether a corporation organized under ch. 368, Laws 1911, must have fifty per cent of its stock subscribed and twenty per cent paid in before it may transact business with any others than its members.

Ch. 368, Laws of 1911, creates sec. 1786e—1 to 1786e—17, which provide for the organization of coöperative associations. The numbers thus given the sections created bring them into chapter 86 of the statutes, relating to the organization of corporations, in which chapter section 1773 is also contained, which provides in part that:

"No such corporation (i. e. a corporation organized under sec. 1772) shall transact business with any others than its mem-

bers until at least one-half of its capital stock shall have been duly subscribed and at least twenty per centum thereof actually paid in."

Prior to the enactment of ch. 368, Laws of 1911, coöperative associations could be formed in no other way than under chapter 86 (see sec. 1786e, Wis. Stats. 1898, repealed by ch. 562, Laws of 1907) and thus subject to the quoted part of sec. 1773. Section 1786e—1, *et seq.*, are complete in themselves and provide in detail for the organization of coöperative associations. The purpose seems to have been to make them a distinct class of corporations, as many of the provisions are in conflict with the provisions of chapter 86 relating to the organization and powers of corporations in general. This of itself creates a doubt as to the applicability to a coöperative association of section 1773. In addition, the final sentence of section 1786e—16 is

"No association organized under sections 1786e—1 to 1786—17, inclusive, shall be required to do or perform anything not specifically required herein, in order to become a corporation or to continue its business as such."

While the provision of sec. 1773 is not strictly a requirement that the corporation do anything either to become a corporation or to continue its business, I think that the plain intent was to free coöperative associations from the restrictions placed on other corporations, including sec. 1773. The supreme court has stated that "The object of the statute (sec. 1773) seems to be to prevent fictitious and fraudulent corporations from extorting money from confiding stockholders and obtaining credit when they have no real basis of capital to do business on and no resources to meet their liabilities." *Anvil Mining Co. v. Sherman*, 74 Wis. 226, 233. These reasons would seem to apply to coöperative associations the same as to other corporations, but I see no reason to doubt the power of the legislature to exempt such associations from the provisions of section 1773 and the advisability of so doing is peculiarly a question for legislative determination. I am of the opinion that chapter 368 exempts coöperative associations organized thereunder from the quoted provisions of section 1773 and that such an association need not have fifty per cent of its stock subscribed and twenty per cent paid in before it may transact business with any others than its members.

*Corporations*—Forfeiture of corporate charter may be rescinded only on presentation of affidavit of president and secretary of company. Affidavit of incorporator not sufficient.

March 4th, 1913.

HON. J. S. DONALD,  
*Secretary of State.*

In your favor of March 1st, you enclose a letter from one of the incorporators of the Wolf River Improvement Company, from which and the facts stated in your letter, it appears that the corporate rights and privileges of that company were forfeited January 1st, 1913, for failure to file an annual report; that the organization of the company "has not yet been completed by the election of a board of directors and officers"; that the company desires to have the forfeiture rescinded; and you ask whether an affidavit of one of the incorporators stating the requisite facts would be sufficient to authorize you to rescind the forfeiture.

I assume that the organization of the company had proceeded so far as to require it to file an annual report and that the forfeiture was legally declared.

Section 1774a of the statutes provides in part:

"The Secretary of State may rescind the forfeiture provided in this section on presentation of an affidavit signed by the president and secretary of a corporation to the effect that such corporation has not suspended its ordinary and lawful business since its organization or since the date of forfeiture; or that the corporation at the time the forfeiture was declared held title or transferable interests in real estate."

"The general rule governing the organization of corporations is that the procedure prescribed by statute must be substantially and strictly complied with." *Slocum v. Head*, 105 Wis. 431, 3; *Bergeron v. Hobbs*, 96 Wis. 641.

I think that the same rule must be applied to the procedure by which a corporation may regain the corporate powers which it has forfeited. Since the recording of the original articles of incorporation is not a compliance with the statute requiring a verified copy of such articles to be recorded, (105 Wis. 431), I think it clear that an affidavit signed by one of the incorporators of a corporation is not a compliance with the statute requiring "an affidavit signed by the president and secretary."

*Corporations*—Document filed does not show facts authorizing revocation of charter of Sphinx Publishing Co.

March 12, 1913.

HON. J. S. DONALD,

*Secretary of State.*

In your favor of March 7th, you enclose a paper reading as follows:

“Whereas, the Sphinx Publishing Company, a nonstock company, organized and doing business with its principal office situated at Madison, Wisconsin, was duly incorporated under the laws of this state in 1910, and

Whereas, said corporation has had no meeting of directors or members since said time, and

Whereas there are no officers nor has any election of officers been held since said time, and

Whereas none of the original incorporators or officers identified with said corporation are present in this city, and their whereabouts are unknown, this affiant, Dennis Crile, editor in chief of a monthly magazine known as the Sphinx, and published in the City of Madison, Dane County, Wisconsin, having been duly sworn, on oath says that he has been identified with the said Sphinx for a period of three and one-half years; that he is familiar with all the affairs and matters pertaining to said publication, and that of his own knowledge he knows the facts herein above stated and petitions that said Sphinx publishing company be dissolved in order to permit of a reorganization of said company.

IN WITNESS WHEREOF he has hereunto placed his hand and seal this 7th day of March, 1913.

(Signed)

DENNIS CRILE. (Seal)

State of Wisconsin }  
                                  } ss  
County of Dane }

Personally appeared before me this 7th day of March, 1913, the said Dennis Crile, known to me to be the identical person herein named, and he acknowledged his signature in my presence.

(Signed) HARRY SAUTHOFF

Notary Public, Dane County, Wisconsin.

My commission expires Aug. 17, 1913.

You ask first, whether “this affidavit is sufficient to cause cancellation of the charter,” second, “if not, would this state-

ment be sufficient to permit the organization of a stock company under the same name?"

1. The document submitted does not show compliance with sec. 1789, providing for a voluntary dissolution of a corporation by vote of its members.

Sec. 1763 providing for a forfeiture of the charter of a corporation which "shall have suspended its ordinary and lawful business for one whole year" does not operate to cause dissolution ipso facto or to authorize you to declare such a forfeiture "but simply declares an efficient cause for adjudging a dissolution in a proper action." *Stolze v. Manitowoc T. Co.*, 100 Wis. 208, 212.

There is no showing that there has been a failure to file an annual report which would justify forfeiture under sec. 1774.

If there is some statute authorizing you to cancel a corporate charter because of the fact set out in the document signed by Mr. Crile, he should bring the same to your notice.

II. Sec. 1772 provides that the articles of incorporation shall contain

"2. The name of such corporation: But such name shall \* \* \* be such as to distinguish it from any other corporation organized under the laws of this state. In case of the reorganization of a corporation the name of the old corporation may be used."

Under this statute a corporation cannot be created with the same name as an existing corporation. As previously stated, no facts have been set up showing that the company in question is not an existing corporation. Neither is it shown that it is being reorganized. Consequently another corporation cannot be organized with the same name.

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*Corporations*—Coöperative association may be organized under sec. 1786e—1 of the Stats. by nonresidents.

March 13, 1913.

HON. J. S. DONALD,  
*Secretary of State.*

In your favor of March 11th, you enclose letter from Mr. Charles H. Burras, of Chicago, in which he asks whether "res-

idents of Illinois could incorporate a coöperative company in your state under the laws of Wisconsin" and you ask my opinion as to whether or not "nonresidents may incorporate under ch. 368, Laws of 1911."

Ch. 368, Laws of 1911 will be found as secs. 1786e—1 to 1786e—17 of the Stats. The first section provides that "any number of persons not less than five may associate themselves as a coöperative association," etc. There is no requirement that such persons shall be residents of the state. This department has ruled in an opinion to your predecessor, under date of May 18th, 1911, that nonresidents of the state may incorporate under section 1788 of the statutes, the language of which is substantially like that above quoted. I am convinced that the same rule must apply to an incorporation under ch. 368, Laws 1911, and that, therefore, nonresidents may incorporate thereunder.

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*Corporations—Insurance*—Amendment of articles of Polish Association of America; certificate of officers as to adoption of amendment must comply with sec. 1774.

March 18, 1913.

HON. GEORGE E. BEEDLE,

*Deputy Commissioner of Insurance.*

You have submitted for my approval certified copies of amendments to the articles of incorporation of the Polish Association of America.

The original articles of incorporation show that this association was organized in 1896, as a mutual benefit insurance association, under ch. 86, Revised Statutes, sec. 1771 of which provided for the organization of such a corporation. The articles are, therefore, amendable in the manner provided by sec. 1774 for incorporations organized under ch. 86 or in the manner provided by sec. 1966a—5. The amendments in question were evidently adopted in attempted compliance with sec. 1774, which provides for an amendment by a vote of "at least one-half of the members of the corporation without stock."

Art. VI of the original articles of incorporation of this association provides:

“All legislative powers granted by this constitution shall be vested in the annual convention of the Polish Association of America composed of elected delegates from affiliated societies. Only regularly elected delegates shall have the privilege of the floor and the right to vote at the convention.”

I am inclined to think that this article validly limits the right to vote on amending the articles of incorporation to “regularly elected delegates.”

The certificate of the chairman and secretary attached to the copies of the amendments in question, show that they were adopted at such a convention as is referred to in art. VI, above quoted, and by the vote of more than two-thirds of the delegates present. As stated, I believe that this method of amendment is proper, but must withhold my approval until the certificate of the officers be made to correspond with the requirements of sec. 1774, i. e. that it state “the total number of members (in this case delegates) and the total vote in favor of such amendment,” etc.

## OPINIONS RELATING TO COUNTIES.

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*Counties*—County board has no power to make appropriation for relief of flood sufferers.

November 2, 1911.

HON. A. H. DAHL,

*State Treasurer.*

Replying to your favor of the 2nd inst., in which you state that the relief committee appointed to receive contributions for the flood sufferers of Black River Falls are intending to make an appeal to the chairman of the county board for aid and asking for the opinion of this department as to whether or not county boards have power to vote county aid for such purposes, would say that I am of the opinion that county boards have no such authority. The powers and duties of the county board are defined by statute and can only be exercised within the statutory limitations and I find no provision of the Wisconsin statutes authorizing the appropriation of public funds by the county board in such cases. The general powers of the county board are defined by sec. 669 of the Wis. Stats. and certain special powers conferred upon the county boards will be found in sec. 670 of the Wis. Stats. and amendments thereto. In construing these statutes the supreme court have confined the powers of the county board to the exercise of the authority expressly given in these statutes and such as are fairly and reasonably necessary and proper in order to give effect to or carry out the powers expressly conferred. "Boards of supervisors can exercise such powers only as are conferred upon them by law." *Detroit v. Blackeby*, 22 Mich. 84, and "They may be restrained in the exercise of unauthorized corporate acts." *Atty. Gen. v. Detroit*, 26 Mich. 263, and *Atty. Gen. v. Moliter*, 26 Mich. 444. The authorities seem to be conclusive upon the

proposition that no power can be exercised by the county board except such as are expressly delegated to the board by the legislature and as no such power has been conferred upon county boards I am of the opinion that they have no legal authority to make an appropriation of the kind indicated and that in case such an appropriation were attempted the county board could be enjoined at the suit of any taxpayer from paying out the money so appropriated.

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*Counties—Appropriations and Expenditures—Bridges and Highways*—A county cannot use any portion of a special asylum fund for the improvement of highways.

November 13, 1912.

ALEXANDER WILEY,

*District Attorney,*

Chippewa Falls, Wisconsin.

In your letter of the 11th, you state that section 1317m—12 provides that the county board can raise money by issuing nontaxable four per cent coupon bonds for road purposes; that the county asylum of Chippewa county is more than self-supporting; and you ask whether the county board may issue such bonds and have the annual payments and interest taken care of by the money derived from the insane asylum and poor farm of Chippewa county. You state that the law provides that all moneys that come into the hands of the trustees shall be placed in a separate fund by the county treasurer, and you ask whether the county board may each year appropriate enough money from this special fund to pay the interest and the payments of these bonds.

Sec. 604g of the Stats. provides in part:

“Any such county board may create an asylum fund out of the moneys received from the state and from all other sources and such appropriations as may be made from time to time by said board; such fund shall be charged with all moneys paid out for or on account of such asylum.”

The money so set aside would be a trust fund and cannot properly be used for any other purposes than those for which

it is so appropriated. See *Weik v. Wausau*, 143 Wis. 645; *Oconto City Water Supply Co. v. City of Oconto*, 105 Wis. 76; *Rice v. City of Milwaukee*, 100 Wis. 516.

In my opinion the money from this fund cannot be used to pay the interest and principal of the bonds issued for highway purposes.

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*Counties—County Boards*—A county which has adopted the policy of insurance in the state fund pursuant to ch. 603, Laws 1911, may rescind its action and return to the method of insuring in private companies.

November 20, 1912.

MR. S. C. DUNWIDDIE,

*District Attorney,*

Janesville, Wisconsin.

In your favor of November 16th you request my opinion on the question:

“Can a county which has adopted the provision of ch. 603, Laws of 1911, rescind that action and insure again in private companies?”

This department has ruled that a county board may rescind its action in voting to insure under ch. 603, and may return to the method of insuring in private companies.

While the supreme court held in *Northern Trust Company v. Snyder*, 113 Wis. 516, that a county board has only such powers of legislation in purely local matters as are delegated to it by the legislature, and that consequently the grant of power to change from the fee to the salary system of compensating sheriffs did not include authority, after having once changed to the salary system, to restore the fee system, it appears that such ruling was based on the fact that the fixing of sheriffs' fees was a matter regulated by general law and not a matter within the board's general powers of local legislation.

In the instant case the board has express power “to cause the county buildings to be insured” etc. Sub. 4, sec. 669, Wisconsin Stats. It thus appears that ch. 603 merely adds to an existing power in permitting a different kind of insurance. I do not think that the power to insure under ch. 603

*Counties—County Board—Municipal Judge—Salaries*—The County Board of Vilas county has no power to change the salary of the municipal judge, as fixed by ch. 228, Laws 1895.

December 12, 1912.

MR. GEORGE E. O'CONNOR,

*District Attorney,*

Eagle River, Wisconsin.

In your favor of December 5th, you ask for my opinion as to whether the county board can change the salary of the municipal judge of Vilas county, and if so, whether such change can be made to take effect during the term of office of the judge.

Chapter 228, Laws of 1895, creates the municipal court for Vilas county, and sec. 14 provides that the salary of the judge thereof:

“shall be \$500 per year, and shall be paid out of the county treasury as the salaries of other county officers are paid and shall be in full for all services rendered by said court in criminal cases.”

This section also provides that it shall be lawful for the judge to charge and retain the same fees in civil actions that are allowed to justices of the peace and one dollar in addition thereto.

“It must be conceded that the county board has no general power of legislation.” *Northern Trust Co. v. Snyder*, 113 Wis. 516, 531.

Such board has only:

“Such powers as were expressly granted by statute or necessarily implied therefrom.” *Fredrick v. Douglas County*, 96 Wis. 411, 418.

I find nothing in ch. 228, Laws of 1895, giving the county board any power to change the salary of the municipal judge.

Sec. 694 of the Stats. provides that “the county board at their annual meeting shall fix the amount of salary which shall be received by every county officer, including county judge” etc., but the supreme court has said that the judges

of municipal or inferior courts "are certainly not county officers." *Milwaukee County v. Halsey*, 149 Wis. 82, 91. You will note that ch. 228, Laws of 1895, seems to regard the municipal judge of Vilas county as a county officer for it provides in the section already quoted for the payment of his salary "as the salaries of *other* county officers are paid", but I do not think that such assumption in the law is to be taken as an enactment that, for the purpose of fixing his compensation, such municipal judge is to be regarded as a county officer. Even if the municipal judge of Vilas county be regarded as a county officer within sec. 694, it might well be held that the special provisions of ch. 228, Laws of 1895, as to his compensation, control over the general provisions of sec. 694. See *Kollock v. Dodge*, 105 Wis. 187, 195. I am, therefore, of the opinion that the county board has no power to change the salary of such judge.

*Counties—County Board*—County board may designate a county depository at a special meeting.

January 8th, 1913.

WILLIAM B. COLLINS,  
*District Attorney,*  
 Sheboygan, Wisconsin.

In your favor of the 21st ult., you state that your county board failed to designate a depository for county moneys at their regular meeting, as provided by sec. 693 of the Stats.; that a special meeting has been regularly called for the purpose of designating a county depository, and you submit the following question:

"Has not the county board the same right to designate a county depository or depositories at a special session regularly called that it would have at a regular session?"

Subdivision 6 of sec. 693 makes provision for proper notice to be given and for the designation of a county depository at the annual meeting of the county board. Under subdivision 7 of said section we find the following provision:

"If at any time after designation is made the board shall for good and sufficient reasons deem the security insufficient it may

require a new bond and if in its opinion the public interest requires it may vacate, revoke or modify such designation and may at any special session, after giving written notice as herein required, again designate a depository or depositories for the remainder of the current calendar year, subject to the approval of a bond as hereinbefore required."

Section 669 provides that the county board of each county shall have the powers therein designated "at any legal meeting."

Among the powers enumerated is the following (under subsec. 15):

"The county board of each county shall have the power at any legal meeting: \* \* \* to perform all other acts and duties which may be authorized or required by law."

The county board is therefore authorized to do at a special meeting what it may legally do at a regular meeting. Your question is therefore answered in the affirmative.

## OPINIONS RELATING TO CRIMINAL LAW.

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*Criminal Law*—"Intent to defraud" a necessary part of the criminal act of uttering checks upon bank when maker has no funds as defined by sec. 4438a Wis. Stats.

March 21, 1911.

MR. CHAS. E. BRIERE,

*District Attorney,*

Grand Rapids, Wisconsin.

You state that on the first day of the month B issued a check on a local bank postdating the check five days so that the same was payable on the 5th of the month, at the same time, informing the party to whom it was delivered, that on the first of the month when the check was drawn he had no money in the bank but would try and get some if he could and pay it on the day it was payable. That the check was duly presented on the fifth day of the month and payment refused because the maker had no funds and that the same has remained unpaid more than five days, and you ask whether under this statement of facts a crime has been committed under sec. 4438a of the Wisconsin Stats.

Sec. 4438a provides that:

"Any person who shall make, sign, utter and deliver an instrument in writing commonly known as a bank check, with intent to defraud, without having money on deposit where such check is made payable shall if such check is presented and remains unpaid for five days after it becomes payable and payment thereof is refused because the maker has no funds on deposit with which to pay such check be punished by fine of not more than one hundred dollars or by imprisonment in the county jail not more than one year."

Upon your statement of facts and in view of the fact that penal statutes must be liberally construed, I am constrained

to answer your inquiry that, in my opinion, the maker of the check in question is not liable. The language of the statute is that any person who shall make, sign, utter and deliver a bank check "*with intent to defraud*" shall be liable, etc. From your statement of facts it appears that at the time of making and uttering the check in question the maker thereof expressly notified the party that he had no funds in the bank but agreed that he "would try and get some if he could and pay it on the day it was payable." I do not think that, under the statement of facts, a conviction could be had under the statute as very clearly an intent to defraud could not be proven where the maker had expressly stated that he had no funds in the bank upon which the check was drawn.

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*Criminal Law—Public Officers*—Oil Inspector cannot settle or compromise violations of the law relating to Inspection of Illuminating oils.

March 23, 1911.

HON. LOUIS F. MEYER,

*State Supervisor of Inspectors of Illuminating Oils.*

In reply to your favor of March 22nd, 1911, in which you enumerate certain violations of the Wisconsin statutes concerning the sale of illuminating oils by the Petroleum Products Sales Co. of Cleveland, Ohio, and the city officials of the cities of Juneau and Horieon, and in which you state that these alleged violations of the law were not intentional either on the part of the Petroleum Products Sales Co. or the two cities mentioned, and in which you ask the opinion of this department as to whether these cases "can be settled out of court honorably and satisfactorily to the State of Wisconsin", I am compelled to advise you that the Law makes no provision whatever for the settlement of violations of the Statute concerning the sale of illuminating oils, etc., out of court. I am unable to find any authority authorizing you as State Supervisor of Inspectors of Illuminating Oils to make any settlement or compromise with those who have intentionally or unintentionally violated the Statute; neither is there any power given by law to the district attorneys or to the Attorney-General to compromise or settle any such violations.

*Criminal Law—Prize Fight*—Boxing match distinguished from prize fight. If a contest develops into a prize fight, it is the duty of the sheriff to stop it.

September 12, 1911.

HON. WINFRED C. ZABEL,

*District Attorney,*

Milwaukee, Wisconsin.

This department is in receipt of your communication under date of the 11th inst. requesting an opinion as to whether or not the contest scheduled to take place in Milwaukee on the 15th inst. between Adolph Wolgast and William McFarland would be in violation of sec. 4520 of the Stats. of this state providing that:

“Any person who shall, by previous arrangement or appointment, engage in a fight with another person for the possession of any prize, belt or other evidence of championship, or for any other cause shall be punished” etc.

You request this opinion upon a statement of facts submitted to you by Mr. F. X. Boden, at whose request you have asked for the opinion.

From the statement of facts thus submitted and which you say that you are “not in a position at this time to either affirm or dissent from” and from the agreement entered into by and between the National Athletic Club and the said Ad. Wolgast, which is attached to such statement, it would appear that an effort has been made to avoid the possibility of a conflict with the aforesaid section, and that the proposed contest is to be of the nature of a “boxing match” as distinguished from a “prize fight.”

See Biennial Report & Opinions of Attorney-General, 1906, page 276, and cases cited.

Whether or not, however, the contest will prove to be a “boxing match” or a “prize fight” will depend entirely, in my opinion, upon the facts as they may develop in the ring. Should the contest develop into a prize fight it would of course be the duty of the sheriff to stop it,

*Criminal Law—Boarding House—Hotel—Inn*—A boarding house is not included within sec. 4438b.

July 12, 1912.

MR. JAMES KIRWAN,  
*District Attorney,*  
Chilton, Wisconsin.

In your favor of July 9th you ask:

1. Whether "a private house where a woman takes into her home a few boarders for a season or so?" is a hotel or inn within sec. 4438b, Wis. Stats.

The house in question is a boarding house rather than an inn. The distinction between the two is:

"In a boarding house the guest is under an expressed contract at a certain rate for a certain length of time, but in an inn there is no express engagement." 4 Words & Phrases, 3624; Beal, Innkeepers & Hotels, Sections 32, 291; Scanlon, Hotels & Boarding & Lodging houses, Section 77; 22 Cyc. 1072.

Statutes like sec. 4438b being penal are subject to strict construction. 22 Cyc. 1092; Beal, Innkeepers & Hotels, Sec. 442.

I attract your attention to the fact that boarding houses were at one time protected equally with hotels and inns by ch. 251, Laws 1889, and ch. 106, Laws 1905. Both these chapters were, however, repealed by the revision of 1898. See sec. 4978 Wis. Stats.

2. Whether a man who "was trusted by special agreement for two months at five dollars a week until he would get his pay from a company he was working for which always holds back one month's pay" and who did not leave surreptitiously but in open day came and packed up and left in full view of landlady, is liable for criminal arrest and prosecution under sec. 4438b or any law of Wisconsin.

That under the circumstances stated a man is not liable to prosecution under sec. 4438b results from the fact that he did not obtain food, etc., "at any hotel or inn". Nor do I know of any other law which makes it a crime to fail to pay a board bill or to remove one's baggage without making such payment in the absence of some fraudulent representation or concealment, etc.

*Criminal Law—Lotteries—Gambling—County Fairs—State Aid*—The drawing of an automobile by the holder of season tickets to a county fair is prohibited by law.

July 12, 1912.

HON. JAMES A. FREAR,  
*Secretary of State.*

In your favor of July 8th you enclose letter from D. S. Stewart, president of the Langlade County Agricultural Society in which it is stated that the Langlade County Agricultural Society intend to put on a sale of season tickets numbered from one to four thousand, and to stimulate the sale it is planned to give an automobile to some holder of a season ticket, the manner of drawing to be decided by the holders of tickets assembled in the grandstand on the last day of the fair, and you ask whether such procedure would be lawful and whether the society would violate ch. 36, Laws 1911, so as to be disqualified to receive state aid under ch. 536, Laws 1911.

There can be no doubt but that the proposed drawing would constitute either gambling or be a lottery and thus be unlawful. Sections 4523, 4529 and 4537, Wis. Stats. 1898; *Horner v. U. S.*, 147 U. S. 449, 463; Opinions of Attorney-General for 1908, page 286.

Chapter 36, Laws 1911, provides that:

“The president and secretary of each society . . . claiming state aid shall file with the secretary of state a sworn statement . . . that at such fair all gambling devices whatsoever . . . have been prohibited and excluded from the fair grounds” etc.

It may be that the proposed drawing could be conducted without the use of any gambling devices though it seems to me that it would be necessary to use some paraphernalia which would come within the meaning of these words. Webster's new international dictionary defines a gambling device to be “A device used in gambling—interpreted sometimes to include anything actually used for the purpose, at others only such as are adopted, designed and used for the purposes by professional gamblers.” Probably the statute was directed

particularly at the last mentioned class, but even if restricted to such devices only, in view of the fact that the drawing itself is plainly prohibited by the statutes, particularly sec. 4537 previously cited, so that it could not be lawfully carried on, this question is probably unimportant.

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*Criminal Law—Arrest—Mississippi river*—One who has committed an offense on the Wisconsin side of the channel of the Mississippi river may be pursued and arrested on the Iowa side of such channel, while still upon the river.

July 18, 1912.

HON. JOHN A. SHOLTS,

*State Fish and Game Warden.*

In your letter of July 17th you inclose a letter from District Attorney M. R. Munson, of Prairie du Chien, Wisconsin, bearing date May 31st last, in which he states that the local deputy game warden arrested a resident of Iowa for illegal fishing in the Mississippi river on the Wisconsin side of the channel; that the arrest was made on the Iowa side of the channel; that, upon the advice of the district attorney of Grant county, the case was dismissed upon the defendant's paying the costs incurred; that at the time of making the arrest the net was confiscated by the warden, but that, when he came to return it to the fisherman, it was gone, having been stolen from his boathouse, and that no trace of it has since been discovered; that the defendant then sued the deputy warden for the value of the net and recovered a judgment, the court holding that the warden was not authorized to confiscate the net on the Iowa side of the channel.

Mr. Munson asks whether your department maintains that the deputy wardens can go into Iowa waters to make arrests and confiscate contrabands where our laws have been violated and the party has taken flight to Iowa waters for safety, and you desire my opinion upon the question.

The case of *Roberts v. Fullerton*, 117 Wis. 222, holds that a Minnesota officer is not justified in seizing a net staked to the bottom of the Mississippi river on the Wisconsin side, under a law of Minnesota prohibiting such net, the claim being made

that the clause in the enabling act referred to by Mr. Munson and art. IX, sec. 1 of the Const. of Wisconsin, both of which recite that the states shall have concurrent jurisdiction of offences committed on the waters of the Mississippi river, authorized such seizure. The court, however, after citing from a decision in support of its conclusion, says:

“That statement, of course was not intended to exclude the mere arrest or service of process on the river as regards causes of action accruing elsewhere.”

Later in the decision it says:

“All the cases in other jurisdictions that we have discussed are to the effect that it [the clause in the enabling act] pertains only to acts or causes of action on the water or in some way connected with the navigation thereof, or floatable purposes of some kind, or to the service of process upon persons while on the water in some sense.”

In the case of *Wedding v. Meyler*, 192 U. S. 573, the court hold that the term “concurrent jurisdiction” as used in the enabling act, includes “as part of that right, the right to serve process there with effect.”

It is therefore my opinion that a person who has committed an offence within the boundaries of the state of Wisconsin may legally be pursued and arrested while still upon the waters of the Mississippi river, even though it be on the opposite side of the channel from this state. It seems to me that it would also follow that in such cases as that referred to by Mr. Munson the warden could also confiscate the net that had been illegally used in this state, although, at the time of confiscation, the net was on the Iowa side of the channel.

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*Criminal Law—Larceny—Embezzlement*—One who, as bailee, converts to his own use property of another left in his custody, may be prosecuted for either larceny as bailee or embezzlement.

The county in which the conversion took place is the proper county in which to bring such prosecution.

July 22, 1912.

JAMES KIRWAN,  
District Attorney,  
Chilton, Wisconsin.

Your letter of the 18th at hand, in which you give the following statement of facts:

A, living in Calumet county, owns a small brass foundry. B, living at Green Bay, orders from A certain brass castings in frames, which B sends him. A replies that it will be necessary that B furnish him the necessary brass for making such castings. The brass is sent and certain castings made, leaving a quantity of the brass so furnished in A's hands. Upon B's ordering more castings, A replies that he has used the brass so left in his hands in doing work for others and has no brass on hand; that he is sorry he did so, and that he has no money to pay for same; and you ask whether A is guilty of any criminal offense and, if so, what offense.

Sec. 4415 Stats., as amended by ch. 208 of the Laws of 1909, provides the punishment for larceny of various degrees and concludes as follows:

“Whoever, being a bailee of any chattel, money or valuable security, shall fraudulently take or fraudulently convert the same to his own use or the use of any person other than the owner thereof, although he shall not break bulk, or otherwise determine the bailment, shall be guilty of larceny, and may be convicted thereof on an indictment or information for larceny, and upon such conviction be punished as hereinbefore prescribed.”

A bailee who fraudulently or unlawfully converts property to his own use is guilty of larceny under this section. *Bergeron v. Peyton*, 106 Wis. 377; *State v. Leicham*, 41 Wis. 565.

Under this section embezzlement is larceny. *Vought v. State*, 135 Wis. 6.

The purpose of that part of the section quoted

“was to abolish the distinction between conversion by a bailee of an entire thing, as a quantity of property in a package of some kind, and the unlawful breaking of the package and conversion of part or all of the contents,—whether preceded by the element of breaking bulk with intent to permanently deprive the owner of the thing appropriated or not,—making the

latter a statutory class of larcenies, differing only from ordinary larcenies by absence in the former of the element of trespass in gaining original possession, which is essential to the latter." *Burns v. State*, 145 Wis. 373.

To constitute larceny by a bailee it is not necessary that the intent to unlawfully convert the property exist at the time of receiving it, but it is sufficient if such intent existed while he had charge of the property, and that it was carried into effect by the conversion of such property to his own use. *State v. Schingen*, 20 Wis. 74.

A belief at the time of the conversion that the bailee has ability to return or pay for the property, and an intent to return or pay for it when called upon to account for it, does not relieve the act of its fraudulent and criminal character. *State v. Leicham*, *supra*.

It appears to me that under the facts stated A is guilty of an offense under this section. The cases cited by you all have reference to statutes that do not contain the provision quoted from our statute. All that is decided in *Hill v. State*, 57 Wis. 377, so far as it relates in any way to this question, is that, to constitute the crime of larceny of a horse, there must have existed a felonious intent at the time of the taking. In that case the prosecution was under a different section of the statute. Sec. 4418 Stats., as amended by ch. 277 of the Laws of 1909, provides in part as follows:

"Any bailee, . . . trustee, agent, . . . who, by virtue of his business or employment, . . . shall have the care, custody, or possession of or shall be entrusted with the safe keeping . . . of any goods, wares, merchandise, . . . or any other property or thing which is the subject of larceny, belonging to such other person, corporation, copartnership or association, shall embezzle or fraudulently convert to his own use or to the use of any other person except the owner thereof," shall be punished, etc.

"Embezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted, or in whose hands it has lawfully come. It differs from larceny in the fact that the original taking of the property was lawful, or with the consent of the owner, while in larceny the felonious intent must have existed at the time of taking." *Moore v. U. S.*, 160 U. S. 268.

Of course, the larceny here spoken of is the common-law larceny. At common law there was no such offense as larceny by a bailee. Our statute has changed that. (See 10 Am. & Eng. Ency. of Law (2nd ed.), 987.)

“To constitute a conversion so as to make out a case of embezzlement, the owner must be deprived of his property or money by an adverse using or holding.” 10 Am. and Eng. Ency. of Law (2nd ed.) 994.

I believe that A could be successfully prosecuted under this section.

You also ask as to the proper county in which to prosecute, the brass having been shipped to A from Milwaukee—if the intent to convert was formed while the brass was being transported to him.

To constitute either offense the intent must be coupled with the overt act: the intent alone is not punishable. The actual conversion took place when the brass was manufactured by A into articles for others than B. In other words, the crime was committed in Calumet county. Furthermore, as to prosecutions under section 4418 Stats., that section expressly provides that they may be brought in any county in which the person charged had possession of the property alleged to have been embezzled.

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*Criminal Law—Railroads*—The word “car” as used in sec. 1809r, Stats., includes baggage and express cars.

July 24, 1912.

B. A. HUSTING,

*District Attorney,*

Fond du Lac, Wisconsin.

In your letter of the 23d you state that you have received inquiries regarding the interpretation of sec. 1809r (ch. 402, Laws of 1907). You state that the particular point asked about is the word “cars”—whether it means cars of any kind and includes baggage and express cars, or whether it means only passenger coaches.

The section referred to provides:

“It shall be unlawful for any railroad company doing business in the state of Wisconsin to run over its road, or part of

its road, outside of the yard limits, any passenger train with three cars or less, with less than a full passenger crew, consisting of one engineer, one fireman, one conductor and one brakeman; for more than three cars, two brakemen; and on trains of more than three cars the said brakemen shall not be required to perform the duties of the baggagemaster or express agent while on the road. Nothing in this section shall apply to trains picking up a car or cars between terminals in this state, or to trains propelled by electricity."

In order that the proper interpretation of this section may be had, I would also call your attention to sec. 1809s, being a part of the same chapter, enacted in 1907, and which reads as follows:

"It shall be unlawful for any railroad company in the state of Wisconsin to run over its road, or any part thereof, outside yard limits, any freight train of three cars or more with less than a full train crew consisting of five persons: one engineer, one fireman, one conductor, and two brakemen."

You will note that the distinction made in the two sections is as between freight trains and passenger trains; no distinction is made as to the particular kind of cars included in such train.

In the case of *Nichols v. The State*, 68 Wis. 416, the following definition of a car is quoted from Webster: "A carriage for running on the rails of a railway."

And the court hold that an express car is a freight car within the meaning of the statute punishing the breaking and entry of a freight car.

The court further state:

"Both courts and juries may take judicial notice of what everybody knows respecting the common incidents of railway and express carriage . . . among these is the fact that an express car is a railroad car."

In volume 1 of Words and Phrases is the following general definition:

"The term 'car' is generally used in this country for any wheeled vehicle used for carrying goods or passengers on a railroad, whether the road be a tramway over the streets of a city to be operated by horses or a more extended road to be worked by steam. *State v. Lang*, 14 Mo. App. 247, 249."

In my opinion the baggage and express cars are to be counted as a part of the number of cars in determining the number of brakemen required under the section in question.

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*Criminal Law—Larceny—Embezzlement—Partnership*—A person running a cheese factory, and paying its patrons the money received from the sale of the cheese, less a specified amount per pound for making it, is not a partner of such patrons.

A partner may be prosecuted for embezzlement of partnership property.

Under the facts stated, the person may be prosecuted for either larceny or embezzlement.

August 19, 1912.

JAMES KIRWAN,

*District Attorney,*

Chilton, Wisconsin.

In your letter of the 12th you give substantially the following statement of facts:

One John Brown is the owner of a cheese factory located in Calumet county. December 1st, 1911, he rented said factory to one John Down, said lessee to run the factory for its patrons and to receive  $1\frac{7}{8}$  cents per pound for making the cheese. The owner of the factory was to sell the cheese, collect the money and pay the patrons what was due them. He allowed the lessee to perform those duties, take out what was due him for making the cheese and pay the balance to the owner, to be by him distributed among the patrons. The owner claims that the lessee has failed and neglected to account for some \$1,391 so collected by him in excess of the amounts he was entitled to for making the cheese. The cheese was made and sold in Calumet county and delivery of same to the railroad company for shipment was made at Manitowoc county. The money was paid to the lessee in Manitowoc county; and you ask:

“What criminal offense is John Down, the cheesemaker, guilty of, if any?”

If I correctly understand the facts, this is one of those cheese factories, so common in our state, which is run by the owner

for the benefit of the patrons. He attends to all business connected with the making and disposing of the cheese, collects the money and divides the proceeds among the patrons in proportion to the milk delivered by each to the factory. For his services he receives a certain amount for each pound of cheese made. This amount is fixed and is in no way dependent upon the price for which the cheese may be sold. He has no share in the profits and is not liable for any part of the losses. Under such circumstances he is not a partner of the patrons (*Sargent v. Downey*, 45 Wis. 398), so that the owner of the factory, Brown, was in no sense a partner of the patrons, but merely their agent. In the absence of some agreement conferring it upon him, he would have no authority to delegate any part of his duties as such agent to the lessee, Down. Much less was Down a partner of the patrons. But, even though he were such a partner, he could still be prosecuted for embezzlement.

(See next to the last paragraph of section 4418 Stats., as amended by chapter 277 of the Laws of 1909.)

In an opinion given you under date of July 22nd last the elements constituting the offenses of larceny as bailee and embezzlement were quite fully discussed and authorities cited. I see no reason why Down could not be prosecuted under either sec. 4415 Stats., as amended, or sec. 4418 Stats., as amended, under the facts stated.

You also ask:

“In what county was the crime, if any, committed, and should prosecution be brought in Manitowoc or Calumet county?”

The crime, if any, was committed in the county in which the conversion took place. You do not state enough of the facts so that it is possible to say with any degree of certainty in which county this occurred. It might well be that the conversion was not complete until his refusal to account for the money received. Of course, if, prior to that time, he did actually and knowingly use any of the money for his own benefit, that would constitute a conversion. In my former opinion I called your attention to the provision of sec. 4418 Stats., as amended, that prosecutions under that section may be brought in any county in which the person charged had possession of the property alleged to be embezzled.

*Criminal Law*—Polygamy must be prosecuted in the county where second marriage took place.

August 20, 1912.

CHARLES H. GILMAN,

*District Attorney,*

Friendship, Wisconsin.

Under date of August 16th you submit the following:

“One Charles Garlock of the town of Jackson, Adams county, Wisconsin, having a lawful wife living, obtained a license in Adams county to marry one Emma Dalton, December 22, 1911, and was thereafter married in Marquette county December 27, 1911. In which county should proceedings be instituted?”

In answer to this question I will refer you to sec. 4679 of the Stats., which provides that all criminal cases shall be tried in the county where the offense is committed, except where otherwise provided by law. Sec. 4577 of the Stats. provides:

“Any person having a husband or wife living who shall marry another person shall be deemed guilty of polygamy, and shall be punished therefor by imprisonment in the state prison not more than five years nor less than one year, or by fine not exceeding one thousand dollars nor less than two hundred dollars.”

In the case of *Gise v. Comm.*, 81 Pa. St. 428, it was decided that the crime was completed at the time and place where the second marriage was accomplished.

In the case of *Wall v. State*, 32 Ark. 565, it was decided that an indictment for bigamy must be found in the county where such marriage was celebrated. In the present case, the marriage having taken place in Marquette county, I am of the opinion that the prosecution should be instituted in that county.

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*Criminal Law*—Bastardy.

1. A bail bond in a bastardy proceeding is not a lien on real property of the defendant.
2. Until bond is forfeited court cannot hold the sureties.
3. In a bastardy case judgment may be taken in absence of defendant if court has jurisdiction.
4. Such judgment may be enforced in a sister state.

September 11, 1912.

JAMES KIRWAN,  
*District Attorney,*  
Chilton, Wisconsin.

You state that in June, 1912, one John Jones was arrested under a warrant charging him with bastardy and that he had his preliminary examination and was held over for trial at the October term of the circuit court, bail being fixed at \$1,000, which a farmer furnished. You state that this bondsman has sold his farm and will move to South Dakota. You inquire:

"1. Is such bond so given and filed in circuit court a lien in any way on the bondsman's real or personal property?"

"2. What, if anything, can the plaintiff do in such case to hold such bondsman liable or to make sure of the defendant's appearance to answer and stand trial at next term of court?"

"3. Can anything be done under sec. 1534 before said term of court?"

"4. If defendant should skip out and not appear at trial in October, could we proceed in his absence to empanel a jury and try case and have him legally adjudged father of the child?"

Under sections 4794 and 4795 of the Stats. the recognizance or bail bond furnished in the present case is not a lien upon the land, tenements, real estate or other property of the one who signed it. Sec. 4795 provides:

"No recognizance taken by any court or magistrate, except as provided in the preceding section, shall bind any lands, tenements or real estate or other property; but such recognizance shall be deemed to be mere evidence of debt."

Sec. 1534 provides:

"If, at the next term of the court to which the accused is recognized or to which the venue has been changed, the complainant shall not have been delivered or shall not be able to attend, or if at any time there shall be any other sufficient reason therefor, the court may order a continuance of the cause from term to term as shall be judged necessary. If the sureties in the recognizance shall at any term of court object to being any longer held liable or if the court shall for any cause deem it proper, such court may order a new recognizance to be taken and the defendant shall be committed until he gives such new recognizance."

It would seem, under this section, that the court can act only at the term of court, which, in this case, is the October term. Until that time the accused is out under his bail bond and I have been unable to find any authority that would lead me to believe that the court could act previous to the said term.

In answer to question 4, I will say that our Supreme Court, in the case of *Baker v. State*, 65 Wis. 50, has decided that, when the defendant in bastardy proceedings is given a recognizance for his appearance in the circuit court, to stand trial, the court has jurisdiction, both of his person and of the subject matter, and that, if he fail to appear, the trial court may proceed to judgment without his presence. Under this ruling the court in question could proceed to judgment in the absence of the defendant, and a valid judgment could be entered. I do not think, however, that the defendant could be extradited if he had left the state previous to the rendition of the judgment, for, as I understand it, he would not, under the decisions of the courts, be a fugitive from justice in such a case, but a judgment recovered in such a case is entitled to recognition and can be enforced in another state. See *Ind. v. Helmes*, 21 Iowa 370; *Schueler v. Schiler*, 209 Ill. 522.

See also, on the enforcement of a judgment of a sister state, 23 Cyc. 654.

Even a judgment rendered upon a forfeited recognizance taken for a violation of a penal law can be enforced.

See *Spencer v. Brockway*, 1 Ohio 259; s. c. 13 Am. Dec. 615; see also *Ark. v. Bowen*, 3 App. Cases (D. C.) 537.

It is very evident, therefore, that, even in case the defendant should leave the state and the sureties on his bail bond also, you would have a remedy against both of them, although they could not be brought back on a requisition.

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*Criminal Law—Arson*—An information for burning of a barn under the first part of sec. 4401 must allege that the burning was in the nighttime and that the barn was located within the curtilage of a dwelling house.

September 23, 1912.

JOHN A. METZLER,  
*District Attorney,*  
Montello, Wisconsin.

You state that some time ago a barn in your county situated within the curtilage of a dwelling house was burned in the nighttime by one not the owner; that the house was not burned. You submit form of information and inquire whether the action should be brought under sec. 4401 or sec. 4402 of the Stats.

In answer I will say that the facts submitted by you would bring the crime within the purview of sec. 4401, the barn having been within the curtilage of the dwelling house and having been lighted and burned in the nighttime.

The form of the information submitted is defective in two respects: first, it does not allege that the crime was committed in the nighttime, and, second, it does not state that the barn was located within the curtilage of a dwelling house. It is necessary to allege both of these facts, as they are essential elements of the crime described in the first part of sec. 4401.

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*Criminal Law—Burglar's Tools*—Under facts stated party may be charged with offense under sec. 4411a.

September 26, 1912.

JAMES KIRWAN,  
*District Attorney,*  
Chilton, Wisconsin.

In yours of September 25th, you state that about five years ago in your county you convicted three noted nonresident burglars for burglary and that they were sentenced to the state prison; that Peter Busch was one of these and was sentenced for five years; that he was released on the 2nd of March last; that September 14th, 1912, at night, Busch and two pals and crooks were traveling along a country road in Calumet county, on foot; that Busch had \$421 on his person; that one of his pals wanted some of it and, upon the refusal of Busch to give it to him, he stepped behind Busch and shot him in the back, the bullet going through the body and out at the

chest; that Busch fell and the fellow shot him again, in the thigh, and then fled; that Busch will not tell who shot him or give any description of the man or his name and says he wants no one arrested; that Busch was found yelling and that the sheriff and doctors removed him to a hospital in your county; that he had on his person, in his pockets, some thirty or more file skeleton keys, with keys on ends of each, and that a common file and a window "jimmy" were found on the side of the highway the next day, near the place where the shooting occurred, but that you cannot prove or learn who had or carried them, or how they came to be there; that Busch had no revolver on his person when found, but that a week later it is said that a revolver was found in a beet field near the place where the shooting occurred.

You inquire whether Busch can be charged with an offense for carrying burglars' tools, under sec. 4411a of the Stats., as amended by ch. 88 of the Laws of 1911.

Sec. 4411a reads as follows:

"Any person who shall knowingly have in his possession any nitroglycerine, or other explosive, thermite, engine, machine, tool, implement, device, chemical, or substance designed and adapted for cutting, or burning through, forcing, or breaking open any building, room, vault, safe, or other depository, knowing the same to be designed and adapted for such purpose, with intent to use or employ the same therefor in order to steal from any building, room, vault, safe, or other depository any money or other property, shall be punished by imprisonment in the state prison not more than ten years or in the county jail not more than one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment."

Although the statute does not mention skeleton keys, it nevertheless enumerates tools, implements, devices, machines, etc., under which terms a skeleton key would be included. A key is certainly a device, implement or tool by which a building may be broken into. Courts have universally held that injury to a building is not essential to constitute breaking. (See 5 Am. & Eng. Ency. of Law, 2nd ed., p. 46, Note 1, and cases cited.)

Opening a door with a key is expressly mentioned as one of the various ways in which a breaking may be effected in *Nichols v. State*, 66 Wis. 420.

I am therefore of the opinion that the person in question, Peter Busch, may be charged with the crime described in said sec. 4411a.

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Supplementing opinion of Sept. 26.

October 2, 1912.

JAMES KIRWAN,  
*District Attorney,*  
Chilton, Wisconsin.

Yours of September 28th has been received, submitting a further inquiry in regard to the matter of the man who was found with the skeleton keys and money in his possession. You ask whether it would be advisable to include in the information the charge that the window jimmy, the keys and skeleton keys which were found in the vicinity of the place where this man was found were in his possession.

In answer I would say that it seems you have no proof showing that these were in his actual possession and, as there were others with him before he was shot, under the facts stated in your letter of September 25th, I do not think it advisable to allege in the information the possession of these keys and the window jimmy.

In the case of *People v. Edwards*, 93 Mich. 636, the court held that it was error to instruct that the possession of the burglary tools of one defendant, both intending to use them in a joint undertaking, is the possession of both.

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*Criminal Law—Husband and Wife*—In a prosecution for adultery, a wife may not testify for or against her husband.

October 1, 1912.

MR. L. H. MEAD,  
*District Attorney,*  
Shell Lake, Wisconsin.

In your favor of September 26th, you raise the question as to whether a woman may testify in a case where her husband and another woman are being prosecuted for adultery. The supreme court of Wisconsin has said:

“It is well settled that neither husband nor wife can be witness at common law for or against the other in prosecutions

for adultery. \* \* \* The case at bar does not come within any exception, nor is there any statute in this state making the wife a competent witness against the husband in such a case." *Crawford v. State*, 98 Wis. 623, 624.

I do not find that the statutes of this state have been changed in this regard since the above decision.

In a separate prosecution of the woman defendant, the wife's testimony would be admissible. *State v. West*, 118 Wis. 469. The fact that the wife's testimony is important and material as to such woman defendant is ground for the court to exercise its discretion to order a separate trial. *Emery v. State*, 101 Wis. 627, 638. *Novkovic v. State*, 149 Wis. 665, 671.

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*Criminal Law—Evidence*—1. In the trial of a defendant for having in his possession burglarious tools with intent to use them for burglary and knowing their nature, it may be shown that defendant committed and was convicted of burglary once before to show his knowledge of the nature of the tools and his intent to use them.

2. Record of court is best evidence of conviction.

3. Burglarious tools found within short distance of where man was found wounded may be put in evidence.

October 11, 1912.

MR. JAMES KIRWAN,  
*District Attorney,*  
 Chilton, Wisconsin.

Under date of September 23rd, you submit some additional questions concerning the case of *State v. Daily*, who was bound over for trial under sec. 4411a of the Stats. The questions submitted are as follows:

1. Can the state legally show at the trial that Joseph Daily was and is Peter Busch, the former convicted burglar, so as to show that he is such a man who is likely to use said burglary tools for burglary?

2. Can such identification be made orally by witnesses who knew Busch and were present in court when sentenced, or must the record proof thereof be offered in court?

3. Can the state legally show that on the side of the highway near where Daily was found there was lying a window

jimmy and some more skeleton keys, and a half mile away a loaded revolver?

It appears from your former letter that Joseph Daily is the same person who was convicted of burglary under the name of Peter Busch in your county about five years ago, and who was released from state prison on the 2nd day of March, 1912. Sec. 4411a of the Stats., defining the crime under which he is bound over, provides as follows:

“Any person who shall knowingly have in his possession any \* \* \* machine, tool, implement, device, chemical or substance designed and adapted for cutting, or burning through, forcing or breaking open any building, room, vault, safe or other depository, knowing the same to be designed and adapted for such purpose, with intent to use or employ the same therefor in order to steal from any building, room, vault, safe or other depository any money or other property, shall be punished,” etc.

Under this crime it is necessary to prove that the defendant knew that the burglarious tools in his possession were designed and adapted to be used for burglary. It must also be shown that the defendant intended to use and employ the same for such criminal purpose. The general rule is that on the trial of a person for a particular offense, evidence tending to prove that he has committed other distinct offenses is incompetent and generally prejudicial. See *Topolewski v. State*, 130 Wis. 244, and cases cited on page 249. But there are exceptions to this rule, the exception permitting proof of other offenses so connected with the one charged as to be evidentiary of the intent essential. In the crime described in said sec. 4411a, intent is not only an essential element of the offense, but it is of the very essence of it, and evidence of the intent in addition to the principal act must be given to warrant a conviction. Underhill on Criminal Evidence, in sec. 89, lays down the rule: “Evidence of similar or independent crimes (but never of those which are dissimilar) is often relevant to show the presence of some specific intent.” As guilty knowledge must also be shown under the express wording of this statute, the commission of the former crime may be introduced in evidence to show that the defendant knew for what purposes these tools or implements could be used.

In the case of *Commonwealth v. Day*, 138 Mass. 186, which was a trial on an indictment alleging the possession by defendant of certain tools and implements named, designed and intended to be used by him for burglarious purposes, it was held that:

“\* \* \* evidence that the defendant had twice used the same or similar tools or implements in the commission of burglaries, once ten days and once about five months before the time of the offense alleged in the indictment, is admissible to show the knowledge and purpose alleged in the indictment and necessary to be proved.”

It is true that the former burglary was committed five years previous, but in view of the fact that this party has been in state prison and was released in March of this year, about six months previous to the commission of this crime, it seems to me that evidence of the former crime can be admitted. I realize that the question is very close, and that our court has not definitely passed upon a case in which the facts were similar to those in this case, but under the general rule it would seem that this case comes within the exception. The fact that this defendant committed the same offense and only recently was released from prison would indicate that he had guilty knowledge or had the intent to use the burglarious tools which were found in his possession for the purpose of committing the crime of burglary. His former crime is very convincing to the mind of his intent to commit the same offense in the case before us. I am, therefore, of the opinion that evidence of the former crime is admissible.

In answer to your second question as to whether this must be shown by oral proof, I will say that the identity of the defendant must, of course, be shown by some person who knows him as he was convicted under a different name from the one which he now bears. But the best evidence of the conviction is the record of the court. See *Kirschner v. State*, 9 Wis. 140, 145; *Ingalls v. State*, 48 Wis. 647, 655; *Paulson v. State*, 118 Wis. 89, 101.

In answer to your third question, I will say that it must be answered in the affirmative except so far as it pertains to the revolver. Unless you have some additional proof or facts

which would connect this revolver in some way with this crime, more definitely than the simple fact that it was found, I should say that it is inadmissible.

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*Criminal Law—Prisoners*—A person sentenced to an indeterminate sentence under ch. 390, Laws of 1889, who has escaped may be retaken even after the period when his term would have expired.

October 12, 1912.

MR. DAN'L WOODWARD,

Waupun, Wisconsin.

In your favor of October 11th you state that in the afternoon previous you were called to the phone by a man giving his name as Jos. J. Byrnes who stated that he was at a hotel at Columbus, Ohio, and that he was an escaped convict from the prison at Waupun having gone out on parole in 1891 and having violated his parole by not reporting to the warden and by leaving the state. He asked whether you desired his return to Wisconsin to complete his sentence and stated that he was willing to return if you demanded it. You further state that you later had a telegram from the chief of police at Columbus asking whether Byrnes was wanted for violation of his parole from your institution. You further state that on the records of your institution it appears that one Jos. Byrnes was sentenced to serve an indeterminate sentence of not less than one year nor more than five years under ch. 390 of the Laws of 1889 and that he was paroled February 12, 1891. You further state that none of the officers of your institution would be able to identify Byrnes and that your records are very incomplete so that you have no adequate description of him. You ask several questions as to your duty and liability in the matter and desire my opinion prior to the meeting of the state board of control next Monday.

In the very short time given me for investigation I am unable to make any careful examination of the statutes and decisions applicable to the situation. I find, however, that the constitutionality of ch. 390, Laws of 1889, was seriously questioned by our supreme court in two cases, *In re Pikulik*, 81 Wis. 158, and *In re Schuster*, 82 Wis. 610. These cases decide,

however, that the question is not one that can be raised by habeas corpus proceedings but only by writ of error. Sec. 4724 limits the time within which a writ of error may be issued to "two years from the date of the entry of" a judgment to be reviewed. This limitation has been held constitutional. *O'Donnell v. State*, 126 Wis. 599. It would thus appear that Byrnes would have no way of raising the question of the constitutionality of the law under which he is sentenced. Ch. 75 of the Laws of 1901 amended sec. 4733 of the Stats. by adding a sentence to the effect that:

"When any convict confined in said prison shall escape therefrom the time during which he unlawfully remains absent from the prison after such escape shall not be computed as any part of the term for which such prisoner was sentenced to be confined in the prison."

This was held to be merely declaratory of the common law in *In re Macauley*, 123 Wis. 31, so that it would be no objection to retaking Byrnes, that the term for which he was sentenced has long ago expired unless the time that he is absent from the prison be excluded.

As to the difficulty of identifying Byrnes it seems from your statement of the situation that it would probably be impossible for you to sufficiently identify him so as to bring him back over his objection, but since he seems willing to return, this question can hardly arise at present. Should it arise later you would have to be guided by circumstances and would at least have his admission that he is the person he now states himself to be. I am inclined to think that this is enough to warrant you in retaking him and probably also sufficient to protect you in case of a suit for damages on his part for false imprisonment, though should he later on make a demand for his release it would be well for you to go over the situation carefully before refusing to comply with it.

As to the policy of spending the public funds in bringing Byrnes back to Wisconsin and keeping him for his unexpired term at the public expense I cannot advise you. Possibly you can secure further information in regard to his present condition and reasons for desiring to surrender himself from the police or other authorities at Columbus, which information should aid you in arriving at a decision as to the advisability of sending an officer for him.

*Criminal Law—Embezzlement—Larceny—Venue—Information*—A prosecution for embezzlement cannot be brought in a county in which the property embezzled has never been in the possession of the accused.

Allegations as to ownership of property embezzled. Amendment of allegations in information.

October 17, 1912.

MR. JAMES KIRWAN,  
*District Attorney,*  
Chilton, Wisconsin.

In your letter of the 12th, you refer to my letters of July 22nd, and August 19th last, and give some further facts substantially as follows: John Brown owns a cheese factory in your county which he leased to one Down. An agreement was entered into between Brown, Down and the patrons of the factory that Down should run the factory, Brown should sell the cheese and collect the money and be responsible to the patrons for the same, less the compensation to be paid Down for making the cheese. That Brown allowed Down to sell the cheese and collect the money and that Down has failed to account for same. That the money was paid Down in Manitowoc county and that as to a part of it at least it was never brought into Calumet county. You ask in which county prosecution should be brought.

This question was very fully answered in my opinion of August 19th, referred to by you. Certainly as to money never in Calumet county no prosecution could be brought there. It appears to me prosecution should be brought in Manitowoc county.

You also ask whether to charge that the money belonged to Brown or to the patrons. It would appear from your statement that there was no relationship of trust as between the patrons and Down. The man entrusted by the patrons was Brown. He in turn trusted Down. I believe that as between Brown and Down, Brown was the owner of the money and he is the man from whom it was embezzled. In any event, it appears to me that each time Down converted money it constituted one embezzlement, even though the money belonged to the several patrons. It was owned by them jointly. It was one fund not yet apportioned, so that no one of the patrons

could claim any particular portion thereof. If I am correct as to this, then it is not very material whether it be alleged to be the property of Brown or of the patrons. Under sec. 4703 of the Stats. the allegation as to ownership may be amended after proof.

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*Criminal Law*—One on probation under suspended sentence may be convicted of another crime, and his sentence to the reformatory is not void even though he is not strictly a first offender. On the completion of the reformatory sentence he may be sentenced for the first crime.

October 25, 1912.

STATE BOARD OF CONTROL.

From the facts stated in your letter of October 22nd, and from the papers submitted therewith, it appears that on May 19, 1911, Frank Krzewinski was convicted of burglary in the municipal court for Milwaukee county and was by Judge Backus placed on probation for two and one-half years under a suspended sentence; that in July, 1912, he was convicted of larceny in the district court of said county and sentenced by Judge Neelen, who was unaware of his previous conviction, to the Wisconsin state reformatory for one year. You ask my opinion as to whether he should be removed from the reformatory and taken before Judge Backus for sentence or whether he should be so taken after the expiration of his sentence to the reformatory.

The fact that Krzewinski was on probation under suspended sentence at the time of his second conviction is obviously no reason why that conviction and the sentence pursuant thereto were not legal, nor is such second sentence void merely because sec. 4944c (ch. 358, Laws of 1907) provides that "Persons convicted the first time of a felony" etc. may be committed to the reformatory, while Krzewinski, at the time of his sentence thereto, had been previously so convicted. Such sentence even if subject to reversal is not void but stands as the judgment of a court having jurisdiction and is valid until set aside in a direct proceeding. *In re Graham*, 74 Wis. 450; *In re Schuster*, 82 Wis. 610.

The detention of Krzewinski at the reformatory is therefore legal and I do not think that he should be removed therefrom and taken before Judge Backus for sentence on the burglary conviction until after the expiration of his sentence to the reformatory. See 1 Bishop on Criminal Law, sec. 953; *Ex parte Bunding*, 47 Mo. 255; *People v. Groves*, 38 Hun. (N. Y.) 382.

You do not state whether Krzewinski was placed on probation under suspended sentence pursuant to sec. 4725a or pursuant to secs. 4734a to 4734m but it seems evident that in either case the court has ample power to terminate the probation and sentence him at any time within the period of probation, and that a conviction and service of a sentence during such period of probation would not affect the right to exercise such power.

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*Criminal Law*—Under facts stated trustees of the cemetery association are not guilty of a criminal offense.

November 25, 1912.

JAMES KIRWAN,

*District Attorney,*

Chilton, Wisconsin.

Under date of November 21st, you say that in 1855 six or seven men in a certain town in your county formed a cemetery association and bought seven acres of land, platted the same into burial lots and recorded said plat in the office of the register of deeds; that such association was not regularly incorporated; that it had a meeting on a certain day each year and elected a president, secretary and treasurer, and three trustees, which made a board of directors, each holding office three years and one of the trustees going out of office each year; that many have been buried in this cemetery; that it has always been fenced in; that it is located on Main street in an incorporated village; that inside the fence on the four sides is a narrow strip of land reserved, in which shade trees are planted and, inside of the trees, is a wagon drive, all around the lots; that there is also a drive across the center of the cemetery, and between the sidewalk and the fence on Main street there is also a line of shade trees, but that the trees are on the

cemetery ground; that some of the trees are getting old and decayed and the roots of some are throwing up the plank sidewalk in front of the cemetery, making it dangerous for pedestrians; that it is proposed by the association to cut down the old trees along Main street and also some of the poor ones inside the fence along Main street and to build a cement walk along Main street in the spring and replace the trees cut down by young and healthy ones of some kind.

You also state that the association never adopted rules and regulations as provided by sec. 1453, Stats. 1898.

You state that the application has been made to you to arrest some of the board of trustees for cutting down trees along Main street, both outside and inside the cemetery fence. You inquire whether these trustees are guilty of any criminal offense, and what.

In answer I will say that, under the facts stated, I know of no offense that such members of the board of trustees have committed for which they could be criminally prosecuted.

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*Criminal Law—Food—Oleomargarine*—One who delivers oleomargarine from a wagon or cart must have upon such wagon or cart the placards prescribed by sec. 4607d, Stats., even though he has displayed in his place of business the signs required by law.

December 19, 1912.

HON. J. Q. EMERY,

*State Dairy and Food Commissioner.*

In your letter of the 18th, you refer to the following clause found in sec. 4607d:

“ \* \* \* or who shall sell or deliver from any cart, wagon or other vehicle, upon the public streets or ways, oleomargarine, butterine or any similar substance without having on the outside of both sides of said cart, wagon or other vehicle a placard, in uncondensed Gothic letters not less than three inches in length, ‘licensed to sell olemargarine.’ ”

You state that you are asked the following question:

“Is it sufficient if retail dealers in olemargarine have a sign displayed in their place of business stating that olemargarine is sold here, or whether it is necessary to also have a sign on the dealer’s wagon when delivering the same?”

And you ask my official opinion upon the matter.

By referring to sec. 4607d it will be noted that the statute attempts to make it absolutely certain that oleomargarine shall not be delivered or furnished to any person without adequate notice of its character. This statute, as I understand it, was taken from the Massachusetts law. In any event, they have a statute very similar to this one. In a case in which a defendant was charged with delivering from a vehicle upon a public street or way, oleomargarine, without having the vehicle placarded, as provided by law, the court said:

"Whoever delivers oleomargarine from a vehicle upon the public streets must have upon his vehicle the placard described. This statute \* \* \* requires that everyone who thus delivers oleomargarine \* \* \* shall carry along with him upon his vehicle a public notice that he is licensed to sell oleomargarine." *Comm. v. Crane*, 162 Mass. 506; 39 N. E. 187.

It is true that this question was not before the court in that case, but the language used is significant.

"The natural import of the words of any legislative act, according to the common use of them when applied to the subject matter of the act, is to be taken as expressing the intent of the legislature unless the intention so resulting from the ordinary import of the words be repugnant to sound, acknowledged principles of public policy." *People v. May*, 3 Mich. 598.

Subsec. 1 of sec. 4971 of the Stats. provides that in the construction of statutes

"All words and phrases shall be construed and understood according to the common and approved usage of the language."

In my opinion a retail dealer in oleomargarine delivering oleomargarine from a wagon or other vehicle must have such vehicle placarded, as provided by statute, even though he have displayed in his place of business the signs provided by law.

I am not unmindful of the line of cases in which it is held that when necessary to the spirit and intent of the document or statute the word "or" should be construed in a copulative, and not in a disjunctive sense. See *Atty. Gen. v. West Wis. Ry. Co.* 36 Wis. 466, 486.

It is barely possible that it might be so construed in this case, but I do not feel at liberty to give it that construction until a court has passed upon it. (See supplemental opinion of Dec. 23, 1912.)

*Criminal Law—Food—Oleomargarine*—The fact that no license is issued by the state for the sale of oleomargarine in no way affects or modifies the opinion of Dec. 19th regarding placards on carts or wagons from which oleomargarine is delivered.

December 23, 1912.

HON. J. Q. EMERY,

*State Dairy and Food Commissioner.*

In your letter of the 23rd, you refer to my opinion of the 19th inst., relative to the interpretation of a part of sec. 4607d Stats. You call my attention to the wording that is required upon the placards to be placed upon both sides of the cart or other vehicle from which oleomargarine is sold or delivered, such wording being, "Licensed to sell oleomargarine."

You state that, so far as you are aware, there is no law of this state authorizing any person to issue such licenses, and you ask whether these facts, in view of the peculiar wording required, would in any way modify the opinion given.

While it is true that the state does not require a license for the sale of oleomargarine, it may, under its police power, require such reasonable notice to the consumer as it may deem necessary for the prevention of fraud. The legislature has seen fit to prescribe the words "Licensed to sell oleomargarine." Presumably they had in mind the licenses issued by the Federal government. In any event, it in no way modifies the opinion heretofore given.

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*Criminal Law—Food—Health—Requisitions*—A person who leaves unsanitary milk in a can on a stand by the side of the highway for the purpose of having the same collected by the driver of a collecting wagon for a condensing factory is guilty of delivering such milk to the factory under sec. 4607b—5, Stats.

A requisition for the apprehension and return to this state of one charged with bastardy will not be granted.

Such a requisition will be granted for one charged with the offense defined in sec. 4580, Stats.

January 13, 1913.

HON. JAMES KIRWAN,  
*District Attorney,*  
Chilton, Wisconsin.

In your letter of January 9th, you state that a farmer in your county delivers his milk to a collecting wagon owned by a condensing factory; that such milk proves to be very dirty, unclean and unsanitary, and you ask whether such farmer is guilty of any criminal offense under ch. 67 of the Laws of 1903.

In a subsequent letter you refer also to ch. 215 of the Laws of 1909 and ch. 267 of the Laws of 1911 and ask what offense, if any, the farmer is guilty of.

Sec. 4607b—5, Stats., as it now stands provides in part:

“No person shall by himself, his servant, or agent, or as the servant or agent of any other person, \* \* \* sell or offer for sale, furnish or deliver, or have in possession or under his control with intent to sell or offer for sale, or furnish or deliver to any person, firm or corporation \* \* \* any unsanitary milk.”

In your letter of the 10th, you state that the farmer places cans of milk on a stand by the highway and the factory team and man collect the cans and haul the milk to the factory.

In my opinion this is a sufficient delivery by the farmer to the factory to bring the farmer within the terms of this section. Ch. 267, Laws of 1911, repeals several sections of the statutes, but does not affect the section quoted above.

You also ask whether the amendment to sec. 4415, Stats., by ch. 208 of the Laws of 1909 does away with embezzlement under sec. 4418, Stats., or whether embezzlement will still lie under the latter statute, for embezzlement by bailee.

Under date of July 22nd last, you were furnished with an opinion fully covering this inquiry. I see no reason for reaching a different conclusion at this time.

In your letter of the 10th, you state that John Brown, under twenty-one, had sexual intercourse with Mary Jones, an unmarried girl about sixteen years of age, and that a bastard child was born to her; that John Brown is now in one of the Dakotas, and you ask whether he can be extradited for bastardy.

No. (See Rule 18 of the Executive office, relating to applications for requisitions.)

You refer to ch. 576 of the Laws of 1911, in this connection. This chapter makes the wilful refusal to support, or the wilful neglect of, an illegitimate child a crime and provides a punishment therefor. It in no way changes the offense of bastardy. You ask whether this man can legally be extradited for rape on a female under the age of consent and whether such age is not eighteen years in this state now.

I presume you have reference to the second offense described in sec. 4580, Stats. That portion of the section reads:

“Any man who commits fornication with a sane female of previous chaste character under the age of eighteen years shall be punished,” etc.

A requisition may be had for the apprehension and return to this state of one charged with this offense.

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*Criminal Law*—Under facts stated the owner of the cheese factory is not guilty of any criminal offense.

A criminal warrant may be sworn out by any person knowing the facts.

January 31, 1913.

MR. JAMES KIRWAN,  
*District Attorney,*  
Chilton, Wis.

In your letter of the 28th, you state that one William Benin owns a cheese factory in Calumet county; that he held a meeting therein with his patrons in the spring of 1912, and a large number agreed with him to haul their milk to said factory during the season of 1912, and he was to make the same into cheese, sell the cheese and pay the patrons respectively once or twice a month what was coming to each for the cheese made from his milk, for which he was to receive as his compensation 2 cents per pound; that he employed his brother, Fred Benin, to run said factory and make the cheese and that on or about November 20th, 1912, Fred ran away, taking with him some \$500.00 of the money so received for cheese made from the milk delivered by the patrons; that William Benin has been called on a number of times to pay the patrons the amounts due them, but that although he admits his liability, he has not as yet made such payment.

You ask:

“Will any criminal action under these facts lie against William Benin, the factory owner, who during all the year 1912, lived in and ran a cheese factory in Outagamie county, miles away from the factory in which his brother Fred did the work?”

In my opinion, under the facts stated William Benin is not guilty of any criminal offense.

You next ask:

“Can any one of the patrons swear out a warrant and make it stick against Fred for stealing and embezzling this money if the money under the facts is his brother William’s. Under such circumstances, could any one but William Benin swear out such warrant?”

Any person knowing the facts may make the complaint. It is not necessary that the complaint be sworn to by the person whose money was taken.

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*Criminal Law—Anti-Lobby Law*—The provisions of the Anti-Lobby law apply only to persons employed to influence legislation by special interests for a pecuniary consideration.

January 31, 1913.

HON. F. M. WYLIE,

*Chief Clerk of the Senate.*

I have your communication under date of January 27th, in which you state that under date of January 16th, you were notified by George R. Lockwood, attorney, of St. Louis, Missouri, that he was sending you by express a package of pamphlets which he requested you to distribute to the senators; that on receipt of the pamphlets you found they were in the nature of a brief against Woman Suffrage which probably will be before the legislature this winter; that you wrote Mr. Lockwood that you doubted the legality and propriety of accommodating him in this matter in view of the Wisconsin Statute regulating lobbying, and especially sec. 4482h, which requires twenty-five copies of all briefs presented to members to be first filed with the secretary of state; that you have also had requests of a like nature from other sources, either ask-

ing that you personally look after the distribution of literature bearing upon public questions or that you provide for their distribution to the senators and members of the legislature, and that in view of the fact that these requests are likely to be quite numerous during the session of the legislature, you ask for my official opinion as to whether or not such practices are in violation of the Anti-Lobbying Law of this state.

The so-called Anti-Lobbying Law of the state is included in secs. 4482a to 4482j, both inclusive, of the Stats.

Sec. 4482a provides that:

“Every person, corporation or association which employs any person to act as counsel or agent to promote or oppose in any manner the passage by the legislature of any legislation *affecting the pecuniary interests of any individual, association or corporation as distinct from those of the whole people of the state*, or to act in any manner as a legislative counsel or agent in connection with any such legislation, shall within one week after the date of such employment cause the name of the person so employed or agreed to be employed, to be entered upon a legislative docket as hereinafter provided. It shall also be the duty of the person so employed to enter or cause to be entered his name upon such docket.”

Secs. 4482b and 4482c require the secretary of state to prepare and keep two legislative dockets in conformity with the provisions of the act and also provide the entries that shall be made therein.

Sec. 4482d requires that legislative counsel and agents required to have their names entered upon the legislative docket, file with the secretary of state within ten days after the date of making such entry a written authorization to act as such, signed by the person or corporation employing them.

Section 4482h provides that:

“It shall be unlawful for any person employed for a *pecuniary consideration* to act as legislative counsel or legislative agent, as defined by secs. 4482a to 4482g, inclusive, to attempt personally and directly to influence any member of the legislature to vote for or against any measure pending therein, otherwise than by appearing before the regular committees thereof, when in session, or by newspaper publications, or by public addresses, or by written or printed statements, arguments or briefs, delivered to each member of the legislature, provided that before delivering such statement, argument or brief, twenty-five copies thereof shall be first deposited with the secretary of state.”

From the foregoing excerpts from the Anti-Lobbying Law it is very plain that the legislature intended to regulate the practices of those endeavoring to influence legislation for a *pecuniary consideration* paid to them by those having a special or pecuniary interest therein. The law does not in any manner attempt to limit or restrict the activities of citizens of the state or other persons having a purely public interest in legislative matters pending before the legislature. Neither does it seem to be the intention of the law to foreclose the members of the legislature from any source of information upon any question pending before it, the only restriction in this respect being that if "any person employed for a pecuniary consideration to act as legislative counsel or legislative agent as defined by secs. 4482a to 4482g inclusive" desires to deliver to the members of the legislature a written statement, argument or brief, then in that case twenty-five copies thereof shall be first deposited with the secretary of state. This provision, however, does not apply to any other persons than those described in the act as legislative counsel or legislative agents and it does not apply in any sense to the ordinary citizen who is not employed for a pecuniary consideration, but whose interest in the pending legislation is purely of a public or patriotic character.

It seems to me that it is entirely appropriate that all of the pamphlets and documents mentioned in your letter be brought to the attention of the legislators as all sources of information upon matters pending before them should be free, open and easy of access. The pamphlets, newspaper articles, magazines and other documents mentioned by you in your letter not only do not offend against the provisions of the statute (unless they emanate from a legislative counsel or a legislative agent), but they must be very helpful to the members of the legislature in securing a comprehensive knowledge of many of the subjects pending for their consideration and determination and it seems to me should rather be commended than condemned.

*Criminal Law—Appropriations and Expenditures—Counties—Municipal Corporations*—Where money received from the forfeiture of a bail bond is erroneously sent to the state treasurer and the legislature desires to refund same, it should be refunded to the county from which received; no municipality within the county has any interest therein.

February 13th, 1913.

HON. WILLIAM L. SMITH,  
*Assembly Chamber.*

In your letter of this date you state:

“On January 9th, 1911, the county treasurer of Milwaukee county forwarded to the state treasurer the sum of \$980, which sum represented a forfeiture on a bail bond in a criminal case entitled *State v. Jos. F. Brown*. The bail bond in this case amounting to \$1000 was declared forfeited by the circuit court and paid to the clerk of said court on July 7th, and this amount less two per cent retained by Milwaukee county, was forwarded, as above stated, by the county treasurer to the state treasurer. Jos. F. Brown, whose disappearance caused the forfeiture of bond, later appeared or was apprehended and it is now desired to return to his mother, who furnished his bail, the amount paid in by her.

“Should this sum (\$980), now in the state treasury, if refunded by legislative act, be returned to the county of Milwaukee or to the city of Milwaukee?”

In an opinion rendered to Hon. A. H. Dahl, then State Treasurer, under date of August 29th, 1911, my predecessor held that this money should have been retained by Milwaukee county, and not paid in to the state treasurer, but that there was no authority for the refunding by the treasurer of the money to Milwaukee county, in the absence of a legislative act. This opinion was based upon the cases of *State ex rel. Guenther, State Treasurer, v. Miles*, 52 Wis. 488, and *State v. Wettstein*, 64 Wis. 234. In the first of these two cases the court says:

“We conclude, therefore, that moneys collected from this source [i. e. forfeited recognizances in criminal cases] belong to the county.”

It follows from this that the money should be refunded to Milwaukee county. The city of Milwaukee has no interest in it.

*Criminal Law—Requisitions*—A justice of the peace may require security for costs in criminal actions under the same circumstances as like security may be required in civil actions.

A requisition will not be issued when it appears that the accused was not in this state at the time the offense is alleged to have been committed.

February 14th, 1913.

HON. HARRY C. WILBUR,  
*Executive Clerk.*

In your letter of the 3rd, you enclose a letter from Chas. E. Briere, district attorney of Wood county, supplementary to an inquiry regarding a requisition for one Earl Van Ert. Mr. Briere asks:

“Whether or not the justice of peace is justified in a case like the present, where the complaining witness states that she does not care to prosecute, but prefers to get married, to demand security for costs, under sec. 4771, of the complaining witness in order that the county would be protected in the money expended in promoting the marriage.”

Sec. 4771 of the Stats. relating to criminal cases in justice courts provides:

“The justice may require of the complainant to give security for costs as in civil cases security may be required of the plaintiff, and if he refuse the justice may dismiss the complaint.”

It is a matter of common knowledge that in civil actions the justice almost invariably refuses to demand security for costs of a plaintiff residing in the same county in which the justice is located. In criminal actions the justice ought not to require security for costs unless he would also require security for costs under similar circumstances in a civil action. In this Van Ert matter, there has been considerable correspondence. The sister of Miss Rieck was in here yesterday and I had a long conversation with her regarding the case.

Of course, the district attorney will not and ought not to be seeking for an excuse to avoid asking for a requisition in cases of this kind. From what I was told yesterday by Miss Rieck's sister, it appeared to me probable that Van Ert departed from the state prior to the birth of the child. If that

is true, it would appear that he was not guilty under sec. 4587c prior to such departure. If I am correct in this then if charged under that section, he would not be a fugitive from justice under the decisions of the court. Upon that question, I would call your attention to an opinion given to the governor under date of May 15th, 1912.

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*Criminal Law—Gambling—Machine described is a gambling device.*

February 17th, 1913.

CLIVE J. STRANG,

*District Attorney,*

Grantsburg, Wisconsin.

In your letter of February 13th you have asked my opinion as to whether certain machines that are being operated in your county are gambling devices and whether the parties operating them are violating the law in respect to gambling.

You state that, to operate said machines, a nickel is first dropped into the slot, causing three wheels to revolve; that the player receives chips all the way from two in number up to twenty, depending upon the place where the wheels stop; that, if they stop in certain places, no chips are received; that the chips are in turn played back into the machine and the results are the same as if a nickel were used, with one exception that, whenever a nickel is played, the player gets a piece of gum worth, probably, two cents or less, and that, when the chip is played, nothing is received unless the player is lucky enough to get a number that will entitle him to a certain number of chips; that these chips are not good for their face value of five cents, except for soft drinks, ice cream and tobacco and goods of that class.

There is no question in my mind that, under the statement of facts submitted by you, the machines are gambling devices and kept and operated in violation of sec. 4529 and also sec. 4531 of the Stats.

This department has held that a certain cigar machine, where the person who puts a nickel into the machine, receiving probably his money's worth by getting a cigar, but where he has a chance of getting additional cigars, is a gambling de-

vice; that, while the purchaser had a chance of obtaining additional cigars, the proprietor was running the chance of losing them. This was held to be gambling. (Opinion rendered to Colonel O. G. Munson, private secretary to the Governor, under date of February 17th, 1907, published in Biennial Report and Opinions of Attorney-General for 1908, page 286. See authorities cited therein.)

It is evident from your statement that chance is the controlling element, and that skill does not enter into the manipulation of the machines to any considerable degree. I am therefore of the opinion that said machines are gambling devices and that their use is prohibited by our statute.

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*Criminal Law—Oil and Oil Inspection—Corporations*—A corporation may be proceeded against by criminal information for violation of the oil inspection law.

The clerk or agent making the sale of oil that has not been inspected, is also liable to the penalty provided by sec. 1421e Wis. Stats. 1911.

February 28th, 1913.

W. J. RUSH,

*District Attorney,*  
Neillsville, Wisconsin.

In your letter of February 24th you call my attention to sec. 1421e Wisconsin Stat. 1911, requiring the inspection of petroleum oils, and especially to the following provision, found therein:

“Any person who shall personally, or by clerk or agent, sell or offer for sale or for use, or who shall in any manner dispose of or attempt to dispose of any oil,”  
without such inspection shall be liable to fine.

You state that complaint has been made against the Standard Oil Company for violation of this section and ask whether the word “person,” used in said section, includes corporations and, if it does, what the procedure is to collect such fine from a corporation.

You also ask whether the agent of the person violating the provisions of this section quoted would also be liable, the stat-

ute using the term "by" clerk or agent, and not the term "also" the clerk or agent.

Sec. 1636l, Wisconsin Stats. 1911, provides in part:

"No person by himself, his servant or agent, or as the servant or agent of any other person, or as the servant or agent of any firm or corporation, shall sell," etc.

In an opinion given by my predecessor to the State Dairy and Food Commissioner under date of January 29th, 1912, it was held that the word "person" as used in that section includes corporations, and, to support such opinion, the following were cited: Subsec. 12 sec. 4971 Wis. Stats. 1911; *Fisher v. Horicon Iron & M. Co.* 10 Wis. 351; *Signitz v. Garden City Banking and Trust Co.* 107 Wis. 171; 7 Am. & Eng. Ency. of Law (2nd ed.) 845; 5 Thompson on Corporations, sec. 6434.

I see no reason for reaching a different conclusion as to the provision to which you refer, and therefore advise you that, in my opinion, the word "person" as used therein includes corporations.

In an opinion given to Honorable E. M. Griffith, State Forester, under date of October 18th, my predecessor held that a town maintaining a nuisance may be proceeded against by indictment or information and as authorities for such procedure cited: 20 Am. & Eng. Ency. of Law (2nd ed.) 1231; *Town of Byron v. State*, 35 Wis. 313; *Town of Saukville v. State*, 69 Wis. 178.

In an opinion given by my predecessor to the district attorney of Calumet county under date of October 14th, 1911, he held that corporations may be prosecuted criminally. In an opinion by former Attorney-General Gilbert, found on page 902 of the Biennial Report and Opinions of the Attorney-General for 1908, will be found a discussion of this question, holding that the procedure is by information and referring to sec. 4734 of the Stats. The same was held in an opinion found on page 282 of the same report.

I agree with these opinions and advise you that the proper procedure in prosecuting a corporation criminally is by information. I believe, too, that a corporation could be proceeded against civilly for the penalty imposed by this section. (See Biennial Report and Opinions of the Attorney-General for 1906, page 219.)

I am also of the opinion that the clerk or agent who actually makes the sale is liable to the penalty and that the principal is made liable by the terms of the statute. The language used was intended to make it clear that the principal could not shield himself by the claim that the offense was in fact committed by his clerk or agent, but it was not intended, in my opinion, to render the clerk or agent making the sale immune from prosecution.

“A person who is acting under the authority of a superior is guilty if his acts are illegal, even if ordered to do so by his superior. Anyone who is acting as agent for another cannot escape the consequences of a criminal act by showing that he did the act for and under the direction of his principal.” 8 Am. & Eng. Ency. of Law (2nd ed.) 299.

To the same effect, see: Wharton's Criminal Law (9th ed.) secs. 94a, 244, 247; Clark's Criminal Law, pp. 99, 101; Bishop on Criminal Law, secs. 355, 631, 658.

The one who actually makes the sale is guilty, even if acting as agent for another. *Welch v. State*, 145 Wis. 86, 88.

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*Criminal Law*—A postdated check issued under the facts stated is not in violation of sec. 4438a.

March 4th, 1913.

J. A. METZLER,

*District Attorney,*

Montello, Wisconsin.

You state that a merchant living in the village of Montello, Wisconsin, was indebted to a firm in Milwaukee for goods purchased from them; that the account had run for some time, when the firm, on the 16th day of February, 1913, demanded payment through their attorney at Montello; that the merchant claimed that he had no money on hand with which to pay same and requested that the company accept three checks on the Montello State Bank for the amount and that the checks be dated ahead, one February 25th, 1913, and two others March 8th, 1913; that, after considering same, the company agreed to accept same, providing the merchant would have money in the Montello State Bank to meet the checks when

due, to which the merchant agreed; that the check that was dated February 25th, 1913, had been endorsed by the company at Milwaukee and transferred to the First National Bank of Milwaukee, who in turn endorsed same and sent it to the Montello State Bank for collection, on the 25th day of February, the check was protested, by reason of the merchant's having no funds on deposit with which to meet the same.

You inquire whether said merchant has committed an offense under sec. 4438a of the Stats.

It is provided by this section as follows:

“Any person who shall make, sign, utter and deliver an instrument in writing commonly known as a bank check, with intent to defraud, without having money on deposit where such check is made payable, shall, if such check is presented and remains unpaid for five days after it becomes payable and payment thereof is refused because the maker has no funds on deposit with which to pay such check, be punished by fine of not more than one hundred dollars or by imprisonment in the county jail not more than one year.”

This statute was enacted in ch. 136 of the Laws of 1887. The revisors changed it to its present form by inserting the words “it becomes payable” in lieu of the words “its date.”

I find no decision of our Supreme Court to guide us in interpreting the meaning of this statute. Neither have I been able to find a statute of another state expressed in the same words.

It has generally been held by the courts that a postdated and post-payable check would not come within the terms of statutes somewhat similar to ours; that false representations or pretenses cannot be predicted upon the nonperformance of a future performance or the happening of a future event. It is generally held that a check postdated amounts to nothing more than a promise by the drawee to have the money at the bank for the payment of the check at a future date.

It appears from the statement of facts presented by you that the check in question was given for a pre-existing debt. No fact appears showing that there was any intent to defraud the party to whom the check was given. It was not given to obtain goods, wares and merchandise or to deprive

the party to whom given of anything valuable; it was given for a debt already contracted, prior to the giving of the check.

I call your attention to the following authorities, which have helped me in arriving at my conclusion: *Brown v. State*, 66 Ind. 85 (see note to this case in Am. & Eng. Ann. Cases, vol. 8, p. 1069); *State v. Ferris*, 171 Ind. 562; *Reg v. Walne*, 11 Cox C. C. 647; *Lesser v. People*, 73 N. Y. 78.

I am therefore of the opinion that the merchant in question should not be proceeded against under said sec. 4438a.

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*Criminal Law—Elections*—Subsec. 4 of sec. 11–24 may apply to a candidate for office if he “*wrongfully*” suppress his nomination papers.

March 20th, 1913.

MR. L. OLSON ELLIS,

*District Attorney,*

Black River Falls, Wis.

In your favor of the 18th, you ask whether subsec. 4 of sec. 11–24 of the Stats. applies to a candidate for office, or whether it refers only to persons to whom he may have handed his papers for the purpose of putting them on file.

The section in question provides that:

“Any person who, being in possession of nomination papers entitled to be filed under this act, or any act of the legislature, shall wrongfully either suppress, neglect or fail to cause the same to be filed at the proper time in the proper office, shall on conviction be punished” etc.

It is difficult to conceive how a candidate could “*wrongfully*” suppress his own nomination papers. Certainly he would not do it wrongfully if he did it of his own free will and not from improper motives or inducements. If, however, the nomination papers were suppressed “*wrongfully*” within the meaning of that word as used in the section, I see no reason why a candidate for office is not included within the general words of the section.

## OPINIONS RELATING TO EDUCATION.

*Education—Public Officers*—Construction of secs. 698 and 704 R. S., as amended by ch. 518, Laws of 1905 and ch. 433, Laws of 1909.

\$250.00 limitation of expenses repealed. No limitation except must be "Actual and necessary."

November 22, 1911.

HON. C. P. CARY,

*State Superintendent of Public Instruction,*

Your favor of the 22nd inst. is received. In substance your query raises the question whether the limitation of \$250.00 for expenses of a county superintendent provided for in ch. 518 of the Laws of 1905 is removed by the provisions of ch. 433 of the Laws of 1909.

Ch. 518, Laws of 1905, amended sec. 704 of the Wisconsin Stats. of 1898 relating to the compensation of county superintendents of schools and provided in part that in addition to the salary fixed by the county board such board may allow such superintendent such sum in addition to his compensation and other allowances specified above as he shall certify he has actually and necessarily expended in defraying traveling expenses while engaged in the discharge of the duties of his office, provided that no more than \$250 shall be allowed for such expenses in any one year to each superintendent.

Ch. 433 of the Laws of 1909, amendatory of sec. 698 of the Stats., contains certain provisions clearly amendatory to sec. 704 since they relate to the same subject matter and distinctly qualify the provisions of ch. 518 of the Laws of 1905.

Ch. 433 provides in part as follows:

"In all cases where the superintendent district comprises the entire county the county board of supervisors of every

county at the annual meeting next preceding the election of such county school superintendent shall fix the amount of the annual salary which shall be received by the superintendent of schools and shall allow such actual and necessary traveling expenses incurred in the proper discharge of his duties within and without the county as may be reasonable and just, the same to be audited, allowed and paid in the same manner as other claims against the county are audited, allowed and paid."

The provisions of ch. 518 providing in such cases that "The county board may allow such superintendent such sum in addition to his compensation" etc. not to exceed \$250, have been interpreted as leaving it discretionary with the board whether such additional expenses should be allowed or not. The language of ch. 433 is mandatory and provides that in addition to his salary and certain other requisites the county board "shall allow such actual and necessary traveling expenses \* \* \* as may be reasonable and just" and further provides as above quoted that the claim shall be audited and allowed by the county board in the same manner as other claims are audited and allowed.

In my opinion the provisions of ch. 433 of the Laws of 1909 should be construed as removing the \$250 limitation and further as making it mandatory upon the part of the county board to allow the actual and necessary traveling expenses incurred in the proper discharge of the duties of such school superintendent, the only limitation thereon being that such expenses must be actual and necessary for the proper discharge of the duties of his office.

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*Education—Schools*—The distance between a child's home and a school in an adjoining district is to be measured, pursuant to sec. 4350 Wis. Stats. (ch. 543, L. 1911), "by the nearest traveled highway," the same as the distance between such child's home and a school in that district.

September 17, 1912.

HON. C. P. CARY,

*State Superintendent of Public Instruction.*

In your favor of September 17th you ask my opinion as to whether the distance between a child's home and a school in

an adjoining district, referred to in subdivision 3 of sec. 4350, ch. 543, Laws 1911, is to be measured along the nearest traveled highway, or in an air-line.

Subdivision 3 of sec. 4350 provides that:

“In cases where there are children of school age in a home located more than two miles from the schoolhouse in the home district and transportation is not provided, the distance to be measured by the nearest traveled highway, and there is another school in an adjoining district located at a distance of one-half mile or more nearer to such home, the children of school age shall be privileged to attend the nearer school,” etc.

While the specification of the method of measurement “by the nearest traveled highway” in the first clause of the sentence, and the absence of such specification in the latter clause might raise some inference that a different method of measurement was there intended, I do not think that such is the correct interpretation in the absence of any reason for a different measurement in the two instances. The obvious purpose of the statute is to permit a child to attend the nearest school even though in another district where at least one-half mile of travel can be thereby saved. I think that when the statute permits a child to attend a school in an adjoining district, which school is at least a half mile nearer the child's home than the one in its home district, the word “nearer” clearly means nearer when compared in the same way, i. e. measuring the distance in the same manner. The method of measurement “by the nearest traveled highway” specified for ascertaining the distance between the child's home and the school in that district is thus clearly required to be the method of measurement when ascertaining the distance between the child's home and the school in an adjoining district.

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*Education—Contracts*—A contract to convey pupils to a neighboring school district under sec. 496q, subdiv. 3 and 4, does not prohibit the driver from taking others with him on the trip unless expressly contained therein.

School district entitled to aid provided by sec. 496q.

February 14, 1913.

HON. C. P. CARY,

*State Superintendent of Public Instruction.*

Under date of January 23d, you state that a special school district meeting was held in a certain school district in this state, at which it was voted to instruct the school board to close the school, in accordance with the provisions of ch. 618, Laws of 1911, and transport the children to the grades in a district maintaining a free high school; that thereupon a contract for transportation was let and transportation was commenced in September last; that of the pupils who applied for transportation five attended the grades of the public school and the rest went to the parochial school, located in the same town with the free high school; that all children were transported in the same conveyance; that the five attended the public school regularly for twenty-three days, when one family moved from the district, taking four of the public school children with them; that the remaining public school pupil attended quite regularly until recently, when she withdrew from the school for the winter months; that one of the children that was in attendance at the parochial school has now entered the public school and that the transportation wagon takes this child to the public school and the rest of the children to the parochial school, as formerly.

You inquire:

“1. On this statement of facts can the school board prohibit the driver of the transportation wagon, who is under contract to transport the children to the public school, from allowing other children of the district to ride to town for the purpose of attending the parochial school?”

“2. On this statement of facts would the district be entitled to the \$150 special aid granted to districts that comply with all the terms and provisions of ch. 618, Laws of 1911, it being conceded that the children who enroll for transportation and attendance at the public school attend regularly for at least eighty per cent of the time during the school year?”

Sec. 496q of said chapter 618 contains the following provision concerning the contract of transportation in such cases:

“3. The district board or town board of school directors shall in all cases where the school is closed and transportation is provided by a team, enter into a written contract in the name of the district with one or more persons, whereby it is

agreed that such person or persons are to safely and carefully carry or provide for carrying the children to and from the school or schools in the district where provision has been made for their schooling.

“4. The driver of each transportation wagon shall be of good moral character, trustworthy and responsible; shall furnish a safe team and suitable and comfortable bus or wagon well supplied for protections against stormy and inclement weather; such driver shall have control of and be responsible for the good order and behavior of the children while in the conveyance going to and returning from school, and shall prohibit the use of profane or unseemingly language upon the part of the pupils, and shall report all cases of insubordination while on the wagon to the parents and to the school board of the district. Be it also understood that, in all cases where it is practicable, conveyance by interurban, steam railway or automobile shall be equivalent for transportation or conveyance by a team.”

I assume that there is no express provision in the contract in question prohibiting the party who is under contract to transport the pupils from allowing other children of the district to ride with him on the regular trips. In the absence of such a stipulation, having in view the parties to the contract, the situation and circumstances attending them and the object of the contract, I do not believe that the law could be construed to imply that no other proper persons, such as are fit to associate with the pupils, could be conveyed with the children in the same wagon, and the board, in the absence of such a stipulation, has not the right, in my opinion, to prohibit the driver from taking other parties in the same conveyance, unless it clearly appears that such prohibition is necessary to protect the pupils, or that it is otherwise essential to their welfare and success. The provision of the law that interurbans and steam railways may be used for transporting the pupils is a fact to be borne in mind as showing that, as a matter of law, they are not entitled under the contract to be transported alone. In interurbans and steam railways they would necessarily ride with others. The person obligating himself to convey these children may have been induced to accept the terms of the contract for the consideration therein named by reason of the fact that it contained no prohibition against the conveyance of other parties on the same trips. Should the board now prohibit such conveyance and the driver refuse to comply with their demands, I do not believe that he would be violating the

express or the implied terms of his contract, or that it could be said that he was guilty of a breach of contract. It may be a serious question whether the board can legally make a contract prohibiting the driver from allowing other children to ride with him, simply because they are attending a parochial school. This question I do not here pass upon.

The answer to your first question must therefore be in the negative.

In answer to your second question I would call your attention to the following provisions of sec. 496q:

“Whenever the electors of any rural school district maintaining a one or two department rural school or the electors of any town maintaining its schools under the township system of school government shall direct the school board or the town board of school directors to close the district, or any sub-district school, and provide transportation and tuition for all persons of school age who may desire to attend school at a district maintaining a one or two department rural school, or a state graded school, or the grades below the free high school in a free high school district, each such rural school district or sub-district shall receive special state aid in the sum of one hundred fifty dollars annually upon complying with the following conditions:

“(1) Transportation and tuition shall be provided for at least thirty-two weeks, including legal holidays, for all persons of school age desiring to attend school during the school year.”

As the district in question has complied with the express provision of this statute, although only one child is now attending the public school, it seems plain that the district is entitled to the aid therein provided.

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*Education—Union Free High Schools*—A Union Free High School district may be dissolved under the provisions of sec. 490a.

It is proper for the district clerk to give notice of election for such dissolution.

March 6, 1913.

HON. D. S. LAW,

*District Attorney,*

La Crosse, Wisconsin.

In your communication of the 6th inst. you state that:

“Last year the question of the establishment of a union free high school in a district comprising a portion of the towns of

Holland and Onalaska was submitted to the electors of said district pursuant to the laws governing school elections; that a majority of the votes were in favor of the establishment of the union free high school and that a school certificate was issued; that now some of the electors of the district desire to have a vote taken on the question as to whether or not the district shall be dissolved and the certificate surrendered; that a petition has been circulated and generously signed that this question be submitted to the vote of the electors at the next annual school meeting to be held the third Monday in March and that the clerk of the said school district gave the requisite ten days' notice thereof as required by section 490a and 495—11; that the clerk of the school board is not satisfied that it is his duty to give this notice or that this question may be submitted to the vote of the qualified electors."

You ask my opinion upon the question thus raised.

Sec. 495—1 to sec. 495—19 inclusive of the statutes provides for the organization of what is termed "union free high schools." Sec. 495—19 provides that:

"All acts and parts of acts relating to town free high schools not conflicting with the preceding sections shall be in force and effect and shall apply to union free high schools established under this act and the provisions relating to state aid to town free high schools shall be applicable to all union free high schools established under this act."

Sec. 490a of the Stats. relates to town free high schools and provides:

"The electors of any town, village or city school district or subdistrict maintaining a free high school may at any annual meeting or election vote upon the question of surrendering the certificate of organization of the free high school and the dissolving of the high school district; provided, that ten days' notice of such purpose be given by posting five copies thereof in five different public places in such town, village or city school district or subdistrict, or by publishing such notice in any newspaper published in any such town, village or city school district or subdistrict ten days prior to the time set for holding such meeting. The vote shall be taken by ballot and canvassed according to the statutes for conducting elections in such municipality. Those ballots in favor of the surrendering of the certificate and dissolution of the free high school district shall be written or printed 'For Surrender' those opposed 'Against Surrender'".

The section just quoted does not appear to conflict with any of the secs. from 495—1 to 495—19 and no reason is perceived why sec. 490a should not apply to union free high schools. It must be confessed, however, that the section is somewhat obscure and much that may be desired in the way of definiteness is lacking therein. It is to be noted that the section does not provide who shall give the ten days' notice therein required; neither does it prescribe the conditions under which any considerable number of taxpayers of the district may require such notice to be given. It is, however, manifest that it was the intention of the legislature to give electors of the district an opportunity to surrender their certificate and dissolve the free high school district, and the statutes should not be so construed as to deprive the electors of this right. It may well be argued that under the terms of sec. 490a it is immaterial who shall give the notice that the question of dissolving the school district shall be voted upon at the annual school meeting so long as the notice is given in the manner prescribed by the statutes and the electors generally are advised that the question will be voted on at such meeting.

I am very much of the opinion that the thing required by the statute is publicity and that so long as notice is given in the manner prescribed so that the electors thereof may be duly advised that an election to surrender the certificate or dissolve the district would be upheld even though such notice were given by electors only.

However, our statutes are quite uniform in requiring clerks of school districts, clerks of towns, as well as clerks of counties, to give notices of these elections and to prescribe in such notice the special questions, if any, that shall be voted upon at such meetings, and I do not consider it a violent construction of the statute to say that it is the plain intention thereof that the district clerk shall give notice of the fact that such question will be voted upon at the annual election. He is required by law to give the notice of the election. The electors of the district are entitled to have an opportunity to vote on this particular question. The clerk is advised through the petitions filed with him that there is a pronounced sentiment in the district in favor of voting on that question. I not only think it would be entirely proper for him to submit this question to

the voters and to give notice thereof, but that he would be subject to censure should he arbitrarily refuse so to do.

Under the circumstances stated in your letter I am of the opinion that it is the duty of the district clerk to give notice of the fact that the question of dissolution of the district and surrender of the certificate issued will be submitted to the electors at the annual meeting and that he should provide the ballots to be used in voting on that proposition as required by the statutes.

## OPINIONS RELATING TO ELECTIONS.

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*Elections—Corrupt Practices Act—Ch. 650, Laws of 1911.*  
County clerks not entitled to fees from secretary of state for preparing copies of poll lists.

October 5, 1911.

HON. JAMES A. FREAR,  
*Secretary of State.*

Replying to your favor of September 22nd, in which you make further inquiry concerning your duties under chapter 650 of the Laws of 1911 known as the corrupt practices act, would say that I fully appreciate the many difficulties attendant upon your office in carrying out the provisions of the act, which difficulties are very much enhanced by reason of the fact that the act is imperfectly drawn and that the measures provided for carrying the act into effect are by no means specific. You suggest that section 62 of the statutes requires that copies of the poll lists be returned to the county clerks but that no express provision of law requires the county clerks to file and preserve these poll lists in their offices and you ask what course is to be pursued providing poll lists have not been filed in all the counties of the state. You further suggest that no provision of law requires county clerks to forward to your office any records of this character and you ask whether there is authority whereby the county clerks can be called upon to furnish certified copies of such lists without the payment of statutory fees, or any authority for asking the county clerks to forward the original lists to your office providing they are on file in their respective offices. You further inquire whether you would be authorized to pay statutory fees for securing certified copies of such lists.

In reply to these several inquiries I can only say that while the provisions of chapter 650 are mandatory and the penalties provided for violations thereof in many cases severe and drastic, nevertheless public officials in the enforcement of this act or in carrying out the provisions of the act cannot perform duties which are impossible. All that can be required of your department is that you use all available means to carry the provisions of the act into effect and since the act does not specifically provide for certain conditions necessary to render it effectual, it follows that you must be governed in these particulars by your own discretion and the means available. It is to be presumed that the several county clerks have preserved the poll lists which the law requires should be returned to them and of which they are the legal custodians. If, however, it should develop that these poll lists have been destroyed in any particular instance the fault will lie with the county clerk and not with you. County clerks, like other officials, take their office *cum onere* and the legislature has power to impose additional duties upon public officers without providing for extra compensation. The only inference which can be drawn from this act relative to the duty of county clerks concerning the poll lists is that they should be certified to your department upon request and in case of a refusal to certify or return the lists to your department for the purpose of carrying out the provisions of this act, the liability will rest with the county clerk and not with you. Under the present law county clerks throughout the State of Wisconsin are upon a salary basis and as no provision is made for the payment of fees for returning the poll lists to the secretary of state it follows that this is one of the additional duties imposed upon county clerks by the legislature and that such duty must be performed by them without compensation. It is not necessary for you to tender to the respective county clerks any fees in advance for certified copies of poll lists; neither are you empowered to pay them any fees for such poll lists under any conditions. It is my opinion that the county clerks are under legal obligation to supply the secretary of state with such poll lists and to do all other things within their power to assist the state officers in carrying out the provisions of this act.

*Elections—Towns—Town Meetings*—Sec. 4544e providing penalty where “any election officer” shall look at a voter’s ballot applies to elections at town meetings.

July 9, 1912.

MR. GAD JONES,  
*District Attorney,*  
Wautoma, Wisconsin.

In your favor of July 6th you state that a case has been brought to your attention where it is claimed that at a town meeting one of the supervisors who was acting as an inspector of election unfolded the town tickets of several of the voters and took notice of the names that appeared upon the tickets before allowing them to be deposited in the ballot box, and you ask whether, assuming that he did so with the intention of finding out whose names were on the tickets, an action against him could be brought under section 4544e, Wis. Stats., or whether that section applies only to officers of general elections.

Sec. 4544e, Wis. Stats., provides in part: “Any election officer who shall take notice of the manner in which any elector shall mark his ballot . . . shall be punished” etc.

This section was enacted by sec. 124, ch. 288, Laws of 1893. The greater part of that chapter is devoted to general elections, though certain sections thereof expressly refer to elections of town officers. See sections 7, 104, etc., but the last sentence of section 801 provides: “All penalties prescribed for any violation of law applicable to a general election shall be applicable to town meetings to the same extent.” This language seems to me to remove any doubt but that the general language of the quoted part of sec. 4544e is applicable to an election at a town meeting.

I am therefore of the opinion that the election officer in question could be properly prosecuted under sec. 4544e, Wis. Stats.

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*Elections—Ballots—Corrupt Practices Act*—Filing of statement of expenses prior to time fixed is an irregularity that may be cured by a later filing at the proper time.

July 18, 1912.

MR. STANLEY G. DUNWIDDIE,  
*District Attorney,*  
Janesville, Wisconsin.

In your favor of July 15th, you state that a candidate for nomination for a county office at the primaries next September filed his first expense account with your county clerk on July 14th; that in that account his first expenditure for campaign purposes was made on July 14th, the expenditure being for the publication of the candidate's announcement in the paper. You ask my opinion as to whether under these facts the county clerk is authorized to certify or print on the official ballot this candidate's name.

Sec. 94—10, Wis. Stats., as amended by ch. 10, Special Session of 1912, provides:

“The name of a candidate . . . shall not be certified or printed on the official ballot . . . unless there has been filed by or on behalf of said candidate . . . the statements of accounts and expenses relating to nominations required by this act up to the time for such certification.”

Sec. 94—9, Wis. Stats., as amended by ch. 10, Special Session of 1912, provides:

“Every candidate . . . shall within the four days ending on the second Saturday occurring after such candidate . . . has first made a disbursement . . . for political purposes and thereafter within the four days ending on the second Saturday of each calendar month . . . file a financial statement . . . which statement shall cover all transactions not accounted for and reported upon in statements theretofore filed. Each statement after the first shall contain a summary of all preceding statements” etc.

The statement in question was filed prior to the time when it should have been filed. Such irregularity can apparently be cured by a new filing “within the four days ending on the second Saturday occurring after such candidate or committee has first made a disbursement.” To save any question it might be well for you or the county clerk to attract the candidate's attention to the fact that his statement was filed too soon to be in strict compliance with the law. I should hesitate to decide that the irregularity of filing a statement too soon

was sufficient to deprive a candidate of his right to have his name on the official ballot, but do not now pass upon this question since, as pointed out, the irregularity may be cured.

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*Elections*—Voting Machines must permit voter to express first and second choice.

July 19, 1912.

MR. D. E. McDONALD,  
*District Attorney,*  
Oshkosh, Wisconsin.

In your favor of July 17th, you request my opinion as to the proper arrangement of names, etc., on voting machines to be used at the September primaries. I have examined the diagram prepared by Mr. J. M. Davis showing a proposed arrangement of names on the voting machine and think that such arrangement would comply with the law provided that provision be made, first, so that a voter may vote for his first choice only if he so desires instead of for both his first and second choice; second, so that a voter may vote either first or second choice for a man whose name does not appear on the printed ballot; such provision should also give the voter opportunity to vote for second choice for a name appearing on the printed ballot where his first choice vote is cast for a man whose name does not so appear.

As to the place that the electoral ticket should occupy upon the machine and as to the other questions you ask, I attract your attention to an opinion previously given by this department to the district attorney of Milwaukee county, copy of same enclosed, which I think will show you the views of this department on such questions.

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*Elections—Ballots—Corrupt Practices Act*—Unless a candidate files the statement of expenses within the time limited by law, as extended by ch. 10 Laws Special Session 1912, his name may not be printed on the official ballot.

July 20, 1912.

MR. STANLEY G. DUNWIDDIE,  
*District Attorney,*  
Janesville, Wisconsin.

You request my opinion as to whether a candidate for nomination for a county office at the primaries next September, who filed his first expense account with the county clerk on July 11th, stating therein that his first expenditure for campaign purposes was made on June 14th, the expenditure being for the publication of the candidate's announcement in the paper, is entitled to have his name placed on the official ballot or whether the county clerk is without authority to certify or print the candidate's name on the official ballot by reason of the provisions of sec. 94—10 of the Stats.

Section 94—10, as amended by ch. 10, Special Session 1912, is mandatory that

“The name of a candidate chosen at a primary or otherwise shall not be certified or printed on the official ballot for the ensuing elections unless there has been filed by or on behalf of said candidate . . . the statements of accounts and expenses relating to nominations required by this act . . .”

It is plain that the candidate in question has not filed his statement within the time provided by sec. 94—9 as amended by ch. 10, Special Session of 1912, and it is also plain that he has not filed it “at least sixty days before the primary or within seven days after the latest time otherwise provided by law accompanied by an order approving such filing,” etc., as provided by sec. 94—10 as amended. It seems impossible to give any meaning to the amendment of sec. 94—10 made by the Special Session of 1912 which will permit this candidate's name to be certified or printed on the official ballot. The amendment definitely specifies the cases when a filing which is otherwise too late “shall not prevent the placing of the name of a candidate upon the official ballot.” It seems to me that unless a candidate who is otherwise too late in filing his statement can bring himself within this amendment he is not entitled to have his name certified or printed on the ballot.

*Elections—Criminal Law*—Where the inspectors and clerks of election place on the poll list the name of a person not voting, and not a qualified elector, and certify that such list contains the names of persons voting and none others, they may be prosecuted under sec. 4544 or under sec. 4545, Stats.

July 29, 1912.

CHARLES A. TAYLOR,

*District Attorney,*

Barron, Wisconsin.

In your letter of the 26th you state that at a judicial election held in your county last spring the clerks of election in one of the towns placed on the polling list the name of a man who, to the knowledge of the clerks and the inspectors, did not live in said town, did not vote at the election and was not in said town on election day; that the poll list containing this fraudulent name was returned to the county clerk of the county with the following certificate attached and signed by the inspectors and clerks of election:

“We hereby certify that the following and within poll list is correct and true and contains all the names of persons voting at a judicial election held on the 2nd day of April A. D. 1912, and none others;”

that a vote was probably inserted in the ballot box by some one, with the consent of all the election officers, as having been voted by said person; that this might be hard to prove, because the witnesses to it would be the inspectors and clerks, some or all of whom would be guilty of fraudulent conduct under sec. 4545 of the Stats; that you would prefer to arrest all of the election officials on a charge of making a false certificate in respect to a duty imposed upon them by statutes relating to election, as such offense is defined in sec. 4544b, but that you cannot find in the statutes any requirement that they make such a certificate to a poll list, although it is a custom long followed; and you ask my opinion as to the proper action for you to take.

You also ask whether, if the certificate they make is gratuitous, and not required, it would, when falsely made, render them liable under sec. 4544b, or whether the certificate must

be required by law in order to make the officials liable for making "any false certificate in respect to such duty."

Section 4545 of the statutes provides in part:

"Any inspector or clerk of elections who shall knowingly make, assist in making or cause to be made any false statement or return of the votes cast at any election . . . or who shall wilfully violate any provision of law or be guilty of any fraud in respect to any election shall be punished by imprisonment in the state prison not more than three years nor less than one year or in the county jail not more than one year or by fine not exceeding five hundred dollars, except as is otherwise provided in these statutes."

Section 4544 provides in part:

"Any member of a board of canvassers of votes cast at any election who shall knowingly make or assist in making any untrue or false statement or canvass of such votes or any false certificate thereof . . . or sign or make or assist in making any certificate of the correctness thereof which shall include or contain any votes or statement or return of votes in the form of additional or supplemental returns . . . shall be punished by imprisonment in the state prison not more than three years nor less than one year, or in the county jail not more than one year, or by fine not exceeding five hundred dollars."

It would appear to me that the making of this certificate, even though not required, is the making of a false statement or canvass of the votes and that each of the clerks and inspectors who signed the certificate you speak of would be guilty under this section. Of course, they could also be punished, I presume, under sec. 4545, to which you have referred. I do not find any provision of the statutes requiring a certificate of this kind and very seriously doubt whether they could be punished under sec. 4544b.

This department cannot undertake to formulate the forms for complaints for district attorneys.

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*Elections—Public Officers*—The resignation or declination of a person who has been nominated as a candidate for the office of Presidential elector, should be filed with the Secretary of State.

Nominations for Presidential elector of a party not heretofore participating in elections in this state must be made by nomination papers as provided in sec. 30, Stats.

July 31, 1912.

HON. J. A. FREAR,

*Secretary of State.*

In your letter of July 30th you inclose a copy of a letter received by you from Honorable John Hicks, of Oshkosh, and ask that I give you answers to the questions presented.

In Mr. Hicks's letter he states:

“If the regular Republican electors resign because they cannot support Taft, to whom are their resignations to be addressed? It has been stated that, as they were chosen by the delegates to the recent Republican National Convention in Chicago, their resignations should be addressed to that body and that that body will fill all vacancies; but, as those delegates have fulfilled their duties and no longer act as an organization, it seems impracticable to think that they will act any further in the premises, or does the law provide that vacancies in the list of electors shall be filled by the State Central Committee? It is quite important that these points be made clear for the reason that a large number of the electors regularly appointed will resign because they are not in harmony with the Taft National ticket.”

Sec. 34 of the Stats. as amended provides in part:

“Any person nominated to office may decline and annul the same by delivering to the officer with whom his certificate of nomination or nomination paper is filed, three days before election in case of city officers, and nine days in other cases, a declination in writing signed by him and acknowledged before some officer authorized to take acknowledgments.”

Under sec. 11—29 of the Stats. the certificate of nomination of Presidential electors is to be filed with the Secretary of State. It therefore follows that the resignation should be filed with the Secretary of State.

The second paragraph of sec. 34 of the Stats. as amended provides how vacancies are to be filled in case of such a declination being filed and provides that the vacancies may be filled in the same manner as original nominations or by the committee representing the party.

I believe this answers the first question. Colonel Hicks's second question is:

“In what manner are the electors chosen who represent Colonel Roosevelt in the coming campaign? It is expected, of course, that the new Progressive Party convention to be held in Chicago next week will be followed by a set of Roosevelt electors in Wisconsin. Now the question is, are those electors to be selected as the others were, by delegates to the national convention, or are they to be placed on the ticket by petition and, if so, who is to get up the petition?”

As the new party has not participated in prior elections in Wisconsin, they cannot be placed upon the official ballot under the party designation, but must go on as independent nominees.

Sec. 30 of the Stats. as amended provides how independent or nonpartisan nominations may be made for any office to be voted for at any general election: that is, by petition. In my opinion the Presidential electors for the new party will have to be placed on the ballot by such petitions, as provided in said section.

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*Elections—Public Officers—Ballot*—In case of doubt as to the eligibility of a candidate for office, the county clerk should place his name on the ballot, if his papers are in proper form.

August 7, 1912.

JOHN F. HOOPER,  
*District Attorney,*  
Crandon, Wisconsin.

In your letter of August 5th you state:

“About twenty months ago the elected and qualified sheriff for Forest county was removed from his office by Governor McGovern for malfeasance in office and one George Monty was appointed to succeed him and has held and still holds said office and discharges his duties as such officer. The said George Monty is now a candidate for reelection or, rather, for nomination. Art. 6 sec. 3, of our constitution says: ‘Sheriffs shall hold no other office, and be ineligible for two years next succeeding the termination of their offices.’ The question has been put to me as District Attorney for this county, Can one who was appointed to fill a vacancy and who has continued to discharge the duties

of the office become a candidate for nomination until two years have intervened? We have very little law on this question in Wisconsin. I have given an opinion, but I find that some other attorneys have given the sheriff a different opinion. I shall be glad to get an opinion from your office."

In the case of *Black v. Pate*, 30 So. 434; 130 Ala. 514, the court say:

"The constitution declares: 'A sheriff shall be elected in each county by the qualified electors thereof, who shall hold his office for the term of four years unless sooner removed, and shall be ineligible to such office as his own successor.' Const. art. V, sec. 26. Here the person made ineligible is designated by the pronoun 'who,' which can have relation to no other than the person previously mentioned, viz., the sheriff elected by the qualified electors for the term of four years. Without an unwarranted extension of its terms, this provision cannot be made to include, or to render ineligible to succeed himself, one who has held the sheriff's office only by appointment for a fractional term."

In *Bozeman v. Laird*, 45 So. 722; 92 Miss. 263, a new county had been created in 1906 and officers elected. The sheriff was a candidate for reelection in 1907 for the term beginning in January, 1908, and was elected and his election contested. The constitution provided that the term of office of sheriff should be four years and that "the sheriff and treasurer shall be ineligible to immediately succeed themselves or each other in office." The court say:

"We do not think that sec. 135 applies to a sheriff who has served a mere fragment of a full term, whether that fragment be a statutory term, as here, or some unexpired term. There are some difficulties in this view; but we do not think that purpose and reason underlying sec. 135 can be reconciled with the opposite view."

The syllabus to *State ex rel. v. Dircks*, 111 S. W. 1; 211 Mo. 568, is as follows:

"Const. 1875, art. IX, sec. 10 (Ann. Stats. 1906, p. 262), providing that sheriffs should serve two years, etc., and be eligible only four years in any period of six, was repealed in 1906 by an amendment providing for the election of sheriffs in November, 1908, to serve for four years, etc., making them eligible for four years only in any one period.

“Held, that one elected in 1906 for two years is eligible for election in 1908 for the new four-year term, he holding the office during the two-year term under the old constitutional provision, and not under the new, which was intended to create a new rule, effective in 1908.”

One of the justices dissented from the opinion in this case.

This ruling was followed in the case of *State ex rel. v. Cloud*, 111 S. W. 8, as to the office of county treasurer.

In the case of *State ex rel. v. Pontius*, 85 N. E. 540; 78 Ohio St. 353, it was held that, where a constitutional amendment authorized the legislature to extend the term of county officers then holding office and, pursuant thereto, the legislature extended the terms of such officers, a sheriff elected in 1905, his term to begin January first, 1906, for a term of two years and which term was by such act extended so that in 1908 he was serving his third year, was not ineligible to reelection in 1908 under the constitutional provision that no person shall be eligible to the office of sheriff for more than four years in any period of six years. The court say as to such amendment:

“Its purpose was to enable the legislature to provide for the carrying on of the government during the interregnum by continuing incumbents in office, and it would be unreasonable to conclude that in the adoption of the amendment it was not the intention to exempt the authority from limitations that would defeat its purpose.”

*State ex rel. v. Harris*, 77 Ohio St. 481; 83 N. E. 912, is to the same effect.

You will note that these several authorities pass upon provisions somewhat like those in our constitution and yet not altogether the same. It appears to me that it is not altogether clear just what our court might hold with reference to the provision in our constitution.

The only way in which I can see that this question could come before you officially would be in a request from the county clerk for advice as to whether or not he should place the name of Mr. Monty upon the ballot for the primary election. You understand, of course, that this department is not authorized to give advice to district attorneys upon matters not coming before them in their official capacity.

In an opinion bearing date June 10th, 1910, and found upon page 341 of the Biennial Report and Opinions of the Attorney-General for 1910, it was held that, where the eligibility of the candidate was in doubt, it was the duty of the county clerk to place the name upon the ballot and leave the matter of eligibility to be determined in a proper proceeding between the parties interested. I think that should be the course pursued here.

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*Elections—Corrupt Practices*—The expenses that may be incurred by a person or group of persons under par. 2 of sec. 94—28 Stats. should be included as a part of the total amount that may be disbursed by or on behalf of a candidate for office under sec. 94—5 Stats.

August 9, 1912.

HON. JAMES A. FREAR,  
*Secretary of State.*

In your letter of the 7th you state that you are in receipt of a letter from Mr. Paul A. Hemmy, of Juneau, Wisconsin, which reads in part as follows:

“I wish to inquire whether you would have an investigation made by the proper official in relation to the Corrupt Practices Act. I would like a construction of the following sections:

“Query: In determining the total of disbursements as defined in sec. 94—28, subd. 2, must there be included the amount spent by local groups paying their own expenses and operating as provided in sec. 94—5?”

Section 94—28 of the Stats., as amended by ch. 650 of the Laws of 1911, provides in part:

“1. No disbursement shall be made and no obligation, express or implied, to make such disbursement, shall be incurred by or on behalf of any candidate for any office under the constitution or laws of this state, or under the ordinance of any town or municipality of this state in his campaign for nomination or election which shall be in the aggregate in excess of the amounts herein specified, namely:” [Here follows an enumeration of the amounts that may be expended by candidates for the different offices.]

“2. Any candidate may delegate to his personal campaign committee or to any party committee of his party, in writing duly subscribed by him, the expenditure of any portion of the total disbursements which are authorized to be incurred by him or on his behalf, by the provisions of this section, but the total of all disbursements by himself, by his personal campaign committee in his behalf, by all party committees in his behalf, or otherwise made in his behalf, shall not exceed in the aggregate the amounts in this section specified, except as provided in sec. 94—30 of the statutes.”

Sec. 94—5, as amended by ch. 650 of the Laws of 1911, provides:

“No person or group of persons, other than the candidate or his personal campaign committee or a party committee, shall make any disbursement for political purposes otherwise than through a personal campaign committee or a party committee, except that expenses incurred for rent of hall or other rooms, for hiring speakers, for printing, for postage, for telegraphing or telephoning, for advertising, for distributing printed matter, for clerical assistance and for hotel and traveling expenses, may be contributed and paid by a person or group of persons residing within the county where such expenses are incurred.”

You will note that by the terms of this section the only expenses or disbursements for political purposes which may be paid by any person or persons other than a candidate, his personal campaign committee or party committee, are those enumerated in the exception.

Under par. 2 of sec. 94—28 the total amount of all disbursements by the candidate, his personal campaign committee on his behalf, all party committees on his behalf “or otherwise made in his behalf” cannot legally exceed in the aggregate the amount specified in the first subdivision of the section. Unless the words “or otherwise made in his behalf” refer to the expenses that may be incurred by a person or group of persons residing within the county where the expenses are incurred, under section 94—5, they are left without any meaning. For that reason, in my opinion such expenses are included in making up the total amount that may be expended for or on behalf of a candidate.

*Elections—Primary Pamphlet*—It is left to the discretion of the Secretary of State to arrange the order in which candidates are to appear in the primary pamphlet, except as directed in statute that candidates for the same office must be grouped together in the order as provided by statute.

August 13, 1912.

HON. J. A. FREAR,  
*Secretary of State.*

You submit the question whether the matter of alphabetical arrangement of candidates' names for the several offices to be entered in the pamphlet for the primary election issued by your department shall govern, or whether the arrangement should be by parties as appears in the ballot.

Sec. 94—21 of ch. 650 of the Laws of 1911 provides as follows:

“Not later than the thirty-fifth day before the September primary, the secretary of state shall compile, prepare and cause to be printed in pamphlet form for each state senatorial district separately, the statements filed for the candidates to be voted for therein, placing the statement relative to the candidate for governor first, followed in order by those of the candidates for the other state offices, for presidential electors, for United States senator, for member of Congress, state senator and assemblyman.”

Under the express provision of this statute it is necessary to group all the candidates of all the parties for a single office and to place the various groups in the primary pamphlet in the order in which the statute provides. There is, however, no provision as to the arrangement of the various statements of the candidates in a single group in any particular order. Neither does the statute require in express terms that the candidates of a certain party should be grouped together. This is left entirely to your judgment and discretion. An alphabetical arrangement of the candidates' statements, without reference to party lines, would be a strict compliance with the statutes, while a grouping of the candidates of each party and placing such groups of the parties in alphabetical order would also be in conformity with the law.

I cannot advise you further than to state that the matter is left entirely within your discretion. It seems that the Leg-

islature did not consider a certain place in the pamphlet as of any advantage to any candidate, as each candidate is to pay the same amount, irrespective of the place in the pamphlet in which his statement is put.

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*Elections—Corrupt Practices Act*—A person who spends money for liquor and other refreshments while campaigning while a candidate, and also advertising his business is violating the corrupt practices act.

August 14, 1912.

WM. F. SCHANEN,  
*District Attorney,*  
Port Washington, Wisconsin.

In your communication of August 8th you submit the following statement of facts and request my opinion thereupon:

“Under the corrupt practices act, if a person who is a candidate for an office at the coming September primary, also who is engaged in business which he attempts or desires to advertise, does said person violate the terms of said corrupt practice act if he distributes his cards and campaign literature with the advertising of his business at the same time; and while so distributing said campaign literature pertaining to his candidacy, and also at said time distributing his advertising matter for his business, if he at the same time spends money for the purpose of liquors, refreshments and cigars, if in that event he violates said act if he states at said time that the expenditure is solely and purely for his business, and not pertaining to his candidacy?”

In answer to your inquiry I will say that the courts would construe the spending of money for the purposes and under the circumstances therein stated as a violation of the corrupt practices act. In my opinion it would be regarded as a subterfuge and, if permitted, would open the way for the use of money prohibited by the corrupt practices act, simply by a pretense of advertising his business, while at the same time combining with such advertisement his political interests.

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*Elections—Municipal Corporations*—A city which has adopted voting machines in all its precincts cannot thereafter return to the old ballot system.

August 14, 1912.

ARCHIBALD MCKAY,  
*District Attorney,*  
Superior, Wisconsin.

You inquire whether the City of Superior, having once adopted the voting machine system, can return to the old system of voting by ballot at the forthcoming primary election.

Under sees. 44—1 to 44—18 of our Stats. the municipalities of the state are authorized to adopt and purchase for use, voting machines. There is no provision in the law authorizing a municipality to return to the old system. In the case of *Northern Trust Co. v. Snider*, 113 Wis. 516, to which you have called my attention and which this department has often cited in passing upon questions of this nature, our court has laid down the rule that power to adopt is a special limited power, which, when once exercised, is exhausted and that the power to give effect to an optional law does not carry with it by implication power to abolish it. In that case it was held that a county that had adopted a salary system for the sheriff could not thereafter return to the fee system.

I am therefore of the opinion that in a case where a city has adopted voting machines under the above quoted sections which our law authorizes, they have no power thereafter to return to the old system, of voting by ballot.

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*Elections—Constitutional Amendments—Ballots—Elections—*  
The constitutional amendments to be submitted to the people under ch. 665, Laws 1911, should be printed upon the same ballot as the names of candidates for office.

The question of the going into effect of ch. 227, Laws 1911, extending the right of suffrage to women, should be printed upon a separate ballot.

August 16, 1912.

HON. J. A. FREAR,  
*Secretary of State.*

In your letter of the 13th you say:

“Ch. 633, Laws of 1911, relating to forms of ballots at general elections, provides (subsec. 8 of sec. 38):

“Whenever a proposed amendment to the constitution, or any measure or other question shall be submitted to a vote of

the people, a concise statement of the nature thereof shall be printed in accordance with the act or resolution directing its submission upon a separate ballot provided for that purpose,

“Ch. 665, Laws of 1911, relating to the submission of certain proposed constitutional amendments to the people at the general election in November, 1912, provides among other things that

“ ‘Said form of ballot shall be printed upon the ballot to be voted at such election, after the names of the candidates, and separated therefrom by an appropriate line or rule.’ ”

“Sec. 2 of ch. 227, Laws of 1911, an act extending the right of suffrage to women, directs that

“ ‘The question whether the foregoing provisions of this act shall take effect and be in force, shall be submitted to a vote of the people of this state, in the manner provided by law for the submission of an amendment to the constitution at the next general election to be held in November, 1912.’ ”

You ask for my opinion as to the proper ballot or ballots upon which ch. 227 and the various proposed constitutional amendments should be placed.

Ch. 633 of the Laws of 1911 is a general law and governs the form of ballot where there is no special provision made. As ch. 227 of the Laws of 1911 contains no special provision as to ballot and provides that the question shall be submitted in the manner provided by law for the submission of an amendment to the constitution, such submission should be in accordance with ch. 633 of the Laws of 1911, that is, upon a separate ballot.

Ch. 665 is a special law, relating to the particular proposed amendments to the constitution therein referred to. It is also a later law than is ch. 633 of the Laws of 1911. One of the rules for interpretation of statutes is that the later law governs in cases of conflict between that and an earlier law. Another rule of construction is that where there is a conflict between the provisions of a general law and the provisions of a law relating to a particular class of cases, the special law prevails as to the particular class. *Mead v. Bagnall*, 15 Wis. 156.

In my opinion it follows from this that the provision of ch. 665 of the Laws of 1911, relating to the ballot, must be followed in submitting the constitutional amendments therein referred to—that is, that it shall be submitted upon the ballot to be voted at such election after the names of the candidates and separated therefrom by an appropriate line or rule.

*Elections—Declination of Nomination*—A declination of the nomination for presidential elector should be filed with the Secretary of State.

August 16, 1912.

HON. L. B. NAGLER,

*Assistant Secretary of State.*

In your letter of August 14th you inclose a letter from Honorable John Hicks, accompanied by a proposed form of his resignation as a candidate for the office of presidential elector, asking whether such form is correct.

You also ask the question, To whom may a candidate for Presidential elector resign?

In an opinion given to your department under date of July 31st last, I referred to sec. 34 of the Stats. as amended, and stated that a resignation as Presidential elector should be filed with the Secretary of State. Such language was not strictly accurate. What I should have said was that a declination of the nomination should be filed with the Secretary of State. On page 194 of your compilation of the election laws of the state you have given a form for such submission. It appears to me that this is a better form than that proposed by Mr. Hicks and I would suggest that you call his attention to such form. The use of such a form and the filing of it in your office will accomplish the purpose desired.

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*Elections—Corrupt Practices Act*—Such act prohibits name of candidate who has not filed statements from being placed on ballot at elections but not at primaries.

Secretary of State should give notification of failure to file expense statements immediately after time therefor has expired and not wait until the seven day period provided by sec. 94—10 as amended has expired.

August 17, 1912.

HON. L. B. NAGLER,

*Assistant Secretary of State.*

In your favor of August 14th you ask whether a candidate who fails to file an expense statement on the dates named in the law is entitled to a position on the primary ballot, or whether the prohibition of sec. 94—10 refers only to the general election following the primary.

Sec. 94—10, as am. by ch. 10, Special Session of 1912, provides:

“The name of a candidate chosen at a primary or otherwise shall not be certified or printed on the official ballot for the ensuing elections unless there has been filed \* \* \* the statements of accounts \* \* \* required by this act,” etc.

A careful reading of the corrupt practices act, of which sec. 94—10 is a part, shows that the word “election” is never used therein to mean a “primary” election, but the latter is always referred to therein as a “primary”. This distinction will be found clearly marked in secs. 94—1, 94—6, 94—8, 94—9, 94—13, 94—14, 94—15, 94—16, 94—17 and 94—18. In addition, the amendment to this section, made by ch. 10, Special Session of 1912, in striking out the word “election” after the word “primary” in the first line of the section, seems to indicate that the word “election” is to be taken as referring only to “elections” as distinguished from “primaries”. I am, therefore, of the opinion that the prohibition of sec. 94—10 does not refer to a primary election.

You also ask whether it is the duty of your department to notify county clerks of the failure of any candidate to file his expense statement as provided by law after the name of such candidate has been certified to the county clerk for a place on the primary ballot. Since the prohibition of sec. 94—10 does not apply to the primary there would seem to be no duty on your department to take any steps to enforce it as to such primary.

You further ask, “Does sec. 94—35 make it the duty of the secretary of state to notify the district attorney before or after the expiration of the seven days grace provided for in the amendment to sec. 94—10 as passed at the Special Session.”

Sec. 94—35 provides for such notification “immediately upon the expiration of the time fixed by any law of this state for the filing” of the expense accounts. A literal reading of this language would plainly require the notification to be given as soon as the time fixed by *any* law of the state had expired, and sec. 94—9 fixes a limitation as well as section 94—10, which merely extends the period fixed by sec. 94—9. I see no reason to give such language any other meaning than such literal one and believe that such construction will oper-

ate equitably in that a candidate who may have unintentionally failed to file his accounts within the period prescribed by section 94—9 will thus be notified of his failure in time to avoid the penalty of losing a place on the official ballot. I am, therefore, of the opinion that the notification should be given a candidate immediately after the expiration of the time fixed by sec. 94—9.

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*Elections—Nominations*—Party in whose favor nomination papers have been filed need not accept such nomination, and in such case his name should not be placed upon the primary ballot by the county clerk.

August 20, 1912.

MR. GAD JONES,

*District Attorney,*

Wautoma, Wisconsin.

You state that nomination papers containing the requisite number of signatures have been filed with the county clerk, nominating one W. A. Roblier as a candidate for the office of county clerk to be voted for at the September primary; that W. A. Roblier demands that his name be not placed upon the primary ballot and declares that he is not a candidate for the office; that the person who filed the nomination papers insists that his name be placed on the ballot; and you ask whether, under these circumstances, the clerk would be justified in omitting Mr. Roblier's name from the ballot.

In reply to your inquiry I would say that, in my opinion, no person can be compelled to become a candidate against his wishes, and this intention is evidently recognized in the primary election law, sec. 11—5, subd. 4, which provides that "each candidate shall file with his nomination paper or papers, or within five days thereafter, a declaration that he will qualify as such officer if nominated and elected."

This provision of the law has been construed to be mandatory, and unless the candidate files such declaration within the time limited he is not entitled to have his name placed upon the primary ballot. I assume that Mr. Roblier, not wishing to have his name placed upon the ballot and declaring that he is not a candidate, has not filed the declaration provided for in the primary law, and if so, he is not entitled to have his name placed upon the ballot under any circumstances.

*Elections—Primaries—Saloons*—Primary election for 1912 in the town of Stockbridge must be held in hall in the village of Stockbridge.

2. Saloons must be closed on primary election day.

August 21, 1912.

JAMES KIRWAN,

*District Attorney,*

Chilton, Wisconsin.

Under date of August 20th, you state that the town of Stockbridge, in Calumet county, always held its town meetings in a hall which, since the incorporation of the village of Stockbridge, is within such village; that after one or two town meetings and elections were held there after the incorporation of said village an oral vote was taken at a town meeting, at the noon hour, without any notice having been given by the town clerk, and that a majority of oral votes were in favor of holding the next town meeting at the town poor house farm, south of the village, in the town of Stockbridge; that two town meetings were held in said town house on the poor farm, and that, in the spring of 1911, at the town meeting, by an oral vote it was again changed back to the village of Stockbridge, and that a town meeting was held last spring in the hall in said village.

You inquire where the primary and election must be held this fall in the town of Stockbridge.

In answer I will say that sec. 783 of the Wis. Stats., provides:

“The annual town meetings in each town shall be held at the place where the last town meeting was held, or at such other place therein or in a city or incorporated village within or adjoining the town as shall have been ordered at a previous meeting, or when there has been no such previous meeting at such place as shall be directed in the act or proceedings by which the town was organized. When twelve electors shall file with the town clerk at least four and not more than six weeks before any annual town meeting their written request that the place of holding such meeting be decided by ballot, he shall within one week after the filing of such request post notices in at least four public places in said town stating that the place of holding the annual town meeting will be decided by ballot at the town meeting then next to be held. Each elector may

vote a ballot designating thereon a building or public hall within said town or such city or village, which ballots at the close of the polls shall be canvassed and the result certified and recorded. The place receiving the largest number of ballots shall be established as the place of holding the annual town meeting thereafter until otherwise ordered."

Sec. 15 of the Wis. Stats., provides:

"All elections under this and the next two following chapters shall be held:

\* \* \*

"3. In each town at the place where the last town meeting was held or at such other place as shall have been ordered by such meeting or by the supervisors when they establish more than one election district as hereinafter provided; but the first election after the organization of a new town shall be at the place directed in the act, order or proceeding by which it was organized."

The last town meeting in the town of Stockbridge having been held in the hall in the village, under these various provisions the primary election should be held in that place.

You also inquire whether saloons must be closed in towns, villages and cities on primary election day this year, September 3d.

In answer I will say that sec. 11—25m provides as follows:

"Any person who shall sell, give away or barter any intoxicating liquors on a primary election day the person so offending shall be punished by a fine of not less than five nor more than twenty-five dollars or by imprisonment in the county jail not to exceed thirty days or by both such fine and imprisonment."

Under this provision saloons cannot be open and sell liquor on primary election day.

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*Elections—Corrupt Practices Act*—The giving of a pass to the State Fair by a member of the Board who is a candidate for office is a disbursement within the corrupt practices act, and if such disbursement is made for political purposes it is forbidden by that act.

August 27, 1912.

MR. J. C. MACKENZIE,

*Secretary, Wisconsin Board of Agriculture.*

In your favor of August 23rd, you ask whether it will be in conflict with the corrupt practices act for a member of the State Board of Agriculture to give away complimentary tickets to the State Fair, such member being at the time a candidate for a state office, it being understood that under the rules of the board each member is given thirty complimentary passes to the State Fair to dispose of as he sees fit.

If the giving of such complimentary tickets is a "disbursement for political purposes" as those terms are defined in the corrupt practices act, then such giving is prohibited by sec. 94—6 and 94—7 of such act.

The term "disbursement" is defined in subsec. 3 of sec. 94—1 to mean and include "every act by or through which any money, property, office or position or other thing of value passes or is directly or indirectly conveyed, given," etc.

It seems to me that a ticket to the State Fair might well be held to be "a thing of value" so as to make the giving of it a disbursement within the quoted definition.

Subsec. 1 of sec. 94—1 provides:

"Any act shall be deemed to have been done for 'political purposes' when the act is of a nature, is done with the intent, or is done in such a way as to influence or tend to influence directly or indirectly voting at any election or primary," etc.

Whether the giving of a ticket to the State Fair is done for political purposes will, within the above definition, depend upon the circumstances of the particular case. In view of the severe penalties (fine, imprisonment and loss of office) provided by sec. 94—38 for a violation of any provision of the corrupt practices act, I should hesitate to advise that any act which in any aspect appeared to be forbidden was not included within the terms of the law. I am, therefore, of the opinion that the giving of a ticket would be a "disbursement" and if given under such circumstances as to be done for "political purposes" it is forbidden by the law.

*Elections—Clerks of Election—Poll Lists*—There may be appointed only two clerks of election, although the law requires them to keep three poll lists.

September 5, 1912.

MR. E. P. GORMAN,

*District Attorney,*

Wausau, Wisconsin.

In your favor of August 31st you call my attention to the fact that while sec. 47 of the Stats., as amended, provides for two clerks of election, and sec. 66, prior to its amendment by ch. 650, Laws of 1911, provided that the clerks of election should keep two poll lists, the amendment to the last named section now requires such clerks to keep three poll lists, and you ask whether or not it would be legal to appoint an additional clerk to keep the additional poll list.

I do not find any authority in the law for any election officers other than those provided for, and do not think that it would be legal to have an additional clerk of election. It was evidently assumed by the legislature that it would be possible for the two clerks to keep three lists.

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*Elections—Candidates—Presidential Electors*—A candidate may have his name appear on the ballot as a candidate for two or more different offices, even though if elected he could lawfully hold but one.

A member of congress may not be a Presidential Elector.

September 5, 1912.

HON. JAMES A. FREAR,

*Secretary of State.*

Under date of August 31st, you forwarded to me a letter from Mr. Frank Schutz, Chairman of the Democratic State Central Committee, in which he requests to be advised whether a candidate for congress and a candidate for assembly may at the same time be a candidate for presidential elector, i. e., whether the same person can appear on the ballot twice as a candidate for different offices; and you request my opinion on this question.

I find no constitutional or statutory provision prohibiting a man from being a candidate for two offices at the same elec-

tion, or which would prevent his name from appearing twice on the same ballot as a candidate for two different offices, even though, owing to constitutional or statutory provisions, or to the fact that the two offices are incompatible, it might be illegal for him to hold both offices. This department has ruled that although a woman is ineligible to hold the office of clerk of the circuit court, it is the duty of the county clerk to place her name on the official ballot. Sec. 11—9, as amended by ch. 200, Laws of 1911, provides: "The names of all candidates for the respective offices for whom the nomination papers prescribed shall have been duly filed shall be printed thereon." And sec. 11—7, Wisconsin statutes, as amended, provides that the secretary of state "shall transmit to each county clerk a certified list containing the name and post-office address of each person for whom nomination papers have been filed in his office," etc. Under these sections I do not think that you have any discretion as to certifying the names of persons who have been duly nominated, even though it may appear to you that they are ineligible to take and hold the office if elected.

On the question of whether or not a man may be a presidential elector and a member of congress, it might be well for you to call Mr. Schutz's attention to sec. 1 of art. II, of the Const. of the United States, which provides that

"No senator or representative or person holding an office of trust or profit under the United States shall be appointed an elector."

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*Elections—Corrupt Practices Act—District Attorneys—Criminal Law*—It is a violation of the corrupt practices act for a candidate to spend money for the circulation of his nomination papers if the expenditure be made for "political purposes."

It is the duty of the district attorney to prosecute offenses under sec. 94—38 upon complaint made.

September 12, 1912.

MR. GEORGE B. NELSON,  
*District Attorney,*

Stevens Point, Wis.

In your favor of September 9th, you state that one of the successful candidates at the recent primary election spent, according to his filed statement, the sum of \$27.20 for circulat-

ing nomination papers, and you ask my opinion as to whether such expenditure constitutes a violation of the corrupt practices act, and whether, in case complaint is made, you should proceed against such candidate.

Enclosed please find copy of letter under date of June 5, 1912, to Mr. W. K. Parkinson, District Attorney, Phillips, Wis., with reference to the payment for circulating nomination papers, which will answer your first query.

As to the second, it seems to me that it is the duty of the district attorney, upon complaint made showing that a person has incurred the penalty denounced by sec. 94—38 of the corrupt practices act, to proceed as he would in the case of a complaint showing a violation of any other of the criminal laws of the state.

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*Elections—Primaries—Tie Vote*—A primary election for sheriff which resulted in a tie must be settled by lot and if the successful candidate resigns then the vacancy can be filled by the committee.

September 16, 1912.

C. J. STRANG,

*District Attorney,*

Grantsburg, Wisconsin.

In yours of September 11th, you state that at the primaries recently held the vote as to the office of sheriff resulted in a tie; that the two candidates wish to go upon the ticket independently, so as to give the people another chance to designate their choice. You inquire whether the law compels the board of canvassers to draw lots and designate the one nominated and, if so, whether the one thus nominated may resign and then be placed on the ticket independently.

In answer I will say that in sec. 84, Stats., as amended by ch. 492, Laws of 1911, it is provided as follows:

“provided, however, that in any case, if any two or more candidates for the same county office shall have received the greatest and an equal number of votes the board of canvassers shall determine the choice by lot, which lots shall be drawn by the persons receiving the equal number of votes; or in the absence of one or both of such persons or their refusal to draw by lot, the board of canvassers shall appoint a competent per-

son to draw the same for them and declare and certify the same accordingly.”

In the case of *State ex rel. Hadfield v. Grace*, 83 Wis. 295, our Supreme Court decided that mandamus would lie to compel the determination of the election, in case of a tie vote, by lot, as required by law.

Under this decision it is the duty of the county canvassers to determine the nominee by lot. The person who is thus nominated may, of course, resign, as no one is compelled to accept an office or run for an office after he has determined not to do so. I see no objection to his running independently after such resignation. My predecessor in office has held that a defeated candidate at an election may become an independent candidate for the same office at the November election, and I know of no law prohibiting a person from becoming a candidate independently after resigning as a candidate on a regular party ticket; but in such case there would be a vacancy. (See sec. 34 Wis. Stats.) Sec. 11—13, Stats., as amended by ch. 54, Laws of 1911, provides that vacancies occurring after the holding of any primary shall be filled by the party committee of the city, district, county or state as the case may be. Under this section it would be the duty of the county committee to fill the vacancy caused by the resignation, and thus the fight would not be between the parties in question, as independent candidates, but it would be a three-cornered fight.

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*Elections—Presidential Electors*—Presidential electors are voted for throughout the state and when nominated by nomination papers pursuant to sec. 30, such papers must be signed by at least 1,000 voters of the state, who need not be residents of any particular congressional district or districts.

September 17, 1912.

HON. JAMES A. FREAR,  
*Secretary of State.*

In your favor of September 16th, you hand me letter received from Colonel John Hicks, of Oshkosh, and request my opinion as to the matters discussed therein, to wit, the number of signatures, etc. that are required on petitions for the placing

of names of presidential electors upon the official ballot at the November election.

In my letter to you under date of July 31st, I gave my opinion to the effect that sec. 30, Wis. Stats. (ch. 613, Laws of 1911), providing for independent nominations, is applicable to the nomination of presidential electors.

Although one presidential elector is nominated from each congressional district and two from the state at large (sec. 11—29 Wis. Stats., ch. 300, Laws of 1911, and ch. 22, Laws of 1912 special session) they are to be elected "by general ticket" (sec. 94y) and are thus to be voted for throughout the state. (See subdivisions 9 and 10, sec. 38, Wis. Stats., ch. 633, Laws 1911.) Their nomination papers must, therefore, pursuant to subd. 4 of sec. 30, be signed by at least 1,000 voters of the state who need not be residents of any particular district or districts.

Sec. 30 will be found on page 46 of the pamphlet of election laws, and a form of nomination paper on pages 193 and 194 thereof.

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*Elections—Nominations—Electors of President and Vice President*—All electors may be nominated by one nomination paper. Such paper should show which are nominated from districts and which from the state at large.

Form in election laws pamphlet should be followed as nearly as possible.

September 23, 1912.

HON. JAMES A. FREAR,  
*Secretary of State.*

In your favor of September 19th, you submit a form of nomination paper for electors of president and vice president, and request my opinion as to its sufficiency.

Although the proposed form includes all the electors on one paper, I am of the opinion that it is not objectionable on that ground. Attorney-General Gilbert decided that "the statute does not prohibit the placing of the names of several candidates upon the same paper." See Biennial Report and Opinions of Attorney-General for 1910, page 309. Subd. 5 of sec. 30 provides that "each voter shall sign for but one candidate for the same office." The persons sought to be nominated as

electors are obviously not candidates for the "same office," i. e. they are not in competition with each other, but each is a candidate for one of thirteen offices. The form submitted does not state the business or vocation of the candidate, nor his post-office address, as is required by subd. 2 of sec. 30. Such form does not show from which congressional district a particular elector is nominated, nor which of the thirteen candidates are nominated from the state at large. It may not be essential that it appear from which district the candidate is nominated, since sec. 94y of the Stats. does not make residence in a particular district a necessary qualification of an elector, although when nominated by national party delegates under sec. 11—29, they must be nominated "one \* \* \* from each congressional district and two from the state at large," so that, by analogy, the same qualifications might be held to be necessary when they are nominated pursuant to sec. 30. But it does seem important that the nomination paper should show which two electors are nominated from the state at large, since sec. 94—28 of the corrupt practices act provides that "a presidential elector for any congressional district" may not legally disburse in his campaign more than \$100, and a "presidential elector at large" not more than \$500.

While the form and affidavit submitted may in other particulars be a sufficient compliance with the statute, I think that it would be better if the language of the statute were followed as closely as possible, and for this reason it seems to me that the form of nomination paper and affidavit found on pages 193 and 194 of the election laws pamphlet more clearly conforms to the statutory requirements.

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*Elections—Parties—Platform Convention*—Pursuant to sec. 11—22 the secretary of a platform convention should file a certified copy of the record that he made of the proceedings of the convention, including record of the vote on roll call, if made.

September 23, 1912.

HON. JAMES A. FREAR,  
*Secretary of State.*

In your favor of September 20th, you request my opinion as to what the "certified copy of the proceedings" of the

party platform conventions which the statute requires to be filed with you should contain, and specifically whether such copy should contain a record of the roll calls taken during the proceedings and the vote of the various members on such roll calls.

The statute in question, subsec. 2 of sec. 11—22, provides:

“The chairman and secretary of the platform convention of each party shall, within thirty days after the holding of said convention, file with the secretary of state a certified copy of the proceedings thereof and of the platform adopted.”

I think that a certified copy of the proceedings means a certified copy of the record of the proceedings and that there should be filed a certified copy of whatever record of the proceedings was actually made. The convention itself would probably have power to determine how detailed the record of its proceedings should be. In the absence of some direction by the convention to its secretary, I think that he should make such a record as is customarily made of the proceedings of such a body, and where a vote is taken by calling the roll, I think that it is the duty of the secretary to record such vote and that his minutes would necessarily show the vote of each member.

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*Elections—Polls, hours open*—A voter's petition to extend hours that polls for a general election are open in a city of less than 5,000 or in a town or village must be filed at least 20 days prior to the September primary.

September 23, 1912.

MR. NEWTON W. EVANS,  
*District Attorney,*

Oconomowoc, Wisconsin.

In your favor of September 21st, you ask my opinion as to whether the hour for opening and closing of the polls at the general election can be changed by a petition filed twenty days prior to the general election, or whether such petition must be filed twenty days prior to the holding of the September primary.

Sec. 49, as am. by ch. 620, Laws of 1911, provides that in-

cities of over 5,000 the polls at general elections shall be open from 6 a. m. to 8 p. m., and in other cities and in towns and villages from 9 a. m. to 5:30 p. m., provided that such last named hours may be extended by a petition "signed by at least twenty voters of such city, town or village and filed with the clerk thereof, not less than twenty, nor more than ninety days, prior to the holding of the September primary."

While it is hard to conceive of any reason for requiring such petition to be filed so long in advance of the general election, especially in view of the fact that ch. 620 makes similar provisions for the hours that the polls shall be open at primaries, and provides that such hours may be extended "as provided in sec. 49, Stats.," yet it seems impossible to give any other meaning to the words of the statute. They are plain and unambiguous and therefore not open to construction.

I am of the opinion that a petition under sec. 49 for extending the hours that the polls shall be open at the general election must be filed at least twenty days prior to the September primary.

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*Elections—Primaries*—Candidate whose name is written in one party column at primary, and who has filed nomination papers as a candidate for nomination by another party, is entitled to have his name placed in independent column as candidate for that office, even when he does not receive 10% of party vote for that office, provided he has majority of votes cast.

September 24, 1912.

MR. GEO. B. NELSON,

*District Attorney,*

Stevens Point, Wisconsin.

Your favor of the 23rd inst., is received, also a further communication from Mr. Sichelsteel. I think I owe you an apology for not having given more careful attention to your former communication but in the press of other matters I only gave it a cursory examination and evidently did not express myself very clearly in my communication to you.

As I understand the situation Mr. Sichelsteel filed a nomination paper as a republican candidate for the office of dis-

trict attorney and that he has also filed within the five days prescribed his declaration that he will qualify as such officer if elected. That at the primary he did not receive the republican nomination but that he did receive a majority of votes cast in the democratic primary through his name having been written in the democratic column; that the aggregate of votes cast for himself and other candidates, if any there were, for the office of district attorney in the democratic primary was not equal to ten per cent of the party vote cast for governor at the last general election. The question to be determined is, first, is Mr. Sichelsteel entitled to go upon the regular ballot as a candidate for the office of district attorney; second, if so, in what column should his name be placed on the official ballot?

Inasmuch as Mr. Sichelsteel has filed a nomination paper for the office of district attorney I am inclined to hold that he has complied with the conditions of subd. 3, sec. 11—18, in respect to filing nomination papers and that the language of this subsection ought not to be construed as limiting the candidate to having filed a nomination paper as the candidate of any particular party. In my opinion the language of this subsection should apply to the office and not to the party designation, and inasmuch as Mr. Sichelsteel filed a nomination paper for the office of district attorney even though he filed it as a republican candidate, I think he has complied with the provisions of the act and if he received a majority of the votes cast for that office in the democratic primary he is not barred from the privilege of having his name placed on the official ballot by reason of the provisions of subsec. 3, sec. 11—18. In short, that under the facts stated he is entitled to have his name placed upon the official ballot as a candidate for the office of district attorney provided that within five days after receiving official notice of his nomination he filed a declaration that he would qualify as such officer if elected.

In reply to the second inquiry the provisions of subsec. 2, sec. 11—18, are very clear and explicit and inasmuch as Mr. Sichelsteel did not receive the required ten per cent his name should be placed in the independent column.

*Elections—Corrupt Practices*—All disbursements for political purposes except those enumerated in secs. 94—6 and 94—7 are prohibited.

The limitation on the amount that may be spent is on the total for both primary and general elections.

Disbursements by friend of candidate permitted subject to provisions of law.

September 30, 1912.

MR. B. A. HUSTING,

*District Attorney,*  
Fond du Lac, Wisconsin.

In your favor of September 24th you request my opinion on the following questions:

1. "Can a candidate pay the expenses of a man to go through his district working for him on days of the campaign other than election day?"

Sections 94—6 and 94—7 prohibit disbursements for political purposes except those enumerated. Payment of the expenses of a man to go through a candidate's district "working for him" is not enumerated, and is therefore prohibited, unless the work that such man does comes within the kinds permitted. If he is "working" as a public speaker or in posting handbills, or distributing campaign literature, or doing anything else that is expressly permitted, there would, of course, be no violation of the law.

2. "Is it permissible for a candidate to pay the railroad fare and hotel expenses of a friend who might accompany him in his canvass?"

The law does not prohibit such a disbursement, or in fact, any disbursement unless it be made for "political purposes". If the disbursement is made to influence voting or voters then it is prohibited, unless what the friend does comes within the things that are permitted by secs. 94—6 and 94—7.

3. "Does the limitation of the amount that can be expended for an office by a candidate seeking the same mean the total sum spent at the primary and general elections?"

Sec. 94—28 limits the amount that may be spent "by or on behalf of any candidate for any office" etc. In view of the fact that the offices enumerated in the section are none of them

the quasi-office of nominee of a party, it seems obvious that the office referred to is the one to which the candidate may ultimately be elected, and that the section therefore fixes the total amount that a candidate may expend adding together the expenses of both the primary and the general election.

4. "Has an individual not a member of a candidate's campaign committee or of any party committee the right to spend money in the securing of an election of a candidate to office?"

Under the corrupt practices law an individual may expend money for political purposes except as prohibited by sec. 94—5 (see am. by ch. 20, Laws 1912, Special Session), and subject also to the provisions of subd. 2 of sec. 94—28, that "the total of all disbursements by himself (a candidate), by his personal campaign committee in his behalf, by all party committees in his behalf, or otherwise made in his behalf, shall not exceed in the aggregate the amounts in this section specified" etc.

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*Elections—Primaries*—Where a person received the highest number of votes at a primary for the Republican nomination for an office for which he is nominated on the Democratic ticket, the person receiving the next highest number of votes on the Republican ticket is not the Republican nominee.

September 30, 1912.

HON. FRANK H. HANSON,

*District Attorney,*

Mauston, Wisconsin.

In your favor of September 27th you state that "A" was a candidate at the September primary for the nomination for county treasurer on the Democratic ticket, he having been regularly nominated therefor by nomination papers; that he received the highest number of votes for that office at such primary and is consequently the Democratic nominee for that office at the November election; that no one filed any nomination papers for that office on the Republican ticket, but "A" 's name was written thereon as the Republican nominee for county treasurer by 151 voters, and the name of "B" by 121 voters; and you ask whether "B" 's name can properly be

placed upon the ticket at the November election as the Republican nominee for the office of county treasurer.

Section 11—18 provides:

“The person receiving the highest vote at such primary as the candidate of any party for any office \* \* \* shall be the nominee of that party for such office” etc.

The supreme court has said as to votes

“cast for a candidate known to be dead or disqualified, or for a fictitious person” that “the great current of authority is to the effect that such ballots are ineffectual for any person and cannot be counted in determining the result of the election.” *State, ex rel. v. Frear*, 144 Wis. 79, 88.

I do not think that such rule is applicable to the situation here presented, for the votes cast for “A” cannot be said to have been cast for a candidate known to be disqualified, since had “A” been defeated for the Democratic nomination he would (having received a plurality of votes for the Republican nomination) have been the nominee of that party. See subsec. 5 of sec. 11—12 “A” was thus not disqualified to be the Republican nominee and the votes cast for him cannot be regarded as nullities but must be counted in determining the result of the election. It follows that “B”, not having received “the highest vote at such primary as the candidate of any party” for the office of county treasurer, is not the nominee of that party for that office. Subsec. 1, sec. 11—18.

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*Elections*—State Central Committee can make its own rules and can allow proxies to sit at regular meetings of the Committee.

October 2, 1912.

HON. GEO. E. SCOTT,

*Chairman Republican State Central Committee.*

You ask for my opinion concerning the legality of using proxies at the regular meetings of the State Central Committee.

In reply thereto would say that I am of the opinion that the State Central Committee, as the governing body of the polit-

ical party which it represents, has full power to make its own rules and regulations in the absence of any specific statute relating to the question involved and that this power would include the authority to permit proxies to represent individual members of the committee at regular or special meetings upon such conditions as the State Central Committee saw fit to prescribe. I am not aware of any statute prohibiting the committee from recognizing proxies at its regular meetings and I am therefore of the opinion that the State Central Committee may legally permit proxies to sit in its regular meetings upon such terms as the committee may prescribe.

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*Elections*—Candidate for District Attorney whose name was written in party column but who did not file nomination papers is not entitled to have his name placed in the Party column on the official ballot but may have name placed in Individual column if he has complied with law in other respects.

October 3, 1912.

MR. PAUL R. NEWCOMB,

*District Attorney,*

Durand, Wisconsin.

You state that no nomination papers were filed for any democratic candidate for district attorney in your county but that at the last primary election three persons received votes for district attorney on the democratic ticket; that in the aggregate these three candidates did not receive first choice votes equal in number to ten per cent of the vote cast for governor at the last general election, but that the person who received the highest number of first choice votes did receive more than would be required on his nomination papers if he had filed any. This candidate now claims the right to have his name placed upon the official ballot in the democratic column and you ask for my opinion as to whether he is entitled to have his name placed in the party column as the democratic candidate.

In reply to your inquiry I am of the opinion that he is not so entitled. If he has complied with the law in other respects he is entitled to have his name placed in the individual column as a candidate for the office of district attorney, but

the law is very clear and specific that even had he filed nomination papers as the democratic candidate he would not be entitled to have his name placed in the party column unless the aggregate of votes cast for the office of district attorney equaled ten per cent of the vote cast for governor at the last general election.

*Elections—Corrupt Practices*—Candidates who have made no disbursements need file no statements.

Failure to file a statement under such circumstances does not prevent a candidate's name from going on the ballot.

October 9, 1912.

HON. W. C. ZABEL,

*District Attorney,*  
Milwaukee, Wisconsin.

In your favor of October 4th you submit the following questions for my official opinion:

1. You ask whether, under sec. 94—9 of the Corrupt Practices Act, it is necessary for a candidate who has made no disbursements for political purposes, to file a statement to that effect.

Subsec. 1 of sec. 94—9, as am. by ch. 10, Laws of Special Session 1912, provides that:

“Every candidate \* \* \* shall within the four days ending on the second Saturday occurring after such candidate \* \* \* has first made a disbursement \* \* \* and thereafter, within the four days ending on a second Saturday of each calendar month until all disbursements shall have been accounted for, and also within the four days ending on the Saturday preceding any election or primary, file a financial statement \* \* \* which statement shall cover all transactions not accounted for and reported upon in statements theretofore filed.”

Obviously, this is not a requirement that a candidate must file a statement that he has made no disbursements. And in view of the fact that the section is highly penal, I do not think that such requirement should be read into the law by implication. Plainly the requirement that a statement be filed within four days ending on the second Saturday occurring after the

candidate has made a disbursement cannot apply to a candidate who has made no disbursement. Similarly, the requirement that "each statement after the first shall contain a summary of all preceding statements" etc. cannot apply to such a candidate. I find no other provisions in the law that require a candidate, who has made no disbursements, to file a statement. Paragraph 3 of sec. 94—9 specifies the details which such statement should give, and it seems almost incomprehensible that, had the legislature intended to require a statement to the effect that a candidate has made no disbursements, it would have failed to state that in the law, when specifying in such great detail what the statement should contain, and I am, therefore, of the opinion that it is not necessary for such a candidate to file any statement.

2. You ask whether or not a candidate is entitled to have his name placed upon the ballot at the election when he has had no disbursements and has filed no statement setting forth that fact.

Sec. 94—10, as am. by ch. 10, Laws special session 1912, prevents the name of a candidate being printed on the official ballot unless there has been filed by him "a statement of accounts and expenses relating to nominations required by this act up to the time for such certification". Since, under the construction of sec. 94—9 that I have adopted, no statements are required to be filed by such a candidate, he does not lose his right to have his name on the ballot by failing to file a statement.

3. You ask: "Is a candidate entitled to have his name upon the ballot when he files a statement of his disbursements after the time required by sec. 94—9, subd. 1?"

On this point I enclose you copy of an opinion rendered to Mr. S. G. Dunwiddie, District Attorney at Janesville, under date of July 20, 1912, which, I think, answers your inquiry.

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*Elections—Corrupt Practices*—Although sec. 94—11 requires an individual to file a statement only when his disbursements for political purposes exceed \$50.00, any disbursements even though less than \$50.00 if within sec. 94—28 must be included in determining the total of all disbursements made in behalf of a candidate.

October 9, 1912.

MR. B. A. HUSTING,

*District Attorney,*

Fond du Lac, Wisconsin.

You refer to my opinion of September 30th, and ask whether sec. 94—11 of the Corrupt Practices Act does not modify sec. 94—28 “and permit the expenditure of at least \$50 by an individual not a member of a candidate’s campaign committee or a party committee.”

Sec. 94—11 requires the filing of a statement by a person other than a candidate, or a personal campaign or party committee only when the aggregate of his disbursements for political purposes exceeds \$50, but I think that an amount less than \$50 must nevertheless, if otherwise within subdiv. 2 of sec. 94—28, be included in determining the amount of disbursements made by or on behalf of a candidate. Subd. 2 of sec. 94—28 uses the words “the total of all disbursements” and I see no reason to except disbursements less than \$50 in amount.

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*Elections*—There is no method of filling a vacancy on a county ticket after the primary when there was no candidate at the primary for the office.

October 10, 1912.

MR. GEORGE B. NELSON,

*District Attorney,*

Stevens Point, Wis.

Under date of October 7th you requested me to give you my opinion on the following question:

“Is there any law by which a vacancy can be filled on a county ticket after the primary where there was no candidate on the ticket for a certain office before the primary election?”

Sec. 11—13 of our Stats. provides:

“1. Vacancies occurring after the holding of any primary shall be filled by the party committee of the city, district, county or state, as the case may be.

“2. If a person whose name is printed on the primary ballot shall die or file a declination to accept the nomination after the ballots are printed, or if he shall be disqualified to accept

such nomination, the votes cast for him shall be counted and returned, and if he shall receive the greatest number of votes as provided by sec. 11—16 of the statutes, the vacancy shall be filled by the party committee as aforesaid.”

In an opinion rendered to Hon. J. A. Frear, Secretary of State, under date of September 24, 1910, this department has construed the word “vacancy” in said statute to apply only to a case where a nomination had actually been made and thereafter, for some reason, the party nominated could not serve. It was said in said opinion:

“The only meaning that can be given to the words ‘vacancies occurring after the holding of any primary’ is that which the words plainly express. ‘To occur’ is ‘to happen’—‘to take place.’ A vacancy could not occur after the holding of any primary unless the place made vacant was filled at the primary.”

I know of no way of filling a vacancy on the ticket where no nomination papers were circulated or where no nomination was made at the primary.

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*Elections*—Ballot for state, congressional and county candidates may be voted on voting machine. But Presidential ballot and Referendum ballot cannot be voted on machine.

October 15, 1912.

MR. J. ELMER LEHR,  
*Assistant District Attorney,*  
Milwaukee, Wisconsin.

I have your favor of August 26th in which you request the opinion of this department upon several questions relating to the use of voting machines at the general election to be held in November, 1912.

Voting machines were first authorized by ch. 459, Laws 1901. That chapter provided that the common council of any city or any town board, etc., might adopt and purchase voting machines, provided that no machine should be approved by the voting machine commission therein provided for, unless such machine affords

“every voter a reasonable opportunity to vote for any person for any office or for or against any proposition, for whom, or for or against which he is by law entitled to vote, and enable him to do this in secrecy.”

At the time of the adoption of ch. 459 of the Laws of 1901, sec. 38 of the Wis. Stats. provided a form of paper ballot prescribing its size, etc., in considerable detail. Sec. 38 and ch. 459 of the Laws of 1901 were both amended by the legislatures of 1905, 1907, 1909 and 1911.

Ch. 633 of the Laws of 1911 amends sec. 38 providing in still greater detail the form, color and size of the ballot and providing for separate ballots for different officers and questions.

Prior to the amendment of 1911 subd. 1 of sec. 38 read as follows:

“Every ballot printed under the provisions of this chapter for use at general elections shall be upon white print paper” etc.

As amended by chapter 633 of the laws of 1911 subdivision 1 of section 38 reads:

“There shall be printed and provided for use in each precinct at general elections a *separate* ballot upon which shall be printed the names of all candidates for state, congressional, legislative and county offices.”

The several amendments to the election laws should be read together and harmonized with the statute relating to the use of voting machines if possible.

It does not seem to me that the change of language in subd. 1 of sec. 38 is sufficient to work an implied repeal of the voting machine law in its application to the candidates for state, congressional, legislative and county offices and I am therefore of the opinion that this ballot may be used upon the voting machine.

Subd. 8 of sec. 38 as amended by ch. 633 of the Laws of 1911 provides as follows:

“Whenever a proposed amendment to the constitution, or any measure or other question shall be submitted to a vote of the people, a concise statement of the nature thereof shall be printed in accordance with the act or resolution directing its submission upon a *separate ballot provided for that purpose* and underneath the question as thus stated shall appear the words

'yes' and 'no' and after and to the right of each of said words there shall be a square. At the top of said ballot shall be printed in letters of not less than three-eighths of an inch in length the words: 'Official Referendum Ballot.' Underneath said words and in plain legible type shall appear the following instructions to voters: 'If you desire to vote for any question make a cross (x) or other mark at the square after the word "yes" underneath such question; if you desire to vote against any question make a cross (x) or other mark in the square after the word "no" underneath such question.' This form of ballot shall be used at all elections at which questions are submitted to the people."

Subsec. 9 of sec. 38 provides:

"In each year in which there is to be elected a president and vice president of the United States, there shall be printed and provided for use *in each precinct at the general election a separate ballot* to be designated 'Presidential Ballot'."

Subd. 10 of sec. 38 provides the form of such Presidential ballot and subd. 17 of sec. 38 provides that the ballot to be used for state, congressional and county offices shall be printed on white paper; that the presidential ballot shall be printed upon blue paper, and the referendum ballot shall be printed upon pink paper. It is also provided in subdivision 10 that upon such ballots shall be printed in type of a certain designated size the official title of such ballot together with certain instructions to voters, which instructions include directions for voting a split ticket and the writing in of the name of any candidate for whom the voter desires to cast his ballot.

It is obvious that the many requirements prescribed for the casting of these three separate ballots cannot be carried out upon the voting machine. It will be observed also that the acts referred to make no exception in the case of cities where voting machines are in use. Nowhere in the act is any reference whatever made to the use of voting machines. The language of the act, however, is specific in that the several ballots shall be voted in separate "ballot boxes", that the ballots shall be printed upon different colored paper, that the presidential ballot "shall be printed and provided for use in each precinct at the general election" and in the case of the referendum ballot this particular clause is added to the old

law by the amendment of 1911: "This form of ballot shall be used at all elections at which questions are submitted to the people."

The question to be determined is: Did the legislature intend that these specific requirements should only apply in precincts where voting machines were not in use, or did the legislature intend the act to be general in its application with reference to the Presidential ballot and the Referendum ballot.

It is difficult to assign any reason why the legislature should intend to restrict the provisions relating to presidential and referendum ballots to those communities where voting machines are not in use. The language of the act with reference to these ballots is specific, and general in its application to every precinct in the state.

The law providing for the use of voting machines is general in its application and may be adopted by every city, village or township throughout the state. If the legislature intended that the provisions of chapter 633 of the laws of 1911 concerning the presidential and referendum ballots should have no application in precincts where voting machines are used, it would follow that the law would be entirely nullified by the adoption of voting machines throughout the state; in other words, if this law does not apply in cities where voting machines are now in use, then it would not apply to such communities as may hereafter adopt voting machines and their general adoption would nullify the act. It does not seem probable that the legislature intended any such absurd possibility.

The act provides that the presidential ticket shall be separate from the state, congressional and county ticket and requires that each of these two tickets shall be printed on paper of different colors and shall be voted in a separate ballot box. From this it was evidently the legislative intent to separate the presidential ticket from the state, congressional and county ticket, thereby requiring the voter to perform two distinct physical acts in voting the two separate tickets.

I do not regard the color scheme in the different ballots as of any particular importance, and yet it has some significance when read in connection with the other provisions of the act as showing the legislative intent.

No valid reason can be assigned for interpreting the provisions of this act as applying only to those communities where voting machines are not in use. It cannot be assumed that the legislature would require a particular form of ballot and specific instructions in relation to voting the same to be given to one class of citizens who did not use voting machines while at the same time requiring another class of citizens residing in localities where voting machines are in use to vote upon the multiplicity of candidates and questions through the medium of a complicated machine within the limited space of time allotted to each voter. It is obvious that only those who are expert in the use of voting machines could within the time available vote intelligently upon the many candidates and questions presented at a general election. It seems to me to be the more reasonable construction to hold that the legislature intended this act to be general in its application and that where important questions such as amendments to the constitution involving a change in the fundamental law of the commonwealth are to be voted upon it was the intention of the legislature that every voter should be given full and intelligent information and instruction and ample opportunity to vote upon such questions.

It is notorious that constitutional amendments have been passed by the vote of a very small minority of those voting at a general election, and it is also a matter of common knowledge that the vote upon these questions of large importance has been particularly small in the large cities where voting machines are in use, and it may be reasonably inferred that the legislature having knowledge of these facts intended by the enactment of chapter 633 to give a wider scope and afford more ample opportunity for a majority expression upon questions of supreme importance.

The question upon which you ask the opinion of this department is one of considerable importance and I have found it somewhat difficult to arrive at a satisfactory conclusion. Either the provisions of chapter 633 must be held to be general in their application or they must be restricted to those communities where voting machines have not been adopted. I find no authority in the law for exempting those communities which have adopted voting machines from the general application of the statute. It is possible that the courts might at-

tempt to harmonize the provisions of ch. 633 of the Laws of 1911 with the voting machine law by ignoring the general language of the act and holding that it was not intended to apply to localities using voting machines and that the use of voting machines, notwithstanding the language of the act, would not invalidate an election. But this department is asked for a construction of the law in advance of any judicial interpretation and as a guide to election officers in conducting the election. It is certain that a strict compliance with the provisions of the act could not invalidate an election held thereunder and it seems to me to be the safer and wiser course to interpret this law as general in its application which the language of the act plainly implies.

The voting machine law is at best only a permissive statute. It is a mechanical method providing for the casting of ballots and is only rendered legal by the enactment of a permissive statute.

I am therefore of the opinion that the provisions of ch. 633 with reference to the form and manner of voting the referendum ballot and the presidential ballot is general in its application and that it must be specifically complied with. It follows that the referendum and the presidential ballot prescribed by ch. 633, Laws of 1911, cannot be voted upon the voting machine.

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*Elections—Corrupt Practices Act*—The Corrupt Practices Act applies to the campaign for presidential electors.

Every party committee, and every personal campaign committee must file a statement of its expenditures.

The Secretary of State is the proper filing officer in the case of a state party committee, or a personal campaign committee for a candidate for an office to be voted upon throughout the state.

Political advertising.

October 19, 1912.

MR. D. E. McDONALD,

*District Attorney,*

Oshkosh, Wisconsin.

In your letter of the 16th instant, you state that you have been requested to officially ask me whether the Corrupt Prac-

tices Act applies to the campaign for president and vice president of the United States, and you quote the definition of the term "candidate" as given in section 94—12 of the statutes, as amended, which expressly excepts candidates for president and vice president of the United States. So it is very clear by the terms of the law itself that candidates for these offices are not such candidates as are therein referred to. Furthermore, no votes are cast at any election or primary for any candidate for either of these offices. The votes are cast for the presidential electors and candidates for that office are clearly candidates within the meaning of the term as used in the corrupt practices act, and such act applies to the campaign for such electors.

You also ask, "Is the committee obliged to file a statement of expenditures? If so, where? Is the committee obliged to place upon the publication by whom published and the amount paid in newspapers?" These questions are not as clearly stated as they should be. I assume, however, that you refer either to a party committee or to a personal campaign committee. Sec. 94—9, subsec. 1, of the Stats., as amended, provides in part: "The secretary of every personal campaign committee and the secretary of every party committee shall" file a financial statement, etc. Subsec. 2 of the same section provides in part:

"The statement of his (the candidate's) personal campaign committee shall be filed with the filing officer of such candidate. The statement of every state central committee and of every congressional committee shall be filed with the secretary of state."

Subsec. 4 of sec. 94—1 of the Stats., as amended, defines who is a filing officer. Under sec. 11—29 of the Stats., as amended, the secretary of state is the proper filing officer for candidates for presidential elector. It follows that a party campaign committee for the state or a personal campaign committee for a presidential elector must file a statement of its expenditures in the office of the secretary of state. If some other committee is referred to, I believe a reading of the sections referred to will enable you to solve the question. The latter part of your question is answered in the affirmative by sec. 94—14 of the Stats., as amended.

*Elections—Corrupt Practices Act*—A candidate for a county office, in filing his financial statement, must account for any contributions made to the state central committee.

October 23, 1912.

MR. THEODORE BUEHLER,  
*District Attorney,*  
Alma, Wisconsin.

In your letter of the 21st, you ask:

“A candidate for a county office has sent in a contribution to his party’s state central committee of \$5.00 for campaign purposes; should he put this item into his report of money expended for his own election under the corrupt practices law?”

Sec. 94—9, par. 1, of the Stats., as amended, provides in part:

“Every candidate \* \* \* shall on the second Saturday occurring after such candidate \* \* \* has first made a disbursement or first incurred any obligation, express or implied, to make a disbursement for political purposes, and thereafter, on the second Saturday of each calendar month, until all disbursements shall have been accounted for, and also on the Saturday preceding any election or primary, file a financial statement verified upon the oath of such candidate, \* \* \* which statement shall cover all transactions not accounted for and reported upon in statements theretofore filed.”

Sec. 94—1, par. (1), provides:

“Any act shall be deemed to have been done for ‘political purposes’ when the act is of a nature, is done with the intent, or is done in such a way as to influence or tend to influence, directly or indirectly, voting at any election or primary, or on account of any person having voted or refrained from voting, or being apt to vote or refrain from voting at any election or primary.”

Sec. 94—3 of the Stats., as amended, provides:

“No candidate shall make any disbursement for political purposes except under his personal direction which for every purpose shall be considered his act, through a party committee, or through a personal campaign committee, whose authority to act shall be filed, as provided in section 94—4 of the statutes.”

Sec. 94—6 of the Stats. provides in part:

“No candidate shall make any disbursement for political purposes except: \* \* \* (4) For contributions to his party committee.”

From these several citations it appears very clear that the contribution to the state central committee is an expenditure for political purposes. Sec. 94—9 heretofore quoted, requires the statement to cover all expenses for political purposes, and I am therefore of the opinion that the candidate should put this item into his report of money expended for his own election under the corrupt practices law.

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*Elections—Corrupt Practices*—A candidate for a state office may make a contribution to his party county committee.

November 9, 1912.

HON. FRANCIS E. MCGOVERN,  
*Governor of Wisconsin.*

In your letter of November 8th, you ask whether under the provisions of sec. 94—6 (ch. 650, Laws of 1911) a candidate for a state office may make a contribution to his party county committee.

Subsec. 1 of sec. 94—6 provides:

“No candidate shall make any disbursement for political purposes except . . . (4) for contributions to his party committee.”

The purpose of this provision seems to be to cause all political disbursements to be made through responsible and authorized sources. Sec. 94—5 inferentially permits a person not a candidate to make contributions to any or to several party committees. I see no reason for denying the same privileges to a candidate or for limiting him in his contributions to a single committee.

You will note that if a candidate is so limited to a single committee the statute does not specify what committee that one shall be; thus a candidate for a county office is not limited to contributions to his county committee, nor a state candidate to his state committee. Either might obviously contrib-

ute to some one committee other than the one working for the election of the party's officers in the district in which he was running and be clearly within any construction of the law. Other provisions of the act limiting the amount candidates may spend and the purposes of such expenditures seem sufficient to prevent abuse in this regard. If the law is to be read literally as permitting contributions by a candidate to a single party committee only then a candidate for a county office who contributes to his county party committee may not also contribute to his state party committee. It does not seem to me that this was the legislative intent.

Subd. 2 of sec. 4971 of the Stats., provides that: "Every word importing the singular number only may extend and be applied to several persons or things as well as to one person or thing." It is therefore permissible to read the word "committee" in the section quoted as plural instead of singular and I am of the opinion that it should be so read.

You will note that subsec. 2 of sec. 94—6 provides that:

"After the primary no candidate for election to the United States senate shall make any disbursement in behalf of his candidacy except contributions to his party committees," etc.

It may, of course, be argued that the use of the plural in this subsection indicates that the singular of the same word in the preceding subsection was intended to be used in a different sense, but in spite of this I am convinced that in view of the apparent hardship of construing the law literally it should not be so construed.

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*Elections—Corrupt Practices Act*—A defeated candidate for nomination for county treasurer at the September primary who is not a candidate at the general election in September must file the statement of expenses required by sec. 4543c.

December 6, 1912.

HON. L. H. MEAD,

*District Attorney,*

Shell Lake, Wisconsin.

In your favor of December 5th, you state that a defeated candidate at the September primary for the office of county

treasurer filed a statement of his election expenses up to and including the Saturday preceding such primary, as required by the corrupt practices act; that he was not a candidate at the general election; and you ask whether he must comply with secs. 4543c and 4543c—1 by filing a further statement within thirty days after the general election.

The filing of the statements required by the Corrupt Practices Act does not dispense with the filing of the statements required by secs. 4543c and 4543c—1, for subd. 5 of sec. 94—9 of the Corrupt Practices Act provides that "nothing contained in this act shall be construed to affect in any manner the provisions of secs. 4543c and 4543c—1 of the statutes." Sec. 4543c provides that

"Every person who shall be a candidate before any convention or at any primary or election to fill an office \* \* \* shall, within thirty days after the election held to fill such office, make out and file \* \* \* a statement in writing \* \* \* setting forth in detail each item in excess of five dollars in money or property contributed, disbursed, expended or promised by him \* \* \* in endeavoring to secure or in any way in connection with his nomination or election to such office or place," etc.

It seems to me impossible to give any other construction to this language than that every candidate for an office, whether he obtain a nomination therefor or not, must, within thirty days after the election held to fill such office, file the statement required. Obviously, an unsuccessful candidate before a convention must file such statement and I see no reason for drawing a distinction between such a candidate and a candidate at a primary.

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*Elections—Nomination Papers*—Under ch. 4, L. 1911, it is advisable that all signers of each separate nomination paper for a judicial officer in a county containing more than 100,000 population, reside in the same election precinct.

January 24th, 1913,

HON. JOHN S. DONALD,  
*Secretary of State.*

In your letter of the 22nd, you ask my official opinion upon the following questions, submitted to you by Orin M. Peters,

17—A. G.

Secretary of the Democratic County Committee of Milwaukee county:

I. "Is it necessary for candidates for judicial offices in the county of Milwaukee to have all signers of each separate nomination paper reside in the same ward or must they reside in the same precinct? In other words, must such a candidate circulate his papers by precincts or by wards?"

II. "As between chapters 4 and 613 laws 1911 which controls?"

Ch. 4, Laws of 1911, is a special law, relating to the nomination of judicial officers in counties having a population of over 100,000 by a nonpartisan primary election. It contemplates the nomination of all judicial officers in such counties by such nonpartisan primary election. Section 2 of that chapter provides:

"Nomination papers for candidates for any such office shall be designated as nonpartisan, and shall be signed by qualified electors equal in number to not less than three per cent nor more than ten per cent of the electors in at least one-sixth of the election precincts of such county who voted for all candidates for such office at the last previous judicial election."

There does not appear to be any provision as to the residence of signers of each separate nomination paper. The provision relating to nomination of officers at the September primary found in par. 4 (a) sec. 11—5, Wis. Stats. 1911, is

"for all nominations, except state officers and representatives in Congress, signers of each separate nomination paper shall reside in the same ward, town or village."

As this section relates only to September primary it is not applicable to the question presented. As the number of voters required to sign is a certain percentage of the number of votes cast in a certain percentage of the precincts at the last previous judicial election, I believe it advisable to circulate such nomination papers by precincts rather than by wards. While if the matter came into court, it might hold that circulation by wards is a compliance with the law, until that has been decided, the respective candidates had better avoid all question by following the other method.

In reply to the second question, I would say that chapter 4 is a special law, relating to the nomination of judicial officers in certain counties. Chapter 613 is a general law, relating to nonpartisan nominations, primaries, caucuses, conventions and special elections, for all classes of officers and throughout the state.

In conformity with the familiar rule of statutory construction, in matters to which it is applicable, the special law (Chapter 4) controls.

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*Contested Elections—Legislature—Public Officers*—Either house of the legislature may inquire into the election or qualifications of any person claiming a seat therein, even though the provisions of sec. 104 Wis. Stats. have not been complied with.

Such house may authorize the issuance of such subpoenas as the committee investigating such question may designate.

January 24th, 1913.

HON. THOMAS J. MAHON,

*Chairman Assembly Committee on Elections.*

In your inquiry of the 22nd you state:

“A certificate of election was issued to John O’Day as a member of the Legislature as having been duly elected from Lincoln County at the recent general election. Later, and more than thirty days after the decision of the board of county canvassers, one Ralph H. Clark duly served a notice in writing on said John O’Day, stating that his election would be contested and giving the cause of said contest; that he duly filed a copy thereof in the office of the Secretary of State more than ten days before the day fixed by law for the meeting of the Legislature;”

and you ask my official opinion as to whether the Assembly may inquire into the right and qualifications of said John O’Day to a seat in that body, in view of the fact that the notice of contest was not served within the time limit set by sec. 104 Wis. Stats.

That section provides in part:

“Any person wishing to contest the election of any senator or member of assembly shall, within thirty days after the de-

cision of the board of canvassers, serve a notice in writing on the person whose election he intends to contest, stating that his election will be contested and the cause of such contest briefly."

This part of the statute has not been complied with by Mr. Clark. Similar provisions relating to election contests tried in courts are quite generally held to be mandatory. 15 Cyc. 399 and cases cited.

Our Constitution, however, provides:

"Each house shall be the judge of the elections, returns and qualifications of its own members." Art. IV, sec. 7.

Under this provision the Assembly is the sole judge and the courts have no jurisdiction of the matter. *State ex rel. Anderson v. Kempf*, 69 Wis. 470, 475; *State ex rel. McDill v. State Canvassers*, 36 Wis. 498, 505; *State ex rel. Kuesterman v. Board of Canvassers*, 145 Wis. 294, 307; 36 Cyc. 849 and cases cited.

In *Peabody v. School Committee*, 115 Mass. 383, the court says:

"It cannot be doubted that either branch of the Legislature is thus made the final and exclusive judge of all questions, whether of law or of fact, respecting such elections, returns or qualifications, so far as they are involved in the determination of the right of any person to be a member thereof; and that while the constitution, so far as it contains any provisions which are applicable, is to be the guide, the decision of either house upon the question whether any person is or is not entitled to a seat therein, cannot be disputed or reversed by any court or authority whatever."

This language is quoted with approval in *Covington v. Buffett*, 90 Md. 569; 45 Atl. 204; 47 L. R. A. 622.

Certainly, if the provisions of the constitution may be finally passed upon by the members of either house, the mere statutory provisions may be. This statute is merely a rule of procedure, to be followed by any person desiring to institute a contest to enable him to claim as a matter of right a hearing at the hands of the Assembly. It in no way precludes the exercise of the constitutional right of the Assembly itself to institute an inquiry as to the election or qualification of any person claiming a right to a seat in that body. **Having that**

right, it may, if it sees fit, proceed with such an inquiry, even though the initial proceedings started by the contestant do not comply with the statute.

The matter is not a mere personal controversy between the two claimants, but is a matter in which the public, as represented by the Assembly, and especially the voters of the particular assembly district, have a considerable interest. Certainly, the public, the State, is interested in seeing that no person not honestly and fairly entitled thereto is given a seat in either house of the Legislature. If it be said that this cannot be done, a sufficient answer would be that such a construction would render the statute repugnant to the constitutional provision referred to. This department will not so construe it.

Furthermore, one legislature cannot, by its acts, bind future legislatures. In my opinion the Assembly has the authority to inquire into the right and qualifications of Mr. O'Day to a seat in that body, although the notice of contest was not served within the time limit fixed by sec. 104 Wis. Stats.

You also ask, if my answer to your first question is in the affirmative, whether the Committee on Elections of the Assembly, to which this contest has been referred by the House, has the power to subpoena witnesses, and especially the county clerk of Lincoln county, with the official ballots, and to take such other testimony as may be pertinent to the consideration of the matter so referred.

Sec. 122, Wis. Stats. of 1911, provides:

“Subpoenas may be issued for the purpose of procuring the attendance of witnesses before any committee of the legislature, or either house thereof, appointed to investigate any subject matter, and such subpoenas shall state when and where, and before whom, the witness is required to appear, and may require such attendance forthwith or on a future day named, and the production of books, records, documents and papers therein to be designated; \* \* \* All such subpoenas shall be signed by the presiding officer and chief clerk of the senate or assembly, and may be served by any person and returned to the chief clerk of the house which issued the same in the manner in which subpoenas from the circuit court are served and returned.”

This seems ample authority for the issuance of such subpoenas, but seems to contemplate that the House shall order

their issue. By proper resolution the House could, in my opinion, authorize the issuance by its proper officers of such subpoenas as the Committee may designate.

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*Elections—Nomination Papers*—There is no limit as to the time when nonpartisan nomination papers for county judge may be circulated.

February 6th, 1913.

HON. PAUL HUSTING,  
*State Senator.*

You have requested me to give you an opinion on the question submitted to you by Judge Lamoreux, of Dodge county, as to the time he is authorized under the statutes to circulate his nomination papers as a nonpartisan candidate for the office of county judge.

Replying thereto I will say that sec. 30 of the Wis. Stats., under which independent, or nonpartisan, nominations may be made, including judicial offices, provides that nomination papers shall be filed

“for candidates to be voted for wholly within one county, in the office of the county clerk, not more than forty nor less than fifteen days before such election.”

There is, however, no provision limiting the time when nomination papers may be circulated. In sec. 11—5, subsec. 3, it is provided:

“No nomination paper shall be circulated prior to sixty days before the date on which such paper must be filed according to law, and no signature shall be counted unless it has been affixed to such nomination paper and bears date within sixty days prior to the time for filing such nomination paper.”

This provision is a part of the primary law enacted in ch. 451 of the Laws of 1903 and contains the following:

“Section 11—2. (4). This act shall not apply to special elections to fill vacancies, to the office of state superintendent, to presidential electors, to county and district superintendents of schools, to town, village and school district officers, nor to judicial officers, excepting police justices and justices of the peace in cities of the first, second and third classes.”

It thus appears that nomination papers for judicial elections are expressly exempted by this law and for that reason the law does not apply to such cases. I have found no other statute limiting the time when nomination papers may be circulated for the office of county judge.

I am therefore of the opinion that the nomination papers may be circulated at any time before the last date designated before which the nomination papers must be filed with the county clerk.

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*Elections—Primaries*—A special primary must be held prior to a special election called to fill a vacancy in the assembly even though no nomination papers are filed for such primary.

February 7th, 1913.

MR. EDWARD W. MILLER,  
*District Attorney,*  
 Marinette, Wis.

In your favor of January 30th, you ask my opinion as to whether it will be necessary to hold a special primary prior to the special election to fill the vacancy in the assembly caused by the death of the late Albert E. Schwittay, if no nomination papers are filed for such primary.

Subsec. (4) of sec. 11—2, Wis. Stats. 1911, provides in part "This act (the primary election law) shall not apply to special elections to fill vacancies \* \* \*."

This provision was in the primary election law when first enacted. See sec. 2, ch. 451, Laws of 1903. Sec. 3 of ch. 613, Laws of 1911, repealed sec. 29 of the Stats. and enacted a new section of the same number, which provides in part:

"Whenever a special election shall be ordered as provided by section 94n of the statutes, all party candidates to be voted for at such election shall be nominated by a primary \* \* \*. This section 94n of the statutes, all party candidates to be voted for at member of the assembly," etc. (See subsec. 1 of sec. 29 Wis. Stats. 1911.)

There can be no doubt but that this section 29 being the later law controls over subdivision 4 of section 11—2.

It appears from the records in the office of the secretary of state that an order for the special election in question was

made by the governor on January 25th, 1913, and filed in the office of the secretary of state on the same day, which order fixed February 25th, 1913, as the day for holding such election. On January 25th, the secretary of state signed a notice for such special election and also one for a primary to be held February 15th, 1913.

Subsec. 1 of sec. 29 plainly makes it the duty of the secretary of state to fix a time for holding the primary and to give notice thereof; subsec. 2 makes it the duty of the county clerk to publish such notice; subsec. 3 provides that "nomination papers shall be filed not later than eight days before the day of the primary;" and subsec. 5 makes the provisions of the statutes in relation to the September primary applicable to such special primary.

These statutes are all mandatory and I am unable to find any statute which gives any officer or election official any discretion as to the holding of such election. In addition the statute contemplates writing in the name of a person not nominated by nomination papers (subsec. 3 of sec. 11—18) and if such person receives the requisite number of votes and files a declaration that he will qualify if elected, he becomes the party nominee and is entitled to have his name placed on the official ballot at the ensuing election as such party nominee. It thus appears that the failure of any person to file nomination papers for a primary is no obstacle either to the holding of such primary or to the election of a party candidate thereat.

I am, therefore, of the opinion that the primary in question should be held even though no person files nomination papers therefor.

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*Elections*—Sec. 31 Stats. was expressly repealed by chapter 613, Laws of 1911.

February 7th, 1913.

HON. JOHN S. DONALD,  
*Secretary of State.*

Under date of February 5th, you have requested an opinion as to whether sec. 31 of the Stats. is repealed by ch. 613, of the Laws of 1911, or whether it is still in force. You call my attention to an opinion rendered by this department February 8th, 1912, to the effect that said section was not repealed.

In answer I will say that ch. 333 of the Laws of 1911 expressly repealed sec. 31 of the Statutes and reenacted a new section, numbering the same sec. 31. This act was approved June 14th, 1911. Ch. 613 of the Laws of 1911, approved July 7th, 1911, provides:

“Section 2. Sections 11a, 11b, 11c, 11d, 11e, 11f, 11g, 11h, 11i, 11j, 11k, 11l, 11m, 29, 32, 35 and section 31 of the statutes are hereby repealed.”

It thus appears that sec. 31 is among the sections expressly repealed by said ch. 613, although it is not indicated in the title, which fact evidently misled the writer of the former opinion.

Section 2 of said chapter occurs in the middle of the chapter and it seems that, in the title to the act, section 31 was inadvertently omitted. This, however, makes no difference in the legality of the repeal, as the provision of our constitution that the subject of an act shall be expressed in the title applies only to private and local bills. (See sec. 8, art. IV, Constitution of Wisconsin.)

My answer to your inquiry, therefore, must necessarily be that sec. 31 is repealed. You will accordingly regard the former opinion as superseded by this one.

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*Elections—Nomination Papers*—Independent nomination papers must be filed at least 15 days prior to the day of a special election, even though the primary is held only 10 days prior to such election day.

February 14th, 1913.

MR. H. B. PEDERSON,  
*County Clerk,*  
Marinette, Wis.

While it is not within the scope of my duties to advise county officers other than district attorneys, in view of the exceptional situation set forth in your letter, I give you my views on the question presented.

It appears that the special election to fill the vacancy in the assembly caused by the death of the late Albert E. Schwittay, has been called by the governor to be held on February 25th; that the special primary to nominate party candidates therefor

has been ordered by the secretary of state to be held on February 15th; that pursuant to subsec. 6 of sec. 30 Wis. Stats. 1911, independent nomination papers must be filed "not more than forty nor less than fifteen days before" such special election; and the question presented is whether in view of this provision, independent nomination papers may be filed after the primary and within fifteen days of the special election.

I can appreciate that the result of the primary may be an important factor in enabling a man to determine whether or not he will be an independent candidate at the ensuing election, but I do not see how such a consideration can have any bearing in construing sec. 30. Subsec. 1 of sec. 29 requires "all *party* candidates" to be voted for at a special election, to be nominated by a primary. Sec. 30 provides for "independent or nonpartisan nominations." It was obviously contemplated that such nominations might be made before the primary, since independent nomination papers may be filed forty days before the election (subsec. 6 of sec. 30) and the date of such election must be not more than forty days from the date of the order therefor (subsec. 2 of sec. 94n), during which period of forty days the primary must be held. (Subsec. 1 of sec. 29.) Consequently, I do not think that the mere fact that the primary is held within fifteen days of the election, so that no opportunity is given to file independent nomination papers after the result of the primary is known, is a valid reason for dispensing with the requirement of subsec. 6 of sec. 30, that independent nomination papers must be filed not less than fifteen days before the election.

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*Elections—Corrupt Practices Act*—Applies to the activities of those interested in a recall election prior to the calling thereof.

February 25th, 1913.

MR. STANLEY G. DUNWIDDIE,  
*District Attorney,*  
Janesville, Wis.

In your letter of February 7th you submit the following question for my opinion:

"During the past week petitions asking for the recall of the mayor and the commissioners of the city of Janesville were

filed with the city clerk. These petitions have been declared to be insufficient and not properly prepared. Those interested in filing the petitions have been working for some time. Several mass meetings have been held and candidates have come out against the mayor and commissioners. As no election has been ordered by the council, owing to the insufficiency of the petitions, would ch. 650 of the Laws of 1911 apply as to anything heretofore done by those interested in the proposed recall?"

Chapter 650, Laws 1911, hereafter designated the Corrupt Practices Act, seeks to restrain and regulate the activities of persons for political purposes. Subd. 1 of sec. 94—1 provides that:

“Any act shall be deemed, to have been done for ‘political purposes’ when the act is of a nature, is done with the intent, or is done in such a way, as to influence or tend to influence, directly or indirectly, voting at any election or primary, or on account of any person having voted, or refrained from voting, or being about to vote or refrain from voting at any election or primary.”

The question, therefore, arises whether the activities of those interested in filing the petitions, in holding mass meetings and in bringing out candidates against the mayor and commissioners, were for political purposes. If their conduct was of a nature, was done with the intent or was done in such a way as to influence or tend to influence, directly or indirectly, voting at any election or primary, it falls within the definition of “political purposes” as defined in the act. The calling of mass meetings, presumably condemning the mayor, and urging favorable consideration of opposing candidates, were certainly not vain and purposeless proceedings. It is perfectly manifest that the nature, the purpose and the intent thereof, was to influence voting at an election. That is not likely to be controverted.

But the further question arises whether the fact that no election was called absolves those participating in such proceedings from complying with the provisions of the Corrupt Practices Act, the answer to which depends on whether the provisions thereof are dormant and impotent until the calling of the election, springing into life only when the election is

called. It is not perceived how the position of those involved is any different than it would have been had the petitions been legal and the election called. They were either under obligations to comply with the Corrupt Practices Act or they were not, and success or failure in securing the calling of the election can make no difference.

The purpose of the Corrupt Practices Act is well understood. It is to condemn many methods hitherto practised in influencing votes at an election and to limit the amount of money that may be expended for that purpose. As a practical proposition a campaign to recall a mayor starts when petitions therefor are placed in circulation. The issue is at once formed and is "shall the mayor be recalled." His friends are arrayed on one side, his opponents on the other. If from this time on to the time when the election shall be called, the Corrupt Practices Act is not to apply to the activities of those interested on either side, and they are given carte blanche to resort to all the methods of campaigning condemned by the act, unlimited in amount and unrestrained in the use of money, much of the mischief which the act in question was designed to prevent will have been accomplished. I feel certain that such a construction would be contrary to the spirit of the law. I feel equally certain that such a construction would be contrary to the letter of the law. It is difficult to conceive of language more inclusive than that contained in subd. 1 of sec. 94—1. It plainly indicates a design on the part of the legislature to include every act carrying a political intent or bearing a political tinge. The expression "at *any* election or primary" could not be broader. It includes an election called or to be called, certain or contemplated, and is certainly broad enough to cover a proposed election for the recall of a mayor, although such election be not yet called and the calling thereof depends upon the filing of the petitions required by the statute.

I am of the opinion that the provisions of the law apply to the situation mentioned in your letter of inquiry and am strongly convinced that those charged with the enforcement thereof should act upon such assumption until it is held otherwise by the supreme court.

*Elections—Registration—Primaries*—1. Unregistered voter may vote at primary by making affidavit.

2. Election inspectors may administer oaths to unregistered voters.

March 14, 1913.

HON. JOHN S. DONALD,  
*Secretary of State.*

In your favor of March 14th, you submit two questions for my official opinion.

“First: If a male person is not registered in his voting precinct as required by law has he a right to vote on primary election day, to wit: March 18th, 1913, if he complies with section 61 of the Wis. Stats. as compiled in 1911 as to furnishing the necessary affidavit, assuming he is otherwise qualified?”

The latter part of subsec. 2 of sec. 11—14 of the Stats. provides that:

“Only voters whose names appear on such registry lists shall be allowed to cast their ballot at a primary election, except it is shown by affidavit that the elector is a qualified voter and resident of the precinct, which affidavit must be corroborated by at least two freeholders, electors in said district.”

Attorney-General Gilbert in two opinions to be found on pages 292 and 299 of the Biennial Report and Opinions of the Attorney-General for 1910, decided that this language gave an unregistered voter upon compliance therewith the right to vote at a primary. I see no reason to differ from his conclusion.

“Second: Can the election inspector administer the oath for the affidavit required by said section 61?”

Sec. 47 of the Stats. provides in part:

“Any inspector may administer any oath required by law in the registration of voters or the conducting of an election.”

Subsec. 6 of sec. 11—1 and sec. 11—6 make applicable in general terms to primary elections the provisions of the statutes relating to general elections. In addition subsec. 1 of sec. 11—12 provides that:

“The provisions of chapter 5 of the statutes of 1898, as amended, shall be applicable to the conduct of primaries where not otherwise provided.”

Sec. 47 above quoted is contained in said ch. 5 and I think that the authority to administer oaths which it gives to inspectors at general elections is thus by reference given to inspectors at primary elections. As bearing on this conclusion, you will note that by the terms of subdiv. (e) of subsec. 2 of sec. 11—12, the persons appointed inspectors, etc., “shall act as such officers at every primary, general, municipal and special election” etc.

I am, therefore, of the opinion that the affidavits provided for in subsec. 2 of sec. 11—14 may be taken before the election inspectors at primary elections.

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*Elections—Registration—Duties of Boards of Registry at meetings held prior to spring election of 1913. Effect of ch. 8, Laws 1913.*

March 15th, 1913.

HON. JOHN S. DONALD,  
*Secretary of State.*

In your favor of March 15th, you attract my attention to ch. 8, Laws 1913, approved by the governor and published March 14th, 1913, amending subsec. 2 of sec. 26 of the Stats., and ask my opinion as to its effect on the duties of the boards of registry at their meetings next Tuesday.

Prior to the amendment of sec. 26 by ch. 632, Laws 1911, and ch. 6, Laws 1912, special session, the board of registry at its first meeting held on the Tuesday next preceding primary election day (sec. 11—14 of the Stats.) was required to “make a registry of all the electors of their respective districts,” placing thereon:

“The names of all persons residing in their election district appearing on the poll lists \* \* \* omitting therefrom the names of such as have died or removed from the district and adding the names of all persons known to them to be electors therein.”

Sec. 27 provides for the second meeting of the board at which

“they shall revise and correct the registry \* \* \* by entering thereon the name of every elector entitled to vote \* \* \* who shall appear and require it.”

It also provided for registration by written application in certain cases.

Subsec. 2 of sec. 11—14 provided that

“no person shall be registered on or after the day of holding the primary without personally appearing before the inspectors.”

It thus appears that prior to the enactment of ch. 632, Laws 1911, the board of registry at its first meeting made a registry by copying the previous poll list omitting the names of persons who had died or removed from the district and adding the names of persons known to the board to be electors; and at subsequent meetings adding thereto only the names of persons “personally appearing before the inspectors.” (subsec. 2 sec. 11—14.)

Ch. 632, Laws 1911, and ch. 6, Laws 1912, special session, provided that:

“At the meetings of the board of inspectors held immediately preceding the first election requiring registration, after the first day of December, 1912, \* \* \* such inspectors shall make a new registry of electors for such election and no previous registry or registry list shall be copied or used in whole or in part in making the same, and no person's name shall be placed upon such registry unless the elector appears in person before the inspectors and requests that his name be registered. Such inspectors shall hold their first meeting on Monday and the following Tuesday three weeks preceding such election; their second meeting on primary election day and the following Tuesday preceding such election.”

This special provision for the registration this spring plainly required personal appearance of every elector before the board, as a condition precedent to his name being placed upon the registry. It quite clearly applied to all meetings of the boards of registry.

Ch. 8, Laws 1913, changed this requirement as to the registry prior to the election this spring by providing that the inspectors

“shall make a new registry of electors for such election and shall place thereon the names of all persons residing in their election district known by them to be qualified electors and the

names of all electors who appear in person or through a responsible elector of the voting precinct known to said inspectors, request that their names be placed on such registry."

I am convinced that this law prescribes the duties of the registry boards at all of their meetings held this spring subsequent to the passage of the law. It cannot be limited to the first meeting of the boards because it became a law subsequent to such first meeting, and since it applies only to the meetings of the board held this spring it would, if restricted to the first meeting only, be entirely inoperative. I interpret the provision to mean that while the boards may not copy the previous poll lists they may use them as a guide in making a new registry, but that they may place on such new registry the names of only such persons as are known to the board to be qualified electors, together with "the names of all electors who appear in person or through a responsible elector of the voting precinct known to said inspectors, request that their names be placed on such registry." It is their duty to do this at the meeting held on primary election day and at their meeting held on the following Tuesday preceding the election. The obvious purpose was to do away with the hardship of requiring every elector to appear in person before the board and yet to require a new registry to be made up of only such persons as the board is convinced are qualified electors.

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*Elections*—Under ch. 4, Laws of 1911, no primary election is held for a judicial office where not more than two candidates have filed for such office.

March 15th, 1913.

HON. EDWARD YOCKEY,  
*District Attorney,*  
Milwaukee, Wis.

You ask for my official opinion upon so much of sec. 4 of ch. 4 of the Laws of 1911 as is hereafter quoted, the particular language upon which you desire my construction being hereinafter indicated. So much of sec. 4 of ch. 4 as is material to the consideration of your question reads as follows:

"The name of each candidate so placed in nomination shall be printed under a designation of the office for which he is

named on the official ballot to be used at said primary election, provided, that, if only two persons are thus placed in nomination, their names shall not be placed on such ballot, but they shall be nominees for the office for which they shall have filed nomination papers and their names shall be placed on the official ballot at the ensuing judicial election."

You ask whether when there are not more than two candidates who have filed their nomination papers as required by ch. 4 any other person may be named at said primary. The language above quoted is so plain that there is no room for construction in my mind. In order that any primary be held, there must be more than two candidates who have filed their nomination papers with the county clerk. If "only two" persons file such nomination papers they are placed upon the ballot at the judicial election as the candidates. Under such circumstances, the holding of a primary election for that office will be futile and nonsensical, because the candidates who shall appear upon the judicial ballot are already determined by the provision above quoted.

The words "only two" mean not more than two and consequently if only one person files nomination papers with the county clerk, in that case it would be equally purposeless to hold a primary election for that particular office. The purpose of holding this primary election seems to be the elimination and not the multiplication of candidates. The law plainly proceeds upon the theory that there will be numerous candidates for the various judicial offices to be filled, and the primary election is an election preliminary to the judicial election for the purpose of reducing the field of candidates, so that when the judicial election comes the electors will have two candidates and no more, from which to select for each office.

If only one or two men indicate their desire to run for a judicial office in the manner prescribed by the law, to wit: by circulating and filing nomination papers, the reason in the legislative mind for the holding of the primary election is not present and under the provisions of the law itself the primary election is rendered unnecessary.

My answer to your question, therefore, is that where only one or two candidates have filed their nomination papers, no

primary election is held for that office, and it is accordingly impossible for anyone to write in the name of any other person and have it counted. No one can be elected or nominated for an office when no election for that purpose is held.

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*Elections—Registration*—Ch. 8, Laws 1913, applies to meetings of boards of registry held prior to first election requiring registration after Dec. 1, 1912.

March 18, 1913.

HON. JOHN S. DONALD,  
*Secretary of State.*

I am informed that some question has arisen as to the scope of my opinion given you under date of March 15th, with reference to the effect to be given to ch. 8, Laws 1913, on the point that my opinion might be construed as limiting the effect of said ch. 8 to the registration this spring.

The question presented in your letter of March 15th was as follows:

“Does ch. 8, Laws 1913, amend secs. 26 and 27 of the Stats. or sec. 26 only? Under what section of the statutes shall the second meetings of the board of registry be governed for this Spring election where registration has been called?”

“This question is raised to ascertain the procedure on Tuesday, March 18th, 1913, which is the second meeting of the registry for this Spring election; consequently an early reply is necessary.”

In my letter I restated the question to be—the effect of ch. 8, Laws 1913, “on the duties of the boards of registry at their meetings next Tuesday.”

Of course, ch. 8, Laws 1913, by its terms, applies to “the meetings of the board of inspectors held immediately preceding the first election requiring registration after the first day of December, 1912.” There is, of course, nothing in the law that would warrant a construction that would limit its applicability to meetings of the boards of inspectors held this spring, but as pointed out that was the only question involved in your inquiry and the only one that I attempted to pass upon.

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\*Supplementing opinion of March 15th.

*Elections—Independent Nominations—County Clerk—Nomination papers filed under sec. 30 must have added to names of signers their post-office addresses, etc., and only such names can be counted.*

The county clerk should not put on the ballot the name of a candidate whose nomination papers are defective.

March 20th, 1913.

MR. L. OLSON ELLIS,  
*District Attorney,*

Black River Falls, Wis.

In your favor of March 18th, you request my opinion as to whether the omission of the post-office address of the signer of a nomination paper under sec. 30 of the statutes, is sufficient to warrant the clerk in refusing to place the candidate's name on the ticket.

Subd. 5 of sec. 30 of the Stats. provides:

“Each voter shall sign for but one candidate for the same office, and shall add his residence, post-office address and the date of signing.”

There can be no doubt but that if the clerk placed the name of a candidate, whose nomination papers are defective, on the official ballot, such defect in the nomination papers will not prevent his being elected. *State ex rel v. Bunnell*, 131 Wis. 198, 203—7; *Blackburn v. Welch*, 127 S. W. (Ky.) 991, 2.

These cases go on the theory that “the voters have the right to rely upon the correctness of the official ballot,” and their votes are not to be invalidated by the mistake of a public officer in improperly placing a name on the official ballot. (131 Wis. 198, 206, 7.) As pointed out in the Bunnell case, the question whether the candidate's name “should have been kept off from the official ballot” is an entirely different question. (131 Wis. 198, 204.)

The question you ask may, therefore, be thus stated: Would mandamus lie to compel the clerk to place the candidate's name on the official ballot. In other words, what is the clerk's duty upon the filing of purported nomination papers—is he to examine them to ascertain that the requisite number of names are appended; that the names are those of persons re-

siding in the district; that there is the required affidavit attached thereto; that the papers are filed within the time required, etc.? Even though the clerk's duties be purely ministerial, he is plainly the officer charged with the duty of determining in the first instance these questions, and if the statute is to have any effect, he *must* decide them for the purpose of determining whose names are entitled to be placed on the official ballot. This was the view taken by Attorney-General Sturdevant of the duties of the clerk. See Biennial Report and Opinions of the Attorney-General for 1908, pages 357, 360—2, where it was decided that nomination papers are invalid which did not contain the affidavit of an elector that he was personally acquainted with all persons who had signed the nomination paper.

While it has been said as to nomination papers that "a substantial compliance with the statutory directions is sufficient," (10 A. & E. Enc. of L. (2nd Ed.) 636), a consideration of the reason for the requirement that each signer of such paper "shall add his residence, post-office address and the date of signing" shows that such requirement is an essential that must be complied with. The purpose is to insure that the nomination is made by persons entitled to make it, i. e., by voters of the district, and to give the clerk on the face of the papers the information from which he can determine such fact. Thus it is said in a recent case:

"It would be absurd to contend that a person might file a paper containing the required recitals and number of names without the consent of any elector residing within the district, and the county auditor would be compelled to recognize such paper as a valid certificate of nomination. To guard against such an imposition the statute requires that each elector joining in the nomination shall sign his own name, adding thereto his place of residence, his business and his post-office address. This is the method provided for determining whether or not the candidate has been named by the requisite number of electors residing within the district. It affords the only means of ascertaining from an inspection of the certificate whether or not it is genuine. \* \* \* The statute expressly declares what the recitals shall be, and what the elector shall do. The reason for requiring the elector's residence, business and post-office address to be stated in his own handwriting is apparent. If one of these matters may be disregarded, all may be, and a typewrit-

ten certificate which in fact represents the will of but one person would be effectual to secure the printing of a candidate's name on the official ballots. This court cannot say that the residence of the signer is less or more important than his signature, his business or his post-office address, because the Legislature has put each upon the same footing, and declared in plain and unmistakable terms that each shall appear in the handwriting of the subscribing elector. \* \* \* There was a substantial defect apparent on the face of the certificate, and the auditor was entirely justified in refusing to print the plaintiff's name as a candidate. \* \* \* The question was whether the paper itself afforded the statutory evidence of its own prima facie validity. It clearly did not, and for that reason, it was properly rejected. *Harris v. King*, 109 N.W. (S. D.) 644, 5—6.

This same principle has been announced by other courts. Thus it has been held that where a statute provided that no signer "should be counted except his residence and post-office address be designated" such language was peremptory and a petition not containing the required number of signers who had designated their names and post-office addresses was insufficient. *Skidmore v. Hurst*, 68 S. W. (Ky.) 841, 2; *In re Adams*, 47 N. Y. Sup. 543, 5; *Cowie v. Means*, 88 Pac. (Col.) 485, 7; *Stone v. Waterman*, 70 Atl. (R. I.) 1009.

In the New York case it was said:

"Each requirement is obviously to be a check upon the making of false and fraudulent certificates and to enable anyone inspecting a certificate to discover the residence of the subscriber, so that he may investigate and see whether in truth and in fact any such person entitled to vote resides at the place of residence named in the certificate." *In re Adams*, 47 N. Y. Sup. 543, 5.

The supreme court of Wisconsin seems to have inferentially adopted the same construction for the statute under consideration. In the Bunnell case, it was decided that the placing of "ditto marks below the business or residence of some former subscriber was a substantial compliance with the statute cited." (subd. 3 of sec. 30 Stats.). It was thus in effect held that the business and residence of the signer must be stated either by writing them out or by the use of ditto marks. *State ex rel. v. Bunnell*, 131 Wis. 198, 202—3.

A provision similar to subd. 3 of sec. 30, is found in subsec. 3 of sec. 11—5 of the Stats., with reference to the nomination of candidates for the primary. Attorney-General Gilbert decided that under the last named section "names upon a nomination paper not signed as required by law should not be counted by the county clerk in determining the number of signers to the paper," and that if a signer does not do the things required by the statute, he has not legally signed the nomination papers. See Biennial Report and Opinions of Attorney-General for 1910, pages 285, 287. I think that the same rule must be applied to nomination papers filed under sec. 30.

While this construction of the statutes may work hardship in some cases, it seems to be the only possible construction of the section. The supreme court of South Dakota said in the case already cited:

"It may be argued that citizens should be facilitated in the exercise of their right to present independent candidates. They have been by the extremely liberal rules prescribed by the statute. The rules are so plain, simple, and easily complied with that a departure from their requirements, such as was disclosed by this proceeding, is wholly inexcusable. \* \* \* If this law is unwise, unjust or inexpedient, it should be modified by the legislature, not by this court."

I am, therefore, of the opinion that the county clerk, in determining whether nomination papers have the requisite number of signers, should not count the names of voters who have not added their post-office addresses.

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*Elections—Ballots*—Arrangement of names of persons nominated by nomination papers on official ballot.

March 20th, 1913.

MR. JAS. F. MALONE,  
*District Attorney,*  
Beaver Dam, Wis.

In your favor of March 19th, you state:

"I have been importuned by several city clerks in this county, in cities holding municipal elections under Chapter 5, Section 30, as to the correct placing of names where there is more than

one candidate, that is, of course no primary is being held but all the candidates are going on the ballot by nomination papers. I suppose this is more strictly the duty of a city attorney, but as the law seems to be somewhat uncertain on this point, and as your department has undoubtedly already decided same, would appreciate very much an opinion thereon."

Subsec. 13 of sec. 38 of the Stats. provides that:

"The names of persons nominated by paper nominations shall be placed in the one or more columns designated independent" etc.

This provision is made applicable to city elections by subdiv. b. of subsec. 16 of said sec. 38. A form for the official ballot is given in the statutes, being the one marked "B" and referred to in subsec. 17 of said sec. 38.

I do not find that there is any provision of the statutes similar to subsec. 3 of sec. 11—10, providing for the arrangement of names on the primary ballot, but it would be certainly proper and fair to all parties for the city clerks to adopt the plan outlined in the last named section in arranging the names of independent nominees on the ballot at municipal elections.

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*Elections—Newspapers*—Under par. 4, sec. 36, Wis. Stats. 1911, in counties or cities where there are both daily and weekly newspapers, the notice of election may be published in either.

March 21, 1913.

MR. E. P. GORMAN,

*District Attorney,*

Wausau, Wis.

In your letter of the 20th, you ask whether under par. 4, sec. 36, Wis. Stats. 1911, the election notice must be published in daily papers, where there are such in the county or city, or whether it may be published in either daily or weekly newspapers, there being both published in the county or city.

This paragraph as amended by ch. 506, Laws of 1909, but prior to the amendment of 1911, provided:

"Such publication shall be made twice in daily newspapers in counties or cities having such, one of which publications shall

be on the day preceding the election and the other publication one week previously; but if there be no daily newspaper published within the county or city, one publication in each weekly newspaper selected" etc.

Under this clearly the publication must be in daily newspapers where there are such.

By Ch. 437, Laws of 1911, this paragraph was amended so as to read:

"Such publication shall be made twice in daily or weekly newspapers in counties or cities having such, one of which publication in daily papers shall be on the day preceding the election and the other publication one week previously, and when published in a weekly paper the dates shall be designated by the county clerk;" etc.

To me it seems apparent that the purpose of the legislature in enacting this amendment was to allow the publication of such notice in weekly papers even where there are daily papers published, and in my opinion, where both classes of papers are published, the notice may be in either.

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*Elections—Ballots—Intoxicating Liquors*—In a town election on the question of license or no license only official ballots marked by the ballot clerks may be cast.

March 31, 1913.

MR. DAVID BOGUE,  
*District Attorney,*  
Portage, Wis.

In your favor of March 29th, you request my opinion as to whether in a town election on the question of license or no license, ballots not marked by the ballot clerks may be cast.

Sec. 1565a of the Stats. provides in part that:

"The election on such question (license or no license) shall be held and conducted and the returns canvassed in the manner in which elections in such city, town or village on other questions are conducted and the returns thereof canvassed."

In the absence of other provisions expressly applicable to such elections, it might be a question whether unless official

ballots marked by the ballot clerks are required in town elections "on other questions" (such as issuing bonds, etc.) such ballots so marked are required to be used in an election on the license question.

You attract my attention to sections 56, 65, 799, 807 and 874 of the statutes and these sections might well be construed to make applicable the provisions of the statutes relating to general elections and so to require official ballots at elections on the license question.

But the above quoted part of sec. 1565a has remained unchanged since the revision of 1898. Since that time, ch. 664, Laws of 1907, creating sec. 40a of the Stats. has been enacted.

That chapter provided in part:

"Whenever the question of granting license for the sale of intoxicating liquors, shall be submitted to electors of any town, village or city, the clerk of such town, village or city shall prepare a separate ballot for such question to be so submitted."

This is the later law and must control. It plainly provides for an official ballot to be prepared by the clerk. Subsec. 2 of sec. 41 provides that:

"Ballots not provided by the respective county or city clerks shall not be cast or counted in any election, except as herein provided."

Sec. 50 provides for the duties of the ballot clerks and states in part that:

"It shall be their duty to take charge of the official ballots, write their names or initials upon the back of each ballot under the printed indorsement thereon, fold it in proper manner to be deposited, and deliver to each voter as he enters the booth one ballot duly folded and indorsed."

Sec. 56 provides for the punishment of "any person who shall knowingly deposit a ballot in the ballot box upon which ballot the names or initials of the ballot clerks do not appear" and provides such a ballot "shall be void, not counted, and be treated and preserved as a defective ballot."

Since sec. 40a unmistakably provides for an official ballot, there is every reason to believe that it was intended that such

ballot should be identified by the signature of the ballot clerks. Reading together all the sections of the statutes herein referred to, I am of the opinion that only ballots prepared by the clerk may be voted at a town election on the license question and that being thus official, such ballots should be identified by the signature of the ballot clerks.

## OPINIONS RELATING TO FISH AND GAME.

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*Fish and Game*—Title to furs of muskrats and minks in the state. When laws violated the same are subject to seizure and sale by the state.

November 11, 1910.

HON. G. W. RICKEMAN,

*State Fish and Game Warden.*

I am in receipt of your favor of the 10th inst., in which you state:

“Would furs taken from fur bearing animals such as muskrats, mink, etc., during the prohibitory or closed season on such fur bearing animals be subject to seizure and sale by this department?”

In reply to the same I will say that sec. 4565c—5 (ch. 525, Laws of 1909) provides in substance that it shall be unlawful and is prohibited to take, catch, kill, hunt or pursue any fisher, martin, mink or muskrat between the 15th day of March and the 15th day of November next succeeding, and that it shall be unlawful and is prohibited to have in possession the green hides of any of the above enumerated animals during the closed season and that all implements used in the violation of said act may be seized, confiscated and sold by any warden as provided by law. It will be noticed that there is no specific mention made of the confiscation and sale by the state of the green hides themselves and this, no doubt, has given rise to your inquiry.

By common law the title to all fish, game and fur bearing animals in a free state of nature is in the state or sovereign. Sec. 4530, Stats. 1898, as amended by sec. 26, ch. 312, Laws 1899, is merely declaratory of the common law as to fish and game and in no manner releases the title of the state to fur

bearing animals in a free state of nature. Unless such fur bearing animals are reduced to possession by individuals in the manner and at the times that the state or sovereign permits title to pass to the possessor, no title passes and the state or sovereign in reaching out and taking physical possession of the animals in question or any part thereof simply exercises its right as the owner.

It is very evident from the fish, game and fur laws now on the statute books that it was not the legislative intent to surrender any of the state's title except in the manner provided by law, and it follows that your question must be answered in the affirmative. Any other construction or holding would simply punish the offender for having said green hides in his possession and still allow him to retain the hides and profit by his wrong doing, and if he were allowed to retain the hides after sentence or fine imposed he would again be subject to arrest for having them in his possession. The law contemplates no such an absurdity.

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*Fish and Game*—Drawing off water in mill pond for lawful purpose not a violation of Fish and Game Laws, because fish are killed thereby.

January 31, 1911.

MR. BONDUEL A. HUSTING,  
*District Attorney,*

Fond du Lac, Wisconsin.

In re. yours of the 18th inst., in which you state that:

“A party nearby and on the west branch of the Fond du Lac river at what is known as the Eldorado mill pond, drew off water on the dam there not for the purpose of taking fish but for the purpose of facilitating his ice business. By so doing the ice along the shores of the pond and river dropped thereby killing great numbers of carp, which are known as rough fish, and some game fish such as pickerel and perch;”

and also that the game warden would like to prosecute this party under the provisions of sec. 4560d, ch. 525, Laws of 1909, subsec. 3, which section makes it unlawful to take fish by means of shutting or drawing off water from any fishery, lock or dam. The law provides a penalty for the unlawful taking

of fish by means of shutting or drawing off water from any fishery, lock or dam when the water is shut off or drawn off for that specific purpose. Undoubtedly the owner of the water power has a right to draw the water off from his pond for certain lawful purposes, such as making repairs, etc., and if in so doing certain fish are injured or destroyed, it does not follow that the owner is liable for violation of the game laws.

From your statement of fact in this case, I am of the opinion that the mill owner is not liable under the law referred to.

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*Fish and Game*—Catfish caught by licensed fishermen in Lake Pepin, may be sold by them and shipped to purchaser.

March 9, 1911.

HON. JOHN A. SHOLTS,  
*State Game Warden.*

I am in receipt of your favor of the 3rd inst. in which you inquire "Can catfish taken from the waters of the Mississippi river, lakes Pepin and St. Croix, by licensed nets or set lines be sold and shipped to points within or without the state?"

In reply to your inquiry your attention is called to sec. 4560a—4, sec. 2, ch. 489, Laws of 1905, ch. 193, Laws of 1907 and ch. 525, Laws of 1909, the same being incorporated in sec. 63 on page 63 of the Wisconsin Fish and Game Laws.

Under the provisions of this law catfish are classified as game fish except in certain designated waters. Where they are classified as game fish it would not be lawful to catch them under the provisions of sec. 4560a—10 being sec. 88 of the Game Laws of Wisconsin; however, it is provided by sec. 88, being ch. 525 of the Laws of 1909, that the State Fish and Game Warden shall upon application therefor issue to any person a license to set, use or operate seines and pound nets, etc., in certain designated waters including the Mississippi river and Lake Pepin between the 15th day of April and the 15th day of November of each year "for the purpose of catching and taking all fish, except pike, of any variety, bass or croppies." The language of this law would seem to except catfish along with all other fish except the three varieties designated. Whether this was the legislative intention or not

may be doubtful but it is certain that catfish are not included in the prohibited varieties and it follows, necessarily, that catfish in these particular waters may be taken since under the well established rules of construction of criminal statutes a liberal interpretation must be given to this law. It follows necessarily that if these fish are included amongst the varieties known as rough fish which may be taken, that they also may be sold as other varieties of rough fish when properly designated or marked either within or without the State of Wisconsin. I confess that I have some doubt as to the legislative intention in making this exception but as the law stands I am unable to give it any other interpretation.

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*Fish and Game*—Liability under chapter 659, laws of 1911, for having in possession brook trout taken without the state of Wisconsin.

August 9, 1911.

MR. ARCHIBALD MCKAY,  
*District Attorney,*  
Superior, Wisconsin.

Your favor of August 7, 1911, asking for a construction by this department of ch. 659, Laws of 1911, is received.

Chapter 659, Laws of 1911, subdivision (g) makes it unlawful

“To take or have in possession or under control trout of any variety less than six inches in length; trout so taken to be immediately returned, without injury, to the water where taken.”

You ask whether this act provides a penalty for having in possession in this state trout less than six inches long which trout were caught outside this state. The statute in question is a penal statute and must be strictly construed and I am of the opinion that the statute as it now reads does not include trout taken in another state. The possession of trout coming within the prohibition of the law would be *prima facie* evidence of the violation of the statute but if the defendant were able to prove that the trout were taken without the state of Wisconsin in my opinion a conviction could not be sustained.

*Fish and Game*—County clerks cannot charge more than the statute fee of one dollar for hunting licenses.

September 6, 1911.

MR. HENRY J. HASTINGS,  
*District Attorney,*

Kenosha, Wisconsin.

On August 19th last, I gave to Mr. John A. Sholts, State Fish and Game Warden, an opinion to the effect that a clerk could not charge more than one dollar for duties performed in issuing a hunting license. On August 28th, you addressed a letter to this department in which you say in part:

“Our county clerk is not charging one and one-half dollars for hunting licenses but he is charging one dollar for the license and fifty cents for the two oaths attached to the application in conformity to a resolution adopted by the county board;”

and you ask whether or not this is a justifiable practice under the statute.

The law in question, section 1498s of the Wisconsin statutes, has since its enactment received a practical interpretation in every county of this state to the effect that the one dollar required for hunting license is all that the clerk is authorized to charge and furthermore that it is the duty of the clerk to prepare the application and administer the oath if so requested by the applicant. The law has been specifically so interpreted by this department ever since its enactment and this interpretation has without exception been accepted throughout the state. The general duties of county clerks are prescribed in sec. 709, Wisconsin Stats., and various other statutes amendatory thereof besides certain other duties are imposed by other statutes. Generally speaking additional duties may be imposed upon an officer without granting him additional compensation. He takes and holds his office *cum onere* subject to the duties it imposes and the legislature may impose additional duties upon such officer and by ch. 12 of the Laws of 1899, being sec. 1498s, the legislature has enacted a state law for the purpose of protecting game in the state and as a means of raising revenue for that purpose have provided for the issuing of hunting licenses and have imposed upon the county clerks the

duty of issuing such license in addition to the duties theretofore imposed upon such county clerks. That the legislature has power to do this is expressly held in the case of *St. Croix V. Webster*, 111 Wis. 270. In that case Judge Winslow said in part:

“A public officer takes his office *cum onere* and all services performed by him within the scope of his official duties or which voluntarily performed as such officer, are covered by his salary or compensation as fixed by law. A municipal corporation has no jurisdiction to allow to such officer additional compensation not authorized by law for the performance of such services and if such allowance be in fact made it is a void act. If such officer receive such additional compensation from the municipal corporation whose officer he is, even with its consent, he obtains no title thereto, but it may be recovered by the corporation in a proper action by law.” p. 273.

See also *Ring v. Devlin*, 68 Wis. 384, and *Supervisors of Ke-waunsee County v. Kniffer*, 37 Wis. 496.

In the case stated by you the county board cannot authorize the county clerk to collect additional fees for the benefit of the county. Ten cents of the fee now authorized to be collected by him is converted into the county treasury since your county clerk is working upon a fixed salary. Prior to that the ten cents went to the clerk as his fee for issuing the license and it seems very clear that if the legislature had intended that he should receive a greater fee that the law would have so expressly stated. Sec. 1498s provides that:

“Every person who has resided in this state for one year previous to applying for a license to hunt game and who desires to hunt the same must first obtain a license from the county clerk of the county in which he resides which said license shall be issued by said county clerk under seal upon blanks furnished by the secretary of state. Said license shall certify that the licensee is a bona fide resident of the state of Wisconsin and give a description of such person such as shall be required by the secretary of state and the state fish and game warden in the blank licenses furnished to said county clerk.”

This clearly imposes an additional duty upon the county clerk which nobody but the county clerk could perform since the license is required to be issued under seal and the county clerk is the custodian of such seal. The section further provides:

“2. The application for such license shall show that the licensee is a resident of this state, shall give his residence and his post-office address, shall contain a description of his person and such other information as shall be required by the secretary of state and the state fish and game warden, shall be verified by the affidavit of the applicant and some resident of the county, other than himself, acquainted with the facts as set forth in the application.

“3. The county clerk shall receive with each such application for license the sum of one dollar, ten cents of which he shall retain, and the remainder he shall transmit to the state treasurer.”

You will observe that the statute expressly says that the county clerk shall receive for such “application” the sum of one dollar, ten cents of which he shall retain. It seems to me very clear that it was the intention of the legislature, by the imposition of a hunting license as a means of raising revenue for the protection of fish and game in the state, to charge one dollar for such license and allow the county clerk who makes out the application and issues such license ten cents for his services and that under no circumstances would he be justified in charging any greater sum than the fee of one dollar authorized by the statute, ten cents of which goes to the clerk when the office is upon a fee basis or which would be converted into the county treasury where the clerk’s salary has been fixed by the county board.

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*Fish and Game*—County clerk cannot charge more than one dollar for hunting license.

September 21, 1911.

MR. HENRY J. HASTINGS,  
*District Attorney,*  
Kenosha, Wisconsin.

Replying to your favor of September 7th, would say that I have examined the statute in question concerning the issuing of hunting licenses by county clerks and that the suggestion made by you that the word “with” as used in the statute might require a different interpretation than the word “for” as used in my communication to you would make no difference in my interpretation of the statute. In my judgment it amounts to the same thing in either case and the fact that the

statute has received this practical interpretation ever since its enactment in 1899 and has at all times been so construed by this department, precludes the possibility of any different interpretation at this time on my part.

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*Fish and Game*—Rough fish minnows and bloaters for bait may be taken and used as bait in crab traps.

September 23, 1912.

JOHN B. CHASE,  
*District Attorney,*  
Oconto, Wisconsin.

You state that a man who is engaged in the crab business exclusively has been arrested and charged with having in his possession rough fish less than seven inches in length; that his contention is that he was retaining these fish for the purpose of baiting his crab boxes. You call my attention to subsection 1 of section 4560a—48, which provides as follows:

“It is unlawful \* \* \*

“(d) To take from said waters bass of any kind by means of nets, or to take, kill or retain any rough fish less than seven inches in length, except rough fish minnows or bloaters for bait.”

You inquire whether or not persons are allowed to retain or take rough fish less than seven inches in length for bait to be used on hooks only. You call my attention to subsection 2 of said section, which provides as follows:

“It shall be lawful to use in the outlying waters of this state not exceeding one thousand lineal feet of gill net having meshes from one and one-half to one and three-quarters inches, stretch measure, for the purpose of taking bloaters for bait for set hooks.”

Under these provisions of the statute I am of the opinion that a person who takes rough fish minnows or bloaters for bait of any kind comes within the exception of subsection 1 of said section 4560a—48.

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*Fish and Game*—No boy under 15 is allowed to hunt except on the land owned or occupied by a person of whose family he is a member,

January 4, 1913.

F. D. RANDALL,  
*Special Game Warden,*  
Waupaca, Wisconsin.

Under date of December 27th, you have submitted to me the question whether a license to hunt may be issued to a boy under fifteen years of age and, if not, whether he has a right to hunt without a license.

In answer I will say that sec. 1498s—1 of the statutes, provides that:

“No hunting license shall be issued to any person under fifteen years of age.”

Sec. 1498a—1, as am. by ch. 551 of the Laws of 1911, provides a penalty for any resident or nonresident of this state

“who shall pursue, hunt, kill or trap any of the birds, fowls or animals protected by the laws of this state without being at the time of such pursuing, hunting or killing in possession of a license duly issued to him,” etc.

It also contains the following:

“Provided that nothing in this act shall be construed to prevent the owner or occupant and members of their families of any land from hunting and killing rabbits thereon at any time or squirrels during the open season without a license.”

It necessarily follows that, as no one is permitted to hunt without a license and as a boy under fifteen years of age cannot be licensed, no boy under the age of fifteen is permitted to hunt in this state, unless he does so on the land owned or occupied by a person of whose family he is a member.

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*Fish and Game*—It is unlawful to purchase or have in possession green beaver hides shipped from Michigan into Wisconsin.

January 7, 1913.

HON. JOHN A. SHOLTS,  
*State Fish and Game Warden.*

In your favor of January 6th, you inquire whether a fur buyer in this state may legally purchase beaver skins of ani-

mals caught in the state of Michigan and shipped into Wisconsin.

Subsec. 1 of sec. 4565c—5 provides:

“It shall be unlawful and is hereby prohibited to take, catch, kill, hunt or pursue:

“ \* \* \* \* \*

“(2) Any beaver or otter at any time.”

Subsection 3 of said section provides:

“It shall be unlawful and is hereby prohibited to have in possession the green hides of any of the above enumerated animals during the close season for taking of same,” etc.

As there is no open season for hunting or killing beaver, it is unlawful, under the above quoted section, for any one to have in his possession green hides of said animals. Of course, this refers only to green hides. The statute makes no distinction between hides that are procured from beavers in the state of Wisconsin and those from beavers caught in another state. The law contemplates all green hides within the state, whether secured from game animals caught within this state or from animals caught in another state and imported into Wisconsin.

Under the Act of Congress of May 25, 1900, 31 Stats. 187, 3 Comp. Stats. 181, commonly known as the Lacey Act, it is provided:

“(Section 5) The dead bodies or parts thereof of any wild game animals, or game or song birds transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such animals and birds had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.” etc. (Found on p. 123 Fish and Game Laws Wis.)

Under these provisions your question must be answered in the negative.

*Fish and Game*—Persons shipping green deer heads without the proper coupons attached should be prosecuted by game warden.

January 14, 1913.

HON. JOHN A. SHOLTS,

*State Fish and Game Warden.*

You have forwarded to me under date of January 10th, a letter from Mr. S. P. Richtman, one of your deputy wardens, who states that on the 6th of December last he confiscated one deer head and reported the same to you under date of December 7th.

Mr. Richtman's letter states:

“The deer head above mentioned was shipped, without a coupon attached, from Eau Galle, Pepin county, by Frank Phillips. W. Smith, a rural mail carrier, took the head to Durand and shipped the same via American Express company, from there to Winona, Minnesota, then transferred to the Adams Express company, and, while the head was on the Adams Express company's truck at East Winona, it was seized. It appears to me that all the above mentioned parties have violated the law by offering, receiving and shipping this deer head without a coupon attached.”

You request my opinion as to whether or not these parties ought to be arrested.

Under sec. 4560a—16 of the Stats. it is made unlawful to ship to any point, either within or without the state, by common carrier, or to convey or cause to be conveyed by private carrier:

“(a) Any carcass or part of carcass of any deer between the third day of December and the succeeding twelfth day of November, provided, that the shipments of green hides or green heads of deer are not to be had in possession after January third or between January third and November eleventh of any year.”

It is thus made unlawful to have in possession a deer head when in the velvet.

Subd. 3 of sec. 4560a—17 provides that any person violating these provisions shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine or imprisonment.

Sec. 1498s provides for coupons attached to the license of residents to be attached to the deer *or part of deer* when shipped.

Sec. 1498q provides for coupons on the license of nonresidents to be attached to the deer or part of deer when shipped, and it is made a misdemeanor for any one failing to comply with the provisions of these sections, and a penalty is provided therefor.

Under the express provisions of these statutes it appears that the parties mentioned in Mr. Richtman's letter have violated our game laws and that they are guilty of a misdemeanor and should be arrested. It is my opinion that it is your duty to see that they are duly prosecuted for this offense.

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*Fish and Game*—The taking of catfish with a net, of less than one pound dressed weight, or 1½ pounds undressed weight, is not prohibited in Lake Pepin or Lake St. Croix.

January 27, 1913.

HON. JOHN A. SHOLTS,

*State Fish and Game Warden.*

Under date of January 25th you have submitted the question whether the statutes prohibiting the taking of catfish of less than one pound dressed weight or one and one-half pounds undressed weight apply to the waters of Lake Pepin and Lake St. Croix.

Sec. 4560a—10 Stats. provides as follows:

“(a) It shall be unlawful and is hereby prohibited to take from the waters of the Mississippi river, Lake Pepin, or Lake St. Croix, any fish by other method than by angling or trolling with hook and line or by licensed set lines, or for the purpose of propagation when taken by the superintendent of hatcheries or his duly authorized agents, or taking rough fish by the aid of spears without first having complied with all the requirements of this section, but it shall be lawful for residents to take, catch or kill, from the waters of the Mississippi river, Lake Pepin or Lake St. Croix any fish at any time between the first day of May and the first day of March following without license by angling or trolling with hook and line.

“(b) The state fish and game warden shall, upon application therefor, issue to any person a license to set, use or operate seines, pound nets, or hoop, gill nets of not less than three

and one-half bar, bait nets, without leads, with four foot hoop front, turtle nets of three and one half-inch bar, in that part of the St. Croix river known as Lake St. Croix and that part of the Mississippi river known as Lake Pepin \* \* \* at any time for the purpose of catching and taking all fish, except pike, of any variety, bass or croppies."

Subdivision (d) provides that every licensee shall immediately return to the waters from which the same have been taken, all fish above enumerated in subdivision (b) being pike of any variety, bass or croppies, when taken in any net used by him or under his supervision and control.

Subdivision (i) provides a penalty for the violation of the act.

Under this act it is lawful for any person who has a license to operate the nets mentioned in subdivision (b), for the purpose of catching any catfish in Lake Pepin and Lake St. Croix, unless the provisions of sec. 4560a—5 or sec. 4560a—50 are applicable to the case. The former section provides:

"Any person who shall take, catch or kill or have in his possession, \* \* \* any fiddler catfish of less than one and one-half pounds round or undressed weight, or less than one pound dressed weight, \* \* \* shall be guilty of a misdemeanor and on conviction thereof shall be punished," etc.

The latter section provides:

"It shall be unlawful and is hereby prohibited in this state:

"(a) For any person, persons, firm, company or corporation to take, catch or kill or have in his or their possession \* \* \* any catfish of any kind of less than one and one half pounds round or undressed weight, or less than one pound dressed weight, \* \* \*"

A penalty is provided for the violation of this act.

These last quoted sections, however, are general provisions applying to all parts of the state, while sec. 1560a—10 contains a special provision applicable to Lake Pepin and Lake St. Croix.

It is an old and familiar rule that, where there is in the same statute a particular enactment and also a general one, which in its most comprehensive sense would include what is embraced in the former, the particular enactment must be opera-

tive and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment. *Felt v. Felt*, 19 Wis. 193; *State v. Hobe*, 106 Wis. 411.

Neither can it be said that sec. 4560a—50 repeals sec. 4560a—10, for there is no clause expressly repealing that section. (See ch. 531, Laws of 1909.)

It is a canon of statutory construction that a later statute general in its terms and not expressly repealing a prior special statute will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general, and the terms of the general are broad enough to include the matter provided for in the special, the special is to be considered as remaining an exception to the general and will not be considered repealed by implication. *State v. Public Land Commissioners*, 106 Wis. 584; *Mead v. Bagnall*, 15 Wis. 156; *Walworth Co. v. Whitewater*, 17 Wis. 193; *Janesville v. Markoe*, 18 Wis. 351.

I am therefore of the opinion that the taking of catfish of less than one pound dressed weight or one and one-half pounds undressed weight is not prohibited by statute, except as provided in said sec. 4560a—10.

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*Fish and Game—Criminal Law—Indians—Search Warrants—*  
Allotted Indians are amenable to the fish and game laws of this state.

A search warrant may be issued to search a house on the Indian reservation for game killed by tribal Indians while off the reservation.

March 4, 1913.

HON. JOHN A. SHOLTS,

*State Fish and Game Warden.*

Under date of February 18th, you have inquired:

First, whether Indians are governed by the same laws as are residents of the state when they hunt or trap protected game on reservations.

Second, whether it is within the power of a warden to take out a search warrant for the purpose of searching buildings occupied by Indians on the reservation.

You have also informed this department since the receipt of this letter that you desire the first question to be understood as applying to allotted Indians only.

Under section 6 of the Act of Congress of February 8th, 1887, it is provided that an Indian who has received an allotment and patent for land from the United States Government thereby becomes a citizen of the United States and of the state wherein he resides and is thereafter to have the benefit of, and be subject to, the laws, both civil and criminal, of the state or territory in which he resides. Under this law all allotted Indians in this state are amenable to the fish and game laws of this state. Their status is like that of all other citizens and they are subject to the penalties provided for the violation of our state laws. See *Matter of Heff*, 197 U. S. 488; 25 Sup. Ct. 506, and cases there cited; *State v. Morrin*, 136 Wis. 552; *U. S. v. Hall*, 171 Fed. Rep. 214.

Your first question as applied to allotted Indians, must therefore be answered in the affirmative.

You have stated that you desire your second question to be limited to tribal Indians living on a reservation who have violated the fish and game laws of this state while off the reservation.

It is the general rule that, when an Indian commits a crime outside of the Indian reservation, he is amenable to the law of the place where the crime is committed and may be prosecuted in the state courts for any offense committed outside the limits of the reservation, although such offense may be against members of the same tribe. See vol. 16 Am. & Eng. Ency. of Law (2nd ed.), p. 224, and cases cited.

Under section 1498k—1 a search warrant may be issued under certain conditions, to seize fish, venison, fowl or game caught, taken or killed or had in possession contrary to the provisions of law, when the same is concealed in any particular house or place.

You have stated that you desire to search for fish, venison, fowl or game that has been killed or taken contrary to law by an Indian outside the reservation, but which is concealed in a building or house on the reservation.

The question whether tribal Indians, while on their reservation, are subject to the criminal laws of the state has been

variously answered by the courts of this country. Our Supreme Court has decided that all tribal Indians living on reservations within this state are subject to the criminal laws thereof. See *State v. Doxtater*, 47 Wis. 278; *State v. Harris*, 47 Wis. 298; *Stacey v. La Belle*, 99 Wis. 520, 524; *Deragon v. Sero*, 137 Wis. 276.

Agreeing with our court in the decision of the Supreme Court of New York in the case of the *People v. James Pierce*, 18 Misc. (N. Y.) page 83.

The Supreme Court of North Carolina, in a recent case, has rendered an opinion to the same effect. See *State v. Wolf*, 59 S. E., p. 40, decided Oct. 16, 1907.

The United States Court, however, holds that tribal Indians are wards of the United States and, while on the reservation, are not subject to the criminal laws of the state wherein they reside. *U. S. v. Kagama*, 118 U. S. 375; 6 Sup. Ct. 1109; *In re Blackbird*, 109 Fed. Rep. 139.

To the same effect is *State v. Campbell* (Minn.), 55 N. W. 553.

In the case of *In re Blackbird*, *supra*, the facts show that it originated in this state, when an effort was made to enforce the fish and game laws against Indians who were members of the Chippewa tribe on the Bad River Reservation. John Blackbird was alleged to have violated the fish and game law on that reservation, was sentenced to pay a fine of twenty-five dollars in the municipal court of Ashland and, in default of payment, was sentenced to imprisonment at hard labor for thirty days. A writ of habeas corpus was secured in the United States Court and the defendant was released, on the grounds that the fish and game laws of this state did not apply to Indians on their reservation. This writ was sued out at the instance of the United States Government, to test the legality of a conviction for the violation of the criminal laws of this state when applied to an Indian.

Other cases since that time, I have been informed, have met with the same result. It is a fact, however, that is well recognized, by both the courts of this state and of the United States, that the state courts have jurisdiction over the Indian reservations so far as the commission of crime is concerned, by others than tribal Indians. A white man or any citizen

of this state committing a crime on an Indian reservation is amenable to the state laws. In the case of *In re Heff, supra*, it was decided that the process of the state courts was not interfered with on Indian reservations.

In view of this fact it would seem that a search warrant for the purpose of seizing game that was unlawfully taken by an Indian while off the reservation and while the same is concealed in a building on the reservation would be lawful; but in view of the fact that the United States court has held that it has exclusive jurisdiction over crimes committed by Indians on the reservation and that the state courts have no right to punish an Indian for a crime committed on the reservation, the Game Warden will be constantly in danger of being interfered with by the United States courts while searching for concealed fish or game on the reservation, for the reason that it will be impossible to prove as a general rule that the same was not taken on the reservation. For this reason it may be advisable for the Game Warden to proceed cautiously when searching for game on such reservations.

## OPINIONS RELATING TO INDIGENT, INSANE, ETC.

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*Indigent, Insane, etc.*—Payment of expenses in transferring inmates from House of Correction to State Reformatory.

June 22, 1911.

MR. M. J. TAPPINS,

*Secretary, State Board of Control.*

You say that the question has been raised as to whether the state should bear the expenses of the transfer of inmates from the County House of Correction to the State Reformatory or whether those expenses should be borne by Milwaukee county.

You also ask:

“Does the statute providing that transfers of prisoners from the jails to the reformatory also apply to the transfer of prisoners from the Milwaukee County House of Correction to the Reformatory?”

In reply I would say that both of these queries are answered by sec. 561jj. The statute, as amended, provides that transfer shall be made in the manner provided by sec. 561jj, which last named statute provides in part as follows:

“Whenever an order of removal is made as herein provided the board shall designate in the order the person or officer who shall make such removal or under whose direction it shall be made, and no mileage or per diem shall be allowed for making the same. The board may designate for such purpose the superintendent of the institution from which or to which such removal is made or any other discreet citizen, who shall be paid therefor his actual and necessary traveling expenses and those of the person removed and of any necessary assistant, to be adjusted by the board and paid out of the current expense fund of the institution from which such removal is made. If some county is chargeable with any portion of the expense of maintaining the person so removed such county shall pay the

expense, and such payment thereof by such county will be enforced in the same manner that payments of charges for the maintenance of such persons are enforced."

This provision of section 561jj seems to supply the answers to both of the questions asked by you.

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*Indigent, insane, etc.*—Construction of ch. 161, Laws of 1903.

Oct. 5, 1911.

HON. C. A. HARPER,

*Secretary, Bureau Vital Statistics.*

Your favor of October 5th enclosing communication from Geo. E. Adams of the health department of the city of Milwaukee, and asking for the opinion of this department concerning the provisions of ch. 161 of the Laws of 1903 in its application to St. Vincent's Asylum, Milwaukee, Wisconsin, is received.

Sec. 4 of the act provides that

"Whenever any child is taken from any so-called maternity home or lying-in hospital, home for infants or so-called 'baby farm,' the owner, keeper or manager thereof shall within twenty-four hours of such removal report in writing to the local board of health or health officer or health department of the disposition of such child and its name and age."

Upon the statement of fact submitted by you I understand that St. Vincent's Asylum is complying with all the requirements of the act unless the provisions of sec. 4 above quoted are being ignored. You state that:

"The only question appears to be upon the method of taking care of the children. It has been the custom of St. Vincent's Asylum to take little babies and put them in families for wet nurse purposes so that they could be better taken care of and given food in this way that would be more readily assimilated. During this period of time the responsibility and control of the child remains with the head of the institution."

You further state that the authorities of St. Vincent's Asylum are reporting the arrival of the children at the institution to the local health officers and when the child is finally

disposed of they have complied with the requirements of the act in reporting its final disposition, the only question being whether or not during the period that the child is being taken care of by a wet nurse should the authorities of the asylum be required to report such disposition to the local board of health?

In answer to this query it is my opinion that the authorities of St. Vincent's Asylum are not required to report such disposition to the local health authorities. So long as the child remains in the control and under the supervision of the asylum authorities it cannot be said to have been "removed" from the asylum in the sense contemplated in the act. I construe the language of the act to mean permanently removed or finally removed from the care and control of the institution. This seems to have been the evident intention of the legislature taking the act as a whole, that the authorities should report the time of the receiving of the child giving its name, age, color, date of birth, etc., and that when finally disposed of by adoption or otherwise and removed from the asylum they should make the report provided for in subd. 4 of the act. Upon the statement of fact submitted the giving over of the babies to the care of a wet nurse seems to be only a method of providing the baby with proper sustenance and designed solely for its good and the child is at all times under the care and supervision of the asylum authorities and is in no sense removed from the asylum any more than it would be if taken out for an airing.

Further, the statute is a penal one providing a severe penalty for a violation of the act and must be strictly construed against the state. I am therefore of the opinion that the asylum authorities are not required by sec. 4 of the act to make a report of the removal of the child to the health authorities because of having turned the child over to the immediate care of a wet nurse, so long as the child remains under the supervision and control of the asylum authorities.

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*Insane—Feeble-Minded*—The expense of maintaining an insane person in a public institution may be recovered of his estate.

The relatives of an insane person are not liable for the expense of his maintenance in a public institution prior to proceedings being commenced to establish such liability.

The expense of maintaining a feeble-minded person in the home for the feeble-minded may be recovered from his relatives to the same extent as for an insane person.

July 29, 1912.

DAVID BOGUE,

*District Attorney,*

Portage, Wisconsin.

In your letter of July 25th you state that your county has adopted the county system of support of the poor and insane and you ask a number of questions, all of which you state are based on that system.

Your first question is:

“A B is declared insane and is known to be the owner of property and at the same time a guardian is appointed for the insane person. Is the estate of the insane person liable to the county and state for the maintenance and expense of said person in the asylum and, if so, to what extent?”

Sec. 604q stats., as am. by ch. 624 of the Laws of 1907, provides in part:

“The property and estate of any insane person kept in any state or county hospital or county asylum or kept by any county at its charge . . . shall be liable for the continuing and past support, maintenance of such person or patient and chargeable for the payment thereof.”

Sec. 600 of the stats., as am. by ch. 624 of the Laws of 1907, prescribes a method for recovery by the county, from the property of any person legally bound to support an insane person, of the amount charged to and by such county for such support.

Sec. 604e stats. provides that the county shall not be entitled to any compensation from the state for the care of any person whose support is not properly a public charge, and our Supreme Court, in *Richardson v. Steusser*, 125 Wis. 66, holds that one who has relatives liable for his support is not properly a public charge. It has accordingly been held by this

department, in an opinion dated June 27th last, that in such a case the State has no interest in the recovery; that, if it has improperly paid for the care of a person whose support is not properly a public charge, the State may recover from the county in an action for money had and received.

This was said with reference to a person committed to a county asylum. Of course, as to one kept in a state hospital, the State would have a right of action.

I am therefore of the opinion that the county may recover from the estate of A B for the continuing and past support given him by the county, such recovery for past support being limited by the six-year statute of limitations, and, if kept in a state hospital, that the State may also recover for a period of ten years last past. *Washington Co. v. Schrupp*, 139 Wis. 219; Biennial Report and Opinions Attorney-General for 1908, p. 134.

Your next question is:

“A B is declared an insane person and confined in the state insane asylum. It is not known at the time, being the year 1900, that A B has any property. This fact is discovered in 1912. To what extent is the estate of the said insane person liable to the county and State or either of them?”

I believe the answer to your first question answers this question also.

You next ask:

“A B is declared an insane person and has no estate, but either the father or the son of A B is well-to-do and amply able to care for A B, the insane person, but refuses to do so.

“(a) Can the father or son be held liable for the keep and maintenance of said insane person and to what extent?

“(b) Does the said liability reach back to the time when A B was declared insane, or does it commence only after A B is officially declared a poor person as well as an insane person and the father and son is also declared liable?”

Sec. 604e stats., as am. by ch. 376, Laws of 1905, provides in part:

“The provisions of sections 1500 and 1505, both inclusive, are hereby made applicable to the support of insane persons.”

The case of *Richardson v. Steusser*, *supra*, treats this as though it read “sections 1500 to 1505, both inclusive,” and expressly

refers to sec. 1502 as applicable to the support of insane persons, by reason of the provision in sec. 604e.

Sec. 1502, as am. by ch. 207 of the Laws of 1909, provides in part:

“The father, mother, husband, children and wife being of sufficient ability, of any poor person . . . unable to maintain himself, shall, at their own charge, relieve and maintain such poor person.”

It would seem to follow that the father and son are liable for the support of A B.

In the case of *Saxeville v. Bartlett*, 126 Wis. 655, it was held that these sections are prospective in character and do not allow a town to relieve a pauper and afterwards recover from the relatives the amount expended, but that, until proceedings are taken to compel the relatives to maintain such poor person, the town has no right of action.

From this it follows that the father and son are not liable to the county until the proceedings provided for by sections 1502a *et seq.* are taken. Biennial Report and Opinions of Attorney-General 1910, p. 396.

You also ask:

“A B, the son of X, is feeble-minded and is now officially declared so and sent to the Home for the Feeble-Minded, at Chippewa Falls. X is amply able to pay for the maintenance of his son, A B. A B has no property in his own right.

“(a) Can X be held liable, and to what extent?”

“(b) If A B is placed in this institution in the year 1900 and no steps are taken to declare X liable until 1912, can X be compelled to pay the amount due for the care and maintenance of A B from 1900, or will the date of liability begin only after the court has declared X liable?”

“(c) Would it make any difference if X, without being declared liable, paid for the keep of said child for the period of four years and then ceased to do so?”

Sec. 573w Stats., as created by ch. 63 of the Laws of 1901, provides:

“Any county which is lawfully charged with the expense, or any part thereof of maintaining an inmate in the Wisconsin home for feeble-minded, shall have all remedies to collect the sums so charged, out of the estate of such inmate, or from

individuals, which are conferred by law upon counties so to collect charges against them for the maintenance in state hospitals and county asylums for the insane, of patients whose maintenance therein is chargeable to such counties respectively."

(See also Biennial Report and Opinions of the Attorney-General for the year 1910, p. 396, and for 1906, p. 147.)

In my opinion X is liable for such maintenance from and after the date when proceedings are instituted under sections 1502a *et seq.* That X voluntarily paid for such maintenance for a time does not waive the necessity of taking such proceedings to hold him liable.

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*Insane, Indigent, etc.—Wisconsin State Reformatory Convicts*—It is the duty of the state to furnish suitable maintenance for the inmates of the Wisconsin State Reformatory, and such maintenance includes proper medical care and attention.

The expense of a necessary surgical operation performed upon an inmate of such reformatory cannot legally be deducted from the amount standing to his credit at such institution.

December 11, 1912.

HON. M. J. TAPPINS,

*Secretary State Board of Control.*

In your letter of the 26th ult. you state that one Joseph Soper, an inmate of the Wisconsin State Reformatory, was recently discharged from that institution, at the expiration of his sentence; that at the time of his discharge he had to his credit \$34.17, earned during the time of his confinement; that during his confinement it was necessary to take him to the hospital at Green Bay and have an operation performed, at a total cost of \$46; and you ask:

"Is the Wisconsin State Reformatory legally liable for the amount which has been earned by the boy, or has the Reformatory management the right to apply the amount so earned by him on the account for his hospital services?"

Par. 1, sec. 561j Stats. provides that it shall be the duty of the state board of control \* \* \*

"to maintain and govern . . . the Wisconsin state reformatory."

By paragraph 7 of the same section it is made the duty of the Board

“to visit and inspect” the reformatory “at least once in each month . . . and ascertain . . . whether all inmates thereof are properly cared for and governed.”

Sec. 4944a Stats. declares that the purposes for which the Reformatory was

“created and the objects to which the rules and regulations for its government, its discipline, and the exercise of all its functions should be directed, are to correct and remove those criminal or evil tendencies and influences which render the inmates confined therein a menace to society, to the end that such inmates may become good, industrious and useful citizens.”

To carry out such purposes it has been deemed wise to give the inmates an opportunity to earn a little money during their confinement, as experience has shown that an inmate who is discharged and sent out without any funds is much more susceptible to the temptations of the old evil life than is one sent out with sufficient funds for his own support during the interim between the expiration of his term and the securing of employment. The funds thus earned are as much the property of the inmate as is money or other property owned by him at the time of his sentence, unless the rules of the institution under which he earned them make some valid provision to the contrary.

It has been held that it is the duty of a county to provide for the maintenance of prisoners in the county jail. *Supervisors of Portage Co. v. Supervisors of Waupaca Co.*, 15 Wis. 361; *Bell v. Fond du Lac Co.*, 53 Wis. 433; *Chafin v. Waukesha Co.*, 62 Wis. 463; *Doty v. Sauk Co.*, 93 Wis. 102; *Deisner v. Waukesha Co.*, 95 Wis. 588, 32 Cyc. 349, 351.

A prisoner is not liable therefor, even though furnished at his own request. 32 Cyc. 355.

“It is . . . the duty of the county board to procure and furnish all needful medical aid and attendance to prisoners confined in its jail.” *Rider v. Ashland Co.*, 87 Wis. 160.

It is the duty of the State to provide medical assistance to inmates of the industrial school, even if out on parole. Bien-

nial Report and Opinions Attorney-General 1910, p. 401. Also to children in the State Public School. *ib.* p. 805.

The inmates of the Reformatory are persons sentenced for crime and therefore on much the same footing as inmates of the penitentiary. See sections 4944c and 4944d Stats.

It has been and still is the policy of this state to maintain all prisoners in the state prison and state reformatory and to require that such prisoners perform labor for the benefit of the State. Such maintenance has included, not only food and clothing, but all other necessities for the well being of the prisoners, including medical care and attention.

“Primarily the expense of supporting convicts while in prison is a state . . . charge.” 9 Cyc. 878.

“And this includes not only food and clothing, but also suitable and necessary medical care and attention.” *ib.*

In my opinion, in the absence of any valid rules to the contrary, the expense of the operation cannot be deducted from the amount standing to the credit of Mr. Soper.

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*Indigent, insane, etc.—Counties Soldiers Relief Fund*—The Soldiers Relief Commission of each county is charged with the administration of the Soldiers Relief Fund therein, and the granting of relief to those applying therefor is within its discretion. If it sees fit to deny relief in a given case, there is no way of compelling it to do so.

February 24, 1913.

HON. GEORGE PRATT,

*Department Commander, G. A. R. of Wisconsin,*  
Sheboygan, Wisconsin.

I have your communication of the 18th inst. in which you state that:

“An old soldier died some weeks ago in somewhat indigent circumstances, left a good wife behind without any visible means of support, it will also take some little time before she gets a pension. He left a little home in the City of Marinette, said to be worth from four to five hundred dollars, simply a mere shack, yet the Soldiers’ Relief Commission of Marinette

county say they are unable to grant her any relief from the fact that she owns property of the value mentioned above.

You also further state that:

“In our county the Relief Commission takes an entirely different view, and those that own a small home, and have nothing else, if their pension is not sufficient they proceed to grant them relief from the Soldiers’ Relief Fund.”

You ask whether under the circumstances the Soldiers’ Relief Commission of Marinette County is doing its duty in accordance with the law.

Sec. 1529b of the Stats. provides:

“It shall be the duty of every county board to annually levy, in addition to all other taxes, a tax not less than one-twentieth nor more than one-fifth of one mill upon the value of the taxable property in the county as determined by said board, such tax to be levied and collected as other county taxes for the purpose of creating a fund for the relief of needy soldiers, sailors or marines who performed military or naval service for the United States in time of war, the indigent wives, widows, minor children of such deceased soldiers, sailors and marines, and the indigent parents of such soldiers, sailors or marines who have not left surviving them widows or children entitled to relief under the provisions thereof.”

Section 1529c provides:

“The chairman of each town board, the board of trustees of each village, and the supervisors of each ward of a city, shall make a written report to the county board, of their respective counties, on or before the first day of their annual meeting, containing the names of all resident indigent persons of the classes mentioned in the preceding section in their respective towns, villages or cities, who may require and be entitled to relief thereunder, and the probable amount necessary for that purpose for the ensuing year; and each county board shall, at the November session thereof, make such levy as will raise the necessary amount.”

Sec. 1529d provides for the appointment and organization of a Soldiers’ Relief Commission.

Sec. 1529e provides:

“Such commission shall meet at the office of the county clerk on or before the first Monday of January in each year and at such other times as may be necessary, and at such annual meeting carefully examine the lists reported pursuant to sec-

tion 1529c, and being satisfied that the persons named on such lists are entitled to assistance, shall fix the amount to be paid to each. They may also furnish relief to any person within section 1529b whose name is not on any such list if the right of such person to relief *shall be established to their satisfaction.*"

It will be observed that considerable discretion is vested in the Soldiers' Relief Commission in determining to whom aid should be granted and the amount thereof which should be extended, and it is not surprising that the commissions in the different counties may pursue different policies with reference to the administering of this law. It is not surprising that some boards pursue a more liberal policy in this respect than others.

It is the manifest purpose of the law that relief shall be accorded to indigent and needy soldiers, as well as to their widows and children.

Upon your statement of the conditions existing with reference to the widow of the deceased soldier, I will say that there is no doubt but what the Relief Commission of Marinette county has power under the law to grant her relief. The fact that she may own a little home does not debar her from the relief contemplated by the statute. She does not have to be destitute in order to secure this relief. The statute in referring to the widows of deceased soldiers uses the word indigent. Indigent is defined by Webster as follows: "Destitute of property or means of comfortable subsistence, needy, poor, in want, necessitous."

It is very plain that a person may have a house within which to reside and yet be in need of the necessities of life.

From the foregoing considerations I have no doubt at all of the power of the Soldiers' Relief Commission of Marinette county to grant aid to the widow of the deceased soldier, assuming the facts to be as stated in your letter. It should be borne in mind, however, that while it is within their lawful authority to do so, it is also within their discretion as they are the ones charged with the administration of the law in that county and if in the exercise of that discretion they see fit to deny relief to this particular widow, there probably is no way provided in the law by which they may be compelled to do so.

*Insane, Indigent, etc.*—*Wisconsin Industrial School for Boys; Prisoners*—Inmates of the state reformatory, transferred to that institution from the Industrial School for Boys, are not entitled to a diminution of their term of imprisonment for good conduct under secs. 4928 and 4944i, Wis. Stats. 1911.

March 27, 1913.

HON. M. J. TAPPINS,

*Secretary, State Board of Control.*

In your letter of the 24th, you call my attention to the following sections in the Wisconsin Stats. of 1911:

Sec. 4944f, which provides in part:

“Inmates of the industrial school for boys who have reached the age of sixteen years may \* \* \* be transferred to the reformatory by the board of control and may be retained there until they are twenty-one years of age. Or they may sooner be returned to the school or to the counties from which they were sent to the school.”

Sec. 4928, being part of the chapter relating to the state prison providing,

“The deputy warden shall keep a true record of the conduct of each convict, specifying each infraction of the rules of discipline. At the end of each month the said deputy shall give a certificate of good conduct to each convict who shall require it, against whom is recorded no infraction of the rules of discipline. Every convict who is now or may be hereafter confined in the state prison and shall conduct himself in a peaceful and obedient manner and faithfully perform all the duties required of him shall be entitled to a diminution of time from the term of his sentence, not exceeding the amounts specified in the following table, for the respective years of his sentence and pro rata for any part of a year, where the sentence is for more than a year” etc.

Sec. 4944i provides:

“Allowances for good conduct in diminution of the term of sentence to convicts in the state prison given by section 4928 of these statutes or by any other statute shall be made to the inmates of the reformatory, and any good time earned in either institution by inmates transferred to the other shall be allowed him in the institution to which he has been transferred.”

And you say :

“The question arises as to whether inmates of the state reformatory transferred to that institution from the industrial school for boys are entitled to the good time allowance provided by section 4928. It would seem as though they are entitled to such allowance but if that is the case, then it would seem to be the giving of a premium to inmates of the industrial school to violate the rules of that institution so that they might be transferred to the Wisconsin state reformatory to get the advantage of that statute. Under the law no boy is entitled to any good time allowance at the Wisconsin industrial school for boys but, of course, if he is transferred to the state reformatory, if that statute applies, then he is entitled to the allowance and it would be in many cases an incentive for an inmate of the industrial school for boys to so conduct himself that it would be necessary to transfer him to the state reformatory.”

And you ask my opinion as to whether sec. 4928 is applicable in case of boys transferred to the reformatory from the industrial school.

It is very evident from a reading of chapters 201, 201a and 203 Wis. Stats. 1911, that the industrial school is on an entirely different basis than either the reformatory or the state prison. The objects of the latter two are the punishment of the offender, as well as his reformation. The commitments to them are for a definite term of years, the length of term varying with the seriousness of the offense committed. The board of control is strictly limited by statute in its power to release prisoners from them. On the other hand, the principal object of the industrial school is reformation and the welfare of the inmates is its principal consideration. Boys are committed to it during their minority without reference to the number of years that may be and without reference to the particular offense with which they are charged. A boy may be committed to the industrial school for incorrigibility, although that is not an offense recognized by the statutes of this state for which any punishment might be inflicted. In fact, I presume that as a rule, the commitment during minority is a longer term than would have been received had the person been committed to a penal institution upon the same charge for which he is sent to the industrial school.

The board of control has an absolute discretion as to the length of service under the commitment and may at any time restore such a boy to the care of his parents or guardian if in its judgment that course is most for the future benefit and advantage of the boy. (Sec. 4967.)

When transferred to the reformatory, the boy, unlike the other inmates, still remains subject to the orders of the board, and may at any time be "returned to the school or to the" county from which he was sent. In contemplation of law, he still remains an inmate of the school. *In re Bonn*, 17 R. I. 572; 23 Atl. 1017. As the board may restore him at any time to the care of his parents or guardian, there is not the same reason for applying the good conduct statute as in the case of inmates committed for a certain definite period. Where the reason for law fails, the law itself does not apply.

I am therefore of the opinion that sec. 4928 does not apply to a boy transferred to the reformatory from the industrial school. Possibly the court would not sustain me in this but certainly this opinion is in line with the opinion of my predecessor, the Honorable Frank L. Gilbert, found on page 212, Biennial Report and Opinions of Attorney-General for 1910, holding that a boy transferred to the reformatory from the industrial school and who is paroled out and violates his parole, cannot be held after reaching his majority, although sec. 4944L provides "the time during which any inmate of the reformatory, who has escaped therefrom, is at large, shall not be computed as any portion of the time for which he was sentenced."

## OPINIONS RELATING TO INSURANCE.

*Insurance—Fire Insurance—Form of Policy*—Policies used must conform as to blanks and size with form on file in office of insurance commissioner.

July 16, 1912.

HON. HERMAN L. EKERN,  
*Commissioner of Insurance.*

In your favor of July 13th, you request my opinion as to whether your department is required to approve a form of fire insurance policy which contains in the blank shown in the form on file in your office "a printed dwelling house form"; and whether you can require as a condition of approval that the form of policy contain blanks like those in the forms on file without any printing in such blanks. You also ask whether you are required to approve any form unless the sizes of the blanks on the policy correspond to the blanks on the forms filed in your office or unless the size of the policy as a whole corresponds to such forms; also whether a company can lawfully furnish its agents for issue in this state or deliver in this state policies in which the blanks do not correspond in size with the blanks in the forms so on file, or on which descriptive forms are printed in the blanks.

The purpose of the standard policy act (sections 1941—42 to 1941—65, Wis. Stats.), was to permit but one form of policy so that:

"when a man contracts for insurance he knows that he is contracting for a standard policy and for nothing else, and he knows that he will get that and nothing else." (*Bourgeois v. Northwestern National Insurance Company*, 86 Wis. 606, 610).

The requirement of sec. 1941—64 that all policies "shall conform in all particulars as to blanks, size of type" etc. with

the printed form filed in your office, was evidently designed to more completely carry out the purpose above stated, and I find nothing in the statutes requiring you to approve forms of policies not containing blanks corresponding in size, etc., to those in the form on file in your office.

Prior to its amendment by ch. 247, Laws of 1911, sec. 1941—64 provided that:

“The policy may be printed on paper of a size different from that of the printed form of contract or policy filed in the office of the commissioner of insurance which, however, shall not be less than nine inches in width.”

This sentence was dropped by the 1911 amendment and seems to show a legislative intent that policies used should correspond in size of paper on which printed as well as in other particulars with the form prepared by you. While the statute does not specifically require the size to be the same, I am of the opinion that it is within the fair meaning of the law that policies used should be of substantially the same size as that on file in your office.

Section 1941—64 provides that no company “shall make, issue, use or deliver for use any fire insurance policy on property in this state other than such as shall conform” to the one on file in your office. I do not think that the mere furnishing by a company to its agents of blank policies not so corresponding is within this section. It seems to me to refer to completed policies rather than to mere blank forms and it obviously makes unlawful the making, issuing, using or delivering for use of *policies* not so corresponding, even though the failure is only as to the size of the blanks or the fact that a descriptive form is printed in a space where the form on file in your office shows a blank.

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*Insurance—Counties—State Insurance*—Insurance on county buildings becomes effective July 1st, after vote by county board to insure in state insurance fund, or on such date thereafter as the policies previously held by county expires.

July 20, 1912.

HON. GEO. E. BEEDLE,

*Deputy Commissioner of Insurance.*

In your favor of July 19th, you state that:

“The county boards of several counties of this state have voted to insure the public buildings and property of their counties in the state insurance fund as provided by section 1978f—5, 1 to 6, inclusive. This department has requested schedules of insurance in force and other matter necessary for determining the amount of insurance to be placed. The work incident to the placing of this insurance has not been completed. I am this day in receipt of a letter from the county clerk of Kenosha county in which he makes the following request:

“‘I wish to ascertain if our buildings are now insured in the state insurance, as I do not wish to have insurance lapse. If not taken care of by your insurance, I can have them reinsured here by local insurance men.’”

And you ask my opinion as to whether the property of such counties as have voted to insure in the state insurance fund is fully protected whether or not the policy of insurance may have been actually issued.

Ch. 603 and sec. 138, ch. 664, Laws of 1911, create sec. 1978f—5 divided into six subsections. You do not state when the county board of Kenosha county voted to insure under this section but I assume that it was prior to July 1, 1912, and also prior to June 10, 1912, so that there has been opportunity for the county clerk to report to you as to the insurance then in force upon the county's property as required by subsec. 2 of sec. 1978f—5. In such situation it seems clear to me under the terms of subsec. 4 of sec. 1978f—5 that the state insurance became effective on July 1st or on such date thereafter as the policies carried on the county's property expired. There is no provision in the law for the issuance of a policy by the state and I do not think that it is essential to the county's being protected by the state insurance, nor do I consider it essential that there should have been furnished to you the information necessary to enable you to compute the cost of the insurance to be charged to the county. The amount of such charge and the amount of claim against the state insurance fund is a mere matter of computation. It is plain, under the provisions of subsec. 1 of sec. 1978f—5 that the county clerk has no right to contract for any insurance after July 1st after the vote of the county board to insure under that section.

*Insurance—Guaranty of Land Values*—An amendment to articles of incorporation providing for guaranty of land values, is void as it is an attempt to authorize the making of an insurance contract.

September 7, 1912.

HON. J. A. FREAR,

*Secretary of State.*

Yours of September 4th, together with the original articles of incorporation of the Woodland Farms Company and the proposed amendment to the articles of said organization, has been received. You inquire whether, in my opinion, there is any objection to filing the inclosed amendment providing for guaranty of land values, either present or future.

The clause which it is intended to incorporate as an amendment reads as follows:

“The corporation shall also have the right to guarantee land values, either present or future, for a consideration; and may include such guaranty in its contracts for sale of real estate or may issue separate guaranty contract for such persons or lands or upon such terms as the board of directors may prescribe.”

It is apparent from the wording of the above clause that the corporation would have power to guarantee land values, not only in cases where a sale of certain real estate is made by the corporation, and as an incident thereto, but also in other cases, where no sale whatever is made. This would not be a contract of warranty, but would be more in the nature of a contract of insurance.

An insurance contract is a contract whereby one party agrees to wholly or partially indemnify another for loss or damage that he may suffer from a specified peril. *Shak v. U. S. Credit System Co.*, 92 Wis. 366.

Insurance is a contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss. May on Insurance, sec. 1 and 2; *People v. Rose*, 174 Ill., 310.

Insurance is a contract whereby, for a stipulated consideration, one party undertakes to indemnify the other against certain risks. 1 Phillips on Insurance, sec. 1.

In law, a contract by which one party, for an agreed consideration, which is proportioned to the risk involved, under-

takes to compensate the other for a loss on a specified thing for specified causes. Century Dictionary.

Other definitions of insurance, similar to those quoted, could be given.

Section 1978 of the Wisconsin Stats., provides:

“No corporation, association, partnership or individual shall do any business of insurance of any kind or make any guaranty contract or pledge for the payment of annuities or endowments or money to the families or representatives of any policy or certificate holder, or the like, in this state or with any resident of this state except according to the conditions and restrictions of these statutes. And the term insurance corporation as used in this chapter may be taken to embrace every corporation, association, partnership or individual engaging in any such business.”

It seems very clear to me that the power that this corporation is endeavoring to assume by the amendment in question would authorize it to make insurance contracts within the definition as given by the courts and text writers upon the subject. Such a contract would possess all the elements of an insurance contract, as the element of risk, which is the essence of insurance, forms the principal foundation of an insurance contract, and for a consideration therein named the guarantor, or insurer, would take upon himself the risk that the insured is liable to encounter. See Biennial Report and Opinions of the Attorney-General for 1906, p. 398; also for 1908, p. 437.

I am therefore of the opinion that the proposed amendment is unauthorized by the statutes of this state and that you should not file such amendment in your office.

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*Insurance*—Articles of association of fraternal benefit society may be amended under sec. 1774, Stats.

October 9, 1912.

HON. H. L. EKERN,

*Commissioner of Insurance.*

In your letter of the 4th, you submit the question of whether or not the supreme assembly of the Equitable Fraternal Union, a fraternal benefit society organized under ch.

86, Stats., may amend its articles of organization in the manner provided by sec. 1774, statutes, or if such amendment must be made in the manner provided by sec. 1955b—5.

It appears from the memoranda prepared by Mr. Poss, attorney for the society, which accompanies your letter, that the articles do not provide any particular method for their amendment and that several amendments to such articles have been made in the past under sec. 1774, Stats. This last mentioned section forms a part of ch. 86 and provides a general method for amendments to articles of organization of corporations without specifically referring to fraternal benefit societies.

Sec. 1955b—5 provides in part:

“The articles of organization of any fraternal or beneficiary corporation, society, order, or association *may* be amended as prescribed herein whether organized under this chapter or ch. 86 of the statutes.”

The first question that suggests itself is whether this section is mandatory or permissive, that is, should the word “may” which I have underlined in the foregoing quotation, be construed as “must.” It is only where the word “may” is used with reference to public rights or interests or where the public or a third person have a claim *de juri* that it should be construed as “must.” *Hart v. Godkin*, 122 Wis. 646, and cases cited. It does not appear to me that it should be so construed here. Subsec. 9, sec. 1956, Stats., as am. by ch. 216, Laws of 1911, provides:

“Unless express reference is made to this subsection or unless expressly designated therein, no law now in force or hereafter enacted, shall apply to any fraternal benefit society or mutual benefit society.”

Does this render sec. 1774, Stats., which in no way refers to the subsection just quoted and in which fraternal benefit societies are not expressly designated, inapplicable as providing a method of amending the articles of association of such a society? Sec. 1958, Stats., as am. by ch. 175, Laws of 1911, provides in part: “Fraternal beneficiary or mutual benefit societies may be incorporated as provided in sections 1896 to

1901m, inclusive." This provision was adopted by the legislature only a few days before the adoption of subsec. 9, sec. 1956, Stats., as amended, so that both sections must have been before it as well as before its committees at the same time. It seems only reasonable to suppose that if they had construed the two sections as in any sense antagonistic they would not have adopted them within so short a time when the provisions of both must have been fresh in their minds.

Sec. 1896, statutes, as am. by ch. 460, Laws of 1909, provides in part for the organization of insurance corporations and that: "The articles thereof may be amended, in the manner provided in ch. 86 of the Stats." I am informed by you that the articles of other fraternal benefit societies have been amended as herein provided and such method has been approved by both your department and this. As sec. 1958 expressly designates fraternal benefit societies and expressly provides that sec. 1896 shall apply to such societies, and as the only method of amendment provided by ch. 86, Stats., in the absence of some method prescribed by the articles themselves, is found in sec. 1774, I am of the opinion that the articles of association of the supreme assembly of the Equitable Fraternal Union may be amended by that method.

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*Insurance corporations*—A contract guaranteeing the present and future values of land as a part of the contract of sale of the land is not an insurance contract.

October 22, 1912.

HON. JAMES A. FREAR,  
*Secretary of State.*

You have submitted a proposed amendment to the articles of incorporation of the Woodland Farms Company, together with a letter from Sherman W. De Wolf, of Reinbeck, Iowa, dated October 19th; and you desire to be advised whether or not, in my opinion, the said proposed amendment is permissible under the statutes of this state.

It appears that some time in September last, the Woodland Farms Company proposed amendments to the articles of incorporation which gave the company power to guarantee land

values not only in cases where a sale of certain real estate is made by the corporation and as an incident thereto, but also in other cases where no sale whatever is made. It was held that this would not be a contract of warranty, but would be more in the nature of a contract of insurance. It is now proposed to insert instead of the former amendment, the following:

“The corporation shall also have the right to guarantee the present or future value of lands sold by the corporation when such guaranty is included in and is a part of the contract for the sale of the lands.”

In an opinion by Ex-Attorney-General Sturdevant to Hon. Zeno M. Host, Commissioner of Insurance, under date of August 6, 1906, it was said:

“In every contract of warranty there is a feature of insurance, but contracts of warranty are made daily and are certainly not to be considered insurance contracts such as are contemplated by our statutory provisions regulating the business of insurance.”

As the corporation is only given the right to guarantee values of land when such land is sold by the corporation and when such guaranty is included in and is a part of the contract for the sale of such land, I do not believe that it can be said that it is a contract of insurance. The guaranty is, of course, a feature of insurance, but it is simply incidental to the contract of sale and is not the principal consideration for which the contract is made. I am, therefore, of the opinion that the proposed amendment under consideration is valid.

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*Insurance*—A rider may be attached to a fire insurance policy by which the insured is required to keep the property insured for at least ninety per cent of its value.

October 30, 1912.

HON. H. L. EKERN,

*Commissioner of Insurance.*

Under date of October 19th, you request me to advise you whether the following clause may lawfully be used as an endorsement on a fire insurance policy issued in this state:

“At the option of the assured, and in consideration of a reduced rate of premium charged for this policy, the assured here-

by agrees to maintain insurance during the life of this policy upon the property insured to the extent of ninety (90) per cent of the actual cash value thereof, and it is mutually agreed that if at the time of the fire, the whole amount of insurance on said property shall be less than such ninety (90) per cent, this company shall, in case of loss or damage less than ninety (90) per cent, be liable for only such portion thereof as the amount insured by this policy shall bear to said ninety (90) per cent of such actual cash value of such property; *but this clause shall be inoperative in event of loss or damage not exceeding five (5) per cent of the total insurance.*"

In an opinion rendered by my predecessor the Hon. L. M. Sturdevant, dated August 6, 1906, to the commissioner of insurance, it was held that a clause in substantially the same words and meaning was not authorized by our standard policy statute. See said opinion on page 439 of the Biennial Report and Opinions of the Attorney-General for the year 1908. My predecessor, however, at the time said opinion was rendered, did not have the benefit of the interpretation of the supreme court of section 1943a of our statutes, upon which said opinion was based.

In the case of *Bloch v. American Insurance Co.*, 132 Wis. 150, 164, the court said, concerning the construction of sec. 1943a:

"It is to have application only to cases in which the insurer attempts by stipulation in the policy, or with the policy, without consent of the insured and without reduction of premium, to limit its liability thereon below the amount or face of the policy upon which or for which the insured has paid full premium, and where the value of the goods destroyed is within the amount of such insurance carried on the property." etc.

Under this construction of sec. 1943a the reasoning in the opinion of my predecessor would lead to the opposite conclusion to the one at which he arrived, as under said construction said sec. 1943a does not prohibit the insertion of a clause such as the one in question. In another opinion rendered by my predecessor, the Hon. Frank L. Gilbert, which you will find on page 470 of the Biennial Report and Opinions of the Attorney-General for the year 1908, it was held legal to waive an inventory where the loss was less than three per cent. It is true that in the opinion rendered by me on the 15th day of September, 1911, it was held that a clause providing that no

special inventory need be made in case the loss did not exceed five per cent of the total of the amount of insurance was not permitted under our statute, but this was based upon the peculiar wording of said clause and would have no force or bearing on the clause in question.

I see no reason why the latter part of the clause which you have presented, which provides that the first part of the clause shall be inoperative in the event of loss or damage not exceeding five per cent of the total insurance, would be invalid. I do not think that this will avoid any inquiry into the total value of the property in case of loss as it seems very evident to me that you cannot ascertain that the loss is less than five per cent of the value unless you have an inventory and appraisal of the property. I see no objection, therefore, to the insertion of the clause in question in a fire insurance policy issued in this state.

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*Insurance*—The clauses referred to are in violation of the provisions of sec. 1943a, Stats.

October 31, 1912.

HON. H. L. EKERN,

*Commissioner of Insurance.*

In your letter of the 22nd, you ask my opinion with regard to whether the following clauses may be used on fire insurance policies issued in this state:

“\$1,000 on furniture, including pictures . . . at not exceeding cost.

“\$1,000 on horses, cattle, sheep, etc., in case of loss no one horse to be valued above \$200; no one cow to be valued above \$100; no one sheep to be valued above \$25, etc.”

You state that these clauses are now quite commonly used on dwelling house policies; that the first limits liability on household furniture, pictures, etc., to actual cost; the second is in the form of a valued policy on cattle, etc.

Sec. 1943a, Stats., as amended provides in part:

“No fire insurance company doing business in this state shall issue any policy containing any provision limiting the amount to be paid in case of loss below the actual cash value of the

property, if within the amount of the insurance for which premium is paid, and no such company shall require the use of any so-called co-insurance clause or rider to be attached or made a part of any policy except at the option of the insured, and every such company shall give to every applicant for insurance the rate of premium demanded with and without such clause or rider."

In *Newton v. Theresa Village Mutual Fire Ins. Co.*, 125 Wis. 289, our supreme court held that a rider attached to a policy which provided that if at the time of the fire the total insurance on the property should exceed 75% of the actual cash value the policy to which such rider was attached should become void in proportion to such excess, was void under the section cited. The court *inter alia* say:

"This provision is not as clear in its meaning as could be wished, but the evident intent is to guarantee that the insured shall, under the circumstances named, receive the full benefit of the amount of insurance for which he pays. The words 'cash value of the property' evidently refer to the property destroyed, not the property insured. Supplying the missing word, the provision simply means that if the total cash value of the property destroyed is less than the total insurance, \* \* \* no provision attached to the policy shall be effective to reduce the amount to be paid by the insurance companies to a sum less than the cash value."

In *Bloch v. American Insurance Co.*, 132 Wis. 150, the court held an agreement attached to a policy made at the option of the assured and in consideration of a reduced rate of premium permitting other insurance to an amount not exceeding 75% of the actual cash value of the property, and providing that if at the time of the fire the total insurance should exceed such per cent, the policy should be void only in proportion of such excess to such total insurance, not void as in violation of the section referred to. The court say they determine the true construction of such section as follows:

"It is to have application only to cases in which the insurer attempts by stipulation in the policy, or with the policy, without consent of the insured and without reduction of premium, to limit its liability thereon below the amount or face of the policy upon which or for which the insured has paid full premium, and where the value of the goods destroyed is within

the amount of such insurance carried on the property. It is not to be taken to conflict with the true interpretation of the standard policy law, nor to prohibit permission for additional insurance, nor restriction of the amount of such additional insurance, nor waiver of the invalidity of the additional insurance in whole or in part, such agreements not falling within its terms as here construed." (p. 164.)

A clause quite similar to the one passed upon in *Newton v. Insurance Co.*, *supra*, was held void by one of my predecessors in an opinion found in the Biennial Report & Opinions of the Attorney-General for 1908 on page 439. The first clause referred to by you would limit recovery on household furniture, pictures, etc., to actual cost. On many such items this might be far below "actual cash value." Pictures, certain rugs and other articles often increase in value with age. Again, this clause would deprive the insured of the benefit of the purchase by him of any goods at below their actual cash value.

In my opinion such a clause is not permissible. The second clause seeks to fix a maximum value on the individual live stock covered by a blanket clause. It is not a clause insuring each horse for \$200, each cow for \$100, each sheep for \$25, etc. On the contrary this one blanket clause of \$1,000 insurance may cover many horses ranging in value from \$100 or less to many times that amount, together with numerous other live stock with similar ranges in value. It appears to me to be equally as objectionable as the first clause.

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*Insurance*—Damage by fire and by explosion whether fire ensues or not may be insured against in the same policy.

November 22, 1912.

HON. GEORGE E. BEEDLE,

*Deputy Commissioner of Insurance.*

Your favor of November 14th, reading as follows, duly received:

"Kindly advise this department if the following clause may be attached to the Standard Fire Insurance Policy of this state:

"It is understood and agreed that this policy shall also cover loss or damage by explosion whether fire ensues or not (excluding however any loss or damage resulting from explosion or

rupture of steam boilers, unless fire ensues, and then for loss or damage by fire only), provided that in case of loss or damage by explosion to property on which there is other insurance, this company shall be liable only for such proportion of said loss or damage as the amount hereby insured bears to the whole amount insured on said property.”

“It is proposed to use this form on Standard Fire Insurance Policies covering gas plants. I doubt very much if the articles of incorporation of fire companies authorize the insuring against explosion of any kind except where fire ensues, and then for loss or damage by fire only.”

Under subd. 1 of sec. 1897, a company may be formed to insure “against loss or damage to property on land” by reason of one or of all the following: “fire, lightning, hail, tempest or explosion.” By the terms of subsections 3 and 4 of sec. 1897a “insurance under each subsection of sec. 1897 shall be written in separate and distinct policies, except that the same policy may embrace risks specified in subsections 1 and 12, or 4 and 5,” and except that “insurance against damage by hail to crops shall be written in separate and distinct policies from other insurance mentioned in subsection 1 of sec. 1897.”

Sec. 1941—64 prohibits agreements or conditions being made a part of the standard policy except “any other matter necessary to clearly express all the facts and conditions of insurance on any particular risk which facts or conditions shall in no case be inconsistent with or a waiver of any of the provisions or conditions of the standard policy.” Sec. 1941—47 provides that the standard policy shall contain a clause as follows.

“This company shall not be liable for loss caused directly or indirectly by invasion, \* \* \* or (unless fire ensue, and in that event for the damage by fire only) by explosion of any kind.”

It seems to me that there is an unavoidable conflict between the section last quoted and subsections 3 and 4 of sec. 1897a, which, as pointed out, expressly permit in one policy insurance against loss or damage by fire and insurance against loss or damage by explosion. Sec. 1941—47 has remained, in the particulars here involved, unchanged since first enacted by ch. 387, Laws of 1905, though amended in other particulars and

reënacted by ch. 525, Laws of 1907. Sec. 1897a was enacted by ch. 460, Laws of 1909, and amended and reënacted by ch. 275, Laws of 1911. Sec. 1897a is thus the later law and so far as it is inconsistent with sec. 1941—47 must prevail. Sec. 1897a unquestionably permits insurance against loss by fire and by explosion to be written by the same company in the same policy and I see no reason why the proposed rider is not a legitimate method of combining the two kinds of insurance in one policy.

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*Insurance—Town—Mutual Companies*—Articles of Organization of Patrons Mutual Town Insurance Co. of Rhinelander not approved, because not in conformity to the statutes.

January 15, 1913.

HON. GEORGE E. BEEDLE,

*Deputy Commissioner of Insurance.*

You have submitted for my approval pursuant to subd. 3 of sec. 1927, two certified copies of the articles of organization of the Patrons' Mutual Town Insurance Company of Rhinelander, Wisconsin.

Subsec. 2 of sec. 1927 gives a form for such articles which has been followed down to the point where the officers of the company are enumerated. While perhaps not vital, I think it would be better if the articles corresponded with the form given in the statute in this particular as well and omitted everything not required by the statute. The form given in the statute states that "the office of such corporation shall be in the town from which said directors shall elect their secretary in the county of \_\_\_\_\_." The articles in question provide "the office of such corporation shall be in the city of Rhinelander." It seems evident that the statute requires the office of the company to be at the place of residence of the secretary and while that may be true as to this company it does not so appear on the face of the articles.

Many other provisions comprising over two pages of type-written matter are contained in the articles in question, although nothing like them is suggested in the form given in the statute. I think it would be far better if all such provisions were omitted and were contained in the by-laws of the

company rather than in its articles. Some of the provisions are perhaps not invalid, but others clearly are so. Thus the provision that the property insured may comprise "grange halls" seems to be in conflict with subd. c of subsec. 1 of sec. 1931 of the Stats. providing that "no property shall be insured in any such city or village except farm property or detached dwelling houses and contents or barns or outbuildings used in connection with such dwelling house," etc. Similarly the provisions for the adjustment of losses by an adjusting board and board of arbitration etc., seem to be in conflict with section 1934 of the statutes which provides how such losses shall be adjusted.

For the reason stated I am unable to approve the articles.

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*Insurance—Town Mutual Fire Insurance Companies—Articles of Organization*—Articles of Organization should comply with sec. 1927 Wis. Stats.

January 29, 1913.

HON. GEORGE E. BEEDLE,

*Deputy Commissioner of Insurance.*

You have submitted for my approval pursuant to subd. 3 of sec. 1927 Wis. Stats. two certified copies of the articles of organization of the Patrons' Mutual Insurance Company of Rhineland, Wisconsin.

Articles of incorporation of this company were refused my approval on January 15, 1913. Changes seem to have been made to obviate some of the objections to which I then called attention, but the articles now presented are dated December 23, 1912. Unless all the signers of the articles as originally drawn have ratified the changes made they would, of course, not be bound by them.

The articles as now submitted contain much more than is authorized or required by statute. Since some of such superfluous matter is plainly improper, being in conflict with the statutes as hereafter pointed out, I again suggest the advisability of making the articles substantially conform to the statute by including just what and no more than the statute authorizes.

The articles in question do not correspond with the statute in the following particulars at least:

(1) As to the officers of the company. Compare the provisions at the end of the first paragraph of the articles with subsection 2 of section 1927.

(2) As to the property to be insured. The statute (section 1931) prescribes what such a company may and what it may not insure and there is no reason for repeating such provisions in the articles, especially when the statutory provision is incorrectly quoted.

Note the attempted quotation of paragraph c of subsection 1 of section 1931.

(3) As to the provisions for arbitration as to the amount of loss. Since the statute must control, whether repeated in the articles or not, there is no good reason for inserting such statutory provisions in the articles.

(4) The same is true as to the paragraphs providing that the application shall be part of the policy and that the policy may be annulled or shall be void, etc. These provisions may be proper in the by-laws and policy, but they have no place in the articles. See sections 1932, 1937, etc., Wis. Stats.

(5) The same is true as to filling vacancies in the office of the company and removal of officers and the amount that the company will pay in case of loss, etc.

(6) As to the manner of amendment of the articles. The final paragraph of the articles provides for amendment "at any annual meeting by a two-thirds vote of the members present." Paragraph c of subsection 3 of section 1927 provides for such amendment "by a resolution adopted by four-fifths of the votes cast at any annual or special meeting."

This last plain conflict with the statutes requires me to withhold my approval of these articles and since they must be redrawn I request that they be made to conform to the statutes by containing no more and no less than prescribed by sec. 1927 of the Wis. Stats.

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*Insurance—Corporations—Town Mutual Fire Insurance Companies—Articles of Association—*Papers submitted for amendment of articles of Cedarburg Mutual Fire Ins. Co. not in compliance with subd. c of subsec. 3 of sec. 1927 Wis. Stats.

February 12th, 1913.

HON. GEORGE E. BEEDLE,

*Deputy Commissioner of Insurance.*

You have submitted for my approval, verified copies of an amendment to the articles of organization of the Cedarburg Mutual Fire Insurance Company, of Cedarburg, Ozaukee county, Wisconsin.

Subd. c of subsec. 3 of sec. 1927 Wis. Stats. provides that the articles of organization of such a company

“may be amended by a resolution adopted by four-fifths of the votes cast at any annual or special meeting.”

Provision is made for a thirty days' notice of such meeting and the statute then provides that:

“Within ten days after the adoption of such amendment two copies thereof and the minutes showing the vote by which adopted, and of the affidavit of the secretary of the mailing of such notice, verified as such by the affidavit of the president and secretary, shall be forwarded to the commissioner of insurance” etc.

In the papers submitted, I find only one copy of the notice and I find no copy of the resolution adopted except as the same is contained in the minutes of the meeting. The verification of the president and secretary only goes to the matter of the notice and its mailing. As I construe the language of the statute above quoted, neither the original amendment nor original minutes nor original affidavit of the secretary of the mailing of the notice should be sent to you, but two copies of each of said papers “verified as such by an affidavit of the president and secretary” should be forwarded to the commissioner of insurance. In other words, the copies of the amendment and of the minutes should be verified by an affidavit of the president and secretary, as well as the copy of the affidavit of mailing.

*Insurance—Town Mutual Insurance Companies—Articles*  
should not contain more than statute authorizes.

March 27th, 1913.

HON. GEORGE E. BEEDLE,

*Deputy Commissioner of Insurance.*

You have submitted for my approval pursuant to sec. 1927 of the statutes two verified copies of articles of organization of the Farmers Mutual Fire & Lightning, Cyclone & Tornado Town Insurance Company, of Eau Claire county, Wisconsin.

If the articles contained only the first two pages thereof, I should approve the same as being in compliance with the statute, but the provisions of the third and fourth pages seem to me not only unauthorized but in some particulars in conflict with the statute. As an example, Article 3 provides that each member shall be entitled to one vote at the annual election, etc., while subsec. 2 of sec. 1928 provides that "each person insured shall have one vote for each two hundred dollars for which he is insured." In my opinion all the matter contained on the third and fourth pages of the proposed articles should be contained in the by-laws of the company and not in the articles. But before being placed even in the by-laws, the provisions should be carefully compared with the statutes and made to comply therewith.

For the reasons stated, I must withhold my approval of the articles.

## OPINIONS RELATING TO INTOXICATING LIQUORS

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*Intoxicating Liquors*—Right of parents or guardians to withdraw names from petition in certain cases.

June 22, 1911.

MR. FRANCIS J. ROONEY,  
*District Attorney,*  
Appleton, Wisconsin.

Your favor of June 21st is received. In it you state that acting under the provisions of sec. 1548 of the Wisconsin Statutes and amendments thereto one hundred and forty-four citizens of joint school district No. 2 of the town and city of Kaukauna, and the town of Vandebroek and the village of Little Chute, constituting a majority of the parents and guardians of said joint school district, filed a petition with the mayor and common council of the city of Kaukauna remonstrating against the granting of a retail liquor license and the occupation of certain premises situated in the city of Kaukauna and within the distance prescribed by statute of the school grounds of said joint school district. That thereafter, subsequent to the filing of said remonstrance but before action was taken thereon by the common council of the city of Kaukauna twenty-eight of the subscribers to said remonstrance filed a counter-petition with the mayor and common council of the city of Kaukauna specifically requesting that each of said subscribers' names be erased from the former petition or remonstrance on the ground and for the reason that they had signed said former petition or remonstrance under a mistaken idea of the facts and without being advised as to the intent and purpose of said petition. Upon this state of facts you ask whether or not the twenty-eight individuals above referred to, being par-

ents and guardians of children attending the school in question, have a right to withdraw their names from the original petition or remonstrance thus reducing the number of subscribers to such former petition to one hundred and sixteen, a number less than one-half of the parents and guardians patronizing said school and which in effect would invalidate the original petition or remonstrance.

I am of the opinion that this query should be answered in the affirmative. The right of petition is a constitutional right and of course may be exercised by the individual citizen for or against any proposition in which he may be interested. The twenty-eight signers who signed the original petition would have been bound by their action, in my opinion, had the statute provided any particular time when the petition should be acted upon and that time had elapsed or in the event of the mayor and common council of the city of Kaukauna having acted upon such petition or remonstrance prior to the filing of the counter-petition or remonstrance by which they withdrew their names from the original petition. Up to the time of such action I am of the opinion that any parent or guardian would have the right to change his mind and withdraw his or her name from the petition which, in effect, they have done. If this reduces the number of signers to less than one-half of the total number of parents and guardians in such district who are patrons of such school, then the original petition or remonstrance becomes ineffectual and will probably be ignored by the common council for the reason that it does not comply with the statutory conditions. I do not recall any case in any court of last resort where this question has been determined specifically but I am personally aware of a recent decision of one of the circuit court judges in the State of Wisconsin in an action arising under the residence district law in which the court held that a signer of a petition or remonstrance had the right to withdraw his name from such petition or remonstrance prior to the time for taking action thereon by the city or village council and I am of the opinion that the court was right in its decision and that the right to withdraw one's name from a petition is a right equally inherent with the right to sign the petition.

*Intoxicating Liquors—Elections—Municipal corporations—*

1. Local option issue must be decided on first Tuesday in April.

2. Dry territory attached to a wet territory or incorporated into a village remains dry until a new election is held.

April 30, 1912.

MR. M. R. MUNSON,

*District Attorney,*

Prairie du Chien, Wis.

You state that the town of Freeman has been dry territory since 1898; that recently the village of Ferryville, which was formerly a part of the town of Freeman, has been incorporated; that they will hold their first election of officers some time during the coming month of May. You inquire, first, whether they can vote on the license question at that time; and, second, whether the village board can grant licenses after July 1st without any vote on the question.

In answer to your first question I will say that under sec. 1565a the local option issue must be decided at an election to be held the first Tuesday of April next succeeding the petition filed with the clerk. Consequently, the question for or against license cannot be voted upon at your May election.

In answer to your second question I will say that under sec. 1565b it is provided that if a majority of the ballots upon such question be against license then it shall be unlawful for any person to buy, sell, deal or traffic in any spirituous, malt or intoxicating liquors or drinks in any quantity whatever in the town, village or city so voting against license; and any license granted or issued therein so long as the result of such election shall remain unreversed by another election held for the same purpose, shall be void. Under sec. 1548 each town board, village board and common council are given the right to grant licenses under the conditions and restrictions specified in the chapter. Our supreme court has not passed upon the second question submitted by you, and under the above quoted statutes it is somewhat doubtful as to what construction should be given to them, but I have investigated authorities in other states and I find that it has been held that if a new district is carved out and created with a new name from a district which has already adopted a local option law, such law

will be enforced in the new district upon the theory that all qualified voters of such new district have had a right and were called upon to vote at the election held in the old district for or against adoption of the law; and that the result of that election subjects the entire population of the new district to the provisions of the law for the period of time covered by such election. See Woollen & Thornton on the Law of Intoxicating Liquors, vol. I. Also *Prestwood v. The State*, 88 Ala. 235, and *Higgins v. The State*, 64 Md. 419.

The court said, in *Prestwood v. The State*, *supra*:

“The act of February 28, 1881 prohibits the sale, giving away or otherwise disposing of any kind of spirituous, vinous or malt liquors in Beat No. 2 known as Fairfield Beat in Covington County. The effect was to establish prohibition as the law of the beat within the boundaries and area as it was then stated. If the act had declared the boundaries of the beat it would not have been more definite or fixed in its operation as a rule of civil conduct. The description was certain because being perfectly capable of rendered certain by record evidence. It necessarily follows that the commissioners court had no right to suspend or limit the operation of the law by narrowing the area of the beat. If so, they might entirely repeal it within their mere discretion by abolishing the beat.”

In this case part of the territory in Beat No. 2 was detached to Beat No. 6, and a conviction of selling liquor was sustained in the territory thus detached from Beat No. 2 and attached to Beat No. 6, although all of No. 6 was wet territory.

In the case of *Higgins v. The State*, *supra*, it was held that under an act of the assembly, submitting the question to the voters of the several election districts of Carolina County whether or not spirituous or fermented liquors should be sold therein, the majority of the third election district of the county was against the sale of any spirituous or fermented liquors therein. By a subsequent act of the assembly a new election district was established out of the said third election district. The prohibition will continue to apply to the inhabitants of the new district, there being nothing in the latter act at all inconsistent with the provisions of the former act. The court said, on page 422:

“All the qualified voters therefore, of that part of election district No. 3, now forming election district No. 6, had a right and were called upon to vote at the election in May, 1876, for

or against the adoption of the prohibitory law and the result of that election subjected the entire population of district No. 3 as then constituted to the provisions of the act, and the subsequent division of the district has not had the effect of restricting the operation of the act to only a part of the original territory to which it applied and for which it was adopted. The mere change of name or number as applied to part of the district certainly should have no such effect and that is really all that has been done in this case. The act of 1876 provided for taking the sense of the qualified voters of the county as it was then divided into election districts for the obvious purpose of giving a mere local effect to the act to accord with the sense and wishes of the majority of the voters of the several districts of the county and from the time that the result of the election was proclaimed as provided by the act such districts as cast a majority of votes in favor of the adoption of the law became henceforth prohibitory or local option districts rather than mere election districts, and they remain so notwithstanding any subsequent change in the districts having reference to the convenience of holding elections."

The authorities are all to the effect that when a certain town adopts prohibition under the local option statute, such territory as is embraced in the town will remain dry territory even though it is detached from the town in which prohibition was adopted. I have found no decisions of any court of last resort taking a contrary view. Of course, these decisions are generally made under statutes that are not entirely like ours, and as I have said before, although the question is not free from doubt, still, in view of the fact that the authorities are all harmonious on this question, I believe that the village of Ferryville in this case will remain dry territory until a contrary position is taken by an election held for that purpose.

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*Intoxicating Liquors—Saloons—Education—Licenses—* Distance of 300 feet from school grounds in subd. 5 of sec. 1548 should be measured along streets—not alleys.

July 3, 1912.

MR. CHAS. A. TAYLOR,  
*District Attorney,*  
Barron, Wisconsin.

In your favor of June 26th you state that you have been asked to prosecute a saloon keeper whose saloon is within

three hundred feet of a school grounds if measured upon an alley but is not within such distance if measured upon the ordinary streets, and you request my opinion as to whether there has been violation of subd. 5 of sec. 1548, Wis. Stats. which provides:

“From and after June 30, 1905 . . . no such license shall be granted . . . for the sale of any such liquors in any building, booth or other place . . . within a distance of three hundred feet of any . . . school grounds, said distance to be measured upon the streets from the boundaries of the school grounds.”

I do not find any decisions directly in point though an Indiana case holds that a brick paved alley sixteen and a half feet wide is not a street within the statute providing that

“any room where intoxicating liquors are sold . . . shall so be arranged . . . that the whole of said room may be in view from the street or highway upon which the same is situated.” *State v. Harrison*, 70 N. E. (Ind.) 877.

There are many cases defining the words “street” and “alley” from a consideration of which cases it is said in Elliott on Roads and Streets,

“It is obvious that whether the way is or is not to be called an alley depends upon the relation it bears to other ways in the same city or town; for in some cities or towns the way would be deemed so narrow as to be merely an alley and not a street, while in others it would be comparatively of such a considerable width as to take rank as a street . . . The question whether the particular way is a street or an alley is to be determined from the statutes upon the subject and the character and location of the particular way or ways.” (1 Elliott Roads & Streets, 3rd Ed. Sec. 27).

The meaning of the word “street” in sec. 1548 must be determined by a consideration of the purpose and object of the statute in which it is used. (*Weirich v. State*, 140 Wis. 98, 101). The reason for providing for measurement “upon the streets” instead of in an air line must have been either to make it unnecessary for the scholars to pass by a saloon in going to and from school or to require travel of at least three hundred feet in order to reach a saloon from the school grounds.

Either reason is, I think, sufficient to show that streets in the ordinary sense of the term—general ways of travel—were what was meant. An alley is not ordinarily used by foot passengers. The statute plainly does not purport to make it *impossible* to reach a saloon except by going at least three hundred feet from the school grounds, otherwise an air line measurement instead of a measurement “upon the streets” would have been specified.

I am therefore inclined to believe that an ordinary alley—one not used by foot passengers—would not be included under the term “streets”, though I think that each case should be determined by its own circumstances as there might well be alleys so located and used as to come within the meaning of the word “streets” as used in the statute.

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*Intoxicating Liquors*—Druggists are not prohibited from selling liquors as a medicine on Sunday or election day or holiday under sec. 1564 of the Wis. Stats.

August 12, 1912.

MR. THORWALD P. ABEL,  
*District Attorney,*  
Sparta, Wisconsin.

Under date of August 7, 1912, you state that:

“John Doe is a druggist at Tomah, Wisconsin, and as such has procured from the city council a permit to sell strong, spirituous and ardent liquors in quantities less than one gallon for medicinal, mechanical and scientific purposes only and not to be drunk on the premises, as provided by section 1548a of the statutes. That on Sunday, July 14, 1912, Richard Roe went into the drugstore of John Doe and complained that he was sick and wanted some whisky for medicinal purposes, and John Doe sold him one quart of whisky. That none of the whisky was drunk upon the premises of John Doe, the druggist.”

You inquire whether this sale was in violation of section 1564 of the statutes.

Said statute provides as follows:

“If any tavern keeper or other person shall sell, give away or barter any intoxicating liquors on the first day of the week commonly called Sunday, or on the day of the annual town

meeting or the biennial fall election, such tavern keeper or other person so offending shall be punished by a fine of not less than five nor more than twenty-five dollars, or by imprisonment in the county jail not to exceed thirty days, or by both such fine and imprisonment."

You will see that this prohibition extends only to any tavern keeper or other person. Our supreme court, in the case of *Jenson v. State*, 60 Wis., on page 582, said, concerning this statute:

"The words 'tavern keeper' indicate very clearly the class of persons against whom the act was aimed, and the general words and 'other persons' must, under the familiar rule, *noscitur a sociis*, be taken to mean a similar class of persons, and not be extended so as to include all persons. (Citing cases) The words 'tavern keeper' as used in this statute clearly mean a person a part at least of whose business is to sell intoxicating liquors; and applying the rule above quoted the words 'other persons' must be held to mean persons whose business is either in whole or in part is to sell such drinks."

The court further says:

"Probably the better construction of the act would be to limit it to persons who were by law authorized to sell such intoxicating liquors as a business, in view of the fact that the unlicensed vendor of such articles on the days named in the act, is punished more severely under other provisions of law than under this section."

Again the court says:

"In this case it is not necessary to determine whether the act in question should be restricted to persons licensed to sell intoxicating liquors. We hold that it is clear that the statute does not include all persons within its provisions, but only such as are tavern keepers or persons who are engaged in the business of selling liquors."

The words "tavern keeper" have never been construed by any court so far as I can find to include druggists. Tavern, as defined by Webster, is a house licensed to sell liquor to be drunk on the spot. In some of the United States "tavern" is synonymous with "inn" and "hotel" and denotes a house for entertainment of travelers as well as the sale of liquors licensed for that purpose.

*In re Schneider*, 8 Pac. 289, 290, and 11 Ore. 288, the word "tavern" is construed as practically synonymous with barroom

or drinking shop. In the case of *Town of Crown Point v. Warner*, (N. Y.) 3 Hill, 150, 156, the word "tavern" is said to be synonymous with "inn" and that they are both houses of public entertainment. In the case of *Commonwealth v. Shortridge*, 26 Kentucky, 638, 640, the word "tavern keeper" is held synonymous with "innkeeper" and that it means a person who makes it his business to entertain travelers and passengers and provide lodging and necessaries for them and their horses and attendants.

As a druggist would be classed with an entirely different business, and would never come within the class of an ordinary innkeeper, I do not believe that a construction should be placed upon this statute which would include a druggist as the words "or other person" in that statute can only include such as carry on a business similar to that of a tavern keeper. The fact that our statute recognizes the sale of liquor as a medicine by druggists as a legitimate and authorized business not only in licensed territory but also in no license territory as a necessity, I am of the opinion that it is very evident that it was not intended by our legislature that a druggist should be included in the prohibition contained in said sec. 1564.

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*Intoxicating Liquors—Liquors licenses*—A town which issued 21 licenses on and prior to June 30, 1907, five of which were located in a village thereafter incorporated, may now issue only 16 licenses and said village five.

August 14, 1912.

WM. F. SCHANEN,

*District Attorney,*

Port Washington, Wisconsin.

You state that the town of Mequon, in Ozaukee county, had in 1908 a population of not exceeding 2800 and at that time had 21 saloons; that thereafter the village of Thiensville was created out of a part of the territory of said town of Mequon, containing a population of between four and five hundred people, and that included in said territory were five saloons, so that, at the time this change took place, the so-called Baker law was already in effect.

You inquire whether the town board of the town of Mequon is authorized to issue five additional licenses for their town. You say that the board now claim that, in view of the fact that the creation of the village of Thiensville took those five saloons, therefore, by "operation of law," five additional licenses may be granted to the remaining territory of the said town of Mequon.

In answer to this inquiry I will say that I am of the opinion that under the Baker law the village of Thiensville would be authorized to grant five licenses, in place of those granted to the five saloons included in the territory comprising at the present time the village of Thiensville, but formerly (prior to the passage of the Baker law) included within the territory of the town of Mequon.

This opinion was held by this department in a letter addressed to Mr. E. V. Werner, District Attorney of Shawano county, under date of September 3rd, 1907. In view of that opinion and said construction of the law it would be very evident that the town out of which the territory comprising the village has been taken cannot also issue licenses for the same saloons. It is my opinion that the town of Mequon will be authorized to issue only sixteen licenses at this time.

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*Intoxicating Liquors*—1. No license can lawfully be granted to a new location under sec. 1565d, as long as one of the old locations may be rented for saloon purposes.

2. Population limiting the number of liquor licenses must be determined from the preceding census, state or national.

August 23, 1912.

JOHN B. CHASE,  
*District Attorney,*  
Oconto, Wisconsin.

You state that in a certain village in your county the question has arisen as to whether the village board has a right to issue a saloon license for a place for which no license was granted or issued on or prior to the 30th day of June, 1907.

It appears from your statement that in the year 1907 said village had seven saloons, which was two more in number than

one for every 250 of the inhabitants; that two of these have since discontinued business and for the two years last past the village has had five, its full quota; that a person desiring to engage in the saloon business in the village has applied to one of the owners of property that was saloon property on and prior to June 30th, 1907, to lease the property for saloon purposes, and that he has been refused; that he now proposes to purchase at considerable expense a parcel of land on which is a building suitable for hotel and saloon purposes and has applied for a license to operate a saloon in said building; that there has never been a license granted to this location. You request my opinion in this matter.

In answer to your inquiry I will say that, there being two places in the village that were licensed on the 30th day of June, 1907, for which no licenses are now granted, it would be necessary for the party in question to have a refusal from the owners of both these places before being granted a license for a new location. In an opinion rendered by my predecessor in office, the Honorable Frank L. Gilbert, to Victor T. Pierrelee, District Attorney of Ashland county, dated June 15th, 1910, it was held that it would be unsafe to advise the authorities to issue a license to a new location unless all the owners of vacant premises for which licenses had been issued and in force on or prior to the 30th of June, 1907, had refused to lease their premises for saloon purposes. The courts have not yet construed this law and, until a construction is placed upon the law by our Supreme Court, this department will adhere to this ruling.

You will find the opinion above referred to in the Biennial Report and Opinions of the Attorney-General for 1910, on page 529, and I refer you to that opinion and the arguments there given.

You also state that in one of the towns in your county two saloon licenses had been granted and were in force on and prior to the 30th of June, 1907; that in 1910 the population of the town had increased sufficiently to permit the issuance of one more license, which was done; that since 1910, and since the taking of the census of that year, the population of said town has materially increased, so that there is now a sufficient number of people within the town to warrant the

issuing of two more licenses, and you state that the town authorities have actually issued one more license, and that they propose to issue a fifth license; that it can be demonstrated that there are in fact more than 1250 people in the town.

You inquire whether the fourth license issued and a fifth license, if issued, would be legal.

In answer I will say that sec. 1565d, ch. 484 of the laws of 1907, provides in part as follows:

“One such license may be granted to and issued for each two hundred and fifty inhabitants or fraction thereof in any town, village or city in this state, such population to be determined by the last preceding state or national census, provided, however,” etc.

It then provides for granting as many licenses in those towns that had more than the maximum number permitted, authorizing them to issue as many licenses as were issued and in force on the 30th day of June, 1907, and further provides:

“but no additional licenses in number shall be granted or issued in any such city, village or town until the increase in population thereof brings the same within the foregoing limitation,” etc.

The “foregoing limitation” here referred to is one saloon for every 250 of the inhabitants or fraction thereof in a town, village or city, such population being determined by the last preceding census (state or national).

I am therefore of the opinion that in the town in question only three licenses may be issued and that the fourth license that was issued is illegal and void and affords no protection to the party to whom it was issued.

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- Intoxicating Liquors*—1. Under facts stated licensee was not a resident of the town at the time when his license was granted.
2. Town board had no authority to grant license to him.
  3. Board in an administrative capacity.
  4. Said license cannot now be legalized.
  5. License is void and no liquor can be sold under it.

August 28, 1912.

N. O. VARNUM,

*District Attorney,*

Hudson, Wisconsin.

You state that prior to July 1st of this year, one Frank Kroll resided with his family, in Glenwood city, St. Croix county; that for several years prior to that he operated a saloon in Glenwood city, under licenses legally issued to him; that at the last spring election Glenwood city was voted "dry"; that the town of Glenwood surrounds Glenwood city on every side; that Mr. Kroll then applied to the town board of the town of Glenwood for a license, which was granted to him, to operate a saloon in the town of Glenwood for the year commencing July 1st, 1912; that since July 1st, he has been operating such saloon in the town, just outside the city; that at and prior to the time that the town board granted this license Mr. Kroll maintained a home in Glenwood city and lived there with his family; that he claims that he intended to move into the town as soon as he could procure a house in which to live; that he did not move until a few days ago, after the question of the legality of his license was brought to the attention of the sheriff and yourself and after you had talked with him about it; that thereafter Mr. Kroll fitted up a couple of rooms in the back part of the saloon building and moved into them with his family.

You submit the following questions, which will be answered in their order:

"1. If, at the time the license was issued, Mr. Kroll intended to move with his family into the town of Glenwood as soon as he could procure a house there in which to live, and has been unable to procure a house there, and actually continued to live in the city of Glenwood with his family until a few days ago, and did on July 1st transfer his business to the town of Glenwood, has he been a resident of the town of Glenwood from the time the license was issued till he actually moved into the town with his family a few days ago, within the meaning of section 1565L, which says that no such license shall be granted to any person who is not a resident of the town, city or village in which such license is applied for? In other words, could Mr. Kroll change his residence from the city to the town by having an intention to do so and simply moving his business, when he continued to live with his family in his former home in the city?"

Under sec. 69 of our Stats., as to the manner of determining the residence of voters, we find the following provision:

“8. If a married man has his family fixed in one place and does his business in another, the former shall be considered and held to be his residence.

“9. The mere intention to acquire a new residence without removal shall avail nothing, neither shall removal without intention.”

I am of the opinion that Mr. Kroll was not a resident of the town, as required by said sec. 1565*l*, prior to the time that he moved his family into the town of Glenwood.

“2. Under the facts stated, did the town board of the town of Glenwood have authority to grant this license?”

This question must be answered in the negative, in view of the provisions of said sec. 1565*l*.

“3. Does the town board act in a judicial or administrative capacity in determining whether or not the applicant comes within the class of persons to whom they are authorized to issue licenses?”

Administrative officers sometimes act in a quasi-judicial capacity. In the case of *Mitchell v. Clay Co.* (Neb.) 96 N. W. 673, 678, it was decided that, where the law commits to an officer the duty of looking into facts and acting upon them, not in a way which it specially directs, but after a discretion in its nature judicial, the function is quasi-judicial.

I am of the opinion that, where the board simply determines the question whether or not a certain person is a resident of the town, that is an administrative, rather than a quasi-judicial, function. (See *State ex rel. Milw. Med. Coll. v. Chittenden*, 127 Wis. 468, *M. St. P. & S. S. M. Ry. Co. v. R. R Comm'n*, 136 Wis. 146.)

“4. If this license was illegally granted, can it be legalized by the act of the licensee in moving with his family into the town where it was granted?”

In Woollen and Thornton's *The Law of Intoxicating Liquors*, Vol. 1, paragraph 351, we find the following:

“Statutes often restrict the license to an inhabitant of the county or a city, or a town, or even to a township; and when such is the case the applicant must be an inhabitant of the

political subdivision for which he seeks the license; and not only that, but he must remain an inhabitant during the life of the license, for, if he do not and move out of it, he will forfeit his license, and his servant retailing liquors over this bar after his master has moved will not be protected by his master's license." See also *State v. Dudley*, 33 Ind. App. 640; s. c. 71 N. E. 975; *Runyan v. State*, 52 Ind. 320; *Kraut v. State*, 47 Ind. 519.

In the case of *State v. Fisher*, 33 Wis. 154, our court held that the giving of the bonds required by the excise law is an essential condition precedent to the validity of the license to sell intoxicating liquors; and a license granted without such bond being given is no protection to the licensee. It was held that such license was absolutely void.

In the case of *State ex rel. Treat v. Hammel*, 134 Wis. 61, it was held that the full payment of the license fee by the licensee is a condition precedent to the validity of the license.

The same reasoning that was applied in those two cases will apply to the case before us, where a provision in the statute requires that the person to whom a license may be given must be an inhabitant of the town in which the license is to operate. I am of the opinion that the license granted to a person who is not an inhabitant is absolutely void and, being void, that a subsequent moving into the town by such licensee with his family cannot validate the license. In the Indiana cases above cited it was held that after the license was forfeited by the man's moving out of the town, he could not after that sell liquor in said town.

I believe that you are correct in answering this question in the negative as you state you have done.

"5. If the license was illegally issued and if it cannot be legalized by the subsequent act of the licensee in moving into the town, and supposing that both the town board and the licensee acted in ignorance of the law in reference to residence in the granting the license and fully believed that the license was legal, have the sheriff and myself the right to exercise any discretion in reference to the starting of prosecutions for sales of intoxicating liquors made prior to the time the illegality of the license was brought to the attention of the licensee?"

You have a discretion, as district attorney, which you must exercise according to your best judgment.

"6. Have we the right to permit the licensee to continue operating under this license?"

I do not believe that you have the right to allow the man to operate under this void license, as the license does not afford him any protection whatever and a sale made under it would be a violation of our liquor laws.

“7. Can the town board of the Town of Glenwood grant Mr. Kroll a new license, upon the payment made by him for the present license?”

I think that this question must be answered in the negative, as the law requires that an application must be made and the fees paid before a valid license can be granted. Of course, an application has been made and a regular fee has been paid, but the board has acted upon this application and given a license, which is void, for the reason that the man to whom it was granted was not an inhabitant of the town for which the same was granted. He cannot now complain if he is compelled to make a new application and pay another license fee for a valid license. I am of the opinion that under our statute a new license cannot be granted by the board, under the facts stated, without the licensee making a new application, filing a new bond and paying the regular license fee.

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*Intoxicating Liquors*—Under a liquor license liquor may be sold in quantities greater than one gallon not to be drunk on the premises.

September 16, 1912.

DAVID BOGUE,

*District Attorney,*

Portage, Wisconsin.

You submit three questions, which may be restated in one, as follows:

If a person who is licensed to sell intoxicating liquors sells liquor in quantities of more than one gallon, not to be drunk on the premises, has such person violated the excise laws of this state?

You state that the license almost invariably reads that A is licensed to sell, vend, deal and traffic in certain drinks, naming them, in quantities less than one gallon, to be drunk on the premises.

In answer to your inquiry I will say that formerly our statute provided for two kinds of licenses: one a retail liquor license, permitting the sale of liquor in quantities less than one gallon, to be drunk on the premises, and the other a wholesale liquor license, permitting the sale in any quantity, not to be drunk on the premises. (See section 1548, Sanborn & Berryman's Annotated Statutes of Wisconsin). This section has been so amended as to do away with the distinction between a retail and a wholesale license. If the form of license to which you refer still makes the distinction, such form is not now in compliance with our statute, as there is no authority for granting a license in this state such as you mention.

In the case of *Michels v. State*, 115 Wis. 43, 47, the court distinctly ruled that the "distinction between licenses for the sale of liquor to be drunk upon the premises, and not to be drunk upon the premises has been abolished."

A liquor license now, as contemplated by sec. 1548, for which the license fee has been paid, authorizes a sale at retail, as well as a sale at wholesale.

I am therefore of the opinion that under the facts stated in your letter the party in question has not violated the excise laws and could not be prosecuted and convicted for such sales simply because he sold liquor in larger quantities than one gallon, knowing that the same was not to be drunk upon the premises.

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*Intoxicating Liquors—Licenses—Transfer of license to new location. What places may be licensed, etc.*

January 4, 1913.

MR. J. ELMER LEHR,  
*Assistant District Attorney,*  
Milwaukee, Wisconsin.

Your communication of the 3rd inst. is received. In it you ask seven specific questions relating to excise matters, which, in answering, I will take up in detail.

Your first question is as follows:

"Can a license to traffic in intoxicating liquors be transferred from one location to another?"

In reply to this question I answer "no". In an official opinion rendered by this department during the term of my predecessor in office this department has expressly answered this question in the negative and I feel that the opinion there expressed is correct.

Your second question is as follows:

"If the above question is answered in the affirmative must an additional fee be paid?"

The first question being answered in the negative precludes any answer to the second question.

Your third question is as follows:

"Can a license be transferred at all to another place if such other place was not used for such traffic on June 30, 1907, there being locations available which were so used at that time?"

In my opinion this question must be answered in the negative. The provisions of sec. 1565d of the Wis. Stats. seem to be sufficiently explicit upon this question.

Your fourth question is as follows:

"Is it incumbent upon the licensing authorities to ascertain before they grant a license for a new location if there are any locations which were used for licensing traffic on June 30, 1907, that are obtainable before such license for such new location can be granted?"

In reply to this question it seems to me that the statute is clear and unambiguous and that the licensing board has no right to issue a license to a new place so long as any of the old places are available and in my opinion it is the duty of the licensing board to ascertain before granting a new license to a new location whether any location previously licensed is available.

Your fifth question is as follows:

"If a place in which a license existed June 30, 1907, is subsequently vacated and the owner refuses to lease for such purposes and a license is granted to another and new location, and subsequently the owner of the first place reconsiders his refusal and is now willing to lease for saloon purposes, which place must have the preference in the granting of licenses—the old location or the new one?"

In answer to this question I am constrained to give to the so-called Baker Law the interpretation which in my opinion the legislature intended it should have. Technically this question is capable of being answered giving preference to the old location but it seems to me that if the law is given this interpretation it might result in great confusion regarding the proper interpretation of the law. The evident purpose of sec. 1565d, ch. 484 of the laws of 1907, is first to limit the number of places or locations at which the licensed traffic in intoxicating liquors may be carried on and the second is to fix and make permanent the situs of those locations the evident purpose being to enable residents and business houses to know before they establish their residence or place of business whether or not a saloon business is likely to be conducted in that vicinity. If a saloon has been established in a particular locality and the owner of the property for any reason refuses to longer lease such property for saloon purposes and the tenant then makes application for and secures a license in some new location under the provisions of the statute and the property formerly used for saloon purposes is converted to other uses for a period of one or more years, should the owner of the property subsequently conclude that he will rent such property for saloon purposes, I do not think that this old location should have a preference. Obviously such preference might defeat the very purposes of the statute. The business or residence property may have in the meantime adjusted itself to the changed condition brought about by the refusal of the original owner to rent property for saloon purposes and to give him a preference over the newly established location obviously might permit the owner of such property to plant a saloon where it was least desired in defiance of the obvious intent of the statute. The law gives the owner of such original location a preference in the first instance but where, in my opinion, it is optional with the owner to waive such privilege and where he has once refused to longer rent his premises for saloon purposes, such refusal is a waiver of the preference given him by the statute and he can no longer invoke the statute for his own advantage and to the detriment of others who may have acquired property rights in other locations. It seems to me that this conclusion is in harmony with the manifest intent of the statute.

Your sixth question is as follows:

“A obtained a license for a designated location July 1, 1912, and took possession. After occupying the premises three or four months he voluntarily gives up business or he is ejected for non-payment of rent. In either case he puts his license in his pocket. Can the licensing authorities issue another license to B to transact business at the same location formerly occupied by A, sufficient proof being furnished that A is out of the premises or has ceased to carry on business there?”

Your seventh question is as follows:

“Does the limitation prescribed in the Baker Law as to the number of licenses either of one to two hundred fifty inhabitants or in the case of excess to locations formerly occupied in the business, apply to the license itself or to the number of places or locations in which the licensed traffic can be conducted?”

These two questions should go together as they are so intimately related as to practically constitute but a single inquiry, and I therefore answer them accordingly.

No cases have arisen under the Baker Law involving the questions here presented; neither am I aware of any decisions in other states in which a similar question has been presented. Obviously, therefore, it is necessary to answer these questions in the first instance without precedent, having in mind the evident intent of the legislature for the purpose of giving this law such reasonable and practical interpretation as the legislature intended it should have. A careful perusal of the statute leads to the conclusion that the legislature intended to limit the number of *saloons* rather than the number of *persons* who might receive licenses to traffic in intoxicating liquors. It is immaterial how many persons or individuals have a license so long as the number of places in which they can carry on the business is limited. It could make no difference to any community how many people paid for a license to traffic in intoxicating liquors or how many licenses were actually issued by the licensing board so long as only the legal number of licenses were in actual operation. It was manifestly the purpose of the legislature to limit the number of places in which a saloon business might be conducted rather than the number of licenses which might be issued since no license can be is-

sued without particularly specifying the place where such business is to be conducted. This is evidenced by certain clauses in the law, for example: at one place the statute contains this provision: "where a greater number of licenses may have been granted or established and in force on or prior," etc. Here the words "in force" clearly indicate and mean "in use" and a license which is not in use is not in force, and to be "in force" it must be fixed in some location where it is in actual operation or where it can be actually used if the owner of it desires to conduct the business. It could not be in use or in force unless he had a location in which he could conduct the traffic. Any other interpretation of the law would permit an individual to take out a saloon license in a community which had voted in favor of license and by refusing to use the same thereby make such locality practically a no license territory notwithstanding the fact that the inhabitants had voted in favor of license. Undoubtedly it was the legislative intention, as expressly provided by statute, that where a community votes in favor of license a license may be issued by the proper authorities and the business conducted at the place indicated by such license, and should the owner or holder of such license refuse to conduct such business or perform any act which in effect abrogated such license, it is my opinion that the local authorities acting in their discretion upon satisfactory evidence would have the right to issue another license to take the place of one which had either by operation of law or by any other contingency been rendered obsolete and ineffectual.

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*Intoxicating Liquors*—Licensed or unlicensed persons who sell or furnish a posted man intoxicating liquors may be punished if they have been properly notified.

January 11th, 1913.

T. P. ABEL,  
*District Attorney,*  
Sparta, Wisconsin.

Under date of January 9th you have submitted for an official opinion the following questions:

"1. Can a person who is a licensed dealer in liquors be punished for selling or giving liquor to a posted man?"

“2. Can a person who is not a licensed dealer in liquors be punished for procuring liquor for a posted man?”

Sec. 1554 of the Stats. provides for the posting of a person who is addicted to the excessive drinking of intoxicating liquors, and forbids the selling, furnishing or giving away of any such liquors or drinks to such posted person by anyone.

Sec. 1556 of the Stats. contains the following:

“When the sale or giving away of any ardent, spirituous or intoxicating liquors or drinks to any person shall have been forbidden in the manner provided by law, every person who shall sell or give to, or for, or purchase or procure for or in behalf of, such prohibited person any such liquors or drinks shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding fifty dollars and the costs of prosecution,” etc.

Sec. 1556a provides as follows:

“The provisions of section 1556 of the statutes shall be held to apply to all persons, whether licensed dealers or not, and the notice provided for by section 1554 of the statutes shall be held to be a notice to all persons, whether licensed dealers or not, in any prosecution brought under the provisions of section 1556 of the statutes.”

Under the express wording of this statute, a licensed dealer, as well as a person who is not licensed, is included within its terms and, *if the notice is given to the person in question*, as provided by law, such person may be prosecuted for the violation of such statutes.

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*Intoxicating Liquors—Public Officers—1.* A newly incorporated village comprising only no license territory cannot grant licenses to sell liquor until after an election making it a wet municipality.

2. A village incorporated from territory which was part of a town in which no preference need be given to locations previously licensed in granting licenses has the same right as the town had and need not give any preference in granting licenses.

3. The newly elected officers in a village newly incorporated hold office until their successors are elected and qualified at the next spring election.

January 21st, 1913.

MR. E. P. GORMAN,  
*District Attorney,*  
Wausau, Wis.

Under date of January 16th, you have submitted two questions to me for an official opinion. The first one relates to the number of licenses that the newly incorporated village of Hatley in your county is authorized to grant. You state that the town of Norrie voted dry at the last spring election; that on the following 4th day of January the village of Hatley, comprising territory located wholly within the town of Norrie, became incorporated; that prior to the spring election of 1912, the town of Norrie had three saloons all located in the territory which is now part of the village of Hatley; that these saloons were in existence on the 30th day of June, 1907, and were the only places for which licenses were issued at that time and up to the time when the town voted dry; that the population in the village of Hatley is about 275. You inquire how many licenses may be issued by said village under the above stated facts.

Right at the threshold of this question, it will be asked whether the village of Hatley is a dry municipality, for the reason that it was incorporated in a town which had voted in favor of no license. In sec. 1565*d*, it is provided that, if a majority of the votes cast on the license question are against license, then it shall be unlawful for any person to buy, sell, deal or traffic in any spirituous, malt or intoxicating drinks in any quantity whatever, in the town, village or city so voting against license, and that any license granted therein, so long as the result of such election shall remain unreversed by another election held for the same purpose, shall be void.

Our Supreme Court has not passed upon this question, but the authorities in other states that have had this question under consideration all agree that the local option law will be enforced in the new district for the reason that the qualified voters of such new district have had the opportunity to vote at the election making it a dry town while they were a part

of the old district and that the result is binding upon them for the period of time covered by such election.

See Woollen & Thornton, on the Law of Intoxicating Liquors, Vol. 1, page 548.

Two good cases on the subject are *Higgins v. The State*, 64 Md. 419; *Prestwood v. The State*, 86 Ala. page 235.

Decisions in other states are, of course, made under statutes somewhat different from ours, but as the authorities are all one way, I am constrained to hold that in this state, a village newly incorporated and comprising territory which is a part of a no-license district will remain a no-license district until an election is held, changing the result of the former election, making it a dry territory. My predecessor has come to the same conclusion in an opinion to M. R. Munson, District Attorney, Prairie du Chien, dated April 30th, 1912, which will be published in the biennial report now in print.

It, therefore, follows that the village of Hatley is a no-license territory and that at the present time no licenses can be granted therein.

If an election is held in said village and the result is in favor of license, then the question is, "Can three licenses be granted or only two?" In sec. 1565*d*, as amended by the laws of 1907, one license may be issued for every 250 of the inhabitants or a fraction thereof. This would make two licenses in the village of Hatley with the present population, but you inquire whether it is not permissible to grant three licenses for the reason that three licenses were issued and in force on the 30th day of June, 1907.

You call my attention to the opinion of Attorney-General Gilbert, found on page 500, in Opinions of Attorney-General, 1910. You will notice, however, that the said opinion was based upon facts where the number of licenses that were issued in the town in question exceeded the number of one for every 250 of the inhabitants and a fraction thereof, and for that reason, the provision of sec. 1565*d*, that as many licenses could be granted as were in force on the 30th day of June, 1907, is applicable to that case.

My predecessor has also ruled that in a town where the licenses granted on the 30th day of June, 1907, were not in excess of one for every 250 of the inhabitants and a fraction

found necessary to include within the purview of the statutes certain acts innocent and not in themselves the subject of police regulation where the inclusion of such acts is necessary in the opinion of the Legislature to make the police regulation effective.

When the sale is made in a no-license territory, it is not necessary to prove that the liquor was intoxicating. It appears from the label submitted that "Pevo" is a fermented malt liquor, containing alcohol, and it would therefore come under the prohibition of this statute as interpreted by our court. If, however, the sale be made in a license territory, a somewhat different question is presented. Our Supreme Court, in the case cited, did not directly pass upon such a case. You will notice, however, that in sec. 1565 it is provided:

"In all cases proofs of the sale or giving away of any malt, spirituous, vinous or distilled liquor of any name or nature whatsoever shall be deemed proof of the sale or giving away of intoxicating liquors without proof that the liquor so sold or given away was in fact intoxicating."

It was argued, by the plaintiff in error in the case of *Pennell v. State* that the words "shall be deemed proof" mean merely to create a rebuttable presumption of the fact that the liquor was intoxicating, while The State contended that these words are to be taken to mean conclusive evidence. Although the court did not find it necessary to pass upon this question, it nevertheless seems to me that, in view of the fact that the word "proof" is used instead of "evidence," the conclusion must be drawn that it means conclusive evidence.

"Proof is that quantity of appropriate evidence which produces assurance and certainty." *Buffalo v. Reynolds*, 6 Howard's Prac. 96, 98.

"Proof is that degree and quality of evidence that produces conviction." *Neving v. Comm.*, 98 Pa. 322, 328.

"Evidence is the medium of proof. Proof is the effect of evidence." *People v. Beckwith*, 15 N. E. 53.

There is an obvious difference between the word "evidence" and the word "proof." The former, in the legal acceptation, includes the means by which any alleged matter of fact is established or disproved. The latter is the result of such evi-

“2. Can a person who is not a licensed dealer in liquors be punished for procuring liquor for a posted man?”

Sec. 1554 of the Stats. provides for the posting of a person who is addicted to the excessive drinking of intoxicating liquors, and forbids the selling, furnishing or giving away of any such liquors or drinks to such posted person by anyone.

Sec. 1556 of the Stats. contains the following:

“When the sale or giving away of any ardent, spirituous or intoxicating liquors or drinks to any person shall have been forbidden in the manner provided by law, every person who shall sell or give to, or for, or purchase or procure for or in behalf of, such prohibited person any such liquors or drinks shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding fifty dollars and the costs of prosecution,” etc.

Sec. 1556a provides as follows:

“The provisions of section 1556 of the statutes shall be held to apply to all persons, whether licensed dealers or not, and the notice provided for by section 1554 of the statutes shall be held to be a notice to all persons, whether licensed dealers or not, in any prosecution brought under the provisions of section 1556 of the statutes.”

Under the express wording of this statute, a licensed dealer, as well as a person who is not licensed, is included within its terms and, *if the notice is given to the person in question*, as provided by law, such person may be prosecuted for the violation of such statutes.

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*Intoxicating Liquors—Public Officers—1.* A newly incorporated village comprising only no license territory cannot grant licenses to sell liquor until after an election making it a wet municipality.

2. A village incorporated from territory which was part of a town in which no preference need be given to locations previously licensed in granting licenses has the same right as the town had and need not give any preference in granting licenses.

3. The newly elected officers in a village newly incorporated hold office until their successors are elected and qualified at the next spring election.

January 21st, 1913.

MR. E. P. GORMAN,  
*District Attorney,*  
Wausau, Wis.

Under date of January 16th, you have submitted two questions to me for an official opinion. The first one relates to the number of licenses that the newly incorporated village of Hatley in your county is authorized to grant. You state that the town of Norrie voted dry at the last spring election; that on the following 4th day of January the village of Hatley, comprising territory located wholly within the town of Norrie, became incorporated; that prior to the spring election of 1912, the town of Norrie had three saloons all located in the territory which is now part of the village of Hatley; that these saloons were in existence on the 30th day of June, 1907, and were the only places for which licenses were issued at that time and up to the time when the town voted dry; that the population in the village of Hatley is about 275. You inquire how many licenses may be issued by said village under the above stated facts.

Right at the threshold of this question, it will be asked whether the village of Hatley is a dry municipality, for the reason that it was incorporated in a town which had voted in favor of no license. In sec. 1565*d*, it is provided that, if a majority of the votes cast on the license question are against license, then it shall be unlawful for any person to buy, sell, deal or traffic in any spirituous, malt or intoxicating drinks in any quantity whatever, in the town, village or city so voting against license, and that any license granted therein, so long as the result of such election shall remain unreversed by another election held for the same purpose, shall be void.

Our Supreme Court has not passed upon this question, but the authorities in other states that have had this question under consideration all agree that the local option law will be enforced in the new district for the reason that the qualified voters of such new district have had the opportunity to vote at the election making it a dry town while they were a part

of the old district and that the result is binding upon them for the period of time covered by such election.

See Woollen & Thornton, on the Law of Intoxicating Liquors, Vol. 1, page 548.

Two good cases on the subject are *Higgins v. The State*, 64 Md. 419; *Prestwood v. The State*, 86 Ala. page 235.

Decisions in other states are, of course, made under statutes somewhat different from ours, but as the authorities are all one way, I am constrained to hold that in this state, a village newly incorporated and comprising territory which is a part of a no-license district will remain a no-license district until an election is held, changing the result of the former election, making it a dry territory. My predecessor has come to the same conclusion in an opinion to M. R. Munson, District Attorney, Prairie du Chien, dated April 30th, 1912, which will be published in the biennial report now in print.

It, therefore, follows that the village of Hatley is a no-license territory and that at the present time no licenses can be granted therein.

If an election is held in said village and the result is in favor of license, then the question is, "Can three licenses be granted or only two?" In sec. 1565*d*, as amended by the laws of 1907, one license may be issued for every 250 of the inhabitants or a fraction thereof. This would make two licenses in the village of Hatley with the present population, but you inquire whether it is not permissible to grant three licenses for the reason that three licenses were issued and in force on the 30th day of June, 1907.

You call my attention to the opinion of Attorney-General Gilbert, found on page 500, in Opinions of Attorney-General, 1910. You will notice, however, that the said opinion was based upon facts where the number of licenses that were issued in the town in question exceeded the number of one for every 250 of the inhabitants and a fraction thereof, and for that reason, the provision of sec. 1565*d*, that as many licenses could be granted as were in force on the 30th day of June, 1907, is applicable to that case.

My predecessor has also ruled that in a town where the licenses granted on the 30th day of June, 1907, were not in excess of one for every 250 of the inhabitants and a fraction

thereof, that no preference need be made for the locations in which licenses were issued on said date.

See Opinions of Attorney-General, 1908, page 559. This was a ruling made on the 5th of August, 1907, shortly after the law was enacted. That seems to be a reasonable construction of said sec. 1565*d*, and in view of the fact that no case has occurred in our court on this question, and that the legislature has not seen fit to amend the law, it would seem that such ruling is acquiesced in and considered correct.

You do not state in your letter the number of inhabitants that the town of Norrie had before the incorporation of this village. As the village has 275 inhabitants, I take it that the town of Norrie certainly had over 500 before the village was incorporated, and as any number over 500 inhabitants would authorize the town to have three liquor licenses, I think I am safe in assuming that no more licenses were issued in said town than one for every 250 of the inhabitants and a fraction thereof, so that prior to the incorporation of the village, it was not necessary to give any preference to the locations for which licenses had been issued. It was within the power of the licensing authorities to grant a license to any new locations and to refuse a license to any one of the locations that had been licensed on the date when the law went into effect. That being the case, I am of the opinion that the village has the same rights that the town had in this regard, and that no preference need be made to the location for which the license had been issued, and that they can grant a license to any location that they see fit, and it necessarily follows that they are authorized to grant only one license for every 250 of the inhabitants or a fraction thereof, making two licenses for the village of Hatley.

For your second question, you submit that the village was incorporated on January 4th, 1913, and that on the 1st day of February will elect officers to comply with the limitations set down by the statutes governing elections for newly incorporated villages.

You inquire how long these officers so elected hold their offices,—whether they will hold to the spring election of 1913, or whether they would hold for the term that they would have held if they had been elected at the coming spring election.

The statute providing for the election of the new officers in the village,—Sections 867 to 869, do not state for how long these officers are elected. Under sec. 875, it is provided, however, that at the annual charter election in each village, the officers of the village shall be elected and under sec. 878, it is provided that the term of the officers, except trustees, shall be one year.

As under these statutes it is necessary for the village to hold an election this spring to elect officers, it seems to me the conclusion is inevitable that the officers elected in the newly incorporated village can only hold until the officers elected at the regular annual election are elected and qualified.

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\* Supplemented by opinion of Feb 20, 1913.

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*Intoxicating Liquors*—"Pevo" a fermented malt liquor cannot be sold without a liquor license in this state.

January 31st, 1913.

M. R. MUNSON,

*District Attorney,*

Prairie du Chien, Wisconsin.

Under date of January 28, you inquire whether the sale of "Pevo" without a license is in violation of the excise laws. You say that "Pevo" is the Bohemian name for beer and you inclose a label taken from a bottle of same. This label reads:

"Non-intoxicating PEVO. Contains less than  $\frac{1}{2}$  of 1% alcohol. A temperance beer. Highly concentrated malt beverage. A great health producer. An invigorating, refreshing and healthful tonic. Recommended by the medical fraternity. Use freely for best results. Manufactured by Semrad Bros. & Pusch Brewing Co., Highland, Wis.

Under sec. 1565c of the Wis. Stats. it is forbidden to sell in a no-license territory, "any spirituous, malt, ardent or intoxicating liquors or drinks." Our Supreme Court, in the case of *Pennell v. State*, 141 Wis. 35, held that this statute forbids the sale of fermented malt liquor containing alcohol, whether intoxicating or not. The court said that the Legislature had power to forbid such sale and did so under authority of said sec. 1565c; that, in enacting a police regulation, it may be

found necessary to include within the purview of the statutes certain acts innocent and not in themselves the subject of police regulation where the inclusion of such acts is necessary in the opinion of the Legislature to make the police regulation effective.

When the sale is made in a no-license territory, it is not necessary to prove that the liquor was intoxicating. It appears from the label submitted that "Pevo" is a fermented malt liquor, containing alcohol, and it would therefore come under the prohibition of this statute as interpreted by our court. If, however, the sale be made in a license territory, a somewhat different question is presented. Our Supreme Court, in the case cited, did not directly pass upon such a case. You will notice, however, that in sec. 1565 it is provided:

"In all cases proofs of the sale or giving away of any malt, spirituous, vinous or distilled liquor of any name or nature whatsoever shall be deemed proof of the sale or giving away of intoxicating liquors without proof that the liquor so sold or given away was in fact intoxicating."

It was argued, by the plaintiff in error in the case of *Pennell v. State* that the words "shall be deemed proof" mean merely to create a rebuttable presumption of the fact that the liquor was intoxicating, while The State contended that these words are to be taken to mean conclusive evidence. Although the court did not find it necessary to pass upon this question, it nevertheless seems to me that, in view of the fact that the word "proof" is used instead of "evidence," the conclusion must be drawn that it means conclusive evidence.

"Proof is that quantity of appropriate evidence which produces assurance and certainty." *Buffalo v. Reynolds*, 6 Howard's Prac. 96, 98.

"Proof is that degree and quality of evidence that produces conviction." *Neuling v. Comm.*, 98 Pa. 322, 328.

"Evidence is the medium of proof. Proof is the effect of evidence." *People v. Beckwith*, 15 N. E. 53.

There is an obvious difference between the word "evidence" and the word "proof." The former, in the legal acceptation, includes the means by which any alleged matter of fact is established or disproved. The latter is the result of such evi-

dence. 31 Calif. 201. "Proof is the establishment of a fact by evidence." *People v. Bowers* (Calif.,) 18 Pac. 660.

"Proof is the perfection of evidence, for, without evidence, there is no proof, though there may be evidence which does not amount to proof." *Schultze v. Plankinton Bank*, 40 Ill. App. 462.

Proof is defined as "conclusive evidence" in middle column, page 1427 Standard Dictionary. See also, *Briffit v. The State*, 58 Wis. 39.

In view of these authorities there can be very little doubt that the words "shall be deemed proof" mean conclusive evidence. It therefore follows that, if the sale of "Pevo" be made in a license territory without a license, such sale will constitute a violation of the excise laws, and that it is not necessary to prove that such malt liquor is actually intoxicating.

I am therefore of the opinion that, if said beverage is sold without a license, such sale is a violation of the excise laws of this state.

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*Intoxicating Liquors*—Village of Hatley may issue two liquor licenses.

February 20th, 1913.

E. P. GORMAN,  
*District Attorney,*  
Wausau, Wisconsin.

Under date of February 19th you state that in your letter of January 16th, upon which my opinion of January 21st last was based, you made an error in giving the number of saloons in the town of Norrie and also in giving the population of said town. You state that the town of Norrie had five saloons in the year 1907, instead of three, as stated in your former letter, four of which were located in the territory now comprising the village of Hatley; that the population of the town of Norrie in 1905 was 1062 and in 1910, 1147; that a year ago the town of Norrie voted "dry" and subsequent thereto the said village of Hatley was incorporated and contains a population of about 275.

You ask what number of licenses the village of Hatley may issue, should the village vote in favor of license at the coming spring election.

In answer I will say that the additional facts stated by you do not alter the conclusion reached in my former opinion. The town of Norrie had, in 1905, a population of 1062, and five saloons. This did not exceed the limit of one for every 250 of the inhabitants and fraction thereof; consequently, no preference need be given to the locations where licenses were issued and in force on the 30th day of June, 1907, and the village of Hatley, for the reasons stated in my former opinion, is entitled to only two saloons and the board is authorized to grant but two licenses.

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*Intoxicating Liquors*—A village board in a no license village is not authorized to grant licenses after an election in favor of license and before July 1st following.

March 31, 1913.

MR. E. P. GORMAN,  
*District Attorney,*  
Wausau, Wisconsin.

Under date of March 27th you say, that the village of Hatley in your county is at present a no-license territory; that at the coming spring election a vote is to be taken on the license question and that the village will undoubtedly vote in favor of license. You inquire whether the village board will be permitted to grant licenses immediately after the spring election without waiting until July 1st.

Sec. 1565b, provides as follows:

“The ballots upon the question so submitted shall be deposited in a special ballot box in each town and election district and shall contain the words ‘for license or ‘against license.’ If a majority of the ballots cast upon such question be against license then it shall be unlawful for any person to vend, sell, deal or traffic in any spirituous, malt or intoxicating liquors or drinks in any quantity whatever in the town, village or city so voting against license; and any license granted or issued therein, so long as the result of such election shall remain unreversed by another election held for the same purpose, shall be void. But if a majority of the ballots so cast shall be for license it shall be lawful for the town board, village trustees or common council,

as the case may be, to grant license for the sale of such liquors or drinks as provided in this chapter."

In construing this section, you must take into consideration the provisions of sec. 1548, which provides for an annual meeting of the village boards on the third Monday of each June and from day to day thereafter so long as it may be necessary for the purpose of acting upon applications for license as may be presented to them, conformably to law, and the other provision that all licenses granted shall remain in force until the first day of July next after the granting thereof unless sooner revoked.

Sec. 1565c contains the following:

"Any person who shall, on or after the first day of July following an election under the provisions of the two preceding sections, vend, sell, deal or traffic in or, for the purpose of evading any law of this state, give away any spirituous, malt, ardent or intoxicating liquors or drinks in any quantity whatever in any town, village or city wherein the majority of the votes cast at such election shall have been against license, shall be guilty of a misdemeanor," etc.

It is very evident under this last quoted statute that, if the vote on the license question is against license, it does not make the sale of liquor under the license in force void, and that the law does not go into effect until the beginning of the new license year. It is only reasonable to presume that it was the intention of the law makers that the law should not be effective until after the first of July, when the vote resulted in favor of license. If a license could be granted immediately after the spring election in your village, provided the vote resulted in favor of license, then the license so granted would necessarily expire, under the provisions of sec. 1548, on the first day of July.

Under the decision of our supreme court and our statute, the money paid for this license for the short period of time of less than three months would have to be the same as if the license were issued for a full year, and in order to authorize the dealer to sell liquor after the first day of July, another license would have to be granted, for which the full license money would have to be paid.

It was evidently the intention of the lawmakers to have the law effective after the election, from the first day of July to the first day of July following, viz., during the full license year.

I am therefore of the opinion that no license can be granted in your village, in case the election results in favor of license, until the regular meeting of the village board on the third Monday in June, which license will go into effect on the first day of July.

## OPINIONS RELATING TO LIVE STOCK AND LIVE STOCK SANITARY BOARD

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*Live Stock and Live Stock Sanitary Board*—An associate professor in bacteriology is not a member of the state live stock sanitary board.

November 10, 1910.

DR. D. B. CLARK,  
*State Veterinarian.*

I am in receipt of your favor of the 7th inst. in which you state in substance that during the past summer Mr. E. G. Hastings, associate professor of bacteriology in the University of Wisconsin made claim to a seat on the Wisconsin Live Stock Sanitary Board on account of his appointment to the position of chairman of the department of bacteriology in the College of Agriculture; that Dr. Ravenel, who is the only professor of bacteriology in the University of Wisconsin, has by virtue of his position held membership on said board for two years and, as executive officer of the board, you wish the opinion of this department as to which of the two gentlemen is entitled to membership on said board under sec. 1492aa (sec. 1, ch. 440, Laws of 1901) which provides that said board shall have as a member thereof "the bacteriologist of the State Agricultural College."

In reply to the same I will say that at the time of the enactment of said sec. 1492aa there was but one professor of bacteriology in the State University but that since then two associate professors have been added, one being Dr. Hastings. Upon examination of the University of Wisconsin Catalog 1909-1910 I find on page 119 thereof that Dr. Ravenel is professor of bacteriology and hygiene in the College of Letters and Science and that Dr. Hastings is associate professor of

that College; on page 365 thereof I find that Dr. Ravenel appears as professor of bacteriology in the College of Agriculture and that Dr. Hastings is an associate professor in said College, and on page 393 Dr. Ravenel appears as professor of bacteriology and hygiene of the Medical School with Dr. Hastings as an associate professor.

You also enclose two letters from President Van Hise to Dr. Ravenel which are very helpful in the consideration of the matter which you submit. Under date of May 27th, 1910, President Van Hise advises Dr. Ravenel as follows:

“No change has been made in the work which you are to offer in the College of Agriculture \* \* \*. Therefore the only change that has been made is that Professor Hastings is chairman of the department of bacteriology for the College of Agriculture.”

Under date of November 3, 1910, President Van Hise advises Dr. Ravenel:

“In response to your request as to your status in the University I have to say that you are professor of bacteriology and chairman of the committee on bacteriology in the College of Letters and Science \* \* \*. There are two other men in the department of bacteriology of professional right, W. D. Frost, associate professor in Letters and Science, and E. G. Hastings associate professor in Agriculture and chairman of the committee of bacteriology for the college of Agriculture.”

It is made very clear by these two letters that no change has been made in Dr. Ravenel's work in the College of Agriculture. The fact that Dr. Hastings is “chairman of the committee of bacteriology for the College of Agriculture” is quite immaterial to the issues involved as I take it that he is merely the chairman of some committee of that college for executive or business purposes connected with the college and it does not seem to me that it was the legislative intent that the person happening to be such chairman should thereby become a member of the board in question. It must be presumed that it was the intention of the legislature to give to said board the benefit of the advice, experience and services of a full professor in bacteriology, that was what they did as a matter of fact in 1901 when the law was enacted, and it

appearing from the catalog referred to that Dr. Ravenel is the only full professor of bacteriology in the College of Agriculture and President Van Hise in his letter of May 27th states that no change has been made in Dr. Ravenel's work in that particular college, and it appearing that Dr. Hastings is an associate to Dr. Ravenel and that in consequence thereof Dr. Ravenel ranks Dr. Hastings in said college, I am constrained to hold that Dr. Ravenel is "the bacteriologist of the State Agricultural College" as that expression is used in said section 1492aa.

*Live Stock and Live Stock Sanitary Board—Public Officers—* Secretary and President of State Sanitary Board should be elected from members of the Board.

Member of Legislature cannot hold office which has been created during his term as member of the legislature.

November 24, 1911.

MR. A. H. HARTWIG,  
*State Veterinarian.*

I am in receipt of your favor of November 24th, in which you ask for the opinion of this department upon the following questions:

1. "Sec. 1492aa—3 provides for the organization of the Live Stock Sanitary Board by electing a president and secretary. Can any one hold the office of President or Secretary who is not a member of said Board?"

The section above referred to provides in part as follows:

"The board may organize by the election of a president and secretary and shall hold its office in such room in the capitol as the superintendent of public property may designate."

In my opinion the language of the section clearly implies that the president and secretary shall be members of the board and in my opinion the board has no authority under this section to elect a president or secretary who is not a member of the board.

2. "When such Secretary is elected and the office demands that he handle considerable money belonging to the State, is it

not proper that such official shall give a reasonable bond for the faithful performance of his duties and disbursements of such moneys?"

In reply to this query I find no provision of the law which requires specifically that the secretary shall give a bond. However, I am of the opinion that such power is discretionary in the board itself and that the board has power to require its secretary as a disbursing officer to give a bond for the faithful performance of his duties should they deem it necessary. Such power being discretionary in the board, however, the secretary is not required to give a bond unless ordered to do so by the board.

3. "Can a Legislator, as such Legislator, hold one or more offices as a State Official, which offices are created by said Legislature, of which he is a member and can he legally draw pay for any such services as such official, last mentioned?"

What I understand you to mean by this last query is in effect whether or not a member of the state legislature can hold an office which has been created by the legislature of which he was a member during the term for which he was elected.

The answer to this question is supplied by sec. 12, of art. IV of the Const. of Wis. which provides as follows:

"Section 12. No member of the legislature shall, during the term for which he was elected, be appointed or elected to any civil office in the state which shall have been created, or the emoluments of which shall have been increased, during the term for which he was elected."

In construing this clause of the constitution the Supreme Court of Wisconsin in the case of *State ex rel. Ryan v. Boyd*, reported in 21 Wis. on page 210, used the following language:

"When a new office is created or the emoluments of an old one increased, while a person is a member of the legislature, such person cannot during the time for which he was elected be appointed or elected to the office he has had an agency in creating or rendering more profitable."

It follows as a matter of course that no member of the legislature can hold or be appointed or elected to any office which has been created or the emoluments of which have been in-

creased during the term for which he was elected as such member of the legislature and that he cannot lawfully draw pay for services as such officer.

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*Live Stock and Live Stock Sanitary Board—Public Officers—*  
Member of Legislature can also be appointed member of State Live Stock Sanitary Board and as such is entitled to his per diem and expenses as provided by law.

December 4, 1911.

HON. JAMES A. FREAR,  
*Secretary of State.*

Your favor of December 1st is received. You state:

“The question has been presented to me whether or not a member of the Live Stock Sanitary Board elected under ch. 637, Laws 1911, who at the time was a member of the state legislature, would be authorized to draw a per diem from the state for services upon such Board.”

Sec. 1492aa, which is incorporated in ch. 637, Laws of 1911, is the original section of the statutes by which the live stock sanitary board was and is created and this section has been amended in no essential feature except to provide that where the sanitary board originally served not to exceed sixty days in any one year for which they would receive a per diem and expenses, they are now authorized to receive pay for one hundred days. The per diem is not increased as the amendment only relates to the time to be devoted to the duties and was evidently intended to render the board more efficient in order to meet the increasing duties of the office.

In my opinion this does not prevent a member of the legislature, who is a member of the state board of agriculture, from being appointed upon this board and such appointment is not in violation of section 12 of art. IV of the state constitution which provides:

“No member of the legislature shall, during the term for which he was elected, be appointed or elected to any civil office in the state which shall have been created, or the emoluments of which shall have been increased, during the term for which he was elected.”

The live stock sanitary board was not created by ch. 637, Laws of 1911, but has been in existence since the passage of sec. 1492aa of the Wis. Stats., and the emoluments of the office are not increased within the meaning of the constitutional prohibition for the reason that the per diem remains the same as originally, the only change in the law being as above stated, the extension of the number of days which the board is authorized to act.

I am therefore of the opinion that a member of the live stock sanitary board is entitled to draw his per diem and expenses as provided for in ch. 637 of the Laws of 1911, notwithstanding that he may have been a member of the legislature which enacted the amendment referred to.

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*Live Stock and State Live Stock Sanitary Board—Animals—Appropriations and Expenditures*—The owner of cattle who fails to observe the laws of the state and the rules promulgated by the state live stock sanitary board relating to the prevention of bovine tuberculosis is guilty of negligence which would justify a refusal to allow his claim for the value of an animal slaughtered under the direction of that board.

December 6th, 1912.

HON. O. H. ELIASON,  
*State Veterinarian.*

In your letter of the 2nd, you state that a certain breeder in this state who, in the past, has had his herd tested for tuberculosis and afterwards failed to comply with the laws of the state and the rules promulgated by the State Live Stock Sanitary Board, now has one animal that reacts to the tuberculin test, which he desires your department to dispose of. You ask whether he is entitled to indemnity for this animal, if slaughtered under the direction of your department on account of being afflicted with tuberculosis, and whether you are justified in declining to approve a claim therefor, if you see fit.

By sec. 1492ab of the Stats., as amended, it is made the duty of the State Live Stock Sanitary Board

“to protect the health of domestic animals of the state; to determine and employ the most efficient and practical means

for the prevention, suppression, control, or eradication, of dangerous, contagious or infectious diseases among domestic animals.”

And it is empowered to establish and enforce quarantine and other measures, including the disposition of animals, and to adopt all such regulations as may be necessary and proper to carry out the purposes of the law.

The section also provides:

“In case of bovine tuberculosis . . . the owner shall be granted the option of retaining the animals in quarantine, under such restrictions as the board may prescribe or of shipping them under the auspices and direction of the board to some abattoir designated by it for immediate slaughter under United States government inspection. In case of the slaughter of animals under the provisions of this section the owner shall receive the net proceeds of the sale thereof and shall have no further claim against the state on account of such slaughter.”

Sec. 1492b, Stats., as amended, provides that where the owner does not exercise the option mentioned in sec. 1492ab and it shall be deemed necessary by the board to slaughter the diseased animals, the animals shall be appraised at their value in the condition in which they are found at the time of the appraisement and compensation paid the owner as therein provided.

Subsec. 2 of sec. 1492d provides:

“The right to indemnity shall not exist, nor shall payment be made in either the following cases:

“\* \* \*

“(5) When the owner shall have been guilty of negligence, or has wilfully exposed such animals to the influence of a contagious or infectious disease.”

It would appear to me that a failure to observe the laws of the state and the rules of the State Live Stock Sanitary Board relating to bovine tuberculosis would constitute negligence and justify the State Veterinarian and Secretary of State in refusing to approve claims for the animals slaughtered.

## OPINIONS RELATING TO LOANS FROM THE TRUST FUNDS

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*Loans from the Trust Funds—School District Meetings—*  
Sec. 427 Wis. Stats. prevents action by a school district at a special meeting, on any subject on which action has been taken at a previous special meeting in the same school year.

A loan may not be increased or its time of payment changed.

September 9, 1912.

MR. W. H. BENNETT,

*Chief Clerk, Land Department.*

In your favor of September 5th, you submit some correspondence showing that the electors of school district No. 4, town of Lincoln, Wood county, voted at a special meeting to borrow \$900 from the trust funds, payable in five years; that at a subsequent special meeting another loan of \$600 was voted payable in fifteen years; that it is now desired to hold another special meeting and change the term of the first loan to fifteen years, and you request my opinion as to whether this can be legally done.

Sec. 427, Wis. Stats., provides in part that no more than one special meeting "to consider the same subject" shall be held in the district in the same school year. It seems to me that the obvious purpose of this section is to prevent a district from changing at one special meeting a policy decided upon at a previous special meeting. It must mean that a subject voted upon and decided at one such meeting shall not be again voted upon at another special meeting in the same school year. Of course, the questions of the amount of the loan, its term, etc., are subsidiary to the main question of voting the loan at all (*Schmidt v. Joint School District*, 146 Wis. 635, 638), but it seems to me that the statutes precludes a reconsideration of such subsidiary questions as much as of the main question. Otherwise the

main question of voting a loan might in effect be reconsidered by voting to reduce it to so small an amount—say, one dollar—as to in effect vote no loan at all, or the term might be made so short—say, six months—as to require the full amount to be raised in the current year and thus in effect change the loan to a tax. I am, therefore, of the opinion that section 427 prevents action by a school district at a special meeting on any subject on which action has been taken at a previous special meeting in the same school year.

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*Loans from Trust Funds—Education—Schools—Notice—Time*—The time for service of notice of special school meeting under sec. 427, Stats., must be computed by excluding both the day of service and the day of the meeting.

September 28, 1912.

HON. JAY F. LYON,  
*County Judge,*  
 Elkhorn, Wisconsin.

I have before me your letter of the 4th, relating to my disapproval of the application of Joint School District No. 7 of the towns of Richmond and Sugar Creek, Walworth county, for a loan from the state trust funds. This application purports to have been authorized at a special meeting of the district. The certified copy of minutes sent states that this special meeting was held July 15th. The affidavit states that on the 17th day of July a request for a special meeting to be held July 23d was served and that, upon the same date, July 17th, notices were posted and served.

In my letter of disapproval I did not make any mention as to the discrepancy appearing as to the date of holding of the meeting, but based my disapproval on the ground that, if the notices were served on the 17th, and the meeting held on the 23d, there was not a sufficient notification to authorize the meeting under sec. 427, Stats., which provides in part:

“No tax or loan or debt shall be voted at a special meeting unless three-fourths of the legal voters shall have been notified, either personally or by written notice left at their places of

residence, stating the time, place and objects of the meeting, and specifying the amount proposed to be voted, at least six days before the time appointed therefor, exclusive of the day on which the meeting is to be held."

You do not agree with me in my interpretation of this section and cite authorities to the effect that, in computing the six days, the day of service should be included and the day of the meeting excluded.

It may be that this is the general rule, but none of the cases you have cited are from this state. In the case of *Ward v. Walters*, 63 Wis. 39, it was held that a notice of tax sale posted on the 16th day of April was not posted "at least four weeks" before the succeeding 14th day of May, and in that connection the court say:

"In the absence of any statutory provision governing the computation of time, the authorities are uniform that, where an act is required to be done a certain number of weeks before a certain other day upon which another act is to be done, the day upon which the first act is to be done must be excluded from the computation, and the whole number of days or weeks must intervene before the day fixed for doing the second act."

See also *Pittelkow v. Milwaukee*, 94 Wis. 651.

It appears very clear to me that, in view of this decision of our Supreme Court, it would not do for this department to adopt a different rule for computing time under sec. 427 Stats. It can hardly be said, I think, that, because the Legislature has directed that the day of the meeting should be excluded in computing the time, it thereby intended that the day of service should be included. Furthermore, a familiar rule of statutory construction requires that such a construction be placed upon a statute as will give force and effect to all the language employed, if such construction is reasonable. To adopt the construction contended for by you would render the words "before the time appointed therefor," and also the words "exclusive of the day on which the meeting is to be held," without effect and meaningless. Without such words, under the authorities cited by you, and I believe under the universal rule for the computation of time, either the first or the last day must be excluded, either of which would require the service of the notice in question on the sixth day before the meet-

ing, the same as you contend is required under the reading of this statute. I do not feel at liberty to adopt this construction and thus say that the Legislature has incorporated into the section words that have no meaning.

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*Loans from Trust Funds—Education—Constitutional Law—*  
Under art. XI, sec. 3, Const., an indebtedness is not incurred until a binding contract is entered into.

September 28, 1912.

GEORGE C. FOSTER,  
*Attorney,*

Hurley, Wisconsin.

Replying to your letter of August 21st, relative to the application of Joint School District No. 1 of the towns of Carey, Montreal and Vaughn, Iron county, for a loan from the state trust funds, I would say that the resolutions adopted at the annual meeting of this district held July 1st, 1912, authorized the board to borrow \$27,000 for the purpose of aiding in the erection and construction of schoolhouses, of which sum they were authorized to obtain \$14,000 from the state trust funds, if possible, and the balance from other sources.

The assessed valuation of the real estate of said district, according to the last assessment roll, is stated in the application to be \$439,500 and of the personal property, \$245,950. The existing indebtedness is given as \$7,000.

Art. XI, sec. 3, of the Constitution provides in part:

“No . . . school district . . . shall be allowed to become indebted in any manner or for any purpose to any amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness.”

Sec. 261 Stats. as am. by ch. 363 of the laws of 1911, relating to loans from the trust funds, provides in part:

“Every loan to a school district may be made for such time, not exceeding fifteen years, and of such amount as, together with all other indebtedness of such district, shall not exceed five per centum of the last preceding assessed valuation of the property in such district, not less than two-thirds of which valuation shall be on real estate.”

It is clear that the total amount proposed to be borrowed would not be in excess of the constitutional limitation. It is clear that, if the total amount proposed to be borrowed from sources other than the trust funds can properly be considered as "other indebtedness" of the district, then the amount applied for as a loan from the trust funds exceeds the limitation found in section 261 Stats. while, if it can not be so considered, then such proposed loan would not exceed the limitation. In your letter you take the position that the money so proposed to be borrowed from sources other than the trust funds cannot properly be considered as an indebtedness. You are probably right in your conclusion that the resolution authorizing the loan does not create an indebtedness. The indebtedness is created when a binding contract is entered into. *Crogster v. Bayfield Co.*, 99 Wis. 1; *McGillivray v. School Dist.*, 112 Wis. 354; *Papes v. Carlton*, 130 Wis. 123.

It follows from this, as I view it, that the important question will be, What is the indebtedness of the district at the time the contract with the State becomes binding? I believe such contract can be said to be binding when the application is approved by the Commissioners. (See Biennial Report and Opinions of the Attorney-General for 1908, page 887.)

I am accordingly advising the Commissioners that, in case of their approval, it be made subject to the filing of proof that the district at that time is not indebted in a sum, including the proposed loan, exceeding \$32,962.50.

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*Loans from the Trust Funds—Education—Two or more loans may be authorized at the same school meeting.*

Proper form of resolution.

No loan can be authorized payable more than 15 years from the first day of February next ensuing.

The electors are the legislative body of the district, and their authority as such cannot be delegated to the board.

October 21, 1912.

HON. C. P. CARY,

*Superintendent of Public Instruction.*

In your letter of the 18th, you state that you desire an opinion upon questions arising under the following statement of facts;

\$50,000 is needed for the purpose of building a schoolhouse. The maximum sum that can be borrowed from the state trust fund under the present law is \$25,000. Under these conditions it is the plan to have the electors authorize the board to make an application to the Commissioners of Public Lands for a loan of \$25,000 payable in 15 years, and also at the same meeting to authorize the board to borrow \$25,000 from some trust company or bank.

The questions you ask are the following:

1. If the voters of the district pass a resolution authorizing the board to borrow \$25,000 from the trust fund, can the voters of the district at the same meeting authorize the board to borrow \$25,000 from some bank or some trust company?

2. If so, what would be the form of resolution to be voted upon

(a) For the purpose of authorizing the board to make application for a loan from the trust fund;

(b) For the purpose of authorizing the board to bond the district to some bank or trust company.

3. Will it be lawful for the district to authorize the board to make an arrangement with the bank or the bonding company that the payment of principal to said bank or bonding company shall be deferred for 15 years, or, in other words, until the loan of the trust fund is paid? It is to be understood, of course, that the interest on the loan made from the bank or bonding company is paid every year. (See ch. 172, Laws 1905.)

4. In what particulars, in your opinion, is the resolution which accompanies this request for information defective?

In a personal conversation, you have stated that in my reply to this inquiry it is to be assumed that the assessed valuation of property in the district is sufficient to authorize an indebtedness of \$50,000.

1. Sec. 475 of the statutes authorizes the borrowing of money by school districts for the purpose of aiding in the erection of a schoolhouse. I find nothing in that section which would seem to indicate that the school district may not, at the same meeting, authorize two different loans for this purpose. If I am correctly informed, it has for years been a common practice to do that. I, therefore, answer your first question in the affirmative.

2. The proper form of resolution for borrowing money from the trust fund would be:

“Resolved, that the school district board be, and it is hereby authorized to make application for a loan of \$25,000 from the

state trust fund, payable in fifteen years in fifteen equal annual installments, with interest at the rate of 3½% per annum, payable annually, for the purpose of building a schoolhouse."

At the same meeting, a resolution substantially in the following form could, in my opinion, be validly adopted:

"Resolved, that the school district board be, and it is hereby authorized to borrow from any bank, trust company or individual, the sum of \$25,000 in addition to the amount authorized to be borrowed from the state trust fund, payable in fifteen years from date, with interest at the rate of 4% per annum, payable annually, for the purpose of aiding in the erection of a schoolhouse."

It would, of course, be necessary as to each of the foregoing resolutions to adopt the additional resolution levying the tax.

3. In answer to your third question I would call your attention to another provision of sec. 475, of the Stats., as follows:

"The resolution to be voted upon shall be in writing, specifying the amount to be borrowed, the rate of interest, and the time and manner of payment, which shall be in annual installments or otherwise, the last of which shall be payable in not exceeding fifteen years from the first day of February next ensuing."

If the loan from the trust fund is not paid until fifteen years from the first day of February next ensuing, then the loan from the bank or trust company would, under this provision, have to be paid at the same time, as the payment of the last installment on the loan from the trust fund. In other words, no loan can be authorized payable more than fifteen years from the first day of February next ensuing after the incurring of such indebtedness. The resolution that you enclosed, and which I return herewith, reads as follows:

"Resolved, that the district be and it is hereby authorized and empowered to borrow the sum of forty-four thousand dollars (\$44,000) for the purpose of constructing and erecting a schoolhouse upon the school property now owned by joint school district No. One in the city of Kewaunee, said sum of forty-four thousand dollars (\$44,000) shall bear interest

at the rate of 4% per annum, payable annually; that for the purpose of securing said loan, said school district board be and it is hereby authorized to issue and provide for the issuance of bonds of said joint school district No. One in the amount of forty-four thousand dollars (\$44,000) in denominations as said school board shall deem expedient, with interest at 4% per annum payable annually, to become due and payable fifteen years after February 1st, 1913; and shall provide for the sale of such bonds.

“Resolved further that the school district board be and it is hereby authorized to levy upon all the taxable property of joint school district No. One, a tax sufficient to pay the interest upon said bonds as it falls due, and to discharge the principal thereof at maturity.”

This resolution should authorize the district board to borrow, and not the district. It is the district that is giving the authorization. They are authorizing the board as the agents of the district to make the arrangements for the loan. Of course, where the word “electing” is used, it is a mere typographical error and should be “erecting.” The resolution authorized bonds to be issued in denominations as the school board shall deem expedient. This, I believe, would be invalid. The electors of the district are the legislative body for the district. It is for them to determine what is expedient. They cannot delegate this legislative authority to the board. You will note that sec. 475 provides that the security for payment to be given shall be “subject to the direction contained in the resolution voted.” This direction certainly should include the amount of each bond. Under the resolution submitted none of the bonds would be due until fifteen years after February 1, 1913. This I believe would be valid, but it appears to me that it is hardly advisable. It seems to me that the bonds at least ought to contain a provision that they are payable on or before fifteen years from the 1st day of February, or something of that sort, unless they are made payable in installments—that is, a part of the bonds payable each year. That part of the resolution or rather the second resolution authorizes the district board to levy the tax. I do not believe that this is the proper form of resolution. The district itself should levy the tax at the time of authorizing the loan. A better form for this would be:

“Resolved, that a sum sufficient to pay the interest and principal of such bonds as the same become due be and the same is hereby levied upon the taxable property of the district.”

I am not unmindful of the language of the statute, which would seem to indicate that the school board might levy the tax, but because the electors are the legislative body and the school board is merely a ministerial body, it seems to me to be very doubtful if the authority to levy the tax can legally be delegated to the board.

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*Loans From Trust Funds—Counties—Bonds*—Where the county board of supervisors adjourns subject to the call of the chairman, the meeting held pursuant to such call is not a continuation of the former meeting, but is a special meeting, and must be called as other special meetings are called.

January 22nd, 1913.

HON. W. J. BRENNAN,  
*Chairman County Board,*  
 Lancaster, Wisconsin.

Since writing you on the 20th, I have received your letter of that date, inclosing form of proposed bond. Permit me to suggest that it is better to have a bond in accordance with sec. 926—11 of the Stats., relating to the issuance of bonds by cities under special charters. This section requires the bonds to show the following:

First, an appropriate name, indicating the purpose of the issue.

Second, a consecutive numbering.

Third, interest coupons attached.

Fourth, to show on their face the amount of the indebtedness of the municipality.

Fifth, to show the assessed valuation for each of the five preceding years.

Sixth, the average amount of assessed valuation.

Seventh, recite the levying of a direct annual tax sufficient to pay the interest as it falls due and the principal within twenty years.

I believe that they should also recite when each bond is payable.

I have also looked into the question a little further as to the validity of the meeting of October 3d. It appears from the proceedings that, at the special meeting held May 14th, 1912, a motion was made and carried that the board adjourn "to such time as it shall be called together again by the chairman." This motion carried and the board was so adjourned. The meeting of October 3d appears to have been "called by the chairman of the board, W. J. Brennan, by authority vested in him at the special session May 14, 1912."

Sec. 664, Wis. Stats. 1911, provides in part:

"Every county board shall meet on the Tuesday next succeeding the second Monday of November in each year at the county seat for the purpose of transacting business as a board of supervisors. Such meeting may, upon the written request of a majority of the members of such board, be adjourned by the county clerk to such day as is designated in such request, but not less than one week nor more than three weeks from the first mentioned day; upon such adjournment being made such clerk shall give each member of the board written notice of the time to which the annual meeting has been adjourned. A special meeting of any county board shall be held only upon a written request of a majority of the members thereof addressed and delivered to the county clerk, and specifying the time and place of such meeting; the time shall not be less than one week from the delivery of such request to the clerk; upon receiving such request the county clerk shall forthwith mail to each member of the board notice of the time and place of such meeting; any special meeting may be adjourned from time to time by a vote of a majority of all the members of the board."

The meeting held on the 14th day of May was not adjourned to any particular time, but was adjourned subject to the call of the chairman of the board. Such a meeting does not come within the terms of the statute. *Kleimenhagen v. Dixon*, 122 Wis. 526; See also *Comm. ex rel. O'Brien v. Gibbons*, 46 Atl. 313; 196 Pa. St. 97.

"Meetings adjourned to assemble at the call of the mayor or reeve are not regular or adjourned meetings, but are special meetings, and the proceedings are not valid unless the required notice is given or waived." 28 Cyc. 330.

For this reason, and because no authority was given to make the bonds payable at the office of the State Treasurer, I cannot approve the application for a sale of the bonds to the State as an investment of part of the state trust funds.

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*Loans From Trust Funds—Municipal Corporations*—Where the special charter of a city contains a provision that the city shall have no power to borrow money or contract indebtedness that cannot be paid from the revenues for the current year, sec. 258, authorizing cities to borrow from the trust funds, is not applicable to such city.

January 28th, 1913.

M. S. HINES,  
Mayor,

Rice Lake, Wisconsin.

I am in receipt of your letter of the 24th, relative to the application of the city of Rice Lake, Barron county, for a loan from the state trust funds.

Referring to my criticism that the note is made payable in sixteen years, while the question before the electors was as to authorizing a loan payable in twenty years, you say:

“I have always understood the statute to mean that those payments could be paid annually during any ten years within the said twenty years.”

My criticism did not involve that question. The point I made was that the authority given you to apply for a loan payable in twenty years did not give authority to apply for a loan payable in a shorter time. I refer to the authority given you by the vote of the electors.

The serious question, however, is as to the authority of the city to incur the proposed indebtedness. Section 2 of chapter 13 of the charter of Rice Lake (ch. 257, Laws of 1887) provides:

“The city shall have no power to borrow money or contract any debts which cannot be paid out of the revenue for the current year.”

With reference to this you first called my attention to the fact that Rice Lake has adopted the commission form of government. (Secs. 925m—301 to 925m—319 Wis. Stats., 1911, inclusive.)

Such adoption still leaves applicable to such city any law not inconsistent with those sections. (Sec. 925m—303 Wis. Stats. 1911.) The charter provision quoted does not appear to be in any way inconsistent with the law relating to commission form of government.

You also state that your city has heretofore obtained loans from the trust funds and has issued bonds without having this question raised.

The doctrine of practical construction cannot be applied to a statute unless it is doubtful, ambiguous or uncertain. A customary violation of the plain language of the law gives no authority for continuing such violation. *Travelers Ins. Co. v. Fricke*, 94 Wis. 258; *State ex rel. Raymer v. Cunningham*, 82 Wis. 39; *State ex rel. Weiss v. District Board*, 76 Wis. 177.

You state that in your opinion this charter provision applies only to temporary loans. It appears to me to apply only to loans not temporary in character. By very clear inference it allows the borrowing of money and contracting of indebtedness temporarily, i. e., to be paid from the revenues for the current year.

Again, temporary loans might be made by the council without any referendum vote, ordinarily, but even this is prohibited by the charter of Rice Lake (sec. 4, ch. 7), which provides:

“The common council shall have no power or authority, and it is hereby prohibited from borrowing any money or from authorizing any city officer to borrow money for the use of the city, or to contract any debt for any purpose whatever, unless there is money in the treasury to pay the same,”

with certain specific exceptions, none of which are material to the question under consideration; so that I am satisfied that the charter provision first referred to herein has reference to something else than mere temporary loans. You argue that the very fact that the state law gives the city a right to borrow money from the State supersedes the charter; that surely the city cannot be deprived of that right.

The authority to make loans from the trust funds is found in sec. 258 Wis. Stats., 1911, which, so far as material, is as follows:

“The said commissioners shall, in their discretion, invest the moneys belonging to the school fund, the university fund, the agricultural college fund and the normal school fund, from time to time as such moneys may be paid into the treasury, . . . in the following named stocks and loans, but in no other manner, to wit:

“\* \* \*

“(5) In loans to towns, villages, cities, counties and boards of education, duly incorporated as such, of any city within this state, as hereinafter provided; and every such town, village, city, county and board of education is empowered to borrow of said commissioners, from said funds or either of them, such sum or sums of money, for such time and upon such conditions as may be agreed upon between said commissioners and the town, village, city, county or board of education applying for a loan, subject, however, to the limitations, restrictions and conditions hereinafter set forth.”

There have been no material amendments to this portion of the law since the passage of ch. 167, Laws of 1881, which first authorized this class of loans. The charter of Rice Lake appears as ch. 257, Laws of 1887, passed six years later. Just how the later law is superseded by the earlier one I will confess I am unable to determine. The general rule of statutory construction is that, in case of conflict, the later law controls and that, as between a general law and a special law, the special law, if applicable, controls. *Pott v. Supervisors Sheboygan Co.*, 25 Wis. 506. This is true where the special law is a special city charter. *Baines v. City of Janesville*, 100 Wis. 369, *Harris v. City of Fond du Lac*, 104 Wis. 44.

A revision of the general laws repealing all laws inconsistent therewith does not repeal an inconsistent provision in a special charter. Such general repealing clause refers only to general laws. *Walworth Co. v. Whitewater*, 17 Wis. 193; *City of Janesville v. Markoe*, 18 Wis. 350; *State ex rel. Gates v. Comm'rs of Public Lands*, 106 Wis. 548.

Sec. 4986 Wis. Stats. 1911 provides:

“All the laws contained in these revised statutes shall apply to and be in force in each and every city and village in the state

as far as the same are applicable and not inconsistent with the charter of any such city or village; but when the provisions of any such charters are at variance with the provisions of these revised statutes, the provisions of such charters shall prevail unless a different intention be plainly manifested."

Sec. 4987 ib. provides:

"None of the general provisions of these revised statutes shall be construed so as to affect or repeal the provisions of any special acts relating to particular counties, towns, cities or villages or the officers or offices thereof unless such special acts are enumerated in the acts hereby repealed."

These two sections have appeared in every general revision of the statutes of this state since the adoption of the charter of Rice Lake.

In addition, sec. 9, ch. 13, of that charter provides:

"No general law of this state contravening the provisions of this act shall be considered as repealing, annulling or modifying the same, unless such purpose be expressly set forth in such law as an amendment to this chapter."

While one legislature cannot bind future legislatures as to the particular form of a repealing act, this provision is entitled to some weight. *Chase v. City of Oshkosh*, 81 Wis. 313.

I am therefore of the opinion that the charter provision has not been repealed by the general law authorizing cities to borrow from the trust funds. That charter provision absolutely prohibits the borrowing of money in excess of the revenues for the current year available for repayment, notwithstanding the inconsistent provision in the general law. *Perrin v. New London*, 67 Wis. 416.

For this reason I cannot approve the application for loan.

I do not think it necessarily follows that the present indebtedness of the city to the state cannot be collected. While the city had no authority to borrow the money, the money having been received and used for legitimate municipal purposes, without protest from any taxpayer, I believe the State can insist upon repayment. The money, being a part of a trust fund, may be followed, into whatever form it may be converted.

*Loans From Trust Funds—Education—Municipal Corporations—Bonds*—Where a school district, after authorizing the issue of bonds, merely authorizes the board “to levy a tax to be annually collected” to pay the principal and interest of such bonds, that does not make provision for the collection of a direct annual tax as required by art. XI, sec. 3, Constitution, and sec. 475, Wis. Stats. of 1911.

February 5th, 1913.

DR. F. N. HANSEN,  
*District Clerk,*  
 Hartland, Wis.

I very much regret that I cannot approve the application of Joint School District No. 3 of the towns of Newton and Delafield and village of Hartland, Waukesha county, for a loan from the state trust funds. It appears that this loan is desired for the purpose of refunding certain bonds issued under authority purporting to have been given at the annual meeting held July 6th, 1909, and adjournments of that meeting. At the annual meeting, after providing for issuing the bonds, the following resolution appears to have been adopted:

“Resolved that for the purpose of paying annually the interest on said bonds and the annual installments of the principal thereof to be paid each year as above set forth the district board is hereby authorized to levy a tax to be annually collected hereafter as follows.”

A similar resolution was adopted at the adjourned meeting held July 20th, 1909. You will note that neither of these resolutions purports to levy a tax but merely authorizes the school board to levy a tax. Art XI, sec. 3 of the Const. of this state provides in part:

“No \* \* \* school district \* \* \* shall be allowed to become indebted in any manner or for any purpose to any amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness. Any \* \* \* school district \* \* \* incurring any indebtedness as aforesaid shall, before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on said debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same.”

Sec. 475 of the Stats., also requires the levying of a tax to pay the principal and interest of any loan authorized at the time of the authorization of such indebtedness. In the case of *Kyes v. St. Croix County*, 108 Wis. 136, it was held that the resolution providing that "there shall be annually levied by the county board," a tax to pay the authorized bonds, was merely a direction to the county board to levy such a tax and was not the levying of the tax and that such a resolution in connection with the resolution authorizing the issue of the bonds in fact did not authorize the issue, because of the failure to levy a tax. This has since been approved in the case of *Bingham v. Board of Supervisors*, 127 Wis. 355. It is necessary that there be a vote levying *in praesenti* a direct annual tax sufficient to meet the required payments. *Borner v. Prescott*, 150 Wis. 197.

As your school district did not comply with this requirement, the bonds are not a valid indebtedness of the district and there is no authority for borrowing money to refund them.

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*Loans From Trust Funds—Counties*—A county board has implied power to adjourn to a subsequent day. An adjournment must be to a time certain, or it is an adjournment *sine die*.

February 13, 1913.

HON. WALTER J. BRENNAN,  
Chairman County Board of Grant County,  
Lancaster, Wisconsin.

In reply to your criticism of the method of loaning the trust funds I will merely say that absolutely no discrimination has been made as between different sections of the state and that our records are open to the inspection of all who care either to verify or disprove the statement. No definite promise was made you, because, as I interpret the statutes, I was not justified in doing so. My ruling that the bonds should be made payable at the office of the State Treasurer was pursuant to the practice adopted by the Commissioners several years ago. Experience has shown that where bonds payable elsewhere are purchased it often causes the State considerable additional

expense, trouble and annoyance. This practice has been in force since long before my election and I am in no way responsible for its adoption, although not ready at this time to say that I think it should be changed. Your reference to "nine verbal criticisms and strict parliamentary distinctions" as applied to proceedings of the county board is all right where applicable; but the question here is: Did the county board, at the October meeting, have jurisdiction? As is well known, upon the matter of bond issues the law must be strictly complied with. No citation of authorities, I take it, is necessary upon this point. Sec. 664 Wis. Stats., 1911, authorizes the adjournment of a special meeting of a county board "from time to time." Your board adjourned subject to the call of the chairman of the board. The Century Dictionary gives the following definitions:

"Adjourn: To put off or defer, properly to another day, but also to a later period indefinitely.

\* \* \*

"To suspend the meeting of, as a public or private body, to a future day or to another place.

\* \* \*

"To suspend a sitting or transaction till another day.

\* \* \*

"Adjournment: The act of discontinuing a meeting of a public or private body \* \* \* until a fixed date or indefinitely.

\* \* \*

"To adjourn *sine die* (literally, to adjourn without day), to adjourn without setting a time to reconvene or sit again."

Blackstone says of an adjournment that it "is no more than a continuation of the session from one day to another."

In 1 Cyc. 793, "adjournment" is defined as "a putting off until another time and place."

You will note that there are only two kinds of adjournments: one to a definite time, and the other without a fixed time. The latter is an adjournment *sine die*, and of course ends the meeting. The next convocation, or sitting, is a new meeting, and not a continuation of the one at which such adjournment was taken. Similar definitions will be found in the following:

1 Am. and Eng. Enc. of Law (2nd ed.), p. 638 and cases cited.

1 Enc. of Pleading and Practice, p. 238 and cases cited.

In *La Farge v. Van Wagenen*, 14 How. Pr. (N. Y.) 54, 58, speaking of an adjournment of a foreclosure sale, the court says:

"It is true, that the primary signification of the term, 'adjourn,' is to put off, or to defer to another day specified. \* \* \*

\* Probably, without some limitation, it would, when used with reference to a sale like the present, or any judicial proceeding, properly include the fixing of the time to which the postponement was made.

\* \* \*

"It is undoubtedly, also, the general rule, that the day to which such a postponement of sale is made should be specified at the time of the adjournment."

In all the cases that I have examined in which this term has come before the court it has been so defined as to indicate that the adjournment must be to a day certain, or it ends the meeting.

Speaking of statutory authority to adjourn a town meeting "from time to time," the Supreme Court of Massachusetts says:

"Undoubtedly, as claimed by the demandant, an adjournment should be to a fixed future time." *Reed v. Acton*, 117 Mass. 384.

In Illinois it has been held that where a county board adjourned to a date-named "or at the call of the chairman," the "chairman of the board had no power to change the date the board had fixed to meet again." Among other things the court in that case says:

"If the record showed that on the adjournment at the September meeting, and each of the subsequent meetings, the adjournment was to a day fixed, and that on said day fixed the board met, and when it adjourned it adjourned to another day fixed, at which time it met again, and so on, this might amount to a continuation of the September session."

And again it is said in the opinion:

"If it was the purpose of the board, when it adjourned in September to October 16th, to confer power upon the chairman of the board to change or alter that date, it was attempting to do something it had no power to do."

And again:

“To authorize a special meeting of the board of supervisors the statute requires that it shall be requested by at least one-third of the members of the board and notice thereof published by the clerk in some newspaper printed in the county. \* \* \* These requirements cannot be dispensed with by an attempt to delegate authority to the chairman of the board to call meetings at such time as he may choose. The member selected chairman of the board is merely its presiding officer, and otherwise has no superior powers to any other member of the board.” *Marsh v. People*, 80 N. E. 1006; 226 Ill. 464.

It seems very clear to me from this and the authorities heretofore cited that the meeting in October was not a continuation of the May meeting. The adjournment of the May meeting, having been for an indefinite time, ended that meeting beyond the power of revival.

You say that the case of *Kleinenhagen v. Dixon*, 112 Wis. 526, cited in my former letter, is not authority, because villages are not given the power to adjourn special meetings. As I read the opinion in that case the fact that the meeting at which the indefinite adjournment was taken was a special meeting was not considered important by the court, nor was the lack of special statutory authority to adjourn considered important. In fact, in the statement of facts it is said:

“The minutes of the proceedings of the village board disclosed that the meetings of the board at which this improvement was authorized were neither special nor regular, \* \* \* nor were they adjournments of such meetings.”

It was because the adjournment was for an indefinite time, and therefore ended the meeting.

There is some language used that, taken by itself, might justify your interpretation; but, in view of the implied power of adjournment being upheld practically universally, I cannot regard the decision in question as based upon the attempted adjournment having been of a special meeting.

I do not find that our court has passed upon the question of the implied power to adjourn a special meeting, but they have upheld such power as to a regular meeting. *Douglas Co. v. Sommer*, 120 Wis. 424.

See also Biennial Report and Opinions of the Attorney-General for 1908, p. 975.

It appears to me that the general rule is well stated in 11 Cyc., 394:

“In the absence of any express provision to the contrary, when a county board is once lawfully convened, either in regular or special session, it may adjourn or take a recess to a subsequent day or from day to day.”

To the same effect, see 2 Dillon on Municipal Corporations (5th ed.), secs. 510 (269); 532 (285), 535 (287), 2 McQuillan on Municipal Corporations, sec. 602.

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*Loans From Trust Funds—Education*—In a special school meeting called to authorize the making of a loan, the consideration of the proposed loan is the main subject, and the levying of a tax to repay said loan is merely incidental to it, so that where no tax is levied, another special meeting to correct the omission cannot be held during the same school year.

February 14, 1913.

MR. CHAS. A. TAYLOR,  
*District Attorney,*  
Barron, Wis.

In your letter of February 13th, you state that about two weeks ago an application for a loan from the state trust funds to joint school district No. 2 of the towns of Almena and Clinton, was disapproved for the reason that the funds were to be used in refunding indebtedness, and that no tax had been levied to pay the indebtedness so to be refunded; that the authorization for this application was made at a special meeting of the district held December 6th, 1912, and you ask whether if another special meeting is held at this time to make application for a loan, the same would be refused on the ground that more than one special meeting to consider the same subject, held within the same school year, is contrary to the provision of sec. 427 of the Stats.

This department has held that at a special meeting for the purpose of authorizing a loan, the authorizing of the loan was the principal business and that the levying of a tax to repay

it was simply incidental to that; that where a meeting was legally called for the purpose of authorizing a loan and there were defects in the proceedings which did not render the meeting illegal, but which were such as not to justify the making of the loan, that no other special meeting could be held during the same school year, for the purpose of authorizing a loan substantially the same as the one attempted to be authorized at the prior meeting.

I see no reason at this time to come to a different conclusion, and therefore, would not advise the holding of another special meeting for that purpose during the present school year.

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*Loans From the Trust Funds—Education—Elections*—Where notice of a special school meeting is served on Sunday, it is not a valid service.

It was not necessary, prior to December 1, 1912, that a person of foreign birth should have taken second citizenship papers to be qualified to sign a request for a special school meeting.

March 6, 1913.

HON. J. P. MONEY,  
*District Clerk,*

Oshkosh, Wisconsin.

I regret very much that I can not approve the application of school district No. 6 of the town of Oshkosh, Winnebago county, for a loan from the state trust funds.

It appears from what you say in your letter of the 3rd that most of the voters upon whom notice of the special meeting was served, were served upon Sunday. It appears clear that service upon Sunday is not valid. *De Forth vs. Wis. & Minn. Ry. Co.*, 52 Wis. 320.

It further appears, if I correctly understand your letter, that one of the signers for the request of the meeting was of foreign birth and had simply declared his intention to become a citizen, but had not, to use the common phrase, taken out his second papers. It does not appear from the papers on file here just when this request was signed and filed, but if the meeting was held December 2, 1912, it probably was so signed and filed prior to December 1, 1912. The request was

signed by four other persons. The statute, section 427, requires the request to be signed by five legal voters. Under art. 3, sec. 1, par. 2 of the Const. of this state, prior to December 1, 1912, any male person of the age of twenty-one years or upward, being of foreign birth, who, prior to the first day of December 1908, had declared his intention to become a citizen conformable to the laws of the United States, was a legal voter. It does not appear when the person in question declared his intention to become a citizen, but if it was prior to December 1, 1908, the mere fact that he had not taken his second papers would not render him ineligible as a qualified voter prior to December 1, 1912.

The first objection, however, is sufficient to invalidate the meeting.

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*Loans From Trust Funds—Education—Taxation—*Under par. 5, sec. 430, Wis. Stats. of 1911, limiting the amount school districts may pay for building schoolhouses in any year, the interest to be paid is to be added to the principal in determining whether or not the amount proposed to be raised is within such limitation.

The certificate of the town board, which would, under that section, authorize raising a larger amount, must be secured before the tax is levied or the amount voted.

March 28, 1913.

MR. MARIUS ANDERSON,  
*District Clerk,*

Withee, Wisconsin.

I regret very much that I cannot approve the application of joint school district No. 2 of the town of Hixon and the village of Withee, Clark county, for a loan from the state trust funds.

The application is for a loan of \$12,000.00, for the purpose of building a schoolhouse, payable in twelve years, \$1000.00 of the principal each year. Thus the payments of principal and interest taken together would exceed \$1000.00 per year.

You state in your letter that the population of the district is 784. Paragraph 5, sec. 430, Wis. Stats., 1911, provides in effect that where the population of the district is less than

one thousand, the district shall not have power to levy and collect a tax for building, hiring or purchasing a schoolhouse of more than \$1000.00 in any one year:

“unless the town board of the town in which such schoolhouse is to be situated shall certify in writing that in their opinion a larger sum should be raised, specifying such sum, in which case an amount not exceeding the sum specified may be raised.”

It appears clear to me that the amount to be raised for interest must be added to the amount payable on the principal in determining whether or not this section is applicable. Applying this rule, it appears that your district did not comply with the section, as no certificate was obtained and the tax levied exceeds \$1000.00.

May such defect be cured by getting such certificate now? All steps of the proceedings must be taken in the order in which they are prescribed. Our court has so held as to proceedings in making public improvements to be paid for by special assessments. *Massing v. Ames*, 37 Wis. 645.

Under the statute, the district had no power to levy the tax at the time it attempted to do so. Hence such levy was invalid. The taking of the necessary steps to give it power to levy such a tax does not validate a tax levied at a time when it had no such power. It would not constitute a ratification of the former action so as to bind the district. Such ratification would have to be by action of the district and no action taken by the town board could constitute ratification. *Clark v. Janesville*, 10 Wis. 136; and *Clark v. Janesville*, 13 Wis. 414; *Rochester v. Alfred Bank*, 13 Wis. 491; *Berliener v. Waterloo*, 14 Wis. 378.

For this reason, I cannot approve the application.

## MISCELLANEOUS OPINIONS

*Miscellaneous—Newspapers*—Only weekly newspapers are permitted to circulate the “copy law” and receive \$100 therefor.

February 11, 1913.

HON. J. S. DONALD,  
*Secretary of State.*

Under date of February 7th, you have referred to me a letter received from Mr. C. A. Booth, Secretary of the Wisconsin Press Association, who desires to know what the ruling of your department will be in the matter of triweekly newspapers, semiweekly newspapers and daily newspapers wishing to print and circulate the copy laws—whether they are authorized to do so and receive compensation provided by law for such publication; and you request my opinion upon this question.

Section 20.70 of the statutes, provides as follows:

“The publisher of any weekly newspaper printed in whole or in part within this state which shall have been regularly published during the six months immediately prior to the opening of any regular session of the legislature with bona fide circulation to actual paying subscribers during all that time of not less than three hundred copies each week, may republish in such newspaper in the numerical order of their chapters, all of the general laws passed at any such session which shall be designated by the secretary of state in the official paper as ‘copy laws,’ and upon filing with said secretary satisfactory proof by affidavit of such publication shall be paid one hundred dollars therefor out of the state treasury.”

It must be presumed that the legislators were aware of the fact that there are triweekly, semiweekly and daily papers in the state and that they used the term “weekly newspaper” intelligently and with the intention of limiting the publication

of the copy laws to such papers as are commonly designated as weekly newspapers.

In the case of *Bank v. Jacobson*, 8 S. D. 292, 300; ib. 66 N. W. 453, the court said that the expression "weekly newspapers" unerringly conveys the idea of a paper issued once a week.

Webster defines "weekly" as applied to publications, as "A publication issued once in seven days, appearing once a week."

Had the Legislature intended that the State should pay for publishing the laws in more than one class of newspapers it would have been very easy for them to have used the word "newspaper," instead of "weekly newspaper."

It is a rule of statutory construction that nothing is to be added or taken from a statute unless there are adequate grounds to justify the inference that the Legislature intended something which it omitted to express. I cannot infer from this statute that the Legislature omitted any class of newspapers to which they intended this payment should be made. It seems to me that a construction placed upon this law that would include triweekly, semiweekly and daily papers would be unwarranted.

My predecessor in office, Honorable L. M. Sturdevant, in an opinion rendered to your predecessor, Honorable Walter L. Houser, dated July 19th, 1905, found on page 431 of the Biennial Report and Opinions of the Attorney-General for 1906, placed a construction upon this statute which I think is correct, and to which I shall adhere. It is my opinion that the act applies only to weekly newspapers, and not to semiweekly, triweekly or daily papers, and that only weekly newspapers are entitled to the compensation of one hundred dollars provided for by the above quoted statute.

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*Miscellaneous—Newspapers*—The Janesville Weekly Gazette is published semiweekly and is not authorized to publish the "copy laws" and receive compensation therefor, under sec. 20.70 of the printing law.

March 1, 1913.

HON. JOHN S. DONALD,  
*Secretary of State.*

Under date of February 21st, you requested my opinion as to whether The Janesville Weekly Gazette is a weekly newspaper, within the contemplation of section 20.70 of the statutes, so as to be entitled to the fee for republishing the general laws passed at the present session of the Legislature under the designation of "copy laws," as provided in said section. You state that The Janesville Weekly Gazette makes two deliveries of the same edition during the week, as Part 1 and Part 2, for the reason, as the publisher claims, that it is too bulky for one delivery.

I have been in communication with the business manager of said paper since the receipt of your letter and have received from him, upon request, a copy of Part 1, published February 25th, and a copy of Part 2, published February 28th, of this year. Each of these parts contains the general news of the world up to the date of its issue; consequently the two parts could not have been printed on the same day. Each part is a newspaper complete within itself, although both parts bear the same number. On the letter head of the Gazette Printing Company, publishers of the Janesville Weekly Gazette, I find the statement: "The Janesville Gazette, published daily and semiweekly." I am informed that originally the paper was published once a week, under the name of "The Janesville Weekly Gazette;" that when it was changed into a semiweekly, the name was retained and that at present it is published under the name of "The Janesville Weekly Gazette." There are in fact two publications each week and for all practical purposes it is a semiweekly paper, and not a weekly paper in contemplation of the provisions of said statute. It is my opinion that the said paper does not come within the provisions of that statute.

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*Miscellaneous—Forfeitures—Auctioneers—*Under Sec. 1587 auctioneers are required to give a bond to town clerk that the required 2% be paid; this will insure the payment of all forfeiture.

Under sec. 3302 defendant may be imprisoned.

March 20, 1913.

JAMES KIRWAN,  
*District Attorney,*  
Chilton, Wisconsin.

You state that a number of western horses have been shipped into your county, to country towns, and sold at auction by the owner, who is a nonresident. You inquire whether, in such case, where the man is financially irresponsible, the forfeiture provided for by section 1586 of the statutes can be collected; also whether the man is liable to arrest and imprisonment if he does not pay such forfeiture.

In answer I will say that the forfeiture must be collected as provided in ch. 142 of the statutes. You will notice that under sec. 1587 it is provided that the town clerk can require a bond of \$250 that the party will pay the required per cent of the auction sale. This will insure the payment by the auctioneer of the per cent required to be paid to the town. In case of a violation of the law the forfeiture may be collected as provided in said ch. 142, and sec. 3295 of said chapter provides that, in case the defendant is a nonresident of the state, an attachment may be issued in such action in like manner as may be done in ordinary civil actions against nonresidents.

An examination of ch. 68, providing for the licensing of auctioneers, and also of ch. 142, providing for the collection of forfeitures, makes it plainly apparent that the forfeiture in this case must be collected in a civil action, and, under sec. 3302, the defendant may be imprisoned in case the forfeiture is not paid.

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*Miscellaneous—Judgment—Divorce*—A divorce judgment is effective from its date except "so far as it determines the status of the parties."

March 26, 1913.

MR. CLIVE J. STRANG,  
*District Attorney,*  
Grantsburg, Wisconsin.

In your favor of March 23rd, you request my opinion on a question which you state as follows:

"In September of 1912 the Circuit Court granted a divorce to a party in our county and made a decree giving the wife an

undivided interest in the husband's property. He refuses to give her a quit claim or in any way to live up to the decree of the court, and as a consequence the wife has become a town charge and the duty has been placed on me to get the husband to live up to the court's decree. Can he be compelled, by action of partition, to divide the property before a year from the rendition of the divorce decree? Section 2374 subsection 1 would seem to give such remedy while subsection four seems to deny the right."

Subsec. 1 of sec. 2374 makes the divorce judgment ineffective for one year only "so far as it determines the status of the parties." Of course, such judgment, like any other, is open to reversal or modification on appeal, both as to the status of the parties and as to any other provision thereof.

Subsec. 4 of sec. 2374 limits the time within which an appeal may be taken, which would otherwise be "two years from the date of the entry of such judgment" (sec. 3039) to "one year from the date when such judgment was entered." I do not find anything in subsec. 4 that makes any part of the judgment not effective from its date.

If notice of entry of the judgment has been served pursuant to sec. 2876 and sixty days have expired since such service, without the service of a proposed bill of exceptions, it would seem probable that no appeal is proposed and it would, therefore, appear safe to take steps to realize on the property or the interest therein given to the wife by the judgment. I do not think that the statute prevents such steps from being taken now and think that you would be amply justified in so doing, though the form of the divorce judgment will, of course, control as to what steps it is necessary and advisable to take.

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*Miscellaneous—Evidence—Privileged Communications—Attorney and Client*—An attorney who swears his client to an answer in a case can testify to the fact that such answer was sworn to by his client before him as a notary.

March 31, 1913.

Mr. JAMES KIRWAN,  
*District Attorney,*  
Chilton, Wisconsin.

Under date of March 28th, you state that a Mr. A., who is an attorney and acting for a Mr. S., drew up an answer in a

case in which Mr. S., is the defendant, and Mr. S. swears to said answer before the attorney, who is also a notary public. You inquire in a criminal case against "S" whether "A", his attorney, will be permitted to testify that "A" signed and swore to the answer before him.

Sec. 4076 provides as follows:

"An attorney or counsellor at law shall not be allowed to disclose a communication made by his client to him or his advice given thereon in the course of his professional employment."

This statute has been before our supreme court in a number of cases. In the case of *In re Downing's will*, 118 Wis. 581, our court held that under said sec. 4076, while an attorney who draws a last will and testament, will not be allowed, without the consent of the testator, while living, to testify to communications made to him concerning the will, or its contents, when the will is presented for probate after the testator's death, such attorney may testify as to directions given him by the testator, and such testimony is properly admitted in evidence in the proceeding. The court held further that although Richmond was an attorney at law, yet in drawing the written instrument in controversy he acted in the capacity of a mere scrivener, and his testimony was clearly admissible, citing *Hatton v. Robinson*, 14 Pick. 416; *Borum v. Fouts*, 15 Ind. 50; *Hanlon v. Doherty*, 109 Ind. 37.

So it is held where the attorney took the acknowledgment of the deed, as a notary, executed by his client, there is no privilege as to the fact of the execution of the deed and the acknowledgment. See *Mutual Life Ins. Co. v. Corey*, 54 Hun. (N. Y.) 493.

It has also been held that the rule of privilege does not exclude evidence of the client having sworn to certain pleadings or to an affidavit. 23 A. & E. Enc. of L. 76. See also *Bruley v. Garvin*, 105 Wis. 625; *Herman v. Schlesinger*, 114 Wis. 382; *Koeber v. Somers*, 108 Wis. 497.

I am, therefore, of the opinion that the attorney in question will be permitted to testify that "S" signed and swore to the said answer before him.

## OPINIONS RELATING TO MUNICIPAL CORPORATIONS

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*Municipal Corporations—Water Works—Power of water commission in cities owning water works.*

Construction of secs. 925—95 and 925—96.

September 18, 1912.

MR. C. A. SEIFERT,  
*Examiner of Accounts,*  
Railroad Commission.

In your favor of September 11th you ask whether under secs. 925—95 and 925—96, Wis. Stats., the common council of a city owning a water works plant may lawfully pass an ordinance granting to a water works commission "the right to collect all revenues of the works, deposit the same with the city treasurer, do all of the buying of materials, hire all help, issue its own orders upon the treasurer in payment of obligations incurred by it without referring its actions to the council for ratification or approval," etc.

Sec. 925—95 provides that municipally owned water works "may be operated under the direction of the board of public works or by a commission, to be determined by ordinance of the common council."

Sec. 925—96 provides that "the council shall have power to legislate on all matters with reference to the construction, purchase, operation, management and protection of water works \* \* \* not contravening the provisions of this chapter, the constitution or laws of the state."

The case of *Northern Pacific Railway Co. v. Barnes*, 51 N. W. (N. Dak.) 386, 403—4, cited by you as to the meaning of the words "under the direction of" in section 925—95, does not,

it seems to me, aid in the construction of the section, as the quoted words are there used in an obviously different sense from that in which they were used in the law considered in the North Dakota case. I think that the words in sec. 925—95 must be read in connection with the word "operated" immediately preceding them, and as so read mean that the commission shall have the control of the operation, i. e. the management of the water works. The section cannot mean that the commission is merely to make rules and regulations since that power is given to the council by sec. 925—96.

Many other sections of the general charter law restrict the power of the council and city officers in letting contracts, paying out money, etc., and are applicable to a city in the management of its water works. Thus sec. 925—90 provides that "all public work, the estimated cost of which shall exceed two hundred dollars, shall be let by contract to the lowest responsible bidder; all other public work shall be let as the council may direct." Sec. 925—93 provides that all contracts shall be signed by the mayor and clerk, etc. Sec. 925—98 provides that the water rates and charges shall be collected by the treasurer, etc. Secs. 925—120 to 925—129 make provision for the fiscal management of the city and deposit and withdrawal of moneys, etc.

Probably a reading of these and other sections of the general charter law will give you what further information you desire.

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*Municipal Corporations—Highways—Villages* incorporated under the general law are authorized to appropriate money for the permanent improvement of public highways within the limits of the village.

November 26th, 1912.

HON. B. A. HUSTING,

*District Attorney,*

Fond du Lac, Wisconsin.

In your letter of the 16th you ask my opinion upon a question that may be stated in substance as follows:

Is the village of North Fond du Lac authorized to appropriate money for the purpose of permanently improving a public highway within the limits of said village?

You do not state whether the village of North Fond du Lac is incorporated under a special charter or under the general charter law for villages. In answering your inquiry I am assuming that it is under the general law. If it is operating under a special charter, the following opinion might need some modification.

Par. 11, sec. 893 Stats. provides that the village board shall have power by ordinance, resolution, law or vote "to lay out, open, change, widen or extend roads, streets, . . . or other public grounds, and to grade, improve, repair or discontinue the same."

Sec. 905 Stats. provides in part:

"The village board may cause any street or any part of any street not less than sixteen rods in length to be graded, paved, macadamized or otherwise improved, \* \* \* upon a petition therefor in writing," etc.,

the cost of such improvement to be assessed against the abutting property.

Our court has held that these sections provide two different methods for making such improvements and that the board may proceed under par. 11, sec. 893 Stats. without any petition and pay for the improvements out of the highway fund of the village. *McCullough v. Campbellsport*, 123 Wis. 334; *Battles v. Doll*, 113 Wis. 357; *State ex rel. McClure v. Wallschlaeger*, 137 Wis. 136.

I am therefore of the opinion that a village incorporated under the general charter law may appropriate money for the permanent improvement of a public highway within the limits of such village.

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*Municipal Corporations—Education—Superintendent of Schools—Electors in cities in counties of less than 15,000 inhabitants having a city superintendent may not vote for county superintendent.*

March 7th, 1913.

MR. CHAS. E. LOVETT,  
*District Attorney,*  
 Park Falls, Wis.

In your favor of February 25th you state that the city of Park Falls, being a city of the fourth class, about one year

ago in conformity to sec. 926—115 of the Statutes, determined to have a city superintendent of schools, and that Price county has less than 15,000 population. You request my opinion as to whether the electors in the city of Park Falls may vote for county superintendent at the spring election or whether sec. 703 of the statutes refers only to counties having a population of over 15,000.

Sec. 703 of the statutes provides in part:

“The county board of each county having over fifteen thousand inhabitants according to the census last preceding division may divide such county into two superintendent districts, to be called superintendent district number one and superintendent district number two, by resolution, specifying therein the territory included in each and every such division, and every like division heretofore made shall remain in force until rescinded by resolution of the county board. Unless so divided each county shall constitute a superintendent district; but every city having a board of education, a superintendent of schools or other board or officer vested with power to examine and license teachers and supervise and manage the schools therein shall be exempt from the provisions of this section and all provisions relating to county superintendents of schools, except so far as required to make reports to the county superintendent of the district in which such city is situated; and the electors of such city shall have no voice in electing such county superintendent, and the supervisors from such city shall have no voice in the county board in determining or providing the compensation or allowance of, or any matter relating to, such county superintendent; nor shall any tax be levied on such city to pay any part of such compensation or allowances.”

The first sentence of the section is, by its terms, limited to counties of more than 15,000 inhabitants, only such being made capable of division into two superintendent districts, but I find nothing in the letter or reason of the section to limit the words “every city having a board of education” etc., in the second sentence of the section, to cities located in counties having over 15,000 inhabitants. I can conceive of no reason why the population of a county in which a city is located has or should have any bearing on the question whether such city should or should not be “exempt from \* \* \* all provisions relating to county superintendents of schools,” etc. The words “every city having a board of education” etc., are gen-

eral and must receive a general construction unless there is something in the statute that restricts their application. Lewis' Sutherlands Statutory Construction, Section 392. I find nothing in the statute that shows any intent to rest in the generality of the quoted words and am, therefore, of the opinion that electors in cities which have a city superintendent pursuant to sec. 926—115 are not entitled to vote for county superintendent, whether such cities be in counties having 15,000 inhabitants or in counties having less than 15,000 inhabitants.

Attorney-General Gilbert decided, but without mentioning this particular question, that the quoted provision of sec. 703 was applicable to the City of Ladysmith in Rusk county, which had less than 15,000 population. See Biennial Report and Opinions of Attorney-General for 1910, pages 321, 336. He must have assumed that the part of sec. 703 above quoted was applicable to cities in counties of less than 15,000 inhabitants.

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*Municipal Corporations—Public Officers—Assessor—*Under the general city charter law one appointed to fill a vacancy in the office of assessor, holds not merely until the next municipal election but "for the unexpired term."

March 17th, 1913.

HON. GEORGE E. SCOTT,  
*State Senator.*

In your favor of March 17th, you state that:

"The people of Chetek are writing me for an opinion in regard to the election of an assessor in Chetek this spring. It seems their city assessor was appointed because of the resignation of the one elected a year ago. The point they wish me to settle for them is, does the appointed officer hold for the unexpired term or should an election be held to fill the vacancy this spring? The city of Chetek is under general charter. Under their special charter the rule was that an election should occur at the next municipal election in cases of this kind. They have asked the opinion of the District Attorney up there and it seems he is not absolutely sure on this point. I know your department is not required to give opinions of this kind, but our attorney on this Committee is absent and this opinion in

order to be of any use should reach the people of the city of Chetek before next Wednesday. May I ask you as a personal favor to kindly have your department give me an opinion today if possible?"

Sec. 925—26a provides in part:

"In cities of the second, third and fourth classes, the terms of office of all city officers hereafter chosen by the electors, except aldermen of cities governed by special charter, shall be two years."

Sec. 925—28 provides that the terms of all officers, except mayor,

"shall commence on the first day of May succeeding their election or appointment unless otherwise provided by ordinance, and they shall hold for such term as has been provided for each respectively and until their respective successors are qualified."

Sec. 925—31 provides in part that:

"Whenever a vacancy shall occur in any office where the officer was elected by the people it shall be filled by appointment by the mayor, such appointment to be confirmed by the council."

Sec. 925—31b provides that:

"A vacancy in the office of mayor shall be filled by the common council, the person selected to hold office until the first Tuesday in April, succeeding, when the vacancy shall be filled by an election."

Sec. 925—33 provides that:

"Every person elected or appointed to fill a vacancy shall hold his office and discharge the duties thereof for the unexpired term."

Assuming that there are no provisions of the special charter of the city of Chetek still in force that have any bearing on the question, the foregoing sections (and a somewhat hasty search has revealed no others applicable) make it reasonably clear that the term of office of assessor is two years and that in case of the resignation of an officer elected for such term, the person appointed to fill the vacancy holds the office "for

the unexpired term" (sec. 925—33). The phrase "unexpired term" can, it seems to me, have no other meaning than the balance of the term which the officer elected thereto would have served had he not resigned.

This conclusion is strengthened by the fact that sec. 925—31b, above quoted, makes special provision that a person selected to fill a vacancy in the office of mayor holds office only until a successor can be elected at the next spring election.

## OPINIONS RELATING TO OIL AND OIL INSPECTION

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*Oil and Oil Inspection*—Placard not necessary on tank wagon selling oil or gasoline.

September 21, 1911.

MR. LOUIS F. MEYER,

*State Supervisor of Inspectors of Illuminating Oils.*

Replying to your favor of the 19th inst. would say that it is not necessary for persons retailing oil and gasoline from tank wagons to have the placard required by sec. 1421e of the Stats. as amended displayed upon such tank wagon. The delivery to the purchaser of the certificates provided for in sec. 1421e by vendors from tank wagons is a sufficient compliance with the law.

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*Oil and Oil Inspection—Public Officers*—Bonds of Deputy Oil Inspectors furnished by Surety Co. and approved by Governor need not be approved by County Judge.

October 6, 1911.

MR. LOUIS F. MEYER,

*State Supervisor of Inspectors of Illuminating Oils.*

You ask whether or not it is necessary to have the approval of the sureties upon the bonds of deputy oil inspectors by the county judge of the county in which the deputy executing the same resides in cases where the bond is furnished by a surety company and a certificate from the state insurance department shows that such company has been duly licensed to transact business in Wisconsin.

In reply to this inquiry I will say that sec. 1421d, as amended, provides in part that "The sureties on the bond

of each deputy shall be approved by the county judge of the county in which the deputy executing the same shall reside and the bond of the supervisor and of each deputy shall be approved by the governor." From the language of this section it is evident that this only applies to sureties upon personal bonds as the approval of the county judge to a bond executed by a surety company would be of no value or effect. I am of the opinion that where the bond of a deputy oil inspector is supplied by a surety company duly certified by the commissioner of insurance as provided by law and approved by the governor there is a sufficient compliance with the law.

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*Oil and Oil Inspection—Public Officers*—Public records in office of oil inspectors may be copied by any person desiring to do so.

October 28, 1912.

HON. L. F. MEYER,

*State Supervisor of Inspectors of Illuminating Oils.*

Under date of October 28th, you inquire whether you can legally permit a lawyer to copy the records of your department which your inspectors made for the year 1912 to the present time. You state that under date of April 14, 1911, an opinion was rendered by this department to the effect that the records in your office shall be open to the inspection of any person and now you desire to know if any person has a right to copy said records.

Under date of September 15th, 1909, my predecessor in office rendered an opinion to the effect that such records could be copied. It was stated in said opinion, which you will find on page 820 of the Biennial Report & Opinions of the Attorney-General for the year 1910, "I have been unable to find any statute directly relating to your office as to your rights and which regulates and restricts the use of the public documents and their inspection by the public. It has generally been held that the right to inspect and examine public records includes of necessity the right to make copies thereof or extracts or memoranda therefrom. (See Amer. & Eng. Ency. of Law, 2nd Ed. Vol. 24, p. 185, and cases cited in Note 4.)

I am therefore of the opinion that if a person presents himself at your office at the proper time and requests access to your records you have no right to absolutely refuse him the inspection of said records."

I still adhere to the opinion given by this department under the administration of my predecessor and I believe that any person has the right to copy the records in your office.

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*Oil and Oil Inspection*—"Power distillate," when used for illuminating or heating purposes, should be inspected.

January 14, 1913.

HON. LOUIS F. MEYER,

*State Supervisor of Inspectors of Illuminating Oils.*

In your letter of the 9th, you ask whether the commercial product known as "power distillate" is subject to inspection by your department under the provisions of secs. 1421c to 1421p Stats., inclusive.

You explain that "power distillate" is a refined and distilled product of petroleum, closely resembling low grade kerosene in its nature; that it might be described as an intermediate product between kerosene and mineral seal or signal oil, the latter being heavy illuminating oils, used in railroad lamps; that "power distillate" has flash and burning tests from 30 to 50 degrees higher than kerosene; that its Beaume gravity is from 3 to 11 degrees lower than kerosene; that its flashing and burning points are not so high, and its Beaume gravity is not so low, as those tests of mineral seal or signal oil; that "power distillate" is used as a fuel in the manufacture and treatment of iron and steel; that in such work it is used as a fuel to heat the furnaces; and you ask whether, when so used, it is subject to inspection by your department. You also state that "power distillate" is used by gas companies; that such companies make from it a gas that is frequently mixed with ordinary coal gas and sold to the public for illuminating, heating, cooking and power purposes, and you ask whether, when so used, it is subject to inspection.

Sec. 1421e Stats. provides in part:

"All mineral or petroleum oil, or any oil or fluid substance which is the product of petroleum, or into which any product of

petroleum enters or is found as a constituent element, \* \* \* shall be inspected \* \* \* before being offered for sale or sold for consumption or used for illuminating or heating purposes within this state. For the purposes of sections 1421c to 1421p, inclusive, all gasoline, benzine, naphtha, or other like products of petroleum under whatever name called, used for illuminating, heating or power purposes, shall be deemed to be subject to \* \* \* inspection," etc.

It seems very clear from your explanation that "power distillate" is a product subject to inspection, if used for illuminating or heating purposes. In my opinion it is used for heating purposes in the first illustration presented by you and for illuminating in the second. In *Wadhams Oil Co. v. Tracy*, 141 Wis. 150, the court sustains the oil inspection law partly upon the theory that the purpose is to secure the consumer against fraud, and that it is therefore a valid exercise of the police power. There is the same reason for protecting the manufacturer against fraud in his purchase of fuel and the gas company in its purchase of raw material as there is for protecting the automobile owner or other consumer of gasoline against fraud in his purchases.

I am therefore of the opinion that this "power distillate" should be inspected when it is to be used for the purposes stated by you.

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*Oil Inspection—Public Officers*—Sec. 1421h does not authorize the oil inspector to enter on the premises of a manufacturer of iron and steel products to ascertain whether petroleum products are being used for heating purposes without having been inspected.

January 29, 1913.

MR. LOUIS F. MEYER,

*State Supervisor of Inspectors of Illuminating Oils.*

In your favor of January 23rd you state that you have reason to believe that a certain manufacturer of iron and steel products is using petroleum products for heating purposes which have not been inspected as required by secs. 1421c to 1421p Wis. Stats.; that such manufacturer does not manufacture, refine, or sell petroleum products but uses them in his business; and you ask whether you or your deputies have

the right under the provisions of sec. 1421h Wis. Stats. or under the provisions of any other statute to enter the premises of this manufacturer against his objection in order to determine whether or not petroleum products are being used without first having been inspected and if such be the case to inspect all such products.

Sec. 1421h provides in part:

“It shall be lawful for the supervisor or any deputy inspector to enter into or upon the premises of any manufacturer, refiner, or vendor of said illuminating oils \* \* \* and other like products of petroleum, and if he shall find or discover upon said premises any oil \* \* \* and other like products of petroleum, which shall not have been examined \* \* \* he shall at once proceed to test and thereafter properly mark, stamp, seal, or brand the same.”

There can scarcely be any dispute but that the word “manufacturer” as used in the above section is confined to a manufacturer of the oils and products of petroleum mentioned. This statute, therefore, does not authorize you or your deputies to enter upon the premises in question. I know of no other statute conferring such authority and in the absence thereof I do not think that you or your deputies have the right to make such entry. 23 Cyc. 295, Cooley’s Constitutional Limitations, (5th ed., pages 365—374).

You would clearly be a trespasser unless you found a violation of the law. *Bailey vs. Rogatz*, 50 Wis. 554, 7.

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*Oil and Oil Inspection*—The commercial product of petroleum known as “gas oil” is subject to inspection.

February 4, 1913.

HON. LOUIS F. MEYER,

*State Supervisor of Inspectors of Illuminating Oils.*

In your letter of January 31st, you say:

“Crude petroleum may be roughly described as being made up of a mixture of various similar compounds known chemically as hydro-carbons. In the process of refining crude petroleum to produce the various commercial products known as gasoline, naphtha, kerosene, lubricating oils, etc., it is placed in

large stills and subjected to gradually increasing heats. At the lower temperatures the lighter hydro-carbons, such as gasoline and benzine, are changed from a liquid to a gas. This vapor is passed through cooling condensers in which it is again changed to the liquid form. This process is called distillation, and the products which are distilled, that is, changed from a liquid to a gaseous form and back again to a liquid form, are known as distillates.

As the still is gradually heated to higher temperatures, the heavier hydro-carbons distil over and are condensed. This process may be carried on until nothing remains in the still, but a heavy, thick or almost solid mass composed of dirt mixed with tar, heavy paraffine, asphalt or other products, depending upon the nature of the crude petroleum.

While the distillation is being carried on the distillates are arbitrarily separated into various groups. The lighter ones, which have the lower boiling, flash and burning points and the higher Beaume gravity, are used for the products of gasoline, benzine and naphtha. As the distillation is carried further the next group of slightly heavier fractions with slightly higher boiling, flash and burning points and lower Beaume gravity are used for the production of illuminating oils such as kerosene.

As the distillation is continued, the next group of heavier fractions with still higher boiling, flash and burning points and lower Beaume gravity is separated and used for the manufacture of light lubricating oils, railroad illuminating oils, power distillate (a product used for fuel and power purposes), and other similar products.

The refining or distillation may be continued in the same manner until all of the crude petroleum, with the exception of a small percentage of residue, has been used.

As the distillation or refining proceeds, the gravity gradually becomes lower meaning that the distillates become heavier and the boiling points, flash points and burning points gradually become higher which means that the distillates gradually become less volatile and less inflammable and explosive.

All distillates so obtained from crude petroleum, among which might be mentioned gasoline, benzine, naphtha, Mineral Seal oil and power distillate, used for illuminating, heating or power purposes, are subject to inspection. The more highly inflammable and explosive products such as gasoline, benzine, and naphtha are inspected only as to their gravity. Other products such as kerosene and Mineral Seal oil, which are used for purposes which require products which are not highly inflammable and explosive, are inspected as to their flash and burning points as well as their gravity. A standard flash and burning point is set and products tested below these standards cannot be used for such purposes.

The flash and burning tests determine the inflammability and explosiveness of a product. The gravity test directly determines its weight according to a standard scale, the so-called Beaume scale. This gravity test, as may be seen from the above brief description of the refining process, furnishes a valuable index as to the quality of the product. It also indicates the relative market value of the product.

Knowledge of these tests is given to the intending purchaser through the medium of placards posted in stores and tank wagon sale tickets.

In view of the above explanation, (together with the oral explanation of the refining process which I made yesterday), I wish to inquire if gas oil is subject to inspection under the so-called Oil Inspection Law. Gas oil may be described as crude petroleum from which the lighter more explosive and inflammable fractions (those used for the manufacture of gasoline, benzine and naphtha) have been removed. In its preparation, the distillation or refining is stopped after the lighter fractions have been distilled over. The distillate is manufactured into gasoline and like products, while the remaining liquid is sold on the market under the names of gas oil, fuel oil or petroleum tailings. This product will vary in its gravity, flash and burning points depending upon how much of the lighter fractions had been removed from the crude petroleum. The knowledge of the tests then will give a knowledge of the quality of the product. For example a gas oil testing gravity 39 degrees, flash 159 degrees and burn 189 degrees will cost more because it contains more of the lighter fractions than a similar product testing gravity 34 degrees, flash 179 degrees and burn 209 degrees.

Are products such as gas oil or fuel oil subject to inspection by this department when sold or used for illuminating, heating or power purposes?"

Sec. 1421e Wis. Stats. 1911, provides in part:

"All mineral or petroleum oil, or any oil or fluid substance which is the product of petroleum, or into which any product of petroleum enters or is found as a constituent element, whether manufactured within this state or not, shall be inspected as provided in sections 1421c to 1421p, inclusive, before being offered for sale or sold for consumption or used for illuminating or heating purposes within this state. For the purposes of sections 1421c to 1421p, inclusive, all gasoline, benzine, naphtha, or other like products of petroleum under whatever name called, used for illuminating, heating, or power purposes, shall be deemed to be subject to the same inspection and control as provided for in sections 1421c to 1421p, inclusive, for illuminating oils, except that the inspectors are not required to test it other than to ascertain its gravity."

Sec. 1421m Wis. Stats. provides in part that the oil inspection law shall not

“be construed to apply to crude petroleum. It is the true intent and meaning of this chapter that the term oils, illuminating oils used for illuminating and heating purposes and all similar words, terms and expressions shall be held to mean any mineral or petroleum oil or any fluid or substance which is the product of such oil or of petroleum, or in which oil or fluid or other substance so obtained, mineral or petroleum shall be a constituent part of whatsoever name or title such oil, fluid or other substance may be known or called.”

You will note that all products of petroleum which are like gasoline, benzine or naphtha are to be inspected. What products are like these is more a question of fact than of law, and I believe you are in a better position to determine this question than I am. From what you state in your letter and from the oral explanation of the refining process recently given me, it would appear that gas oil or fuel oil is obtained from petroleum by precisely the same process as is gasoline, benzine and naphtha, except that the process is carried farther and that the gasoline, naphtha and benzine are removed from the crude oil in the distillation of the gas oil or fuel oil, while other portions of the crude petroleum which do not appear in gasoline, benzine or naphtha are retained in the gas oil or fuel oil; that this gas oil or fuel oil is a liquid oil somewhat similar in appearance to gasoline, benzine or naphtha, and that it is used for similar purposes; that the chemical constituents of gas oil or fuel oil are precisely the same as the chemical constituents of gasoline, benzine and naphtha, except that they appear in different proportions. Webster defines the word “like” as “having the same, or nearly the same, appearance, qualities or characteristics; similar.”

“Not, necessarily, identical with.” Anderson’s Law Dictionary.

In the case of *City of Lincoln Center v. Linker*, 7 Kan. Appeals 282, 53 Pac. 787, it was held that an ordinance making it unlawful for any person or persons to sell any malt, hop tea, malt tea tonic, ginger ale, American hop ale, cider, or any other drink of a like nature, no matter what name it might be called, applied to liquors like the specified liquors in this; that they are liquids; that they are kept in bottles; that

they are nonintoxicants; that they contain a mere trace of spirits; that they are put up for the Kansas trade, and, finally, that they are all used as a beverage.

In *Houghton v. Field*, 56 Mass. (2 Cush.) 141, it is held that saying that one article is like another does not necessarily mean that they are the same in all particulars, but, rather the contrary, that is, that they are the same in some particulars, and not in others.

In the case of *U. S. v. Wallace*, 116 U. S. 398, it was held that a statute providing as to fees "for issuing any warrant or writ, and for any other service, the same compensation as is allowed to clerks for like services" must receive a reasonable construction, and where the service of the clerk bears a substantial resemblance to the duty performed by the commissioner, the commissioner would be entitled to the compensation allowed by law to the clerk, it being, in legal substance, a like service. It would rather seem to me that this gas oil under these definitions is a product of petroleum like benzine, naphtha, etc. This view is based upon my understanding of the facts, and as stated before I think this is a question you ought to decide for yourself, as you are so much more familiar with this subject, and it being a question of fact rather than of law.

In a former opinion from this department, it was held that gas oil ought not to be inspected. This was based very largely upon a misunderstanding as to the nature of this particular product of petroleum. In that opinion, it was stated in substance that because the statute did not require the inspection of crude petroleum, it could not be supposed the legislature intended that a product less liable to explode than crude petroleum should be inspected. From what you have since told me, it appears that some of the products now being inspected are much less likely to explode than crude petroleum or even than gas oil. Furthermore, the danger from explosives is not the only basis upon which the oil inspection law rests. It was expressly held in the case of *Wadhams Oil Co. v. Tracy*, 141 Wis. 150, that

"the manifest purposes of the enactment here are to conserve individual members of society and their property from physical harm and prevent them from dealing fraudulently; or being

victimized by fraudulent practice. This purpose concerns the public welfare in a very broad sense."

It would appear that the fraudulent practice the statute is intended to prevent might as well be exercised with reference to gas oil or fuel oil as to naphtha or benzine.

*Oil and Oil Inspection*—Sec. 1421f, Wis. Stats. 1911, prohibits the transportation of kerosene, for pay, by express companies in express cars.

February 19, 1913.

HON. LOUIS F. MEYER,

*State Supervisor of Inspectors of Illuminating Oils.*

In your letter of the 17th, you state that sec. 1421f Wis. Stats. 1911 provides in part that:

"No kerosene oil or fluid \* \* \* which will ignite and burn at a temperature of less than three hundred degrees Fahrenheit's thermometer, open test, \* \* \* shall \* \* \* be carried as freight in any passenger, baggage, mail or express car on any railroad;"

that ordinary kerosene will ignite and burn at a temperature much below three hundred degrees Fahrenheit; that the Interstate Commerce Commission has certain regulations which permit the shipment by express of properly labeled packages containing not more than one gallon of kerosene; that it is and for years has been the custom of express companies to accept for shipment as express such packages of kerosene, and you ask if, in my opinion, there is a difference between "carried as freight" and "carried as express", sufficient to permit the shipment of such small packages of kerosene by express.

The word "freight" has several meanings and to determine in what sense it is used in any particular statute requires a careful study of the context. See the definitions in 4 Words and Phrases, 2973 et seq.

When applied to goods or merchandise as distinguished from the charge for transportation, it is defined "that with which anything is laden for transportation, orig. by water, now esp. in U. S., by land or water; lading; cargo, esp. of a vessel or of a car on a railroad. In a general sense any burden or load." Webster's Dictionary.

The term is sometimes used as synonymous with merchandise. Bouvier's Law Dictionary.

"Merchandise transported or to be transported." "Goods carried." Anderson's Dictionary of Law.

"In the United States or Canada, in general, anything carried for pay either by water or by land." Century Dictionary.

Under a law prohibiting the carrying as freight of any refined petroleum on any steamer carrying passengers a ferry boat was libeled because a truck loaded with ten barrels of refined petroleum was carried by it. *Inter alia* the court says:

"It is next contended that the statute does not apply to steam ferry boats, because it is, by its terms restricted to steamers on which the enumerated articles are 'carried as freight,' it being argued that the truck load of petroleum was not so carried. Many authorities are cited on the brief; but upon examination they are all found to relate to the word 'freight,' when used to indicate the compensation paid for the service rendered. That word, however, has another meaning. It includes the articles carried, as well as the compensation paid for carrying them. Whether the money paid for the transportation is called 'freight' or 'toll,' or 'fare,' or what not, articles belonging to one person which are transported by another person for pay on a vessel owned by him or it, are properly described by the phrase 'articles carried as freight.' Undoubtedly these barrels of petroleum were carried for pay." *The Nassau*, 188 Fed., 46

Our Supreme Court has held that "every 'express car' must be a 'freight car'" within the meaning of a statute punishing burglary of a railroad freight car. *Nicholls v. State*, 68 Wis. 416.

To hold that kerosene shipped by express is not covered by this statute would render the term "express car" as used therein mere surplusage, as it is only when "carried as freight in any passenger, baggage, mail or express car" that the statute affects it.

It is well known that any merchandise carried in an express car is transported by the express company, the charges therefor are called "express charges" and so far as there is any distinction in the designation of merchandise as between "freight" and "express" it is called by the latter name.

In my opinion, the prohibition of the statute is applicable to shipments by express.

## OPINIONS RELATING TO PEDDLERS

*Peddlers*—Transient Merchant—What constitutes under statute requiring bond.

November 7, 1911.

MR. CHAS. A. KADING,  
*District Attorney,*  
Watertown, Wisconsin.

You state in substance that a party engaged in the mercantile business in Milwaukee has opened a store in Watertown under a lease for two months only and that his employes have made statements to the effect that if the business in Watertown does not pay the proprietor will discontinue it. You ask me whether in my opinion this statement of facts would make the proprietor a transient merchant within the meaning of the statute. You further state that upon being requested to give the bond required by transient merchants this party has refused to execute such bond.

From your statement of facts I am of the opinion that you are in a better position to judge of the merits of this case than I am myself. In every case the question whether or not a merchant is "transient" within the meaning of the statute requiring him to give bond is one of fact and in case of a prosecution for failure to execute such bond the question of fact would be one to be determined by the court or a jury. In every case it would be the duty of the prosecuting officer to determine whether or not the case was one which, in his judgment, merited prosecution and such fact would necessarily be determined upon the amount and quality of the testimony which he might be able to produce to sustain his contention. Judging from the nature of the case, as stated by yourself, I should say it was a very doubtful proposition whether or not this merchant comes within the meaning of the

statute. Evidently he has opened a business in Watertown in good faith and with the intention of continuing such business provided the business continues profitable. Generally speaking this would be true of any person who opens a mercantile business. In any event the question you ask is one of fact and not of law and consequently one which this department is unable to determine.

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*Peddlers*—Bibles may be peddled as any other article of trade.

September 17, 1912.

HON. J. A. FREAR,  
*Secretary of State.*

Yours of September 16th, inquiring whether a book agent selling Bibles in homes throughout the state is obliged to secure a peddler's license, is received.

In answer I will state that our statute does not define a peddler, and it is therefore necessary to examine the decisions of the courts to determine the significance of that word.

A person may peddle a Bible as well as any other object of trade; but you do not state facts sufficient to enable me to determine whether the case in question would come under our peddler's law or whether the person in question is a peddler.

This department has held that taking orders for future delivery is not peddling, and courts have generally held that delivering articles for which orders have previously been taken is not peddling. There are decisions in England holding that where the hawking or peddling is pursued from nonmercenary and charitable motives and the profits of the undertaking are devoted to philanthropic or religious objects, the license act does not attach. See 15 Am. and Eng. Ency. of Law, 2nd ed., p. 294, and cases cited under footnote No. 3.

But, if the party in question carries the Bibles with him and goes from house to house offering them for sale and selling them and does this for a profit, it is my opinion that he is a peddler and that, unless he takes out a peddler's license, he is violating our peddler's law.

*Peddlers*—A person may be a peddler although he is selling the goods belonging to another man on commission.

September 24, 1912.

HON. DAVID H. DAVIES,  
*State Treasury Agent.*

Yours of September 18th, together with a letter addressed to you by L. E. Gettle, attorney for Willson Brothers, proprietors of Willson's Monarch Laboratory, of Edgerton, Wisconsin, dated August 12th last, has been duly received.

It appears that Willson Brothers are manufacturers of extracts, etc., and have agents out on the road selling their preparations from place to place, making spot deliveries; that the goods are never, at any stage of the business, owned by the salesmen, but are and remain the property of Willson Brothers until sold to the customer; that the salesmen are paid for their services a certain percentage of the amount of their sales; that the goods are manufactured in Wisconsin by the said Willson Brothers and sold as above stated, by them through their salesmen, who deliver to the customer.

The question submitted by you is, whether the salesmen, while traveling from house to house selling the goods as above stated, are peddlers under our statute.

Ch. 490 of the Laws of 1905, commonly termed "the hawk-er's and peddler's act," does not attempt to define the business or occupation of a hawker or peddler. We are therefore obliged to resort to such definitions as are given by the courts and lexicographers.

"Hawkers or peddlers are itinerants or traveling traders who carry goods about for sale." *People v. Baker (Mich.)*, 73 N. W. 115; *State v. Hoffman*, 50 Mo. App. 585.

Peddling has been defined in *State v. Lee*, 113 N. C. 681, 18 S. E. 713, as an occupation of an itinerant vender of goods who sells and delivers the identical goods which he carries with him, and not the business of selling by sample and taking orders for goods to be thereafter delivered and to be paid for in whole or in part upon their subsequent delivery.

A general definition which will cover the subject is: A person who travels about from place to place and from house to house offering for sale and selling articles of merchandise

which he carries. The fact that the person who travels from house to house making sales of merchandise is not the owner of the merchandise which he sells, but is the agent of another, does not alter the case. One may be a peddler, whether he sells goods belonging to himself or to another, who employs him to sell upon a salary or otherwise. In the case of *In re Wilson*, 19 D. C. 341; 12 L. R. A. 624, the court said:

“Nor does the fact that the petitioner was selling the goods of another which he himself had never purchased for sale exempt him from the operation of the act.”

In the case of *Commonwealth v. Gardner*, 7 L. R. A. 666, the court said:

“Whether the goods are the property of him by whom they are carried and offered for sale or of another who employs the seller is of no possible consequence. The business of the itinerant vender is the same in either case and so is the inconvenience and annoyance he inflicts on others.”

See also *District of Columbia v. Wilson*, 19 Wash. Law Rep., p. 337.

I am therefore of the opinion that the salesmen of Willson Brothers are peddlers and cannot lawfully carry on said business without a peddler's license.

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*Peddlers*—A baker operating a bakery need not have a license in order to sell his goods from his wagon in a near-by city.

February 24, 1913.

MR. M. E. DAVIS,

*District Attorney,*

Green Bay, Wis.

In your favor of February 20th, you state:

“A baker in the city of Green Bay operating a bakery shop sends his wagon to the city of De Pere in this county, loaded with his bakery goods and sells the same going from house to house. He says that he is working up a new route, and that he already is receiving orders from people he has met in the manner above mentioned. Is he required to have a peddler's

license? Suppose he went out with his wagon loaded with bakery goods, and went from store to store in the city selling and delivering as he went. Does that constitute peddling under our state law?"

I attract your attention to two opinions rendered by Attorney-General Sturdevant, which you will find in the Biennial Report and Opinions of Attorney-General for 1908 on pages 602 and 607. On the authority of those opinions, it is apparent that selling bakery goods in the manner you state is not "peddling."

## OPINIONS RELATING TO PUBLIC HEALTH

*Public Health—Citizenship—Requisites for Admission to State Tuberculosis Sanitarium.*

June 6, 1911.

MR. J. W. COON,  
*Superintendent State Tuberculosis Sanitarium,*  
Wales, Wisconsin.

Your letter of the 5th inst., concerning the admission of William A. Gaffney to the Wisconsin Tuberculosis Sanitarium, and enclosing a letter from Mr. J. A. Aylward, of Madison, who is the guardian of Mr. Gaffney, is received.

Sec. 1421—7, ch. 442 of the laws of 1909, provides that no person shall be admitted to the Wisconsin State Tuberculosis Sanitarium unless he has been a resident of the state for a period of at least one year preceding his application for admission. You state that Mr. William A. Gaffney is a young man twenty-five years of age who was born in the state of Wisconsin and resided here continuously until November, 1909, since which time he has been working in Chicago. Mr. Aylward is guardian of Mr. Gaffney, states in his letter to you that he knows the facts in the case and that he as such guardian consented to Mr. Gaffney going to Chicago and insists that he went there merely as a temporary matter with no thought or intention of giving up his residence in this state. You ask for the opinion of this department as to whether or not, under this statement of facts, Mr. Gaffney is eligible for admission to the Wisconsin State Tuberculosis Sanitarium.

In reply thereto I would say that the matter of residence is fundamentally a matter of the intention of the individual himself. If Mr. Gaffney left Wisconsin, as his guardian states, for the purpose of obtaining temporary employment in Chicago and with the intention of returning to Wisconsin and

maintaining his legal residence here, he is still a resident of this state and entitled to admission to the sanitarium; if on the contrary Mr. Gaffney left this state with the intention of making his permanent residence in Chicago, then he has lost his residence in the State of Wisconsin and would not be entitled to admission to the sanitarium. It is more a question of fact than a matter of law which is involved in this particular case and you as superintendent of the institution should perhaps determine the question of fact for yourself. If Mr. Gaffney and his guardian both insist that his residence in Chicago was merely for the purpose of obtaining temporary employment, it would seem that the facts would warrant the admission of Mr. Gaffney to the institution. Mr. Aylward is an honorable gentleman and as a guardian of Mr. Gaffney he must necessarily have known what the intentions of his ward were in going to Chicago and as his statement concerning the matter is very positive and explicit, it would certainly warrant your receiving Mr. Gaffney as a patient provided Mr. Gaffney corroborates the statement of his guardian.

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*Public Health—Resident—Registered Nurses*—Under ch. 346 Laws 1911, a nurse need not be a resident of the state for any particular length of time in order to be entitled to registration.

July 12, 1912.

MR. C. A. HARPER,

*Secretary Bureau of Vital Statistics.*

In your favor of July 9th you request my opinion as to the meaning of the word "resident" as used in sec. 1409a-5 (ch. 346, Laws 1911) which provides:

"Any resident of this state . . . who shall make application to the state board of health for registration as a registered nurse . . . shall be entitled to registration" etc.

You ask:

"Does the term 'resident' imply citizenship and if so, before a nurse, say from Canada, can become a registered nurse in

Wisconsin is it necessary for her to be here five years or can she gain a residence by being here one year, declaring her intention of remaining in the state?"

It seems to me that a person is a resident of this state within the meaning of those words as used in the section in question if he has "an actual location in the place in question with the intention of making it a permanent home." *Kempster v. Milwaukee*, 97 Wis. 343, 347.

I do not find that there is anything in the law that requires residence in the state for any particular length of time and this department has decided that where residence in a particular senatorial district was essential in order to be eligible to appointment as game warden in such district, that "It is possible for a person to move into a district three weeks before an appointment is made and acquire a legal residence therein." (Biennial Report & Opinions of Attorney-General for 1910, page 383, 384). The period of three weeks was mentioned in the opinion cited because that was the length of time of actual residence in the case under consideration.

It is apparent from this that bona fide residence in the state, that is, actual location here, with no present intention of leaving, is all that is required by ch. 346 of the Laws of 1911.

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*Public Health—Physicians—Medicine, practice of—Chiroprac-*  
*distists—Manicuring is not; but treating corns and bunions may*  
*possibly be, within the statutory definition of practicing medi-*  
*cine.*

September 25, 1912.

MR. FRANCIS J. ROONEY,  
*District Attorney,*  
Appleton, Wisconsin.

In your favor of September 23rd you request my opinion as to whether a person can engage in the practice of manicuring and in the treatment of corns and bunions in this state without procuring a license under the statute governing the practice of medicine and surgery, and you state that

"the party does not intend to use any of the prefixes or titles mentioned in sec. 1435f Wis. Stat., but simply wishes to conduct a business of treating feet, manicuring, etc. for compensation."

Sec. 1435f (ch. 363, Laws 1907) provides that:

“Every person shall be regarded as practicing medicine, surgery or osteopathy \* \* \* who shall for a fee, or for any compensation of any kind or nature whatsoever, prescribe or recommend for like use any drugs or other medical or surgical treatment or osteopathic manipulation for the cure or relief of any wound, fracture, bodily injury, infirmity or disease” etc.

I do not think that the “practice of manicuring” comes within the above language, but it may be a serious question whether the “treatment of corns and bunions” is not prescribing for the cure or relief of a bodily infirmity. The question may well turn on just what is done in the particular case. When a case for prosecution arises, if you are unable to determine whether what was done constitutes prescribing for a bodily infirmity within the statute, I will, on receiving a full statement of the facts, be glad to give you my opinion on the case.

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*Public Health—Registered Nurses—Citizens—Who are eligible to be registered as nurses. What constitutes citizenship.*

October 25, 1912.

ANNA J. HASWELL, R. N.,

*Secretary Committee of Examiners of Registered Nurses.*

In your letter of the 24th you state that the Committee of Examiners of Registered Nurses now in session in Madison, desires information in regard to nurses of other states who claim a residence in Wisconsin, as to their eligibility for registration here. You state that you have on file applications from nurses claiming residence in Wisconsin, but who are severally located at present in Chicago, Minnesota, Washington and Arkansas. That it is not your intention or desire to withhold certificates from them if they are legally eligible as their credentials indicate that they are, but will conform to the meaning of the law in the matter as interpreted by this department. You enclose a copy of the law relating to registered nurses, being ch. 346, Laws of 1911, and request my opinion.

Sec. 1409a—5 of the Stats. as created by ch. 346, Laws 1911, provides:

“Any resident of this state, being over 21 years of age, of good moral character, who shall make application to the state board of health for registration as a registered nurse, upon compliance with the provisions of sections 1409a—5 to 1409a—11, shall be entitled to registration” etc.

I understand that this is the section upon which you wish an interpretation. You do not state sufficient facts so that I can give you a definite reply. I would call your attention to an opinion given to Dr. Harper under date of July 12, 1912, relating to a somewhat similar question. The question of residence is quite fully discussed in an opinion found on page 323 of the Biennial Report and Opinions of the Attorney-General for 1910. Other opinions will be found in the same report upon pages 364, 383 and 503. Also in the Biennial Report of the Attorney-General for 1908, upon page 132.

The question of residence is very largely one of intention. A person may have a residence in this state although actually located for the time being in some other state. A person once having had a residence in this state does not lose that residence until he has gained a residence in some other state. The fact that he is temporarily absent from this state for business or other reasons, if not coupled with an intent permanently to remove from this state, would not cause a loss of his residence here. In the case of *Langhammer v. Munter*, 31 Atl. 300, 80 Md. 518, 27 L. R. A. 330, it was held that to constitute a residence there must be an actual home in the sense of having another home whether he intends to reside there permanently or for a definite or indefinite length of time. Residence, therefore, is a question depending upon fact and intention, and, if so, it may be applicable to a particular spot or to a whole country. A person who wanders from country to country with no intention of remaining fixedly anywhere acquires no new residence. On the other hand, one who confines his wanderings to a particular country or locality, but declines to fix himself upon some particular spot, can very properly be said to be a resident of that country or locality. Home, domicile or residence may therefore include a spot or

a wide area. Each of these words may be applied either to a house, a precinct, a ward, a county or a state. In *Lave v. Brauss*, 12 Pa. Co. Ct. Rep. 255, it was held that a person's residence is not broken by his going into another state or foreign country to seek a new abode but continues until the fact and intention unite in another abode elsewhere. In the case of *Illinois Life Insurance Co. v. Shenehon*, 109 Fed. 674, it was held that where a person resided in Illinois and went to Wisconsin because of litigation and her stay was prolonged by delay of hearing, although she engaged temporary room only and had neither made nor negotiated permanent arrangements, and her household goods were left in store in Chicago, she was not a resident of Wisconsin. In the case of *Swaney v. Hutchins*, 13 N. W. 282, 13 Neb. 266, it was held that the test of residence when a party removes from one state to another seems to be "Did he remove from his former residence with the intention of abandoning the same?" If he did so leave and in pursuance of that intention actually went beyond the borders of the state he will become a nonresident of that state and upon going into another state with the intention of residing there he will become a resident thereof.

Of course, I cannot attempt to give you all the rules relating to residence, nor state with any degree of precision what would constitute residence and what would not. A person who has never been in this state could not, of course, claim to be a resident of this state. Having once gained a residence here, the question of whether or not such residence is retained is altogether a question of intention and fact, rather than a question of law. You speak of having marked the clause as to actual residence in the state. That phrase occurs in sec. 1409a-6, as created by ch. 346, Laws 1911, and requires the committee of examiners of registered nurses at the time of their appointment to be actual residents of the state. The fact that in the same law the term resident of the state is used in one section and the term actual residence in another section would indicate that the legislature had in mind that the two terms were not synonymous. I do not understand that the question referred to by you has anything to do with any member of the committee of examiners of registered nurses.

*Public Health—Licenses—Public Officers*—The State Board of Dental Examiners have no authority to revoke a license issued by them for any reason other than as stated in sec. 1410g Stats.

November 14th, 1912.

W. T. HARDY,

*Secretary, Wisconsin State Board of Dental Examiners.*

In your letter of the 12th you ask me to advise you whether it is within the power of the State Board of Dental Examiners to revoke a license for unprofessional conduct or where the party has been convicted of a felony, or for any reason excepting the one referred to in ch. 258 of the Laws of 1909, sec. 1410i, for nonpayment of registration fees.

The only cause for which the laws of the state seem to provide that such a license may be revoked is that found in sec. 1410g of the Stats., as am. by ch. 258 of the Laws of 1909, which provides that such license may be revoked in case of failure to pay the annual registration fee. Furthermore, you will note that the only qualifications required of an applicant for a license are educational ones. There is no authority expressly given the Board by the statutes to refuse a license because the applicant has been convicted of a felony or because he may have been guilty of unprofessional conduct or for any other reason, if he passes the necessary examination and possesses the required educational qualifications. The State Board of Dental Examiners

“is a creation of the statute, and has only such power as the statute confers. It has no common-law powers.” *State ex rel. Adams v. Burdge*, 95 Wis. 390.

This case, it is true, refers to the State Board of Health, instead of the State Board of Dental Examiners, but the language used is equally applicable to the latter. The court further say:

“The powers of the State Board of Health, though quite general in terms, must be held to be limited to the enforcement of some statute relating to some particular condition or emergency in respect to the public health; and, although they are to be fairly and liberally construed, yet the statute does not, either expressly or by fair implication, authorize the board to enact a

rule or regulation which would have the force of a law changing the statute in relation to the admission and the right of pupils of a proper school age to attend the public schools. The State Board of Health had no legislative power properly so-called, and none could be delegated to it. It is purely an administrative body . . . That no part of the legislative power can be delegated by the Legislature to any other department or body is a fundamental principle of constitutional law, essential to the integrity and maintenance of the system of government established by the constitution, and repeatedly recognized and asserted by the courts."

In my opinion the State Board of Dental Examiners has no authority to revoke a license for any other reason than that stated in the statute. To allow it to revoke licenses for other causes than those prescribed by statute would be to allow it to exercise legislative functions, and would therefore not be upheld by the courts.

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*Public Health*—It is doubtful whether a department store or other similar place is a "public building" within the meaning of the rule adopted by the state board of health relating to the use of common drinking cups.

Whether or not such place is a "public building" within the meaning of ch. 440 Laws 1911, would depend upon the facts in each case.

January 6th, 1913.

DR. C. A. HARPER,

*Secretary State Board of Health.*

In your letter of the 3d you state that the question arises whether a department store, grocery store and buildings in general wherein people frequent for the purpose of carrying on trade, come under the provisions of the ruling of your board in regard to the abolishment of use of the common drinking cup; that this rule is as follows:

"That the use of the common drinking cup on railroad trains, in railroad stations, in all state buildings, other public buildings, on the street and in public parks, in the public, parochial and private schools and in other educational institutions of the state of Wisconsin is hereby prohibited;"

that the question arises whether the places of business where people are invited to trade, come under the heading "other

public buildings;" that the same question arises under ch. 440, Laws of 1911, in the words "public buildings," whether it is expected to cover such places of business herein mentioned.

Under date of October 6th, 1911, an opinion was given to Mr. Stanley G. Dunwiddie, District Attorney of Rock county, regarding the use of the term "public buildings" as used in ch. 440, Laws of 1911. It was there held that a wash room in a restaurant open for the use of the patrons would be within the meaning of this provision. The opinion also states:

"Whether or not it would include a wash room in a store, would, in my opinion, depend so entirely upon the facts in each particular case that it would be impossible to lay down any general rule. It might well be that a wash room could be maintained in a store for the use of the proprietor and his employes to which access would be given to the patrons of the store and yet which would be used so seldom by such patrons as not to be within the provisions of this act. In another store such a wash room might be so commonly used by the patrons of the store as to bring it within the provisions of the act."

I see no reason at this time to change the conclusion there reached, so far as it relates to ch. 440 of the Laws of 1911. A more serious question might possibly arise under the rule regarding the common drinking cup. In this rule you have particularly specified railroad trains, railroad stations, parochial and private schools and other educational institutions. You also specify state buildings, "other public buildings" and public schools.

Under the rule of *noscitur a sociis* it might be held that the term "other public buildings" would be construed as meaning other similar public buildings to the state buildings. The fact that you have specified trains, stations and private and parochial schools might be construed as meaning that such places were not considered as coming within the term "other public buildings." Had they been so considered it would not have been necessary to specify them.

It therefore appears to me to be very doubtful whether the term "public buildings" as used in that rule would be construed as including department stores, grocery stores and other places of that nature.

*Public Health*—The attending physician in at the birth of a child is not required to report to the health officer the inflamed condition of the eyes under subsec. 1, sec. 1409a—2, but he is required to apply the remedy to prevent blindness prescribed by the state board of health.

January 29, 1913.

MISS CARRIE B. LEVY,

*Secretary, Wisconsin State Association for the Blind,  
Milwaukee, Wisconsin.*

Yours of January 24th is received. You call my attention to the provisions of sec. 1409a—2, subsec. 1, being part of ch. 59, Laws of 1909, which provides as follows:

“Should one or both eyes of an infant become inflamed, swollen and red, and show an unnatural discharge at any time within two weeks after its birth, the nurse, parent, or *other attendant* having charge of such infant shall report in writing, within six hours thereafter, to the Board of Health of the city, incorporated village, or town in which the parents of the infant reside the fact that such inflammation, swelling, redness, or unnatural discharge exists.”

You inquire whether physicians are included in the phrase “or other attendant”. In answer, I will say that I do not believe that it was the intention to include physicians in this provision. Where general words or terms follow specific words or terms, the former are presumed to embrace only such things or persons as are of the same class as those designated by the specific words or terms. A physician comes in a different class from those enumerated; a nurse or parent is a constant attendant of a child and they are not considered capable of applying the remedy to cure the ailment of a child under consideration without directions from a physician or health officer. For that reason, they are required to notify the Board of Health and you will notice in subsection 2 it is made the duty of the health officer to inform the attending physician of the conditions and in a case where there is no attending physician, it is the duty of the health officer to employ one who is to apply the proper remedy. An attending physician would be compelled to apply the same remedy, for it is provided in the first part of subsection one, sec. 1409a—2 as follows:

“It shall be the duty of the attending physician, midwife, nurse or other person in attendance on a confinement case, to use such prophylactic treatment for the prevention of blindness among newborn children, as the State Board of Health and Vital Statistics in its rules and regulations may determine are necessary.”

In sec. 1409a—4 it is provided:

“Any person who violates, neglects, or refuses to observe the provisions of this act shall be punished by a fine of not more than \$100.00 for each offense.”

An attending physician who does not use the treatment for the prevention of blindness among new born children as the State Board of Health and Vital Statistics have determined by its rules and regulations are necessary, will be liable under this section and, of course, it is not necessary to provide that such physician shall notify the health officer and then to have the health officer again notify the attending physician to apply such treatment. Any attending physician is required under this law to apply the treatment without any special orders from the Board of Health or health officer. It seems to me that although the physician is not included in those persons enumerated who are required to serve notice on the Board of Health as to the condition of the illness, still the statute imposes upon him an obligation to apply the correct remedy so that if he does not comply with it, he may be prosecuted and punished for such violation.

## OPINIONS RELATING TO PUBLIC OFFICERS

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*Public Officers—Appropriations and Expenditures*—The compensation of the Commissioner of Banking cannot be increased during his term of office.

The legislature has no authority to appropriate money to reimburse citizens for losses by fire, where there is nothing to make it a public purpose.

March 22, 1911.

HON. A. W. SANBORN,

*Chairman Joint Committee on Finance.*

Your favor of the 21st inst. enclosing copies of Bill No. 256, A., and Bill No. 572, A., and requesting the opinion of this department concerning the same is received.

Bill No. 256, A., is a bill

“to amend sections 2016 and 2018 of the statutes relating to the regulation and supervision of banking business and making an appropriation therefor.”

You ask

“whether or not the increase in salary for the commissioner of banking therein provided would apply to the present incumbent of the office during his term thereof.”

In reply to this inquiry your attention is called to section 26 of Art. IV of the constitution of Wisconsin, which provides as follows:

“The legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services 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.”

In construing this provision of the constitution our Supreme Court has held that this provision applies to officers who re-

ceive a fixed salary from the state treasurer. *Supervisors v. Hackett*, 21 Wis. 613.

In 1902 the people of the State of Wisconsin adopted an amendment to sec. 4 of Art. XI of the State Constitution as follows:

“Section 4. The legislature shall have power to enact a general banking law for the creation of banks and for the regulation and supervision of the banking business, provided that the vote of two-thirds of all the members elected to each house, to be taken by yeas and nays, be in favor of the passage of such law.”

The first legislative action exercising the right to frame laws under the powers thus conferred is embodied in ch. 234 of the Laws of 1903 providing for the creation and maintenance of banks and the supervision of the banking business. By the terms of that law and subsequent amendments made thereto the office of commissioner of banking is created. While the amendment to the constitution does not in express terms provide for the creation of this office, it would seem that the proper administration of the banking laws contemplated by the constitution would necessarily involve the creation of the office of commissioner of banking and that such office must be considered as a constitutional office created under the express provisions of the constitution as amended, and if so, it would necessarily follow that the compensation of the commissioner of banking may not be increased or diminished during his term of office. Your attention is also directed to the opinion of the Attorney-General of the State of Wisconsin in relation to this matter found in the Biennial Report of the Attorney-General for 1908 on page 107.

Your second inquiry relates to Bill 572, A., entitled

“A Bill to preserve the public health and welfare of the forest fire sufferers of Price County and making an appropriation therefor.”

Concerning this measure you ask “whether or not public money can be appropriated for the purposes named in this bill.”

From an examination of the authorities I am convinced that the legislature has no authority to appropriate money for the

purposes named in this bill. It does not appear upon the face of the bill that the act is intended or designed to meet any such extraordinary emergency or condition as was presented at the time of the enactment of chapter 286 of the laws of 1901 entitled "An Act to relieve the city of New Richmond, Wisconsin, from its indebtedness to the trust funds and making an appropriation therefor", which act was sustained by the Supreme Court of this state in the action of *State ex rel. New Richmond v. Davidson*, 114 Wis. 563. The present act provides for the appointment of a commission to investigate the losses sustained by the fire sufferers in Price county in the year 1910 and to reimburse them for such losses to the extent of the proposed appropriation. It is difficult to conceive how the purposes of this bill are in any manner related to the public health or general welfare of the people at large. Undoubtedly the inhabitants of Price county sustained severe and perhaps overwhelming loss by reason of the forest fires of 1910 but I am unable to differentiate between the losses sustained by these people in Price county and the losses sustained by the people of any other community, village or city who may have sustained losses in the past by reason of conflagration. So far as it appears upon the face of the measure it amounts to an appropriation of public money for the benefit of private individuals and comes within the inhibition of the constitution.

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*Public Officers*—Concerning expenses of State School Inspector.

June 2, 1911.

HON. C. P. CARY,

*Superintendent of Public Instruction.*

Your favor of the 1st inst., concerning the matter of the expenses of the school inspector appointed under the provisions of paragraph 11 of section 496f of the statutes while such inspector is engaged in the performance of duty in the city of Madison, is received. You state that the state has been divided into two state graded school districts and that one of the inspectors visits the schools in the western half of the state and the other in the eastern half of the state; that the inspector who has charge of the schools in the eastern half

makes his home at Waldo, Wisconsin, for his own convenience and for his convenience in reaching the schools in his territory; that he is engaged for ten months in inspecting graded schools in this territory and that he makes no charge to the state for his expenses while at his home; that he seldom comes to Madison during the school year but that at the close of the school year it is necessary for this inspector to come to Madison for a period of four to six weeks and assist in closing up the state graded school work for the year and of making the apportionment of state aid to these schools. You ask whether you would be legally justified in approving his expense account for his maintenance while so engaged at the city of Madison.

Sec. 496f, being ch. 439 of the Laws of 1901, provides:

“The state superintendent is hereby authorized to appoint two persons of suitable qualifications to assist him in inspecting and supervising the state graded and free high schools and to aid him in giving information and needed assistance to localities in organizing such schools. Such persons shall be known as state school inspectors and shall each receive an annual salary of sixteen hundred dollars, and reimbursement for all actual and necessary traveling expenses incurred, when duly certified to by the state superintendent; said salary and expenses to be paid monthly from the general fund and to be deducted from the annual appropriation provided for in this act before the apportionment is made to the state graded schools. Said state school inspectors when not engaged in the specific duties enumerated herein may be assigned for such other duties as the state superintendent may determine and designate.”

The language of this statute is a little peculiar in that it expressly provides that the inspector shall receive his “actual and necessary traveling expenses” only. It does not say that he shall be reimbursed for all actual expenses incurred and in this respect differs from the ordinary statute providing for the expenses of state officers while engaged in the performance of duty, since it only specifies traveling expenses. However, I should be inclined to the opinion that the legislature did not intend to restrict the state high school inspector to traveling expenses merely but that the term “actual and necessary traveling expenses” might include his maintenance while traveling as well as his railroad fare, etc. However, I can see no

ground upon which I can make any distinction between the case of a high school inspector and that of any other subordinate officer occupying a position in one of the state departments. The situs of the office is at the capitol city where the department is located and while there is no law requiring such subordinate to make his home in the city of Madison, the law implies that the compensation which he receives shall cover his maintenance while on duty at the situs of the office and I am unable to interpret section 496f as in any way authorizing such inspector to charge for maintenance while on duty in the city of Madison. He undoubtedly has a right to maintain his residence at Waldo or at any other point in the state of Wisconsin and under the statement of fact made by you I am of the opinion that he would be entitled to his traveling expenses in going to and returning from his home when you assigned him to special duty under the provisions of the act at the end of the school year, but under the language of the act it is my opinion that you would not be justified in certifying to his expenses for maintenance while on duty in your office.

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*Public Officers—Counties—Duty of county officers in counties having more than one superintendent district.*

June 2, 1911.

HON. C. P. CARY,

*Superintendent Public Instruction.*

Your favor of the 1st inst. asking for an interpretation of certain provisions of ch. 433, Laws of 1909, is received. After citing the language of the law which makes it the duty of the board of supervisors in counties which have more than one superintendent district to meet and organize in the manner provided by chapter 433 of the laws of 1909 and providing for the manner in which the county treasurer and county clerk shall keep accounts of the several superintendent districts, etc., you ask whether this law is mandatory or merely directory and whether the county board of supervisors in counties maintaining two superintendent districts must comply with its provisions and organize separately when considering business pertaining to the several superintendent districts within

counties and if the county treasurer and county clerk must keep the accounts of the several superintendent districts separate as directed in such chapter.

In reply to these several inquiries I answer yes, that the language of the law is mandatory and that it is the duty of the county board to organize in the manner provided by law and the duty of the county treasurer and county clerk to keep the accounts in the manner therein provided. The law does not provide any penalty for a failure to comply with its terms and provided the county board and the other county officers ignored the provisions of the statute and conducted their school affairs in the same manner as those counties which have only one superintendent district it is difficult to see what harm would be done except that the officers would not be complying with the law. Evidently the law was designed for the purpose of defining the separate jurisdictions of the superintendents within their territory and for the purpose of keeping their expense accounts, etc., separate in order that the county board might pass upon them. The county officers are directed to keep such accounts separate and distinct and as the law is mandatory in its terms, in my opinion the supervisors together with the county treasurer and county clerk are under legal obligation to obey the mandate of the law.

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*Public Officers*—Powers of State Forester, when acting as Fire Warden under ch. 601, Laws of 1911.

July 27, 1911.

HON. E. M. GRIFFITH,  
*State Forester.*

Your favor of July 27th, asking interpretation of certain sections of ch. 601 of the Laws of 1911, is received. In it you state that section 2 of the act provides that

“The state fire warden shall have general charge of the fire warden force of the state and shall have authority to mass such fire warden force as may be available at any special point to suppress fires.”

Concerning this clause in the law you say that you are in doubt as to whether this section gives you authority to order

the town chairman and superintendents of highways, as town fire wardens, to any portion of their county or adjoining counties for the purpose of fighting forest fires, and if you have such authority under the law as state fire warden, how shall the traveling expenses and wages of the men be paid?

Replying to this inquiry would say that the law gives you authority "to mass such fire warden force as may be available at any special point to suppress fires." The question of availability is one of fact in all cases and will necessarily have to be determined by you in any emergency which may arise. The state forester as state fire warden is clothed with discretionary power in such cases and you have authority under this act to call for the services of all such wardens as may be available and their availability will necessarily be largely a matter of your own discretion, depending upon the extent of the fire. It is not a question of law which can be answered by this department. The authority is reposed in you and you will have to use your own judgment in each particular case and be governed by the necessities of the case. Should any of the parties called upon refuse or neglect to comply with your order, the question of whether or not they were available at the time will be a question of fact to be determined in each particular case and no general rule can be established, in my opinion, since their availability must be determined by the emergency and is almost entirely a matter of discretion with the state fire warden under the provisions of the act. No provision is made in the law for the payment of the town wardens in such cases. As this is a duty imposed by law upon these town officers, however, it is probable that they would be authorized to charge for their services in the same manner as for other services rendered to their respective towns in the discharge of their official duties. Whatever the legislative intention may have been, no provision is made for the payment of fire wardens except those especially enumerated in the act, and nothing can be read into the act by implication.

*Public Officers*—Deputy Commissioner of Banking not entitled to expenses while in Madison.

August 15, 1911.

HON. ALBERT E. KUOLT,

*Commissioner of Banking.*

Your favor of August 14th, 1911, is received. In it you state that the Secretary of State has refused to audit the expense voucher for the month of July, 1911, of Mr. W. H. Richards, of Black River Falls, Wisconsin, Deputy Commissioner of Banking, and that the reason for the refusal is a charge made by Mr. Richards for several days' board and lodging at a hotel in Madison, and that the Secretary of State claims that an opinion rendered by this department on April 28th, 1911, relating to the Oil Inspector, applies also to the Banking Department.

In your communication you further recite at considerable length the facts relating to Mr. Richard's case; but I am unable to perceive in your statement of facts anything which would render Mr. Richards an exception to the rule laid down by this department in the opinion rendered to the State Department concerning the Oil Inspector. In fact, the statement of facts submitted by the Oil Inspector was almost identical with that of Mr. Richards. You state that, for the purpose of examining banks systematically, you have divided the state into four districts, exclusive of Milwaukee, and that two of the examiners for your department reside by your direction in each of such districts, thereby saving to the state each week the difference between the railroad fare of eight men to Madison and the railroad fare to near the heart of their respective districts.

I do not question but that these arrangements may be for the best interests of your department and that they may result in a considerable saving to the State, although that does not necessarily follow. However, the division of the state into districts is nothing more than the exercise of a wise discretion on your part, and is not a requirement of the statute. This department does not make laws, since that is exclusively the province of the legislature. We can only deal with the law as we find it, and endeavor to give it the interpretation which the Legislature intended. Obviously, every office must have

some situs, and the statute creating your department requires that the Superintendent of Public Property shall provide the Commissioner of Banking with offices in the Capitol building, at Madison, and expressly fixes the situs of his office in the capital city. Likewise, the situs of the office of each and every one of your deputies or clerks is at your office, in the capital city. In this respect you are no differently situated than all of the constitutional officers of the state. The statutes which provide for the payment of actual and necessary expenses while absent from the office in the transaction of the business of the State apply only to those officers who are on duty away from their home office. There is no provision of the statute which permits any officer, either the head of a department or any of his appointees or employes, to collect actual or necessary expenses while at the seat of government, or, in other words, at the situs of his office.

This question was presented to the Circuit Court of Dane county in the case of *State of Wisconsin ex rel. Edward L. Tracey v. James A. Frear, Secretary of State*. In that case Judge Stevens decided that the relator could not be reimbursed from the public treasury for any expenses, unless such right was expressly given him by the statute.

This is an elementary principle of law, which has the support of many authorities.

It is well understood that no officer can collect for his expenses for board, lodging, etc., while engaged in the performance of his official duties at the situs of his office. It seems perfectly clear that the office must have a legal situs somewhere and, as your office is by statute located in the capitol building, it seems an elementary proposition that neither yourself nor any of your deputies can collect expenses while in the city of Madison. This is not a question of economy to the State: it is a question of law only and has no reference to the economical management of your department.

It necessarily follows that the opinion in the case of the Oil Inspector applies, not only to your department, but to each and every department in the state government.

*Public Officers—Compensation of Fire Wardens: How paid.*

August 15, 1911.

HON. E. M. GRIFFITH,  
*State Forester.*

You request the opinion of this department as to whether the pay and expenses of town fire wardens called into service by you under the provisions of ch. 601 of the Laws of 1911 would not come under the provisions of subsection 4 of sec. 1494—48 of the act, which provides:

“The expense of preventing or extinguishing forest, marsh, swamp or other running fires by the town or assistant town fire wardens, and by those called upon by either of said fire wardens to assist them, shall be borne by the road district or districts within which the expense was incurred.”

The language of this subsection seems to confine the expenses to be paid by the road district or districts to those incurred by the town warden or assistant town wardens and those called upon by either the town warden or the assistant town wardens, which would probably include the amount, not to exceed twenty cents per hour, provided for in subsection 2 of sec. 1494—48; as stated in my opinion addressed to you on July 27th, 1911, in reply to your inquiry of that date, the per diem or expenses of those town or district officials who are made *ex officio* town and district wardens by virtue of their office may be collected for services actually rendered, in the same manner and in the same amount as heretofore charged by such officers in the discharge of their official duties.

This act imposes upon certain officials an additional official duty and, in the discharge of that duty, such officers would, in my opinion, be entitled to charge and receive the same compensation which they have heretofore been entitled to charge by law in the discharge of their official duties.

I find no provision in the act for the payment of these officers in any other way and in that particular must adhere to my former opinion, of July 27th.

In reply to your second inquiry, concerning the payment of per diem and expenses of additional fire wardens appointed by you under the following conditions provided for in the act:

(a) In case of emergency;

(b) When the town has no highway superintendent;

(c) When the town is unusually large,

I am unable to enlarge upon the language of the act itself, which says:

“Each fire warden appointed by the state fire marshal to act in case of emergency shall receive for his actual services rendered, two dollars per day.” (Sec. 1494—48a.)

This act is singularly defective in respect to the manner of payment of fire wardens in certain cases; but, as there is no authority for the payment of per diem or expenses of fire wardens appointed by you, except as specifically provided in the act, and as the act is new and imposes upon yourself as Chief Fire Warden and upon those acting under you, entirely new duties and obligations, for which there is no authority in law for the payment or otherwise, except as provided in this act, I am unable to advise you of any manner in which these expenses can be met, unless the same are specifically provided for in the act itself.

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*Public Officers—Attorney-General—Rule of Attorney-General's department not to render opinions upon questions involved in pending litigation.*

September 25, 1911.

J. F. BAKER,

*Deputy Fire Marshal.*

I have before me your letter of September 25th, in which you state that one of the deputies in the fire marshal's department examined several persons under the provisions of sec. 1946k of the Stats., as amended in 1909, and among them one who is now defendant in an action in court; that the complaint in this action was signed by the deputy and that the deputy was sworn as a witness, but not permitted to testify, on the ground that the calling in of the defendant before the deputy in a secret examination, before a warrant was issued, to give evidence which might afterwards be used against him, was contrary to his constitutional right, which guarantees that no man can be compelled to be a witness against himself, and that a motion has also been made to dismiss the case, on the same ground.

You ask:

“Can said deputy be ruled out as an incompetent witness and, should the case be dismissed on the above grounds, thus holding the statute unconstitutional?”

You are of course aware of the fact that the opinions rendered by this department are only given force and effect when delivered to the address of the various departments of the state government or to the several district attorneys throughout the state who are entitled to ask for them officially. The obvious purpose of giving any force or effect to the opinion of the attorney-general when so delivered is to facilitate the administration of the law through the medium of official interpretation until such time as the same may be construed by a court of competent jurisdiction. For this reason it is, and I think should be the policy of the department to refrain from delivering any opinion official or otherwise concerning any question which is pending before the court. It is apparent from your statement of facts that whatever might be the opinion of this department concerning the question submitted it could only tend to confusion if made public for the reason that the question involved is now pending before the court and must there necessarily receive judicial interpretation.

For this reason and others which must be apparent from the fact that it may be the duty of this department, if called upon, to appear in court on behalf of the fire marshal to uphold this particular statute, I do not deem it advisable to give out any opinion at this time.

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*Public Officers*—Under sec. 1087—12 of the Stats., as amended by ch. 530 Laws 1911, the County Judge of Dane county may make a charge of \$5.00 for each nonresident inheritance tax proceeding, whether there be any inheritance tax or not.

The County Treasurer, in each such case, may likewise retain, for the use of the county, \$5.00 in each such estate in which it is found that no inheritance tax is due.

October 6th, 1911.

HON. JOHN HARRINGTON,

*Inheritance Tax Investigator, Wisconsin Tax Commission.*

In your letter of October 5th you ask for an opinion as to the construction of sec. 1087—12 of the Stats. as amended by

ch. 530 of the Laws of 1911. You state that there are many applications to determine the inheritance tax, if any, in the case of nonresident decedents and that a considerable number of applications are made where no tax is due and the only purpose of which is to secure the requisite order of the court authorizing the transfer of stock on the books of the corporation. You further state that it appears that in all such cases the county judge of Dane county makes a charge of five dollars for his services and that, in addition, five dollars is deducted in each case as the minimum fee due the county, thus making a total cost to the State of ten dollars in each case where no inheritance tax is paid and where the only purpose is to secure the order of the court. You ask an opinion upon the following questions:

“1. Whether the county judge is entitled to five dollars for each case, and whether he is entitled to the same charge regardless of whether the estate is one in which an inheritance tax is collected or not.

“2. Whether the county is entitled to deduct five dollars in each case where no inheritance tax is paid in the case.”

Sec. 1087—12, par. 3, as am. by ch. 530 of the Laws of 1911, provides in part as follows:

“The county court and the judge thereof at the seat of government shall have jurisdiction to hear and determine as other matters not appertaining to its regular probate business, all questions relating to the determination and adjustment of inheritance taxes in the estates of nonresident decedents in which it does not otherwise appear necessary for regular administration to be had therein.”

In an opinion given to Honorable A. G. Zimmerman, Judge of the County Court for Dane county, under date of September 15th, it was held that the phrase “other matters not appertaining to its regular probate business” was inserted by the Legislature for the purpose of bringing such business within the provision of subd. 2 of sec. 2454 of the Stats. as amended by ch. 82 of the Laws of 1911, which provides for compensation of five dollars per day to be paid to the judge of any county court which is not vested with civil jurisdiction for such time as he shall be actually engaged in the examination

of any person upon a criminal charge, or engaged upon any other matter not appertaining to probate business.

There is nothing to be found in ch. 530 of the laws of 1911 to indicate that a difference is to be made in the compensation of the county judge engaged in such work, between estates in which a tax is to be paid and those in which it appears that no tax is due.

In answer to your second question I will say that the latter part of par. 3, of sec. 1087—12, as am. by ch. 530 of the Laws of 1911, provides:

“The county treasurer shall retain for the use of the county out of all such taxes paid and accounted for, only one per cent, and the balance, less the statutory expenses of collection and adjustment as fixed by the court, shall be paid into the state treasury; provided, however, that the minimum fee to which the county shall be entitled shall be five dollars in each case and that in no case shall the maximum fee exceed five hundred dollars.”

It appears from the above quotation that the county is entitled to at least five dollars in each case. In Anderson's Law Dictionary the word “case” is given several definitions, among which is the following: “A state of facts which furnishes occasion for the exercise of the jurisdiction of a court of justice.” In volume 1 of Words and Phrases, page 985, the following definition is given:

“A case ‘is a question contested before a court of justice in an action or suit at law or in equity. The primary meaning of the word, according to the lexicographers, is *cause*. When applied to legal proceedings, it imports a state of facts which furnish occasion for the exercise of the jurisdiction of a court of justice. In this, its generic sense, the word includes all cases, special or otherwise.’ *Buell v. Dodge*, 63 Calif. 553, 554; *Kundolf v. Thalheimer*, 12 N. Y. (2 Kern.) 593, 596.”

I am informed that this matter was very thoroughly discussed before the legislative committee having charge of this particular bill, and that the purpose of the bill was to avoid payment in the future of any excessive sums to the county and that the Kennedy case, in which something like twenty-seven thousand dollars was paid to the county treasurer of Dane county, was the occasion for the amendment to the former law

and that in arriving at the one per cent basis fixed in the present law the question of reimbursing the county in all cases brought in the county court was fully discussed. In the argument before the committee it was expressly stated that the amount of work involved in determining whether or not an estate was liable for an inheritance tax was equally as great in cases which paid no tax as it was in cases where a tax was found due, and in order to obtain the order of the county court authorizing a transfer of stock such proceedings were necessary in all cases whether a tax was collected or not and that it was there agreed that in all cases the county should receive a minimum fee of five dollars. The county is necessarily put to the expense of the salary of its officers and clerks and the maintenance of the public buildings, heat and light for the county court room, etc., and it was felt that the county was entitled to some benefits in performing the extra amount of work incident to the conferring of exclusive jurisdiction upon the county court of Dane county in all nonresident inheritance tax cases. The language of the statute seems to embody this idea which, I am informed, was the unanimous expression of the committee in recommending the amendment to the law.

I am therefore of the opinion that the statute as amended should be so construed and that the minimum fee of five dollars therein provided may be retained by the county treasurer in each nonresident decedent inheritance tax case brought in the county court for Dane county whether any tax is found due the state of Wisconsin or not, in addition to the per diem charge of the county judge in each case.

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*Public Officers*—Duty of District Attorney to represent State Game Warden when State is interested in action but not otherwise.

October 18, 1911.

MR. M. E. DAVIS,  
*District Attorney,*  
Green Bay, Wis.

Replying to your favor of Oct. 17th would say that it is considered to be part of the official duties of the district attorney to represent any department of the state government

in actions in which the state is a party or in which state officials are interested in their official capacity. It has been the custom heretofore for district attorneys to represent the game warden in all local prosecutions. An action of replevin is a civil action and if instituted by a game warden in his own name it is doubtful whether it would be the duty of the district attorney to represent him in such proceeding unless the property to be replevined was claimed to be property of the State of Wisconsin. Your statement however is not sufficiently full to enable me to determine whether or not this property is claimed to be the property of the state or otherwise. Unless the warden is acting under the direction of the state fish and game warden and the property in dispute is claimed to be the property of the state, I should not consider it the duty of the district attorney to appear in the matter in his official capacity. You say that in commencing civil actions the sheriff and clerk of the court charge their fees to the attorney who commences them. I do not know of any authority in law for clerks or sheriffs making any such charges and I should not consider the attorney liable in such cases unless he obligated himself to pay such fees. If the fees in question relate to the replevin action instituted by the game warden the sheriff and clerk should look to such warden for their fees and probably are entitled to demand their fees in advance of the service of processes. If the action is instituted in the circuit court the clerk is, of course, entitled to demand the state tax and two dollars advance fees at the time of filing the papers and these fees should be paid by the plaintiff in the action.

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*Public Officers—Barbers Board*—Barber holding permit may run shop and apprentice holding permit may work therein under secs. 1636—24 and 1636—25.

November 16, 1911.

MR. J. A. SHANKS,

*Secretary, Barbers Board of Examiners.*

Sec. 1636—24, Wis. Stats., being ch. 54 of the Laws of 1907, relating to barbers, examination, etc., provides in part that "Any person desiring to obtain a certificate of registration under this act shall make application to such board therefor,

pay to the treasurer of said board an examination fee of one dollar, present himself at the next regular meeting of the board for the examination of applicants, and if he shows that he has studied and practiced the trade for two years" either as an apprentice or in a properly conducted barber school or has practiced the trade for at least two years in this or other states and that he is possessed of the requisite skill in such trade to properly perform all the duties thereof, etc., and has sufficient knowledge concerning the common diseases of the face and skin to avoid the aggravations and spreading thereof in the practice of said trade, his name shall be entered by the board in the register provided therefor "and a certificate of registration shall be issued to him authorizing him to practice said trade in this state." This section further provides that:

"All persons making application for examination under the provisions of this act shall be allowed to practice the occupation of barbering until the next meeting of the board and the board shall issue him a permit authorizing him to practice such trade until the next meeting of the board."

You ask whether under the provisions of this section a barber holding a permit has the right to conduct a shop for himself without securing the services of a registered barber.

In reply to this query I am of the opinion that any person to whom a certificate of registration has been issued by the board as provided may conduct a shop for himself without securing the services of a registered barber from the time of the issuing of such certificate until the next meeting of the board.

You ask further whether the board has authority to refuse to issue a further permit secured under this section on failure of the applicant holding such permit to pass the examination before the board.

In reply to this inquiry I answer yes. The certificate only authorizes such applicant to practice barbering until the next meeting of the board at which time he is required to appear for examination and of course if he should fail to pass such examination the board would be justified in refusing to grant a license and the permit theretofore issued would not authorize the holder to practice barbering after such examination.

You ask further:

“Can an apprentice holding an apprentice permit practice the trade under a barber holding a permit secured under sec. 1636—24 above referred to?”

It is provided in sec. 1636—25, in part, as follows:

“Nothing in this act shall prohibit any person from serving as an apprentice in said trade under a barber authorized to practice the same under this act.”

Any barber holding a permit from the board such as is provided for in sec. 1636—24 is “a barber authorized to practice under the provisions of this act” and in my opinion an apprentice holding an apprentice permit may practice the trade under a barber holding such permit.

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*Public Officers—Corporations*—Under ch. 335, Laws 1907, the State Board of Forestry is not required to pass upon the engineering problems or the method of mechanical construction of the proposed dams or reservoirs.

The Wisconsin Valley Improvement Co., in establishing the Rice Storage reservoir, is acting under a franchise “heretofore authorized.”

November 18th, 1911.

HON. E. M. GRIFFITH,  
*State Forester.*

In your letter of the 11th instant you state that the State Board of Forestry has instructed you as Secretary of the Board to request from me an opinion as to the authority of the Board, under the provisions of section 6, chapter 335, laws of 1907, to authorize the Wisconsin Valley Improvement Company to establish the Rice Storage Reservoir, and also as to whether the above cited law gives the Board the right to pass upon the plan, form and location of any dam that is built by the Wisconsin Valley Improvement Company for storage purposes.

You further state that early in October this company, through its secretary, Mr. G. D. Jones, of Wausau, notified the

State Board of Forestry that it had acquired the lands necessary for flowage purposes and that it had commenced the construction of the Rice Storage dam; that the company petitioned the Board to approve the appraisal of the Railroad Commission of certain state lands required for flowage purposes, but did not include in its petition the request that the Board sanction the building of the dam or the creation of the reservoir, holding upon advice of its attorneys that the dam and reservoir were being established under the provisions of a franchise formerly granted to the Tomahawk River Improvement Company.

I have examined the records in the office of the Secretary of State and find that on September 22nd, 1892, articles of organization of the Tomahawk River Improvement Company, bearing date September 21st, 1892, were filed. The purposes and business of the company are stated in said articles to be the improvement of the Tomahawk river from the mouth thereof in the city of Tomahawk to the foot of the dam of the Minocqua Dam Company across said river, in sections 10 and 15, township 39, range 6, and also of the north branch of said Tomahawk river from its junction with the main Tomahawk river to section 34, township 41, range 6 east; and driving of logs and timber in and upon said streams and the erection and maintenance of booms and dams in said streams and their tributaries to aid and facilitate the driving and handling of logs and timber in and upon the same and for manufacturing and hydraulic purposes and such other business as shall be in aid and furtherance of the purposes above mentioned.

Under the general laws of the state the formation of corporations for such purposes was authorized at the time of the filing of these articles. Corporations formed for such purposes were further authorized to take lands for flowage purposes, under the right of eminent domain.

Chapter 335 of the laws of 1907 is an act to authorize the Wisconsin Valley Improvement Company to construct, acquire and maintain a system of water reservoirs located on the tributaries of the Wisconsin river north of the south line of township 34 north, for the purpose of producing a uniform flow of water in the Wisconsin river and its said tributaries and thereby improving the navigation and other uses of said streams and diminishing the injury to property, both public and private.

Among the provisions of said chapter are the following:—

“All franchises, other than corporate franchises, and all riparian rights and rights of flowage, either perfected or inchoate acquired by purchase or grant, by any person or by any corporation organized to improve the navigation for any purpose, of either of said Wisconsin or Tomahawk rivers or any of their tributaries, not above excepted, shall be and hereby are made assignable to the Wisconsin Valley Improvement Company, and shall be of the same force and effect in the possession and ownership of such assignee to accomplish the purposes of this act as the same may be before assignment to accomplish their original purpose.”

Section 6 of said chapter provides in part:

“No dam or reservoir not now in existence or heretofore authorized shall be constructed or created until the plan therefor showing the form and location of the dam and a description of the lands to be overflowed thereby be first submitted to the state board of forestry and approved thereby, after first giving reasonable notice and opportunity to be heard, to all persons interested, by publication in one or more newspapers most likely to give such notice, or such other notice as the board shall deem advisable.”

In my opinion this phrase would include not only dams or reservoirs authorized by special act of the legislature but also such dams or reservoirs as had been theretofore authorized under existing statutes which would include dams or reservoirs authorized under the general laws of the state at the time of the organization of the Tomahawk River Improvement Co. The question is not altogether free from doubt and it is possible that the courts might construe the phrase differently from the construction which I have placed upon it, but in my opinion the legislature intended by the enactment of this particular statute and the use of the phraseology quoted to except from the operation of the statute any and all improvements theretofore authorized whether by special act of the legislature or under the general laws.

I am also of the opinion that it was not the intention of the legislature to impose upon the forestry board the responsibility of supervising either the engineering or mechanical construction of such dams as might thereafter be constructed. It is scarcely conceivable from the language of the act that the legislature intended to impose this responsibility upon the board

by the use of such general language as that employed in section 6 of the act which only goes to the extent of providing that "no dam or reservoir not now in existence or heretofore authorized shall be constructed or created until the plan therefor showing the form and location of the dam and a description of the lands to be overflowed thereby be first submitted to the state board of forestry and approved thereby" after giving notice, etc. The mere use of the word "form" in this section cannot, in my opinion, be construed as charging the board of forestry with the duty or obligation of solving all the intricate problems of engineering and mechanical construction involved in the erection of the great dams necessary to an adequate storage supply to enable the Wisconsin Valley Improvement Co. to carry out the purposes of the act.

I therefore advise you (1) that the Wisconsin Valley Improvement Co., in establishing the Rice Storage reservoir, is acting under a franchise "heretofore authorized" under the general laws of the State of Wisconsin, and, (2) that in approving the plans for the future construction of dams or reservoirs the state board of forestry is not required to pass upon the engineering problems or the method of mechanical construction of such dams or reservoirs.

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*Public Officers*—Construction of sec. 12, Art. IV, Wis. Constitution.

Member of assembly not eligible to appointment to office created by Legislature during the term for which he was elected.

December 6, 1911.

HON. JAMES A. FREAR,  
*Secretary of State.*

In your communication you submit to this department for determination three distinct propositions, and in view of their importance I desire to dispose of them explicitly in their order.

Your first proposition relates to the opinion heretofore given to your department concerning a member of the live stock sanitary board. You say, with reference to this matter:

"Your favor of the 4th inst. in reference to the live stock sanitary board received and I ask you if a similar construction

will be had in two other cases which have been called to my attention and which are herewith submitted."

In view of your suggestion as to whether or not the other two questions are to receive a similar construction I deem it my duty to suggest that in my opinion the question concerning the live stock sanitary board was entirely dissimilar to either of the questions submitted in your present inquiry. To be specific, your inquiry relating to the sanitary board was as follows:

"The question has been presented to me whether or not a member of the live stock sanitary board elected under ch. 637, Laws of 1911, who at the time was a member of the state legislature, would be authorized to draw a per diem from the state for services upon such board."

This query was answered in the affirmative for the reason that the live stock sanitary board was in existence long prior to the session of the legislature of 1911 or the election of the members of such legislature and the particular member referred to had been appointed to membership upon such board prior to his election as a member of the legislature of 1911 and the only amendment made to the law relating to the live stock sanitary board which had any bearing upon the eligibility of such member did not create the office in question nor increase the emoluments thereof except to the extent of increasing the number of days for which such member could draw a per diem for services from sixty to one hundred and under the decision of the Wisconsin supreme court in the case of *State ex rel. Ryan v. Boyd*, 21 Wis. 210, in which the court interprets section 12 of Art. IV of the State constitution, there could be no possible question as to the eligibility of such member to retain his membership on the live stock sanitary board, and the only possible question which could arise would be whether or not he would be entitled to draw a per diem for the additional number of days in any one year. In the case above referred to the court says, in its opinion:

"The creation of the new office or increase in the emoluments of an old one must have taken place prior to the appointment or election of the member to such new office or existing one to bring the case within the (constitutional) prohibition."

See also Opinion of Attorney-General on page 451 of the Biennial Report of 1910 and authorities there cited.

Inasmuch as the sanitary board was already in existence at the time of the legislative session of 1911 and the member referred to had been appointed to membership on such board prior to the session of the legislature of 1911, I am clearly of the opinion that your inquiry concerning the live stock sanitary board should have been answered as it was, in the affirmative.

The second proposition stated in your communication is as follows:

“By ch. 458, Laws of 1911, the legislature passed an act in reference to the grain and warehouse commission. The question has arisen whether or not a member of the legislature of 1911 appointed on the board subsequent to the passage of said chapter is in any way subject to the constitutional objection.”

I assume that this inquiry relates to the eligibility of Mr. Nye, member of the assembly of 1911 from Douglas county, Wisconsin. I base this assumption upon the fact that Mr. Nye has applied to this department requesting that the attorney-general assume the defense of an action in quo warranto which I am informed has been brought against him as such member of the grain and warehouse commission. Inasmuch as this action has been commenced and is now pending in court, I must decline to render any opinion concerning the same since it is a rule in this department not to render opinions concerning matters actually in litigation, for the reason that such opinions, if rendered, would be of no value in determining the question at issue and might seriously embarrass the department in cases where it is the duty of the attorney-general to appear in such litigation on behalf of the state or its officers. I think you will agree with me that this is the only proper course to be pursued by this department concerning questions involved in litigation or pending before the courts. I suggest, however, as a proper course to be pursued by the state department in such matters, that the accounts of individuals whose title to office is in controversy for salary or expenses should be withheld from audit until such litigation is terminated.

The most important question submitted by you relates to the act of the legislature creating the Wisconsin Industrial Commission and is stated by you as follows:

“Under this act the law creating the labor bureau was repealed from and after September 1, 1911. Prior to such repeal and subsequent to the adjournment of the legislature a member was appointed deputy labor commissioner under the old law. Subsequently he was reappointed by the commission under the new law.”

You ask whether this appointment is in conflict with the constitutional provision, to wit, sec. 12 of art. IV above referred to. The constitutional provision referred to is as follows:

“No member of the legislature shall, during the term for which he was elected, be appointed or elected to any civil office in the state which shall have been created, or the emoluments of which shall have been increased, during the term for which he was elected.”

In construing this clause of the constitution the Wisconsin supreme court, in the case of *State ex rel. Ryan v. Boyd*, 21 Wis. 210, in its opinion says: “When a new office is created or the emoluments of an old one increased while a person is a member of the legislature, such person cannot, during the time for which he was elected, be appointed or elected to the office he has had an agency in creating or rendering more profitable.” Mr. Justice Story, in commenting upon a similar provision in the constitution of the United States, says:

“The reasons for excluding persons from office who have been concerned in creating them, or increasing their emoluments, are to take away as far as possible any improper bias in the vote of the representative, and to secure to the constituents some solemn pledge of his disinterestedness.” Story’s Com. on Const. Sec. 864.

Applying this rule above stated to the facts stated in your letter of inquiry we find that the position to which you refer was expressly created by ch. 50 of the Laws of 1911. The act creating the position was enacted by the legislature of 1911. The term of office of the members of the legislature of 1911 does not expire until January, 1913. From your statement it appears that a member of the legislature which enacted this

law and created this particular position has been appointed "during the term for which he was elected" to an office which was created by the legislature of which he was and is a member. The conclusion seems irresistible that he comes strictly within the prohibition of the constitution and that his appointment to such position would be null and void from the beginning. It follows that he has not and never had any right to draw a salary from the state as such appointee. The authorities of our own and other states are practically unanimous upon this proposition. I cite in support of the question a few of the cases as follows: *State ex rel. Ryan v. Boyd*, 21 Wis. 210; *State ex rel. Bashford v. Frear*, 138 Wis. 536; *State v. Sutton*, 65 N. W. R. 262; *Shelby v. Elkhorn*, 72 Amer. Dec. 169; *State ex rel. Polk v. Galusha*, 104 N. W. R. 197; *Fyfe v. Mosher*, 112 N. W. R. 725; *State ex rel. Chealander v. Carroll*, 106 Pac. R. 748.

It is a matter of sincere regret that I am compelled to a conclusion so serious in its consequences to a public officer, but the duty of this department is imperative to interpret the law as we find it fearlessly and impartially and in the question submitted by you the express prohibition of the constitution and its interpretation by our own supreme court admit of no alternative.

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*Public Officers—Construction of ch. 204, Laws of 1911.*

State Board of Dental Examiners has discretion to allow examination of candidate who is not a graduate of Dental College prior to Dec. 31, 1911.

December 19, 1911.

MR. W. T. HARDY,

*Secretary, State Board of Dental Examiners.*

You ask for the opinion of this department upon the question of whether or not the board of dental examiners has discretion in admitting a candidate to take an examination who is not a graduate from a reputable dental college.

In reply to this inquiry I am of the opinion that the board has certain discretionary powers concerning the admission of candidates to take an examination prior to December 31, 1911: Sec. 2 of ch. 204 of the Laws of 1911, provides in part that:

"Prior to December 31, 1911, the board shall admit to such examination any graduate of a reputable dental college or den-

tal department of a university who shall file with the secretary of the board credentials proving to the satisfaction of the board that he has a general education equivalent to that demanded for entrance to the junior class of an accredited high school."

Sec. 1 of the Act provides that after December 31, 1911, no person shall be examined by the board for a license to practice dentistry in this state who shall not file with the secretary of the board certain credentials therein provided for. Sec. 1 appears to be mandatory concerning the qualifications of applicants for examination after December 31, 1911, and sec. 2 of the Act was evidently designed to lodge certain discretionary powers with the board prior to that date and sec. 2 is mandatory concerning the application of certain graduates possessing qualifications therein specified. These candidates, however, are required to present credentials establishing their eligibility to such examination "to the satisfaction of the board." This clearly gives the board certain discretionary powers concerning the qualifications of the applicant and it cannot be assumed that the legislature intended to bar individuals who may have been equally well qualified to practice dentistry but who are not graduates of some dental college. In my opinion the provisions of sec. 2 are mandatory upon the board concerning the qualifications of applicants who are graduates of a reputable dental college or a dental department of a university, but that the board may in its discretion admit other applicants who, in the opinion of the board, are equally well qualified for the practice of the profession.

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*Public Officers—Stationery, Supplies, etc.*—The State Veterinarian and Live Stock Sanitary Board are not entitled to books and periodicals under the provisions of Sec. 1492e Stats.

That section does entitle them to such equipment as is reasonably necessary to enable them to perform the duties imposed upon them by law.

July 1, 1912.

HON. O. H. ELIASON,  
*State Veterinarian.*

In your letter of June 28th you state that you have great need of the following equipment: A few authoritative works

on contagious diseases among domestic animals, veterinary and agricultural periodicals, one or two hypodermic injection outfits, rubber gloves and a revolver. You state that the last named articles are for use in connection with your field work. You also state that the Superintendent of Public Property declines to honor your requisition for the above mentioned equipment unless supplied with my written opinion to the effect that you have legal authority for ordering such supplies through him, under sec. 1492e, par. 3 (ch. 637, Laws of Wisconsin of 1911), which provides as follows:

"The superintendent of public property is hereby instructed to furnish the state veterinarian and live stock sanitary board with a suitable office in the capitol building and with the necessary stationery, postage stamps, office supplies and equipment,"

and you ask whether, in my opinion, you are entitled to such supplies.

This department has quite consistently held that the various departments of the government are not entitled to books or periodicals, in the absence of a statute especially mentioning them. I am therefore of the opinion that, as to the works on contagious diseases among domestic animals and veterinary and agricultural periodicals, the Superintendent of Public Property would not be authorized to furnish them.

In a conversation with you relating to the hypodermic injection outfit, rubber gloves and revolver, you stated that these articles are necessary in order to enable you to perform the duties required of you by law.

The word "equip" is defined by Webster as follows:

"To furnish for service, or against a need or expediency; to fit out; to supply with whatever is necessary to efficient action in any way; to provide with arms or an armament, stores, munitions, rigging, etc., as ships or troops."

And he defines "equipment" as

"Whatever is used in equipping."

In volume 3 of Words and Phrases, p. 2432, the term "equipment" as applied to a charitable or benevolent institution is defined as

"The visible, tangible furniture, fixtures, and apparatus on the premises which are usual and necessary for the operations therein conducted."

In my opinion, under the provisions of the statutes quoted, you are entitled, upon proper requisition, to be furnished by the Superintendent of Public Property with such articles as are reasonably necessary to enable you to perform the duties imposed upon you by law. If the articles named by you are reasonably necessary for that purpose, and you state to me that they are, then the Superintendent of Public Property should furnish them to you upon your requisition.

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*Public Officers—Eligibility—Oils and Oil Inspection*—The acceptance, by the brother of a deputy oil inspector of the agency for an illuminating oil, does not render such deputy ineligible to hold the office under sec. 1421k, Stats.

July 3, 1912.

HON. LOUIS F. MEYER,

*State Supervisor of Inspectors of Illuminating Oils.*

In your letter of to-day you give the following statement of facts:

“The brother of a deputy oil inspector, whose inspections during the term of one year exceed fifteen hundred barrels, lives in the same city in which the deputy resides. The said brother of the deputy has been offered the agency in that city for one of a number of competing oil companies.

“It is apparent that the brother’s acceptance of such agency would subject the deputy of this department to considerable criticism from the friends of the other oil companies, if not from the public at large. I may explain that persons interested in the various oil companies make frequent efforts to induce the deputies of this department to commend or criticise, as the case may be, certain commercial brands of oil. I seriously object to any such activity on the part of the deputies, holding that their duty ends in this respect when they have tested and made public records of the tests of the various oils inspected by them. In other respects I expect the deputies to maintain a neutral position,”

and you ask whether, in such a case as that cited, the acceptance of the oil agency by the brother would operate under the provisions of sec. 1421k of the Stats. to render the deputy ineligible for his office.

Sec. 1421k of the Stats: provides in part as follows:

“No inspector shall, during his term of office, traffic, directly or indirectly, in any oil used for illuminating or heating purposes or be interested in any manner whatever in the manufacture, refining or sale of such oil, and any inspector violating any of the provisions of this section shall be removed from office immediately upon proof of such violation and be liable to a fine of not less than one hundred dollars nor more than five hundred dollars; provided, that these provisions in regard to dealing in oil shall not apply to deputies whose inspections during the term of one year shall not exceed fifteen hundred barrels.”

In my opinion, the mere fact that the brother of an inspector accepts the agency for an oil company would not of itself show that the inspector was trafficking, directly or indirectly, in such oil, or that he was interested in any manner in the sale of such oil, within the meaning of those terms as used in the section referred to. It can hardly be said that a person is “interested,” in the sense in which that term is used in the statute, in any article which the members of his family may be selling. Should the brother accept such agency, I can well see that it might be improper for the deputy to inspect the particular oil which the brother is selling. I can also understand that it would be preferable to have deputies none of whose relatives were in any way engaged in the handling of such oil, but I do not believe that the statute intends to prohibit the relatives of deputies from dealing in that commodity. I believe, too, that you are taking the proper stand regarding the commending or criticising of any brand of oil by your deputies. Of course, in the case mentioned by you, the deputy ought not to make any comments upon the brand of oil handled by his brother.

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*Public Officers—Education—Teachers' Insurance and Retirement Fund—County Treasurer's Fees—County Treasurer not entitled to 2 per cent fees under sec. 719 in paying over money received under ch. 323, Laws 1911.*

July 12, 1912.

HON. A. H. DAHL,

*State Treasurer.*

In your favor of July 3rd, you enclose letter received from the county treasurer of Milwaukee county in which he asks whether all moneys arising in Milwaukee county for the account of the teachers' insurance and retirement fund (ch. 323, Laws 1911) are to be turned over to the state treasurer or whether sec. 719, Wis. Stats. is applicable.

Ch. 323, Laws of 1911, provides for the retention of a certain per cent from the salaries of teachers in the public schools, the sums so retained to be forwarded annually by the town, village or city treasurers to the county treasurers who "shall transmit to the state treasurer all moneys which he has received from the treasurers of the towns, villages and cities in accordance with the provisions of this act; and shall certify under oath to the board of trustees of the teachers' insurance and retirement fund the amount so received and transmitted to the state treasurer, as herein provided." (Sec. 460—9, par. 8, ch. 323 Laws of 1911).

Sec. 719, Wis. Stats., provides:

"The county treasurer shall retain two per cent for fees in receiving and paying into the state treasury all moneys received by him payable to the state treasurer except state taxes."

While this language is general, I think that the provisions of ch. 323, Laws of 1911—the later law—prevail. It is obvious from the words in sec. 460—9, par. 8 above quoted—"the amount so received and transmitted"—that the same sum is to be transmitted by the county treasurer as was received by him, i. e., without any deduction, so that even if the general language of section 719 would include such a special fund as this, I think it clear that the legislature did not intend that there should be any deduction by the county treasurer.

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*Public Officers —State—Forestry —Railroads—Contracts —*  
Neither the state nor any of its officers, in his official capacity, is authorized to execute contracts of guaranty.

A railroad company is not obliged to execute a contract authorizing a forest ranger to use a railway velocipede upon its tracks.

It is the duty of a railroad company to patrol its right of way after each train when that is necessary to prevent forest fires.

July 18, 1912.

M. A. CASTLE,

*Chief Clerk, State Board of Forestry.*

In your letter of the 17th, you state that your department has secured permits from various railroads authorizing your forest rangers to patrol the railroad tracks in times of danger from forest fires, on railway velocipedes, and that your employes have signed an agreement releasing the railroad from any claim for damages from accidents that might occur through such use of the velocipedes; that recently you deemed it necessary for one of your employes, Mr. J. H. Krumm, to extend his patrol beyond the point covered by his permit; that you applied for an additional permit to the Soo Railroad and that they sent you a new form of agreement, which seems to you unnecessarily stringent in its requirements. You inclose a copy of the old form of agreement and also one of the new form and ask my opinion as to the advisability of your asking Mr. Krumm to execute such an agreement as is contained in the new form.

In the old form of agreement, which is to be signed by the forest ranger alone, he agrees as follows:

"Now, therefore, in consideration of said license or permission, the undersigned does hereby for himself, his heirs, beneficiaries and personal representatives, release and discharge the Minneapolis, St. Paul and Sault Ste. Marie Railroad Company from all claims and causes of action for damages that may arise, accrue to, or be sustained by him or them or either of them, on account of personal injury or death resulting from the use of a gasoline or hand velocipede upon the tracks of said railway company, whether such action may result from the negligence of said railroad company, or its employees, or otherwise."

The new form submitted to you appears to be a tripartite agreement, to be signed by the railway company, the State Board of Forestry and the forest ranger. The agreement upon the part of the State Board of Forestry and the ranger are as follows:

"Section 2. J. H. Krumm further agrees not to allow any other person or corporation to take, use or be a passenger upon said speeder on any part of the Soo Company's trackage.

“Section 3. It is expressly understood that the exercise of all rights herein granted by the Soo Company shall be at the sole risk of J. H. Krumm, and the said J. H. Krumm further agrees to indemnify said Soo Company and save it harmless against all loss and damage to its property, passengers or employes or to the person or property of any other person or corporation that is occasioned in any manner, either directly or indirectly, by said J. H. Krumm’s use of said speeder; that this section shall apply irrespective of the question of negligence of one, any or all of the parties hereto.

“Section 4. In consideration of the benefits conferred on it by the license herein granted, the State Board of Forestry of Wisconsin agrees to all the provisions herein, and hereby guarantees the due observance and performance of all things to be done or not to be done by J. H. Krumm, its forest ranger.”

I do not know of any authority under which the State Board of Forestry as such can enter into any contract of guaranty such as this appears to be. This board is merely one of the departments of the state government. It cannot bind the State by any such contract as this. Whether or not the individual members of the board might be personally bound is a question upon which I do not pass.

As to the advisability of your asking Mr. Krumm to execute an agreement of this kind, that, of course, is something upon which I do not care to pass. The duties of this department are to advise as to the legal phases of such matters, but not as to the advisability of entering into a contract or not entering into it.

I would suggest that you call the attention of the railroad company to par. 7 of sec. 1494—57 of the Stats., as am. by ch. 494 of the Laws of 1911. This paragraph provides as follows:

“All such corporations, during a dangerously dry season, and when so directed by the state board of forestry, shall provide fire patrols for duty along their tracks. Whenever the state board of forestry shall deem it necessary they may order such corporations to provide for patrolmen to follow each train throughout such districts as may be necessary to prevent fires. When the state board of forestry has given a corporation such notice that in its opinion the conditions require such patrol after trains, the corporation shall immediately comply with such instructions throughout the districts designated; or, in their failure to do so, the state board of forestry may employ patrolmen, and furnish them with the necessary equipment to

patrol the rights of way of such corporations, and the expense of the same shall be charged to the corporation and the same may be recoverable in a civil action in the name of the state of Wisconsin, and in addition thereto, the said corporation shall be deemed guilty of a misdemeanor. It is also made the duty of such corporation, acting independently of such state board of forestry, to patrol their rights of way after the passage of each train when necessary to prevent the spread of fires, and to use the highest degrees of diligence to prevent the setting and spread of fires, and it is also made the duty of its officers and employes operating trains in this state, to use diligence in the extinguishment of fires set by locomotives or found existing upon their respective rights of way, and any negligence in this regard shall render such corporation or any officer or employe thereof guilty of a misdemeanor."

Of course, the railroad company is not obliged to grant permission for the use of such a velocipede upon its tracks. When it does grant such permission, it may be upon such terms and conditions as it sees fit to impose. It would appear, however, from the provisions above quoted that it is the duty of the railroad company to patrol its tracks at its own expense whenever, in the opinion of the Board of Forestry, conditions are such as to render such patrol necessary, in order to prevent fire.

It appears to me that, in entering into a contract such as those heretofore entered into, the Board is really providing for doing, at the expense of the State, work a part of which, at least, might well be required of the railroad company itself. This being so, it seems to me that, upon the attention of the railroad company being called to these provisions, it will be very glad to grant permits upon the same terms as formerly.

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*Public Officers—Barbers Board*—The members of the Barbers Board are entitled to three cents per mile for each mile traveled in attending meetings of the Board only.

When traveling in the performance of their duties, other than attending such meetings, they receive for such travel only their actual expenses.

August 7, 1912.

STATE BOARD OF PUBLIC AFFAIRS.

In your letter of the 6th, you ask whether chapter 523 of the Laws of 1909 includes the Barbers' Board, whose moneys are

not paid into the state treasury and who do not draw money out of the state treasury.

In reply thereto I would state that ch. 523 relates expressly to accounts and claims against the State when payment thereof is provided by law to be paid out of the state treasury. The funds of the Barbers' Board are all handled by the treasurer of said board and no part can come out of the state treasury. For that reason I do not think that this section applies to claims by members of the Barbers' Board. In my opinion, however, all such claims should be audited by the Secretary of State. He is made ex officio auditor, by art. VI, sec. 2, of the Const. and, in the case of *State v. Hastings*, 10 Wis. 525, it was held that this duty cannot be transferred to another.

You also ask:

"Does the term, as used in sec. 1636—21, 'three cents per mile for each mile traveled in attending the meetings of the board' limit the members of the Board to three cents per mile in traveling to meetings only, or are they entitled to three cents per mile for traveling, whether to meetings or in the performance of all other duties of the Board?"

Sec. 1636—21 provides:

"Each member of said board shall receive a compensation of three dollars per day and actual expenses for actual service, three cents per mile for each mile actually traveled in attending the meetings of the board, which compensation shall be paid out of any moneys in the hands of the treasurer of said board; provided, that the said compensation and mileage shall in no event be paid out of the state treasury."

In my opinion the members of said board are entitled to the three cents per mile for travel only in attending the meetings of the Board, and if in the performance of their duties they are required to do traveling other than in attending meetings of the Board, then they can only receive for such travel the amount actually expended by them.

You further ask:

"If they are entitled to three cents per mile, are they entitled also to 'three dollars per day and actual expenses for actual service'?"

They would not be entitled to both the three cents per mile and also to the amount actually expended for travel. They would be entitled to their compensation of three dollars per

day and actual expenses necessarily incurred by them other than traveling expenses when attending meetings of the Board. At other times they would be entitled to the compensation of three dollars per day and actual expenses, including the expenses for travel.

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*Public Officers—Powers and Duties*—Board of control has no power to enter into a contract with a company to collect excessive freight and express charges, and pay a certain per cent of the money collected as compensation for such work.

August 10, 1912.

HON. M. J. TAPPINS,

*Secretary State Board of Control.*

Yours of the 7th is received, together with a proposed contract, or agreement, between the Interstate Service Commission of St. Louis, Mo., and the Wisconsin State Board of Control.

You state that the Interstate Service Commission of St. Louis, Missouri, advises your Board that it finds from investigation that a number of large shippers have been charged excessive rates by the railroad and express companies and that it is the opinion of that company that your department has paid excessive freight and express charges; that the said Interstate Service Company has agreed to take the paid freight and express bills of your department and make an investigation of the charges that have been paid and secure a refund for your department of the excessive charges paid, on condition that they receive fifty per cent of the amount so collected.

You ask me to examine the copy of the agreement and advise you whether there is anything in the law that would prohibit you from making such an agreement.

In answer I will say that I find no statute that would authorize your Board to make an agreement with a company of this nature. Such an agreement would necessarily involve some legal work, and under the constitution and laws of this state the legal work for your department must be done by the Attorney-General's department. I am of the opinion that this contract would be illegal and could not be entered into by the State Board of Control.

*Public Officers—Passes—Villages*—A village officer cannot legally use a pass, even though employed by a railroad, except in the performance of his duties as such employe.

August 14, 1912.

HON. L. B. NAGLER,

*Assistant Secretary of State.*

In your letter of August 9th you inclose a letter from Professor T. W. MacQuarrie, village clerk of the village of North Hudson, and ask for an official opinion upon the matters therein set forth.

Professor MacQuarrie's letter states in substance that practically every able-bodied man in the village of North Hudson, with the exception of himself and two saloonkeepers, is employed by the railroad company; that it is practically impossible to secure officers for the village unless railroad men are included, and he asks whether the anti-pass law would prevent such railroad men, if elected or appointed as officers of the village, from using passes.

Sec. 4552a of the Stats., as am. by ch. 486 of the Laws of 1905, provides:

“No person, association, copartnership or corporation shall offer, or give, for any purpose, to any political committee, or any member or employe thereof, to any candidate for, or incumbent of, any office or position under the constitution or laws, or under any ordinance of any town or municipality, of this state, or to any person at the request or for the advantage of all or any of them, any free pass or frank, or any privilege withheld from any person, for the traveling accommodation or transportation of any person or property, or the transmission of any message or communication.

“No political committee, and no member or employe thereof, no candidate for and no incumbent of any office or position under the constitution or laws, or under any ordinance of any town or municipality, of this state, shall ask for, or accept, from any person, association, copartnership, or corporation, or use in any manner, or for any purpose, any free pass or frank, or any privilege withheld from any person, for the traveling accommodation or transportation of any person or property, or the transmission of any message or communication.

“Any violation of any of the above provisions shall be punished by imprisonment in the state prison not more than five years nor less than one year, or by fine not exceeding one

thousand dollars, nor less than two hundred dollars. \* \* \*

“The term ‘free pass’ shall include any form of ticket or mileage entitling the holder to travel over any part of the line or lines of any railroad issued to the holder as a gift or in consideration, or partial consideration, of any service performed or to be performed by such holder, except where such ticket or mileage is used by such holder in the performance of his duties as an employe of the railroad issuing the same.”

It follows from this that railroad companies are forbidden to give to village officers, and such officers are forbidden to receive, a pass, even though such pass be given as partial consideration for services performed or to be performed, except that such officers may accept and use such passes in the performance of their duties as employes of the railroad. That is to say, they cannot use such passes for their own benefit, but merely where their duties as such employes require them to ride upon the railroad.

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*Public Officers—Duties—Criminal Law—District Attorney—*

It is the duty of the District Attorney to conduct a prosecution under sec. 4608 Wis. Stats.

August 20, 1912.

DR. C. A. HARPER,

*Secretary State Board of Health.*

In your favor of August 16th you enclose a copy of letter from Dr. F. M. Hawley, Health Officer of the village of Minocqua, Wisconsin, from which it appears that the local board of health of Minocqua passed and published an ordinance providing that

“no person \* \* \* shall deposit nor maintain in any street \* \* \* nor on private property, any garbage \* \* \* or horse manure without providing a suitable covered receptacle or box for the same”,

that a certain liveryman maintains a manure pile on his property near the public sidewalk and not far from an occupied residence; that the liveryman ignores notices from the health officer to remove the manure; that the district attorney and vil-

lage attorney each say that the other is the proper person to conduct a prosecution; and you request my opinion as to what official should upon complaint made institute proceedings against the liveryman.

Sec. 4608 of the Wis. Stats. provides:

“Any person who shall wilfully violate any law relating to the public health, for which violation no other penalty is prescribed, or any order or regulation of any board of health lawfully made and duly published, shall be punished by imprisonment in the county jail not more than three months or by fine not exceeding one hundred dollars.”

If it is desired to prosecute under this statute I am clearly of the opinion that it is the duty of the district attorney to conduct the prosecution. By the terms of sec. 4608 itself, the violation of an order of a board of health is placed on the same footing as the violation of “any law relating to the public health.”

A violation of sec. 4608 “is a misdemeanor punishable as other offenses of that nature in the name of the state.” *Stallman v. Lake*, 124 Wis. 462, 466.

Subsec. 2 of sec. 752, Wis. Stats., makes it the duty of the district attorney “to prosecute all criminal actions” with certain exceptions, of which the instant case is not one. Probably section 4608 was not called to the attention of the district attorney, or he would have appreciated his duty in the matter.

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*Public Officers—Passes—Railroads—Criminal Law*—An agent of the railroad who is also an officer of this state may use a frank but only while acting as such agent in the performance of his duty as such agent.

August 23, 1912.

HON. S. W. RANDOLPH,  
*State Senator.*

Yours of August 22nd, together with a frank issued to you as agent for the Erie Railroad Company between the points on Western Union lines in the United States during the year 1912, is received. You inquire whether it is in violation of

our statutes for you to use the said frank, which is to be used only for business of your transit line, you being an employe of the Erie Railroad Transit Line.

In answer to your inquiry I will say that my predecessor in office the Hon. L. M. Sturdevant rendered an opinion to the Honorable John Barnes, Chairman of the State Railroad Commission, July 25th, 1905, on the question as to whether a public officer may use a frank or pass given him by a railroad while he is an employe of said company. You will find this opinion in the Biennial Report and Opinions of the Attorney-General for the year 1906, on page 448. On page 451 he says:

“The question still remains whether a railway employe who is also a public officer, municipal officer or member of a political committee can receive and use such transportation and whether railway corporations can give the same to such employe who also holds a position under the laws of this state. The statute does not distinguish in this exception between employes who are public officers and those who are not, and I am inclined to the opinion that it includes those who are public officers, members of political committees, etc., as well as those who are simple employes, but that the use of such transportation by public officers who are also railway employes must be limited to the actual performance of duties as such. As illustration I think and have held that a physician who is a member of a library board and also the physician for a railway company, and a notary public who is also a railway employe, may each use free transportation, but only in the actual performance of their duties as such employes, and that railway companies may lawfully issue transportation to such persons for such purposes, and I regard this as but a reasonable interpretation of the intent of the Legislature in passing these acts.”

See also note to sec. 11 of art. XII of the Const. of Wisconsin, relating to passes and franks, and especially the case there cited of *Dempsey v. N. Y. C. & H. R. R. Co.*, 146 N. Y. 290.

The ruling of my predecessor on this question is still the ruling of this department, as no changes have been made in the law.

*Public Officers—Duties—District Attorney—Duty of District Attorney to prosecute assault and battery cases in circuit court.*

August 30, 1912.

MR. FRANK H. HANSON,  
*District Attorney,*  
 Mauston, Wis.

You ask whether it is the duty of the district attorney to prosecute assault and battery cases in the circuit court in view of the provisions of sec. 752, Wis. Stats., and the language of the supreme court in *Bartell v. State*, 106 Wis. 342.

Sec. 752 makes it the duty of the district attorney:

“1. To prosecute or defend all actions \* \* \* civil or criminal, in the circuit court of his county, in which the state or county is interested or a party \* \* \* ” “2. To prosecute all criminal actions except for common assault and battery \* \* \* before any magistrate in his county \* \* \* when requested by such magistrate.”

This language seems clearly to make it the duty of the district attorney to prosecute assault and battery cases in the circuit court, but in the *Bartell* case the supreme court said:

“The law does not impose upon district attorneys the duty of prosecuting a person charged with the offense of assault and battery. They are expressly exempted from it by subd. 2 of sec. 752, Stats. 1898.” *Bartell v. State*, 106 Wis. 342, 345.

I have examined the briefs of counsel in the above case and find that the brief for the plaintiff in error contains the following statement on page 7 thereof: “While the district attorney was not obliged to prosecute a common assault and battery under R. S. 1898, sec. 752,” yet, etc.; and on page 6 of the brief for defendant in error, it was said: “It is conceded by counsel for plaintiff in error that the district attorney was not obliged to prosecute cases of this kind under sec. 752, Stats. of 1898.” It thus seems probable that the court was misled by the concessions and arguments of counsel as to the true construction of sec. 752. Possibly the court intended its language to be confined to the duty of the district attorney to prosecute assault and battery cases in the municipal court of Waukesha county, which was the court from which the case came to the supreme court, and did not mean

to pass on the question of the duty of such officer to prosecute such cases in the circuit court. But in either event, I am of the opinion that the language of the court cannot be taken literally—cannot be the true construction of sec. 752, and that it is the duty of the district attorney to prosecute assault and battery actions in the circuit court, pursuant to the first subd. of sec. 752.

You also ask whether it is the duty of the district attorney to prosecute in the circuit court an assault and battery action which has been tried in justice court by counsel privately employed, and then appealed to the circuit court, the district attorney having no notice that such a case is in existence other than the notice given by the filing of the appeal papers in the circuit court.

The manner in which the district attorney acquires knowledge of the pendency of a case which it is his duty to prosecute does not seem to me important. Knowing of such a case he should proceed as in any other matter within the scope of his official duty.

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*Public Officers—Powers and Duties—State Board of Barbers Examiners—Attorney-General—*The State Board of Barbers Examiners has no power to employ attorneys.

It is the duty of the attorney-general to advise such board.

September 5, 1912.

STATE BOARD OF PUBLIC AFFAIRS.

In your favor of August 27th you request my opinion as to whether the State Board of Barbers Examiners have the right to expend money out of their receipts for the employment of attorneys and whether the attorney-general is the attorney for this board and will act for them if called upon.

In an opinion rendered by Attorney-General Gilbert, under date of November 27, 1907, and which you will find in the Biennial Report and Opinions of the Attorney-General for 1908, on page 871, it was decided that in the absence of express statutory provision conferring authority upon the regents of the university to employ legal assistance, there was no such authority. I do not find any express authority so conferred upon the State Board of Barbers Examiners and be-

lieve that in accordance with the opinion referred to they therefore have no such power. The same opinion with reference to the regents of the state university held that it was the duty of the attorney-general to act for that board. I see no reason to differentiate the state board of Barbers Examiners from the Board of Regents in this particular. In addition I find that the attorney-general has on several occasions advised the State Board of Barbers Examiners and in a letter by Attorney-General Gilbert to the secretary of that board, under date of May 23, 1907, and published in the Biennial Report and Opinions of the Attorney-General for 1908, on pages 589 and 590, it was stated that "the law made it a part of my official duty to advise the Wisconsin State Barbers Board of Examiners." I see no reason to doubt the correctness of this statement.

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*Public Officers—Eligibility—Sealer of Weights and Measures—Civil Service Commission—City Sealer, appointed pursuant to Sheboygan special charter, holds office until expiration of his term although ch. 566 Laws 1911 provides for such appointment from an eligible list prepared by the civil service commission.*

September 5, 1912.

HON. F. E. DOTY,

*Secretary Civil Service Commission.*

In your letter of August 30th, you state that pursuant to sec. 1661, as am. by ch. 566, Laws of 1911, your commission prepared a list of eligibles for the position of sealer of weights and measures in the city of Sheboygan; that under the provisions of the special city charter of that city such an officer had been appointed in April, 1911, for the term of two years, and you request my opinion as to whether it is within the jurisdiction of the commission to authorize the retention of the present incumbent, or whether an appointment must now be made from the eligible list, the present incumbent not being one of those who qualified for the position.

The city charter of Sheboygan provides for the appointment of a "sealer of weights and measures" by the mayor for the term of two years. See sec. 8, title 2, and sec. 15, title 3, ch. 124, Laws of 1887, as am. by ch. 245, Laws of 1889, and

276, Laws of 1891. Such office is thus a legislative—not a constitutional—office and one of which the legislature may change the term or compensation, and such change “will apply as well to the officers then in office as to those to be thereafter elected.”

*State ex rel. Martin v. Kalb*, 50 Wis. 178, 183.

“The compensation of municipal officers or their terms of office can be changed, or the office can be abolished altogether.”

*State ex rel. Risch v. Trustees*, 121 Wis. 44, 48.

Sec. 1661, as amended, does not expressly amend or repeal this charter provision, but provides that

“There shall be a city sealer of weights and measures in all cities having a population of more than five thousand inhabitants \* \* \* who shall be appointed by the mayor from a list to be furnished by the state or local civil service board, and under the rules of said board.”

But such a general law may apply to a particular city without in terms mentioning its charter. *Raymond v. Sheboygan*, 76 Wis. 335, 339. The legislative intent that section 1661, as amended, should apply to all cities in the state within its terms seems clear from the provisions of secs. 1, 3 and 9 of ch. 566, the last section providing:

“Nothing contained in sec. 3 of this Act shall interfere with present incumbents of any office in a department or bureau of weights and measures heretofore created and presently existing in any city of the first class.”

See *State ex rel. Faber v. Hinkel*, 131 Wis. 103, 106—7.

Under the city charter the sealer of weights and measures holds his office until his successor is appointed (see sec. 15, title 3, ch. 124, Laws of 1887, as amended). Unless the enactment of ch. 566, Laws of 1911, operated to abolish the office created by the charter so that upon the passage and publication of such amendment there was no longer any such charter office, it seems evident that the incumbent continues to hold, at least to the extent of his term, until his successor is appointed under the new law. In the absence of some express reference to the city's special charter, I do not think that the passage and publication of chapter 566 operated to immediately abolish the office of “sealer of weights and measures” provided for by such charter, and thus to leave the city with-

out any such officer until an eligible list could be prepared by your commission and appointment made therefrom. It seems more in harmony with the legislative intent that chapter 566 should be construed to supersede the charter provision in such a way as to interfere as little as possible with the city's affairs. Of course, a new appointment could not be made *under the charter provision* after your commission had furnished a list of eligibles provided for by chapter 566, and possibly it is the duty as well as within the power of the mayor to make an appointment from such list as soon as it is furnished. But in the absence of such an appointment, I am of the opinion that the incumbent of the charter position may legally hold his office until the expiration of the two-year term for which he was appointed.

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*Public Officers—Expenses—State Treasury Agent—Sec. 1583 Wis. Stats. (ch. 634, Laws 1907)* provides salary of \$2,000.00 for State Treasury Agent and his assistant and provides for traveling expenses of the State Treasury Agent and provides 10% fee for deputies.

September 10, 1912.

STATE BOARD OF PUBLIC AFFAIRS.

In your favor of August 28th, you request my opinion as to the expenditure authorized by sec. 1583, Wis. Stats. being ch. 634, Laws of 1907. This section provides:

“There shall be paid out of the state treasury \* \* \* the sum of \$2,000 annually, which shall be in full for salary of the state treasury agent and his assistant, together with his actual and necessary traveling expenses incurred in the performance of his duties, and to the deputy agents 10% of the licenses actually collected and turned into the state by them.”

Sec. 1583 prior to its amendment by ch. 634, Laws of 1907, provided that the treasury agent should receive fees as compensation on condition that such fees “shall not produce a net salary \* \* \* in excess of \$2,000 per annum after deducting \* \* \* the necessary office and traveling expenses.” I think that the 1907 amendment was not designed to reduce such compensation but was intended merely to change it from a fee to a salary basis, and in my opinion

therefore this section allows to the treasury agent his traveling expenses in addition to the salary provided.

While it may be argued that since sec. 1580, Wis. Sta's. (sec. 11, ch. 490, Laws 1905) provides that the assistant "may perform such duties as are required of the treasury agent", he should therefore be allowed the same traveling expenses as the treasury agent himself, the answer is that sec. 1583 does not so provide, but seems carefully worded to prevent such construction. Had it been desired to provide for the traveling expenses of the assistant, the statute should have used the word "their" instead of "his" in the sixth and seventh lines of section 1583. There being thus no provision for the traveling expenses of the assistant or the deputies, I am of the opinion that none can be allowed them. I do not think that the \$2,000 is intended to cover the salaries, traveling expenses and the 10% allowed the deputies, but it seems to me that the section is authority for the payment of \$2,000 salary to the state treasury agent, his actual necessary traveling expenses in addition thereto, and to the deputy agents 10% of the licenses collected; that is, \$2,000 is not the total and maximum amount that may be paid out under the authority of section 1583.

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*Public Officers—Eligibility—Assessor of Incomes*—The assessor of incomes may be appointed to make a reassessment of property pursuant to sec. 1087—45 and may receive therefor, in addition to his salary as assessor of incomes, the same compensation that any other person would receive therefor.

September 12, 1912.

WISCONSIN TAX COMMISSION.

In your favor of September 9th you request my opinion as to whether an assessor of incomes appointed pursuant to sec. 1087m—8 (ch. 658, Laws of 1911) is eligible for appointment under sec. 1087—45 (ch. 259, Laws of 1905) to make a reassessment of property in an assessment district, and if so, whether he may lawfully receive for his services rendered in making such reassessment compensation in addition to his salary as assessor of incomes.

Sec. 772a (ch. 445, Laws of 1901) provides for the election by the county board of a county supervisor of assessments.

Sec. 772c provides that his compensation shall be a per diem fixed by the county board, and provides that such board may limit the number of days for which he shall receive compensation.

Sec. 1087—45 (ch. 259, Laws of 1905) authorizes the tax commission, upon complaint made, etc., to order a reassessment of the property in any assessment district "to be made by one or more persons to be appointed for that purpose by said commission." Secs. 1087—52 and 1087—53 recognize that the supervisor of assessments may be appointed to make the reassessment and the last named section provides that "the person or persons making such reassessment \* \* \* shall receive compensation for their services \* \* \* at such rate not exceeding five dollars per day" as may be fixed by the tax commission, and that the time that the supervisor of assessments, if appointed to make the reassessment, "shall be engaged in such reassessment \* \* \* shall not be taken or considered as any part of the time devoted to the general duties of his office." Sec. 1087—55 provides that the compensation of the person making such reassessment shall be paid out of the state treasury but shall constitute a special charge against the district so reassessed and be collected therefrom in the next levy of state taxes.

Sec. 1087m—8 (ch. 658, Laws of 1911) provides for the division of the state into assessment districts and the appointment by the tax commission of an assessor of incomes for each district, his salary to be fixed (sec. 1087m—9) by the commission and paid out of the state treasury. Sec. 1087m—25 abolishes the office of county supervisor of assessments and provides that "the assessor of incomes shall \* \* \* in addition to the duties and powers herein imposed and conferred upon him, perform all the duties and possess all the powers heretofore imposed and conferred by law upon the said county supervisor of assessment," and the same section requires him to "make such reports to the commission, to the county board of review and the county board of supervisors and perform such other duties as the commission shall direct."

The general rule that must govern this situation is well established. The supreme court of Wisconsin has said that "a person accepting a public office with a fixed salary is

bound to perform the duties of the office for the salary and no very nice distinctions should be indulged in as to what are and what are not official duties. But the rule, nevertheless, has its limit. It does not follow that a public officer is bound to perform all manner of public services without compensation because his office has a salary attached to it. Nor is he in consequence of holding an office rendered legally incompetent to discharge duties which are extra official outside of his official duties as prescribed." *Kollock v. Dodge*, 105 Wis. 187, 198; *Baron v. Beckwith*, 142 Wis. 519, 526.

In an opinion by Attorney-General Gilbert, published in the Biennial Report and Opinions of the Attorney-General for 1910, on pages 604 to 606, it is said:

"Because one is a state official or employed to perform certain specific duties or to perform such duties as are assigned to him by his superior officer, it does not follow that he cannot be employed in other capacities even by the state, when the duties of the two positions do not conflict, where the law does not require him to perform the duties of the second employment and where the duties of the additional position or employment do not interfere with his successful performance of the duties of the first."

And it has been said that the best test whether any particular work is within the scope of an officer's official duties is "whether he could be compelled to perform the extra duty for which he seeks extra compensation". Opinions of Attorney-General for 1910, page 599. Or, as the supreme court said in the *Kollock case*, page 197, "A common test of whether a service is official or not official is whether it may be lawfully performed by another."

The assessor of incomes can be under no obligation to make a reassessment of property unless the making of such reassessment was within the official duties of the county supervisor of assessments, to whose duties the income tax assessor has succeeded. The statute clearly recognizes that the county supervisor of assessments was a proper person to be appointed to make a reassessment, but it is equally clear that his authority to make such a reassessment was referable not to his office as supervisor of assessments but solely to the appointment by the tax commission to make such reassessment. Such appoint-

ment was not an appointment to office (*State, ex rel. v. Daniels*, 143 Wis. 649, 653), but was an employment separate from his office as supervisor of assessments and I see no reason to doubt but that he had as much right to refuse such appointment and the duties connected therewith as any other person to whom an appointment might be tendered. If then there was no obligation on *him* to accept the appointment to make the reassessment there can be none on the assessor of incomes merely because he has succeeded to the former's duties. "The person or persons making such reassessment" being entitled to compensation not exceeding five dollars per day, there is, under the authorities previously quoted, no reason why the former county supervisor of assessments or the present assessor of incomes, merely because of their incumbency of office, may not receive the statutory compensation for the special services rendered the same as would any other appointee.

It may be suggested that the assessor of incomes is required to "perform such other duties as the commission shall direct" and that therefore the reassessment of property may be required of him as a part of his official duties. But it is obvious that the words "other duties" cannot be given such broad construction. Certainly it would not be claimed that under the authority of such clause the tax commission might require services from the assessor not in any way pertaining to the enumerated duties of his office. As said by the supreme court of Utah, "The general words 'other duties' \* \* \* must be restricted to mean other duties of similar character with the duties indicated in the previous provision." *State ex rel. v. Eldredge*, 76 Pac. (Utah) 337, 340. The making of a reassessment of *property* can scarcely be said to be a duty of a character similar to the assessment of incomes when the assessment and reassessment of *property* is by law placed in the hands of an entirely different corps of officers and appointees.

I am, therefore, of the opinion that the making of a reassessment of property pursuant to sec. 1087—45 is no part of the duty of the assessor of incomes, but that he may lawfully accept an appointment to make such reassessment and when so appointed is entitled in addition to his salary to the same compensation that any other person would receive therefor.

*Public Officers—Fees—Register of Deeds*—Articles of Incorporation are an instrument within sec. 764 entitling a register of deeds to fees for recording the same and sec. 1772 (ch. 341 Laws of 1911) provides an additional fee of 25c for forwarding a certificate of such recording to the secretary of state.

September 17, 1912.

MR. CHARLES E. BRIERE,  
*District Attorney,*  
Grand Rapids, Wis.

In your favor of September 14th, you request my opinion as to what fees a register of deeds is entitled to receive for recording articles of incorporation. Sec. 1772, Wis. Stats. (ch. 341, Laws of 1911) provides that a certified copy of such articles shall be recorded by the register of deeds, etc., and that

“The register of deeds shall forthwith transmit to the secretary of state a certificate stating the time when such copy was recorded, and shall be entitled to a fee of twenty-five cents therefor, to be paid by the person presenting such papers for record.”

Sec. 764, Wis. Stats., provides that the register of deeds shall receive

“For entering and recording any deed or other instrument, ten cents for each folio and three cents for every necessary entry thereof in the tract index when kept.”

I think that there is no question but that articles of incorporation are included under the term “instrument” as used in this section. Judicial definitions of the word show that it is all comprehensive and the supreme court of Indiana has said: “The word ‘instrument’ is frequently employed in our registry laws and usually refers to some written document that is entitled to be recorded in a public record.” *State, ex rel. v. Phillips*, 62 N. E. (Ind.) 1214.

Prior to the enactment of ch. 507, Laws of 1905, amending subd. 7 of sec. 1772, there could thus be no question but that the register of deeds was entitled to the same fees for recording articles of incorporation as for recording any other instrument. Ch. 507, Laws of 1905, first brought into the law the requirement that the register of deeds should transmit to the

secretary of state a certificate stating the time when the copy of the articles was recorded in his office, and it seems to me clear that the twenty-five cents fee which the statute says the register shall be entitled to "therefor" was clearly intended to compensate such register for making and transmitting the required certificate, and was not intended to provide the sole fee to which he should be entitled for recording the articles as well as transmitting the certificate to the secretary of state.

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*Public Officers—Fees—Game Wardens*—Game wardens may collect the fees of constables when performing the same duties such as serving warrants, etc.

September 19, 1912.

GEORGE E. O'CONNOR,  
*District Attorney,*  
Eagle River, Wisconsin.

In yours of the 16th, you submit the question whether game wardens may legally charge and collect the same fee as do constables for travel and service of warrants in making arrests of violators under the fish and game laws of this state.

You call my attention to sec. 1498c, as amended by ch. 525 of the Laws of 1909, which provides that the warden and his deputies have full authority to execute and serve warrants and process issued by any justice of the peace, etc.

You also call my attention to ch. 3 of the Laws of 1911, which provides as follows:

"Section 4549g. Except as specifically authorized by statute, no officer or employe of the state shall, directly or indirectly, receive or accept any sum of money, or anything of value, for the furnishing of any information, or performance of any service whatever relating in any manner to the duties of such officer or employe. Any person violating this section shall be punished by a fine of not less than twenty-five nor more than one thousand dollars, or more than six months imprisonment in the county jail, or by both such fine and imprisonment."

But there is another statute providing as follows:

"Section 2959. When a fee is allowed to one officer the same fee shall be allowed to other officers for the performance of the same services, when such officers are by law authorized to perform such services."

Our Supreme Court has decided in the case of *Musback v. Schaefer*, 115 Wis. 357, 360, that this section applies

“Only where either of two officers may legally perform a particular act and a fee is specifically allowed to one and not to the other,”

and that the fee is made incident to the service, so that it may be rightfully claimed by the officer performing the same.

You will thus see that the game warden is authorized to perform the same service as a constable or sheriff in some cases and that under this section he is specifically authorized to take the fee provided for a constable or sheriff. It therefore comes within the exception of said ch. 3 of the Laws of 1911, where it provides “except as specifically authorized by statute.” As the game wardens are thus specifically authorized by statute to accept the same fees that constables are, I am inclined to the opinion that they are entitled to the same fees for the performance of the services for which constables may receive fees.

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*Public Officers—Appropriations and Expenditures*—State officers or appointees cannot charge expense account while in city of Madison under any circumstances.

October 3, 1912.

HON. JAMES A. FREAR,  
*Secretary of State.*

I have your favor of the 2nd inst. enclosing correspondence and expense account of H. L. Terry, State High School Inspector. From the enclosed letter it appears that Mr. Terry has removed outside of the city limits of the city of Madison, at least temporarily, and that his expense account contains items for hotel bills incurred in the city of Madison. You state that the items referred to were disallowed by your department and stricken out from a former expense voucher, but that Mr. Terry desired to appeal from that decision, and you request the opinion of this department as to whether or not the action of the state department in disallowing these items was justified.

In reply to your inquiry, would say that there is nothing in this case to decide as the matter has already been repeatedly passed upon by this department to the effect that no official or employe can lawfully charge for expenses for board or lodging incurred in the city of Madison. This decision is not based upon the fact of whether or not such officials or employes reside in the city but upon the fact that the capitol city is the domicile of the office or position and that the law does not contemplate payment of expenses other than the salary at such domicile. Very many of the officials and employes upon the pay roll do not, as a matter of fact, reside in the capital city and if one person could collect expenses in Madison under any circumstances whatever, it would follow that all of them could do the same thing.

I am of the opinion that you were justified in disallowing the items referred to.

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*Public Officers—Oil and Oil Inspection*—Superintendent of Public Property is not required to furnish magazines, pamphlets or periodicals to the Oil Inspector which pertain to his line of work.

October 10, 1912.

MR. W. L. ESSMANN,

*Superintendent of Public Property.*

In answer to yours of October 8th, in which you inquire whether you are required under the laws of this state, on the requisition of the Oil Inspector, to supply his department with magazines, pamphlets or periodicals pertaining to the line of work of said department, I will say that I find no law which would authorize you to do so.

In an opinion rendered by this department to Mr. Dexter Witte, Chief Deputy Oil Inspector, under date of February 29, 1912, it was held that the superintendent of public property was not required to supply said department with the current numbers of the National Petroleum News in connection with the office equipment, supplies, etc., provided for by law. I still adhere to said opinion and must advise you that you are not authorized to furnish the Oil Inspector with magazines pamphlets and periodicals pertaining to his line of work.

*Public Officers*—The offices of chairman of a town and member of the assembly are not incompatible and may be held by one person at the same time.

November 15, 1912.

E. P. GORMAN,

*District Attorney,*

Wausau, Wisconsin.

You inquire whether a chairman of a town who has been elected member of the Assembly may still act as chairman of the town while he is serving his term as Assemblyman: in other words, whether the two offices are incompatible.

In answer I will say that I find nothing in our statute prohibiting the holder of one of these offices from holding the other. Neither have I found any decisions of a court of last resort which would lead me to believe that the two offices may not be held by one person. The nature and the duties of the two are not such as to render it improper, from considerations of public policy, for one person to retain both. I am therefore of the opinion that the two offices are not incompatible.

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*Public Officers*—A Superintendent of a county asylum cannot legally purchase for such institution groceries from a corporation in which he is one of the stockholders.

November 21, 1912.

FRANCIS J. ROONEY,

*District Attorney,*

Appleton, Wisconsin.

Under date of November 19th, you inquire whether it is lawful, under the provisions of sec. 4549 of the Stats. of 1898, as am. by ch. 282 of the Laws of 1909, for the superintendent of the Outagamie County Asylum for the chronic insane to purchase groceries from the S. C. Shannon company, a corporation in which the superintendent is a stockholder.

The language of section 4549 is:

“Any officer, agent or clerk of \* \* \* any county \* \* \* or in the employment thereof, or any officer, regent, treasurer, secretary, superintendent, clerk or agent of any penal, correc-

tional, educational or charitable institution instituted by or in pursuance of law within this state, or any member of any body or board having charge or supervision of such institution, who shall have, reserve or acquire any pecuniary interest, directly or indirectly, present or prospective, absolute or conditional, in any way or manner in any purchase or sale of any personal or real property or thing in action or in any contract, proposal or bid in relation to the same or in relation to any public service \* \* \* made by, to or with him in his official capacity or employment \* \* \* shall be punished by imprisonment in the county jail not more than five years or by fine not exceeding five hundred dollars."

Our Supreme Court has held that a contract entered into in violation of the terms of this statute is not voidable, but absolutely void. *Qualey v. Bayfield Co.*, 114 Wis. 108, 115.

A stockholder in a private corporation has an interest in the contracts of the corporation.

See cases cited on pp. 742—4 Biennial Report and Opinions of the Attorney-General for 1906.

I must therefore answer your question in the negative: i. e., that the contracts in question are in violation of sec. 4549 and are unlawful.

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*Public Officers—Eligibility*—A city sealer of weights and measures, appointed under the civil service law, is not authorized to appoint a deputy.

December 9, 1912.

HON. J. Q. EMERY,

*Ex Officio Supt. of Weights and Measures.*

In your favor of December 4th, you request my opinion as to whether a city sealer of weights and measures, who has been duly appointed to that position pursuant to the provisions of the civil service law, may appoint as deputy a person who has not passed a civil service examination for the position.

The rule as to the authority of a public officer to appoint a deputy is well stated as follows:

"In those cases in which the proper execution of the office requires on the part of the officer the exercise of judgment or discretion, the presumption is that he was chosen because he

was deemed fit and competent to exercise that judgment and discretion, and unless power to substitute another in his place has been given to him he cannot delegate his duties to another." Mechem Public Officers, sec. 567.

That the duties imposed upon the city sealer of weights and measures by sec. 1661 (ch. 566, Laws of 1911) require the exercise of judgment and discretion and are not merely ministerial seems entirely clear from a reading of the section. In addition, the requirement that the appointee must be selected from a list "furnished by the state or local civil service board" would seem to indicate a legislative intent that the duties of the office are to be performed only by a person who possesses the qualifications deemed requisite therefor, and as shown by being placed on an eligible list after examination by the civil service commission. I am, therefore, of the opinion that the law does not authorize a city sealer of weights and measures to appoint a deputy and still less one who is not certified as qualified after examination by the civil service commission.

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*Public Officers—County Board*—Where register of deeds is on a salary, the county board may not during his term provide for the payment of a salary to his deputy.

December 10, 1912.

MR. N. O. VARNUM,  
*District Attorney,*  
Hudson, Wisconsin.

In your favor of December 7th you request my opinion on the question of whether, where the method of compensating the register of deeds has been changed from the fee to the salary system, the county board may, during the term of a register, provide for the payment of a salary to a deputy register.

The case of *Etsell v. Knight*, 117 Wis. 540, answers your question in the negative.

*Public Officers—District Attorneys*—District attorney may not legally, as agent, write insurance upon county buildings.

December 12, 1912.

O. H. BRUEMMER,

*District Attorney,*

Kewaunee, Wisconsin.

In your letter of the 6th you ask whether you, as a county officer, have the right under the law to take insurance on county property as an agent for insurance companies.

Sec. 692 Stats. prohibits any county officer from being

“a party to or in any way or manner interested, either directly or indirectly, in any contract or agreement whatever, verbal, written or otherwise, with the county for the purchase of any article whatever required by such county.”

You would certainly be interested in the proposed contract of insurance. There may be some question as to whether such a contract, being one for the purchase of indemnity against loss or damage by fire, is a contract for the purchase of an “article.” Were I in your place, however, I should give the public the benefit of every doubt, and not take any chances of its not being so construed.

Sec. 4549 Stats. as am. by ch. 282 of the Laws of 1909, provides:

“Any officer \* \* \* of any county, \* \* \* who shall have, reserve or acquire any pecuniary interest, directly or indirectly, present or prospective, absolute or conditional, in any way or manner, \* \* \* in any contract \* \* \* in relation to any public service, \* \* \* shall be punished,” etc.

Under this section my predecessor held that a county clerk is prohibited from being employed, for compensation, as janitor or as purchasing agent for the county.

Biennial Report and Opinions Attorney-General 1910, p. 588.

Also that a contract for printing ballots cannot be let by the county to a company in which the district attorney is a director and stockholder.

Biennial Report and Opinions Attorney-General 1908, p. 779.

In the latter opinion Attorney-General Gilbert said:

“You are the district attorney of Ashland County and as such it is your official duty to advise the county officers in regard to

their official duties. You are asked by the clerk as to the legality of the contract which he is contemplating entering into for the county with the company in which you are pecuniarily interested. He has a right to ask your advice and to procure your counsel in entering into this contract, and it is your duty to give such legal aid in the making of said contract. It seems to me to be in violation of the statute quoted and also in violation of the general principle that an attorney cannot be interested in both sides of a controversy in which he is engaged to render legal services."

This language so modified as to meet the facts presented by you seems to me peculiarly apt and appropriate as a reply to your question. In my opinion it would be both improper and illegal for you to write this insurance.

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*Public Officers—District Attorneys*—District Attorney may not lawfully argue a case in the Supreme Court on behalf of a common carrier, even though the case is fully prepared prior to his taking office, so that the argument in Supreme Court is the only service remaining to be performed on behalf of said carrier.

December 12, 1912.

CHARLES F. MORRIS,

*Attorney at Law,*

Iron River, Wisconsin.

In your letter of the 6th you state that you have been acting as attorney for a railroad company, in defending a personal injury action; that the case will be on the calendar for the January term of the circuit court; that you have been elected to the office of district attorney for the term commencing January 6th, 1913; that sec. 4552m prohibits district attorneys from being retained or employed by any common carrier operating within this state; that the case mentioned has been tried upon its merits in the circuit court, the appeal perfected, the railroad's brief prepared and printed; and you ask as to whether you are compelled by the statute to discontinue your connection with the case upon taking office on January 6th.

As you are not as yet district attorney, strictly speaking you are not entitled to advice from me. However, as the question asked by you pertains to the duties of the office of

district attorney and as you will occupy that office on and after January 6th next, I have decided to treat your inquiry as official.

Sec. 4552m Stats. as created by ch. 542, Laws of 1907, provides:

“It shall be unlawful for any district attorney \* \* \* to be retained or employed by any common carrier operating within this state,”

and, for violation of this provision,

“his office shall be deemed vacant.”

Webster gives as one of the definitions of “employ”: “To make use of the services of; to have or keep at work; to entrust with some duty or behest.”

The word “employ” does not necessarily imply that there is any obligation to pay for the services to be rendered. *Mousseau v. City of Sioux City*, 84 N. W. 1027, 1028; 113 Iowa, 246.

To employ:

“is to engage or use another as an agent or substitute in transacting business or the performance of some services. It may be skilled labor, or the service of the scientist or professional man, as well as servile or unskilled manual labor.” *Gurney v. Atlantic & G. W. R. Co.*, 58 N. Y. 358, 371.

The word “employed” may mean either busy or occupied at work, or it may mean entrusted with the management of an affair. *Brugier v. Moussier's Adm'r*, 5 La. 93, 95.

“To be employed in anything means, not only the act of doing it, but also to be engaged to do it; to be under contract or orders to do it.” *Ritchie v. People*, 40 N. E. 454, 455, 155 Ill. 98, 103.

The word “employed” may refer to any present occupation. *Anderson's Dictionary of Law*.

“Employed” “signifies both the act of doing a thing, and being under contract or orders to do it.” *Bouvier's Law Dictionary*.

One of the definitions given by Webster of the word “retain” is: “To keep in pay; specif., to employ (a lawyer) by paying a preliminary fee, which secures a prior claim upon his services in case of need.”

That one is retained does not necessarily show that there was a consideration. *Elsee v. Gatward*, 5 Term Reports 143, 151

“Retainer” is “the act of engaging an attorney at law to prosecute or defend a cause.” Anderson’s Dictionary of Law.

Bouvier defines “retain” as: “To engage the services of an attorney or counsellor to manage a cause;” and “retainer” as: “The act of a client by which he engages an attorney or counsellor to manage a cause, either by prosecuting it, where he is plaintiff, or defending it, where he is defendant.”

It appears to me from these authorities that, in appearing in the Supreme Court for the common carrier, you are at least employed by it and are probably retained by it, within the meaning of those words as used in the statute referred to. It is true that the statute is a penal one and would be construed strictly, but I am of the opinion that it prohibits a district attorney from performing any services whatever for a common carrier.

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*Public Officers—Counties*—A town clerk designated by the members of the town board to attend a meeting of the county board, because of sickness of the town chairman, is a de facto officer, and a resolution adopted by the board is not void because but for his vote it would not have carried.

December 13th, 1912.

L. OLSON ELLIS,  
*Attorney,*

Black River Falls, Wisconsin.

In your letter of the 7th you state that you were elected district attorney of your county at the recent election and that, at the coming meeting of your county board, you expect to be asked for an opinion as to the validity of a resolution adopted at the November session of the board appropriating money for the purpose of building an experimental highway; that the resolution carried by one vote; that the chairman of the town of City Point in your county was unable to attend the meeting, because of sickness, and that the supervisors of the town appointed or elected the clerk of the town to represent the town on the county board, and the board unanimously seated him as such representative and he voted in favor of the appropriation. You ask:

“Did the clerk become a legal member of the county board as provided for under section 663 of the statutes?”

"If not, can the board now take advantage of their own illegal acts, or can any citizen or taxpayer take advantage of this matter and have the appropriation declared illegal?"

Sec. 663 Stats., as am. by ch. 398, Laws of 1907, provides in part:

"If, from sickness or other cause, the chairman of any town board shall be unable to attend any meeting of the county board, either of the other members of such town board, to be designated by themselves (and if they shall disagree they shall decide the same by lot), shall attend such meeting and act as a member of such county board."

It seems clear that under this provision the clerk was ineligible and therefore did not become a member of the county board *de jure*. If, however, his name was certified to the county clerk as having been designated to represent said town, as provided by said section 663 Stats., as amended, even though ineligible, he would still be an officer *de facto*. Mechem's Public Offices and Officers, secs. 317, 318. *In re Boyle*, 9 Wis. 240; *Dean v. Gleason*, 16 Wis. 1; *State v. Bloom*, 17 Wis. 521; *Laver v. McGlachlin*, 28 Wis. 364; *State v. Bartlett*, 35 Wis. 287; *State ex rel. v. Goldstucker*, 40 Wis. 124; *C. & N. W. Ry. Co. v. Langlade Co.*, 56 Wis. 614; *Cole v. Black River Falls*, 57 Wis. 110; *Yorty v. Paine*, 62 Wis. 154; *In re Burke*, 76 Wis. 357; *In re Manning*, 76 Wis. 365; *State ex rel. Atty. Gen. v. Cunningham*, 81 Wis. 440, 516; *In re Radl*, 86 Wis. 645; *Strange v. Oconto Land Co.*, 136 Wis. 516, 525; Biennial Report and Opinions Attorney-General 1908, p. 461.

Mechem says that perhaps the most comprehensive definition is that given by Butler, C. J., in *State v. Carroll*, 38 Conn. 449; 9 Am. Rep. 409, as follows:

"An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised:

\* \* \*

"3. Under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power or defect being unknown to the public." Mechem's Public Offices and Officers, sec. 318.

The case quoted from has been cited with approval by our Supreme Court in *State ex rel. v. Noyes*, 87 Wis. 340. The acts of a de facto officer are valid and cannot be inquired into collaterally.

See cases cited above.

Mechem says:

"The title of an officer *de facto*, and the validity of his acts, cannot be collaterally questioned in proceedings to which he is not a party, or which were not instituted to determine their validity." Mechem's *Public Offices and Officers*, secs. 330, 343.

"Their right to the positions which they hold can only be raised in a direct proceeding which questions their title to such positions." Ex-Attorney-General Gilbert in opinion cited, *supra*.

"Their acts bind all parties in all collateral proceedings."  
*Yorty v. Paine, supra*.

"Their acts are valid as to the public and third persons."  
*State ex rel. Atty. Gen. v. Cunningham, supra; Yorty v. Paine, supra; Cole v. Black River Falls, supra*.

So held in actions attempting to void a tax levied by such *de facto* officers. *Yorty v. Paine, supra; Dean v. Gleason, supra*.

I am therefore of the opinion that the appropriation in question is not rendered invalid by reason of the fact that, but for the vote cast by the clerk of the town of City Point, the resolution would not have been adopted.

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*Public Officers—Counties—Tract indices* for a county should be prepared by the register of deeds, and there is no authority for a contract for the furnishing thereof by a private party.

Where the register of deeds is on a salary basis he is not entitled to extra compensation for preparing tract indices.

Any county may adopt tract indices and a chain of title system.

The books for such a system should be prepared by the register of deeds, if the abstract department is made simply a department of his office.

December 16, 1912.

MORRIS E. YAGER,

*District Attorney,*

Frederic, Wisconsin.

In your letter of Nov. 19th, you state that the county board of Polk county adopted a resolution establishing a tract index and arranging for the register of deeds to prepare and furnish abstracts of title to such persons as may apply for them; that the board also adopted a resolution to pay a private individual a specified sum for preparing a complete set of abstract of title books and records for the county; that the following questions now arise:

"1st. Can the county board make a contract with a private individual for making a tract index? Or, under section 764, would it be for the register of deeds, and no one else, to make such tract index? If so, would a register of deeds who is on a salary system be required to make this index in addition to his present work, without any further compensation?"

The first part of your question is answered by an opinion which you will find on page 894 of the Biennial Report and Opinions of the Attorney-General for 1908, holding that these tract indices should be prepared by the register of deeds. Sec. 764 of the Stats. provides a fee to be paid the register of deeds for making such an index. This, of course, is where the register is on the fee system. An officer for whom a salary has been provided "in lieu of all fees" can receive no extra compensation for performing any services he can be required to perform as such officer. *Parsons v. Waukesha Co.*, 83 Wis. 288.

It follows from this that where the register is on a salary basis he is not entitled to any extra compensation for preparing the tract index.

Your second question is:

"Do subd. 2 and 3 of sec. 762, as am. by ch. 368, 1907, apply to any other county than Milwaukee, at the present time, that being the only county in the state which has a city of the first class? If so, could Polk county provide for a more complete system of tract indexes than is permitted by subd. 1 of said sec. 762?"

Par. 2 and 3 of sec. 762, as am. by ch. 368, Laws of 1907, by their terms appear to be limited to counties in which there is a city of the first class. However, sec. 762m of the Stats., as am. by ch. 61 of the Laws of 1911, provides in part:

“Whenever any county shall adopt tract indices and a chain of title system, the county board of supervisors of any such county may create a department to be known as an abstract department, either in connection with or independent of the office of the register of deeds, as said county board shall deem advisable.”

Sec. 762m as first enacted provided for the adoption of tract indices and a chain of title system by counties having a population of sixty thousand and over. The limitation as to population has been removed by ch. 61, Laws of 1911, so that now it would appear that any county may adopt such system.

Your third question is:

“Could Polk county, under sec. 762m, as am. by ch. 61, Laws of 1911, create an abstract department? If so, could the county contract with an individual to prepare and furnish it with a complete set of abstract books, or would the newly created abstract department have to prepare its own books and records?”

Sec. 762m, just referred to, authorizes the county board of any county to create an abstract department. The opinion heretofore referred to by this department holds that a county may establish an abstract department and also states that there is an implied authority to purchase or procure the making of abstract books of title. This latter was not a matter before the department at that time. If the abstract department is to be in connection with the office of the register of deeds, it would appear to me that there is no authority to contract with an individual to prepare and furnish the set of abstract books. A county has only such authority as is conferred upon it by statute. *Montgomery v. Supervisors*, 22 Wis. 69; *Frederic v. Douglas Co.*, 96 Wis. 411.

“If we cannot find a delegation of power to it (the county board) . . . then it must be . . . that it does not exist.” *Northern Trust Co. v. Snyder*, 113 Wis. 516, 531.

Under section 758 it is the duty of the register of deeds:

“1. To have custody of all the books, records, deeds, maps, papers and property deposited or kept in that office, and to safely preserve and deliver the same to his successor in office. \* \* \*

“4. To keep the several books and indexes hereinafter mentioned in the manner required. \* \* \*

“10. To perform all other duties required of him by law.”

Under section 762, paragraph 1,

“The register shall also keep a tract index in suitable books \* \* \* but no such index, when once made in any county, shall ever thereafter be discontinued unless such county has or shall adopt, keep and maintain a complete abstract of title to the real estate therein as a part of the records of the office of the register of deeds thereof.”

It appears very plain to me that the statute contemplates that, if such an abstract system is adopted as a department of the office of register of deeds, it shall be the duty of the register to prepare the abstract books and to keep and maintain the same.

Your fourth question is:

“Has the county board of Polk county any power, other than is given in sections 762 and 762m, to create an abstract department?”

Sec. 650 of the statutes provides in part:

“Each county organized in this state is and shall be a body corporate, and empowered to \* \* \* purchase, take and hold \* \* \* personal estate for public uses, \* \* \* to sell and convey the same, to make such contracts and do such other acts as shall be necessary and proper to the exercise of the powers and privileges granted and the performance of the duties charged upon it, or as shall be conferred by law and shall so continue until altered by law.”

In my opinion this would not authorize the creation of an abstract department, as that has been specially provided for by the other sections herein referred to. So far as I know, there is no other authority for the creation of such a department.

*Public Officers—Trustee of Poor Farm*—A member of the county board who resigns may be elected to the office of trustee of the local poor farm as he is no longer a member of such board.

December 17th, 1912.

LAWRENCE J. MISTELE,

*District Attorney,*

Jefferson, Wisconsin.

Under date of December 14th you state that at the last session of your county board John L. Gates, a duly elected and qualified supervisor from the city of Fort Atkinson, took part in the board proceedings up to the day prior to the election of county minor officers, when he resigned as supervisor; that on the following day he was elected trustee of the local asylum and poor farm. You call my attention to sec. 604a of the Stats., which provides:

“No member of any county board shall be eligible to election or appointment as such trustee;”

and you inquire whether the election of Mr. Gates under the above stated facts is legal.

As Mr. Gates was no longer a member of the county board when he was elected, he was within the express terms of the statute. While other courts have construed the term “eligible” as including the capacity of being elected to an office, as well as the capacity of holding an office, our court has held that it relates only to the capacity of holding an office, and that eligibility to office is to be determined by the qualifications of the officer at the time of entering upon the duties of his office, and not at the time of his election.

See vol. 10 Am. and Eng. Ency. of Law, 2d ed., p. 971; *State v. Smith*, 14 Wis. 497; *State v. Murray*, 28 Wis. 99; *State v. Trumpf*, 50 Wis. 103.

I am of the opinion that the election of Mr. Gates was valid.

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*Counties—Public Officers—Compensation—Mileage—County Board*—Sec. 695 allows mileage to members of a county board for only one round trip to attend the annual meeting.

December 23, 1912.

MR. S. G. DUNWIDDIE,  
District Attorney,  
Janesville, Wisconsin.

In your favor of December 14th, you state that your county board, on November 12th, adjourned its annual meeting until November 19th, and at the close of the annual meeting on November 20th adjourned until January 14, 1913; that practically every member of the board goes home every night at the close of each day during the meetings of the board; and you ask whether the members are entitled to only one mileage, or whether they are entitled to one for each adjournment, or to one for each time the members go home.

Sec. 695, Wis. Stats. as am. by ch. 240, Laws of 1909, provides:

“Each member of the county board shall be allowed and paid by the county a compensation for his services and expenses in attending the meeting of the board at the rate of three dollars per day for the time he shall actually attend, excepting Sundays, and six cents for each mile traveled in going to and returning from the place of meeting; but no per diem allowance shall be made for any time occupied in traveling, where mileage is allowed therefor.”

The words “the meeting of the board” must include all adjournments of the meeting since “an ‘adjournment’ is not more than a continuance of the session from one day to another, as the word signifies.” 1 Words and Phrases, 190; citing *In re Division of Lansford Borough*, 21 Atl. (Pa.) 503, 4. The power of the county board to act at an adjourned meeting is due to the fact that such adjournment is merely a continuation—a part of the annual meeting. *Hull v. Winnebago County*, 54 Wis. 291, 4. The statute makes no express provision for mileage to attend adjourned sessions of the annual meeting, and in the absence of some express provision in the law it is difficult to see how the statute can be construed to allow mileage for an adjournment from November to January and not for one over Sunday or merely from one day to the next. All are equally “adjournments” and as pointed out, merely continuations of the original meeting.

Statutes in terms similar to section 695 have been construed to allow but "one mileage for each session of the board." *Homers v. Abbott*, 20 Pac. (Cal.) 572. *State v. Norris*, 16 S. E. (N. C.) 2, 3. *Wallace v. Jones*, 107 N. Y. Suppl. 290.

In the California case it was said:

"The law requires a supervisor to attend all regular and special sessions of the board, and to be present and assist the other members in transacting such business as lawfully comes before them. And while engaged in the performance of these duties his official residence is at the county seat. In going to a place of meeting at the beginning of a session, and in returning to his home at the end of it, he is evidently 'traveling on public business.' But, if during a session he makes daily visits to his home, such visits must be deemed to have been made for his own convenience, comfort, or economy, or to attend to his own private affairs, and not on public business."

Sec. 21 of art. IV, Wis. Const. providing that "each member of the legislature shall receive \* \* \* ten cents for every mile he shall travel in going to and returning from the place of meeting" etc., has always been construed, I am informed, to allow mileage for only one round trip from the legislator's residence. It seems that section 695 should receive a similar construction.

While the question is not free from doubt it is clearly your duty and mine to resolve such doubt in favor of the public. (*State ex rel. Bashford v. Frear*, 138 Wis. 435, 541.) Furthermore, it is a rule of construction that "where the provision of law fixing the compensation (of an officer) is not clear it should be given the construction most favorable to the government." 29 Cyc. 1426.

I am of the opinion that sec. 695 allows mileage for only one round trip to attend the annual meeting, no matter how long such meeting may be continued, how many times it may be adjourned, or the length of time between adjournments.

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*Public Officers—Compensation*—The salary of a member of the legislature may not be withheld on account of an unpaid judgment in a disbarment proceeding, against such member and in favor of the State.

January 4, 1913.

MR. JAMES C. MORGAN,  
*District Attorney,*  
Wausaukee, Wisconsin.

In your favor of January 1st, you enclose transcript of judgment for \$500 docketed in Marinette county July 19, 1904, in favor of the State of Wisconsin and against Albert E. Schwittay. You state that this judgment was obtained in a disbarment proceeding brought against Mr. Schwittay, which resulted in his being suspended from practicing law for three years; that the judgment has never been collected for the reason that Mr. Schwittay is and has been execution-proof; and that he has been elected to the assembly. You suggest that this judgment can be collected from his salary as a member of the legislature.

Sec. 21 of art. IV of the Const. provides for the compensation of members of the legislature, and sec. 110 of the Stats. provides for the issuance to each member of the legislature by the presiding officer of each branch thereof of a certificate

“showing that such member has taken the prescribed official oath and the number of miles traveled by him in going to and returning from the place of meeting of the legislature \* \* \* and thereupon the amount of mileage and salary to which each member is entitled shall be audited and paid out of the state treasury.”

“It is well settled that the public, whether it be the United States, State or municipal government \* \* \* cannot be charged in garnishment or attachment for the compensation due to its public officials. This exemption is based upon public policy and is not for the benefit of the officers but for that of the public that the latter may not be harrassed or inconvenienced by suit against it and that the efficiency of its servants be not interfered with by any uncertainty as to their payment.” *Mechem on Public Officers, Sec. 875.*

This is the rule independent of any statutory provision. 18 Cyc. 1434—5.

It seems to me that there is the same reason of public policy to exclude the state as well as a private creditor and I do not think that the state may reach Mr. Schwittay's salary by attachment, garnishment or execution.

Nor do I think that the secretary of state and state treasurer have any discretion under this principle and under the

mandatory provisions of sec. 110 of the Stats. above quoted to refuse to audit and pay the salary and mileage of a member of the legislature when it has been regularly certified. Should such officers refuse to audit and pay the salary it seems clear that mandamus would lie to compel them to do so. 26 Cyc. 266; 29 Cyc. 1429; *State ex rel. v. Kenney*, 23 Pac. (Mont.) 733; *State ex rel. v. Warner*, 55 Wis. 271, 283.

While I am unable to find any authority directly in point, I am convinced that it would not be a valid answer for the secretary of state or state treasurer in case they were proceeded against by mandamus to compel them to audit and pay Mr. Schwittay's salary and mileage, that he owed this judgment to the state. The public policy exempting an officer's salary from execution is equally applicable to this situation in that the withholding of such salary in payment of this claim would equally tend to injure the public service by depriving the officer of the compensation to which he is entitled by the constitution and the statutes.

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*Public Officers*—The county clerk is not entitled to additional compensation for acting as a member of the county board of election canvassers.

January 6, 1913.

ALEXANDER WILEY,

*District Attorney,*

Chippewa Falls, Wisconsin.

In your letter of the 30th ult., you state that the statute provides that the county canvassers of election shall be paid such sum as the county board shall designate, a per diem fee; that it makes the county clerk a member of said canvassing board; and you ask whether the county clerk is entitled to extra pay for such service, or whether this is one of the duties that he must perform as a part of the duties of his office as clerk.

In an opinion found upon page 581 of the Biennial Report and Opinions of the Attorney-General for 1910, my predecessor, Mr. Gilbert, ruled that the clerk was not entitled to additional compensation because performing the duties of canvasser of election. I see no reason at this time to reach a different conclusion,

*Public Officers—Fees—Counties—County Board—Mileage—*  
Members of a county board are not entitled to mileage for special meetings.

January 7, 1913.

MR. WILLIAM B. COLLINS,  
*District Attorney,*  
Sheboygan, Wisconsin.

In your favor of December 21st you ask:

“Where a county board is limited to a per diem of twenty days in any one year and they have sat the full number of days and have drawn all the per diem which they are entitled to under section 668, can they be allowed any additional per diem for attendance at a special session?”

You also ask:

“Are the members of a county board legally entitled to mileage for their attendance at a special session of a county board?”

You are undoubtedly correct in your opinion that the supervisors cannot be allowed a per diem for more than twenty days in any one year, even though the excess is for time spent in attending special meetings. Sec. 695 of the Stats. as am. by ch. 240, Laws of 1909, is scarcely open to construction in this respect.

Sec. 695 provides for mileage “in attending the meeting of the board.” The meeting referred to is obviously the annual meeting which sec. 664 requires to be held in November. While pursuant to subd. 2 of sec. 4971 a word “importing the singular number only may extend and be applied to several persons and things as well as to one person and thing,” I do not think that a word in the singular should be so extended and applied unless an intent to have it so apply can be found in the statute.

I see no reason to assume that the legislature meant anything other than the natural meaning to be drawn from the words used in sec. 695. Had it intended to provide for mileage to and from special meetings it seems to me that such intent would have been expressed in the language used rather than leaving it to be inferred or read into the statute by construction.

Under the rule of construction "that where the provision of law fixing the compensation (of an officer) is not clear it should be given the construction most favorable to the government" (29 Cyc. 1426), I am of the opinion that members of the county board are not entitled to mileage in going to and returning from special meetings of the board.

See also opinion of Jan. 8, 1913.

*Public Officers—Duties—Removal*—1. Under sec. 975 a county superintendent of schools may be removed for wilful neglect of duty, in failing to render reports.

2. Such wilful neglect of duty would subject a county or city superintendent to the penalties imposed by secs. 4549 and 4550.

January 7, 1913.

INDUSTRIAL COMMISSION OF WISCONSIN.

In your favor of December 27th you state that secs. 439cc and 439ce of the Stats. provide for certain reports to be made to the Industrial Commission by county and city superintendents of schools and you request my opinion on the following questions:

"May a county superintendent who fails to make such reports be removed from office by the circuit judge on that ground?"

"Is a county or city superintendent who fails to make such reports guilty of official malfeasance under secs. 4549 and 4550 of the Stats.?"

Sec. 975 of the Wis. Stats. provides "the judge of the circuit court may \* \* \* remove any county superintendent of schools in his circuit for incompetency, willful neglect of duty," etc. There would be such "wilful neglect of duty" in failing to report under sec. 439cc (ch. 421, Laws of 1911) only in case the superintendent had received "the reports and information as provided in the preceding sections" and after blanks had been "furnished for that purpose." The same would seem to be true of his failure to report under sec. 439ce (ch. 542 Laws of 1911) since a knowledge of the facts required to be reported would depend upon his having received the reports and information required to be furnished to him, *Brown vs. State*, 137 Wis. 543, 9.

In order for a neglect of duty to be willful there must be "an evil intent without justifiable excuse,"— not a mere "inadvertent omission of a required act." *Brown vs. State*, 137 Wis. 543, 9; *State vs. McAloon*, 142 Wis. 72, 3.

Sections 4549 and 4550 impose a penalty on "any officer, agent or clerk of the state or of any county, town, school district, school board, city or village therein" who shall

"wilfully violate any provision of law authorizing or requiring anything to be done or prohibiting anything from being done by him in his official capacity or employment or who shall refuse or wilfully neglect to perform any duty in his office required by law."

I see no reason why a failure to report as required by sections 439cc and 439ce by a county superintendent if "willful" within the legal meaning of that word as defined in the cases previously cited will not subject such superintendent to removal pursuant to sec. 975, nor why such failure on the part of either a county or city superintendent is not punishable as provided in secs. 4549 and 4550.

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*Public Officers—Duties—State Treasurer*—Pursuant to subdiv. 4 of sec. 1958 Wis. Stats. the state treasurer is authorized to return securities deposited upon the certificate of the Commissioner of Insurance that the company depositing them has dissolved, etc.

January 8, 1913.

MR. HENRY JOHNSON,  
*State Treasurer.*

In a letter written by your predecessor under date of January 2, 1913, it is stated that your department has in its custody a bond of \$1000 deposited by the Loyal Protective Association pursuant to the provisions of subd. 4 of sec. 1958 Wis. Stats. That section provides for such deposit by foreign accident associations as—

"Security for the payment of claims against said corporation in case of voluntary dissolution or the winding up of its affairs;" such securities to "be retained by the state treasurer so long as said corporation shall continue to do business \* \* \* and in case of the dissolution of said corporation or the winding up of its affairs, the said securities shall be delivered to the duly appointed receiver of the said corporation or to the corporation itself, upon the certificate of the commissioner of insurance."

It appears that the commissioner of insurance has handed you an affidavit of the president and secretary of the Loyal Protective Insurance Company in which it is stated that such company is the successor of the Loyal Protective Association; that

“On the 28th day of December, 1912, all outstanding policies and obligations of the Loyal Protective Association located within the state of Wisconsin expired and that all liabilities and obligations whatsoever of said Loyal Protective Association located within the state of Wisconsin have been fully discharged and terminated and that there are now no outstanding liabilities and obligations whatsoever of said Loyal Protective Association within the state of Wisconsin.”

The commissioner of insurance also presents a receipt reading as follows:

“Received of Andrew H. Dahl, treasurer of the state of Wisconsin, one city of Chicago sanitary district 4 per cent bond due 1914 in the sum of \$1000 (deposited by the Loyal Protective Association) in full of said deposit with the state of Wisconsin.

Dated at Boston, Massachusetts,  
this 31st day of December, A. D.  
1912.

S. Augustus Allen, President.  
Francis R. Parks, Secretary.”

In his letter to you the commissioner of insurance states that:

“The company has advised the department that no liabilities against them exist in the state of Wisconsin, and you may return the bond direct to C. R. Parks, Secretary, Loyal Protective Insurance Company, Copley Square, Boston, Massachusetts.”

On taking the matter up with the commissioner of insurance I find that he made an examination of the Loyal Protective Insurance Company in the spring of 1912 and the report of such examination states that:

“The Loyal Protective Association, a fraternal, beneficiary, accident and health association, was incorporated June 12, 1895, and continued to transact business until October 30, 1909, when it reinsured its outstanding liabilities in the Loyal Protective Insurance Company. The latter was incorporated July 23, 1909, having a paid-up capital of \$100,000 and the same officials as the former. It was in effect a reorganization of the old com-

pany under the stock form and an assumption of its business, name, assets and liabilities by the new."

The insurance commissioner also has on file in his office an affidavit of the president and secretary of the Loyal Protective Insurance Company dated January 22, 1912, stating that said company on October 30, 1909, "assumed all of the assets and liabilities of the Loyal Protective Association" and that said association "is no longer in existence having no assets or obligations of any kind whatever" and that "there are no policies in the name of the Loyal Protective Association outstanding in the state of Wisconsin or in any other state."

There is also on file in the office of the commissioner of insurance a certified copy of a report of an examination of the Loyal Protective Insurance Company dated February 28, 1912, made by the insurance department of the state of Massachusetts, which affirms the same facts as to the reorganization of the company and that the same was effected "conformably to the laws of Massachusetts."

It seems evident from this statement that the commissioner of insurance has abundant proof to justify his making the certificate authorized by subsection 4 of section 1958 as to the dissolution of the Loyal Protective Association and the winding up of its affairs. I suggest, however, that such statement from him to you should be somewhat more formal than the letter of December 31, 1912, and should be in the form of a certificate.

Upon receipt of such a certificate I am of the opinion that you are authorized to deliver these securities deposited by the Loyal Protective Association "to the duly appointed receiver of the said corporation or to the corporation itself." If the Loyal Protective Association is no longer in existence and has no officers and no receiver I think that you would be justified in delivering such securities to the corporation which has succeeded it, though it would be more strictly in conformity to the statute if such delivery could be made to the Loyal Protective Association which possibly still has sufficient corporate existence under the laws of Massachusetts to enable it in closing up its affairs to receipt for the securities in question.

*Public Officers—State Board of Control—Binder Twine Plant*—Ch. 377 Laws 1911 does not give power to Board of Control to sell binder twine to whoever it chooses but the Board is still restricted by the provisions of secs. 4918—3 to 4918—9 of ch. 574 Laws 1907.

January 15, 1913.

MR. RALPH E. SMITH,  
*President State Board of Control.*  
Merrill, Wisconsin.

In your favor of January 11th, you attract my attention to ch. 574 Laws of 1907 and ch. 377 Laws of 1911, with reference to the sale of the product of the State Binder Twine Plant at Waupun, and ask what right, if any, you have to sell such product to retail implement dealers who are not consumers of twine and you state that you have interpreted ch. 377 Laws 1911 as giving you full power to sell to whomsoever you choose.

Sec. 2 of ch. 377 Laws of 1911 repeals "all acts or parts of acts in conflict herewith." Under familiar rules of construction the later law must control insofar as its provisions conflict with those of the earlier law, but repeal by implication is not favored and the later law must be read in harmony with the earlier and effect given to the provisions of both if on any reasonable construction this is possible.

Sec. 4918—15 of ch. 377 Laws of 1911, provides that the price of the binding twine and cordage shall be fixed by the State Board of Control and the warden of the state prison. This is quite obviously in conflict with the provisions of sec. 4918—2 of ch. 574 Laws of 1907 providing that the Board of Control shall fix such prices. Again, section 4918—15 of ch. 377 Laws of 1911, provides that the price so fixed may be changed "at any time" by said board and warden, while sec. 4918—2 of ch. 574 Laws of 1907, provides that the price may be changed "at any regular meeting of said board." In both these cases of conflict the provisions of the 1911 law must control.

Sec. 4918—15 of ch. 377 Laws of 1911, provides that

"The product of said binder twine plant shall be sold at such times and places and in such manner as the said board of control and the warden of the state prison shall determine to be for the best interests of the state; provided, that the citizens of the state shall have the preference in purchasing said products of said plant."

Secs. 4918—3 to 4918—9 of ch. 574 Laws of 1907 contain detailed provisions for the sale of the twine to the effect that prior to June 1st of each year it shall be sold only to actual consumers and after that date to any citizen of the state, subject to agreement on his part as to the price at which he will sell it, and after August 1st to the first applicant therefor. I am unable to convince myself that the provisions of the 1911 law above quoted are so repugnant to these detailed provisions as to show a legislative intent to repeal them by the later enactment. Had the legislature so intended it seems to me that the repeal would not have been left to inference and implication, but that the sections of the 1907 law above referred to would have been expressly repealed.

It is a clearly permissible construction of sec. 4918—15 that it requires the board of control and warden to fix the time, place and manner of sale, subject to the restrictions as to the persons to whom sold contained in the 1907 law, and that it adds to such provisions the further restriction that citizens of the state shall be given a preference in purchasing the products of the plant. This construction, which avoids a conflict between the 1907 and 1911 laws so far as possible, seems to me to be the one that must be adopted in compliance with the rule previously stated that the later law must if possible be construed to be in harmony with the earlier.

I am, therefore, of the opinion that your board is restricted by the provisions of the 1907 law in its power to sell to retail implement dealers.

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*Public Officers—Fees and Expenses—Expenditure for car fare and meals of a public officer not made because of traveling on official business but necessary only because of the distance between the officer's home and office in the city of Milwaukee cannot be allowed as traveling expenses under sec. 2394—45.*

January 16, 1913.

HON. J. S. DONALD,  
*Secretary of State.*

In your favor of January 13th you ask my opinion as to the legality of charges for car fare and meals in the city of Milwaukee made by an employe of the Wisconsin Industrial Com-

mission, said employee being a resident of the city of Milwaukee and having his office with the factory inspector there.

Sec. 2394—45 Wis. Stats. 1911, provides for the payment of the "actual necessary expenses while traveling" of employees of the Industrial Commission.

In an opinion dated October 16, 1907, found in the Opinions of the Attorney-General for 1908 on pages 82 and 83, Attorney-General Gilbert said:

"Concerning street car fare: It has been held that an officer whose headquarters were at Madison and whose home was in a suburb of Madison could not properly charge street car fare in going from his home to the capitol.

"It would seem to me that this ruling would apply to an officer whose headquarters were in Milwaukee and his home at such a distance as to require the use of street cars. The interpretation is that an officer traveling from his office to his home on the street cars is not upon official business."

I see no reason to depart from this ruling or to make any distinction between an expenditure for car fare and one for meals. If either can be allowed it must be because it is a necessary expense of traveling on official business. Expenses of either kind made necessary by reason of traveling about a city on official business would, in my opinion, be proper, but such expenses, due solely to the distance between an officer's residence and his office, would not be.

Nor do I think that it makes any difference that in the case considered by Mr. Gilbert the office was required by law to be kept in Milwaukee, while in the instant case the Industrial Commission is required to keep its office in the capitol since the headquarters of the employee in question are in Milwaukee. The point is that one can not be said to be traveling on official business when he is merely going from his home to his office in the city of his permanent residence.

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*Public Officers—Secretary of State*—It is the duty of the Secretary of State to countersign all commissions and appointments of public officers executed by the Governor and affix the great seal of the State thereto. His duty in this respect is purely ministerial and he is without discretion in the premises.

January 17, 1913.

HON. J. S. DONALD,  
*Secretary of State.*

This department is in receipt of your communication under date of the 15th inst. wherein you officially request an opinion as to what action you should take in reference to the notification received by you from the governor advising you of the removal of Herman L. Ekern as commissioner of insurance, and also in reference to the certification of the governor certifying to the appointment of Mr. Louis A. Anderson as commissioner of insurance.

In reply thereto I will say that in my opinion a casual consideration of the duties of your office will point quite plainly the answer to your question. Your office is that of secretary of state. You are the SECRETARY of the state. The name of your office is in itself suggestive of your duties. The duties of a secretary of any organization are quite generally understood and it is in keeping with our general scheme of government that the duties of the secretary of state are not unlike those of the secretary of any other organization. It is almost universal that among other duties the secretary is required to keep the records of his organization and so the statute of our state, section 141, subdivision 1, provides that the secretary of state shall "keep a record of the official acts of the executive department of the state." Plainly this duty is purely ministerial and clerical. It matters not whether the act on the part of the executive be legal or illegal. So long as it is his act it is the duty of the secretary of state to keep a record thereof so that evidence of the same may be preserved in permanent form to the end that it may be given such potentiality and force as the law may ascribe thereto. It is no part of the functions of a secretary to pass upon the legality or illegality of the acts of the executive, nor is it within his prerogative to pass upon the acts of the governor which may or may not be given recognition upon the records of the state. Subdivision 2 of section 141 also provides that the secretary of state shall "keep the great seal and affix the same to and countersign all commissions and other official acts issued or done by the governor." This is simply in furtherance of the general idea that the secretary shall keep a record of the offi-

cial acts of the executive and provide for their authenticity. The word "countersign" is defined by Webster to mean: "To sign on the opposite side of an instrument in writing, hence to sign in addition to the signature of another in order to attest the authenticity." Hence you are not required to countersign the commissions or other official acts issued or done by the governor to signify that you either approve or disapprove of such act, but merely for the purpose of attesting to the genuineness of his signature and the great seal of the state is used for the same purpose.

"The public seal of the state or government proves itself and authenticates the laws of such state. So the courts judicially notice the great seals of foreign governments or sovereigns; in like manner where officers act under official seals such seals usually authenticate the official character of the person and prove themselves, and courts take judicial notice of the seals of courts of sister states." 25 A. & E. Ency. of Law, p. 81.

The foregoing considerations clearly indicate that it is your duty to record all of the official acts of the executive as well as to countersign the same and affix the great seal of the state thereto; all of which is merely for the purpose of preserving an authentic record and enduring evidence of such official act. It is very plain that your refusal to properly record and countersign the act of the governor will not invalidate his legal action, nor will your complying with the requirements of the statute in this respect validate his illegal action. It simply does not affect the legality of his action one way or the other and you are therefore not called upon nor is it within your province to assume to exercise any discretion or supervisory powers over any of his official acts.

In this connection it is considered that the case of the *State ex rel. Ackerman v. Dahl*, 65 Wis. 510, is in point. In that case there was a vacancy in the office of treasurer of a school district who later was appointed to fill the vacancy and presented his bonds to the director and clerk of the district for their approval within the proper time. The director approved the same but the clerk refused to approve it or file the same in his office. The court says:

"It is urged that, because the clerk of the school district refused to approve and file the relator's bond, the relator is not the treasurer of said district, and that there is still a vacancy

in such office. We do not think such construction should be given to the law. The person who has been elected or appointed to an office, and who does all that is required of him by law to entitle him to hold the office, cannot be deprived of such office by any wilful or unjust refusal of the person or officer who is required to approve his official bond to give it his approval. If such a rule is to prevail, then the officer whose approval of an official bond is required may, in any case, by such wilful and unjust refusal, create a vacancy in an office."

The case of *State ex rel. Bienvenu v. Wrotnowski, Secretary of State*, 17 La. Ann. Repts. 156, is a case involving exactly the same question under consideration here.

In that case the district court of New Orleans granted its mandate ordering Stanislas Wrotnowski, Secretary of State, to affix his official signature and seal of his office to the commission signed and issued by James Madison Wells, governor of the State of Louisiana, or, in default thereof, that the said Wrotnowski show cause to the contrary on Monday, the 11th day of May, 1865. Wrotnowski filed his answer to the relator's petition, and therein averred for reason why a peremptory mandamus should not be issued against him, as prayed for by the relator, that the commission referred to in the said petition was utterly null and void, and of no force, effect or validity whatever, because attempted to be issued by the governor without any warrant of law for so doing and in direct violation of the constitution and laws of the state; that he cannot be compelled to lend the sanction of his name as secretary of state, by countersigning such illegal commission and affixing the great seal of state thereto; that the office of sheriff of the parish of Orleans has been held since March 16, 1864, and is now held under a commission issued in pursuance of the laws and constitution of the state of Louisiana, by Alfred Shaw, which commission does not expire until the next regular election for sheriff, and that the governor is without any authority to supersede the said Shaw, as sheriff aforesaid, by the appointment of the relator, and he prayed that the application of the relator for a peremptory mandamus be refused.

The court said:

"Divested of all extraneous, superfluous and irrelevant surroundings, what is the real question to be solved? We appre-

hend it to be this: Is the secretary of state, under the constitution and laws of the state of Louisiana, a mere ministerial officer, as regards the authorization by him of official acts; or is he, under the constitution and laws, vested with a discretionary and supervisory power, which enables him, before executing the functions by law imposed on him in this particular, to judge for himself whether such official acts as need his ministry are constitutional or unconstitutional, legal or illegal, and to affix or withhold from such acts, at his option, according to his discretion, his official signature and the impress of the great seal of the state? . . . The secretary of state is not to suspend his action to inquire why and wherefore any appointment by the governor is made. His duty is plain: he is not directed, but ordered by law, to perform it. When commissions from the governor need authentication, he shall affix his official signature and the public seal of state, for these are official acts. Whatever improvidence or illegality there may be in the issuing of commissions, that concerns not him. His authenticating any official act can never compromit him; for he has no discretion to exercise regarding it. It is the duty of the governor to fill vacancies. In elective offices he cannot remove an incumbent; but the appointment to fill a vacancy does not operate a removal of the previous incumbent because no removal can so be made; the office is vacant, or it is not vacant; if it is vacant, it is properly filled by the last appointment; if it is not vacant, the first incumbent cannot be disturbed. What injury, then, could by any possibility result to the first incumbent by the new appointment, if it were illegally made. It would be to him *damnum absque injuria.*”

It seems unnecessary to prolong this opinion further. I regard your duty in the premises to be clear and unequivocal. It matters not to you whether the order removing Mr. Ekern from office was legal or illegal and in giving this opinion that question has not been considered at all. It is your duty to file the appointment of Mr. L. A. Anderson sent to you by the governor, as well as the notice of the removal of Mr. Ekern, countersign the same and affix the great seal of the state thereto.

*Public Officers—Sheriff*—The salary of a sheriff cannot legally be withheld until the return of an escaped prisoner, because of such escape.

January 17, 1913.

HON. JOSEPH T. SIMS,  
*District Attorney,*  
Wabeno, Wisconsin.

In your letter of the 11th you state that one James Hardhead, an Indian, was, at the September term of your circuit court, convicted of assault with intent to do great bodily harm and sentenced to a term of six months in the county jail; that while working outside of the jail, under the custody of the under-sheriff, he escaped and as yet has not been recaptured; that, acting under instructions from the county board, the county treasurer is withholding the sheriff's salary until the prisoner has been returned; and you ask whether the salary may legally be withheld for that reason.

I assume that your county board has adopted the salary system of paying its sheriff. Sec. 694a Wis. Stats. 1911 provides in part:

“Such salaries shall be paid at the end of each month.”

I find no statutory provision authorizing the withholding of the salary for the reason above stated. Sec. 725 Wis. Stats. 1911, subsec. 1, makes it the duty of the sheriff

“to take the charge and custody of the jails of his county and the persons therein, and to keep them himself or by his deputy or jailer.”

It may be that, if, through the negligence of the sheriff, a prisoner escapes and the county is thereby injured pecuniarily, he would be liable for such injury; but, even then, the amount of such liability would have to be agreed upon or decided by some competent tribunal before it could be collected. This department has recently held that a judgment in favor of the State and against a person elected to a seat in the Legislature cannot be offset against the salary of such legislator. I am inclined to think that the same would hold good here and that, even though such a claim were reduced to judgment, it would not justify the withholding of the salary.

Sec. 697t Wis. Stats. 1911 provides for punishment and, for a second offense, removal from office of a sheriff, who neg-

lects or refuses to require a prisoner sentenced to hard manual labor to perform such labor.

Sec. 4486 Wis. Stats. 1911 makes it a criminal offence for any officer, through negligence, to suffer any prisoner in his custody upon lawful process to escape. The Legislature having prescribed a penalty for permitting such escape, there is no authority for imposing a different penalty. In my opinion, there is no legal authority for so withholding the sheriff's salary.

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*Public Officers—Statutes*—Where the law authorizing the appointment of a committee provides that such committee shall report on or before a certain date, such provision is directory and not mandatory.

January 23, 1913.

HON. W. O. HOTCHKISS,

*Wisconsin Levee Commissioner.*

In your inquiry of the 22nd, you state that somewhere about the 15th of January you, together with Professor D. W. Meade and Mr. A. A. Andrews, of Portage, were appointed a committee to investigate the levee system along the Wisconsin river in the vicinity of Portage, under the provisions of ch. 8 of the Laws of the Special Session of 1912; that, under the provisions of this law, the committee was to report to the Governor on or before January 1st, 1913, but that it is impossible to do so, because the committee was not appointed until after that date; and you ask whether, under these circumstances, the committee is warranted in going ahead with the performance of their duties and the incurring of the expenses contemplated by said act.

Ch. 8 of the Laws of the Special Session of 1912 first provides for the appointment of this committee, which shall

“inquire into the feasibility of organizing and creating out of the territory thus liable to be damaged or affected a levee district to defray the expense of future improvements and repairs of said levee system and of keeping the same in a condition of safety; or shall formulate some other feasible method or plan for the permanent improvement and maintenance of said levee system so as to afford protection to said city and territory.”

Section 2 of said act provides:

“The committee shall report the result of its investigation with its recommendation to the governor on or before **January 1, 1913.**”

Section 3 makes an appropriation for carrying out the provisions of the act.

The matter of improving and keeping in repair the system of levees in the vicinity of Portage is one of great public importance, as is evidenced by the several appropriations made by the State for that purpose, the last of such appropriations having been made by ch. 5, Laws of 1912.

It is perfectly apparent that it is much more to the public interest to have this report made after the time named in the act than not to have any report made. Our Supreme Court has said:

“Where there is no substantial reason why the thing to be done might not as well be done after the time prescribed as before . . . no presumption that, by allowing it to be so done, it may work an injury or wrong . . . nothing in the act itself, or in other acts relating to the same subject matter, indicating that the legislature did not intend that it should rather be done, after the time prescribed, than not to be done at all; there the courts assume that the intent was that, if not done within the time prescribed, it might be done afterwards.” *State ex rel. Cothren v. Lean*, 9 Wis. 279, 292; *Application of Clark*, 135 Wis. 437, 445.

Such statutory provisions are directory, and not mandatory. *Klatt v. Mallon*, 61 Wis. 542; *Allen v. Allen*, 114 Wis. 615, 621; *State ex rel. Johnson v. Nye*, 148 Wis. 659, 669.

In my opinion the committee may lawfully perform the duties imposed upon them, incur the expenses necessarily incident thereto and make the required report after the date named in the statute and within a reasonable time.

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*Public Officers—Coroners*—May not hold inquests unless directed by the district attorney.

In counties having jury commissions, coroner's juries are to be selected according to the provisions of sec. 4878.

January 23, 1913.

CHARLES R. FREEMAN,  
District Attorney,  
Menomonie, Wisconsin.

I have your communication of the 15th inst., in which you submit the question whether the coroner may hold inquests in

view of the provisions of sec. 4865 of the Stats. as am. by ch. 314 of the Laws of 1905 and you call my attention to an opinion of the attorney-general to be found in the Biennial Report of the Attorney-General for 1906 on page 551; also another opinion to be found on page 822 of the Biennial Report for 1910 as well as an opinion by Mr. Titus, Assistant Attorney-General, to be found in the Biennial Report of the Attorney-General for 1910 on page 620.

I fully appreciate the suggestion contained in these opinions that there is some doubt as to the constitutionality of this law owing to the fact that the coroner is a constitutional officer and that the right to hold inquests is one exercised by that officer from time immemorial, but notwithstanding this doubt I feel that administrative officers of the state should regard the law as being constitutional and should be governed by its provisions until it has been declared unconstitutional by the courts. Cases may be cited where administrative officers have failed to act under laws passed by the legislature on the theory that they were unconstitutional and void which have been held to be constitutional by the court.

I deem it more appropriate for administrative officers to follow the law as written by the legislature until set aside by the courts and I accordingly endorse the opinion of Mr. A. C. Titus, Assistant Attorney-General, to be found on page 620 of the Report of the Attorney-General for 1910, to the effect that the law should be respected and followed.

You also ask whether in all counties in which there are jury commissioners a coroner's jury should be selected in accordance with the provisions of sec. 4878 as am. by ch. 189 of the Laws of 1909 or the provisions of sec. 4866 as am. by ch. 314 of the Laws of 1905. It seems to me very clear that the provisions of sec. 4878 providing that

"In all such counties where there are jury commissions or in any county having a jury commission the jurymen for all inquests shall be selected by the clerk of the circuit court from the regular list of veniremen regularly chosen by the jury commission"

are in conflict with the provisions of sec. 4866 which provides that

"Whenever any justice of the peace or coroner shall be so ordered as provided in the preceding section he shall issue a

precept to the sheriff or any constable forthwith to summon a jury of six good and lawful men of the county to appear before him at the time and place specified in the precept”

and that the provisions of sec. 4878 being the last expression of the legislature upon the subject must be held to constitute an implied repeal of that portion of sec. 4866 above quoted in such counties.

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*Public Officers—Eligibility—Bridges and Highways*—A member of a county board may not legally be employed on the construction of a road under the county highway commissioner.

January 25, 1913.

MR. A. J. O'MELIA,

*District Attorney,*

Rhineland, Wisconsin.

In your favor of January 23rd, you ask:

“Could a member of the county board work on the construction of a road under county highway commissioner where the work is conducted under county and state aid?”

Sec. 692 of the Stats. prohibits a member of the county board from being interested in any contract or agreement with the county and provides that any supervisor offending shall be deemed to have vacated his office. In *Land, Log & Lumber Co. v. McIntyre*, 100 Wis. 245, the supreme court seem to have assumed that labor furnished by a supervisor in constructing a county road was included within the section.

In addition sec. 4549 has been construed by this department to include such a situation as you have in hand. See Opinions of Attorney-General for 1910, pages 81, 207 and 608.

Roads built under the state aid highway law, (ch. 337 Laws 1911) are constructed pursuant to contracts between the county board and a contractor (subsec. 3 of sec. 1317m—7) or under the supervision of the county highway commissioner (subsec. 4 of sec. 1317m—7). In either case it is clear that the county is a party to the contract so that it seems clear to me that a member of the county board in the case you state is prohibited from doing work on such road under the county highway commissioner.

*Public Officers—Counties*—The city and village supervisors in the county board are entitled to vote on a resolution under sec. 1260 providing that highway taxes in the various towns shall be paid in money.

February 5, 1913.

E. P. GORMAN,  
*District Attorney,*  
 Wausau, Wisconsin.

You state that at a recent meeting of your county board a resolution was introduced under sec. 1260, as am. by ch. 599 of the Laws of 1911, providing that highway taxes in the various towns of the county should be paid in money. You inquire whether the city and village supervisors have a right to vote on such question.

Said section 1260 provides as follows:

“Sections 1241 (1911), 1246 (1911), 1249 (1911), 1250 (1911), 1252 (1911) and 1260 (1911) shall apply only to towns in counties wherein the county board at any annual meeting shall have adopted a resolution by a majority vote of all members, determining that said sections shall so apply to such county.”

Under the express provision of this statute, all members of the county board may vote on this question. This, of course, includes the representatives from cities and villages.

I am therefore of the opinion that the city and village supervisors on the county board have a right to vote on the resolution in question.

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*Public Officers—Fees & Expenses—Traveling Expenses*—An employee of the state having his headquarters at some place other than Madison is entitled to his expenses if called to Madison temporarily.

February 8, 1913.

HON. J. S. DONALD,  
*Secretary of State.*

In your favor of February 7th, you refer to my opinion of January 16th, which was to the effect that an officer of the state whose office was in Milwaukee could not be allowed his

traveling expenses, car fare and meals, made necessary only by reason of the distance between his home and his office in Milwaukee, and you state another question of the same sort arises under facts stated as follows:

“The Railroad Rate Commission have established Milwaukee as headquarters for one of their employees and later expect to establish a permanent office at that place. Now the question arises if such employee cannot receive hotel and street car expenses while in Milwaukee and if necessity should require the bringing of such employee to Madison for temporary employment, would he be entitled to expenses while in Madison during such temporary employment?”

I call your attention to an opinion rendered by Attorney-General Bancroft, to your predecessor, under date of May 2nd, 1911, which would seem to require an affirmative answer to your question.

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*Public Officers*—Registers of Deeds must note the satisfaction of a mortgage opposite the description to each lot in his tract index when the mortgage covered the plat.

February 12, 1913.

ARCHIBALD MCKAY,

*District Attorney,*

Superior, Wisconsin.

Under date of February 8th, you inquire whether the register of deeds in counties where a tract index is maintained is required to write opposite each lot in a plat the satisfaction of a mortgage covering the whole tract of the plat which was recorded before the filing of the plat and the subdivision into lots of the tract covered by the plat.

You call my attention to sec. 762 of the Stats., which provides as follows:

“The register shall also keep a tract index in suitable books, so ruled and arranged that opposite to the description of each quarter section, sectional lot, town, city or village lot or other subdivision of land in the county, which a convenient arrangement may require to be noted, there shall be a blank space of at least forty square inches in which he shall enter in ink the letter or numeral indicating each volume, and the class of records

of such volume designating mortgages by the letter M, deeds by the letter D, and miscellaneous by the abbreviation Mis., and the register of attachments, sales and notices by the letter R, together with the page of said volume upon which any deed, mortgage or other instrument affecting the title to or mentioning such tract or any part thereof shall heretofore have been or may hereafter be recorded or entered; provided, that no such index shall be kept in any county where none now exists until ordered by the county board to be made;" etc.

Under sec. 764 the register of deeds is authorized to charge a fee of three cents for every necessary entry in the tract index. The satisfaction of a mortgage is certainly an instrument affecting the title to each lot covered by the mortgage and, under the express wording of said sec. 762, the register of deeds is required to note the same in the blank space opposite the description of the lot.

In my opinion your conclusion that the register of deeds is required to enter a satisfaction of said mortgage opposite each lot covered by the mortgage is correct, and the register of deeds is authorized to receive a fee of three cents for each entry.

In the case of *Johnson v. Brice*, 102 Wis. 575, damages were recovered from the register of deeds, who had failed to make an entry in the tract index, as required by this section.

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*Public Officers—Libraries*—Librarians of Public Libraries are not public officers within the meaning of par. 9, sec. 20.84 Wis. Stats. 1911.

February 18, 1913.

HON. J. Q. EMERY,

*State Dairy & Food Commissioner.*

In your letter of the 14th, you call my attention to par. 9, sec. 20.84 Wis. Stats. 1911, and request my official opinion on the following: "Are the librarians of public libraries, that is libraries supported by public taxation as shown on pages 36, 37 and 38 of the Eighth Biennial Report of the Free Library Commission of Wisconsin, \* \* \* public officers within the meaning of" the paragraph referred to?

The paragraph in question provides for the following distribution of public printing by the superintendent of public property:

“Of, \* \* \* all official reports, one copy of each to each state officer and to each member of the next succeeding legislature applying therefor. Any state officer, board or commission may file a list of other public officers to whom he or they desire his or their official reports sent, and said superintendent shall make distribution accordingly, one copy to each.”

The list of libraries to which you refer is found in the report of the Free Library Commission for the biennial period ending June 30th, 1910, and is headed “Statistics of Libraries.” It gives no information as to the manner of the appointment of the librarians, the qualifications required, the tenure of office or other information very essential to a full determination of this question.

I have had just a short talk with the secretary of the Free Library Commission and he informs me that many, if not all, of the librarians are appointed by library boards, these boards in turn being appointed by the common council or board of trustees; that the librarians have no fixed term of office as a rule, but hold during the pleasure of the library board or for the time fixed by their contract; that there is no fixed salary attached to the position, but the amount to be paid is determined by contract; that the librarians take no oath of office and are not required to give any official bond.

“A public officer is usually required to take an oath, and frequently has to give a bond. \* \* \* The term ‘office’ also embraces the ideas of tenure and duration or continuance. Generally speaking, one of the requisites of an office is that it must be created by a constitutional provision, or it must be authorized by some statute.” 23 Am. & Eng. Ency. of Law (2nd Ed.) 322.

“A duty or employment arising out of a contract and dependent for its duration and extent upon the terms of such contract is not an office.” Ibid, 324.

The question of whether or not the holding of a certain position constitutes the incumbent an officer has often arisen in our state. In *United States v. Hatch*, 1 Pin. 182, it was held that a civil officer within the meaning of that term as used in

the organic law (Act of Congress of April 20, 1836) is one in whom a portion of the sovereignty is vested or to whom the enforcement of municipal regulations or the control of the general interests of society is confided and that a canal commissioner authorized to manage and dispose of lands granted by Congress to aid in the construction of the Milwaukee & Rock River Canal is not such an officer.

In *Butler v. Regents of the University*, 32 Wis. 124, it was held that a professor in the university is not a public officer.

In *Hall v. The State*, 39 Wis. 79, the commissioners appointed to make a geological survey of the state were held to be public officers on the ground that their functions related to the material and permanent interests of the whole state and the duty imposed upon them was an important public trust to be exercised for the benefit of all the people of the state. This was reversed by the United States Supreme Court in 103 U. S. 5, on the ground that the law creating the position required that a contract be executed by the person appointed and that his compensation was fixed by the contract and not by law. Among other things the court said:

“Where an office is created, the law usually fixes the compensation, prescribes its duties, and requires that the appointee shall give a bond with sureties for the faithful performance of the service required. To do all this, if the employment were an office, by a contract with the officer and without his bond would, to say the least, be a singular anomaly.”

In *Weise v. Milwaukee County*, 51 Wis. 564, the court said that a county physician acting under a contract probably is not a public officer.

In *State ex rel. v. Myers*, 52 Wis. 628, it was held that commissioners appointed to review the aggregate valuations made by the county board of the taxable property in the several towns, villages and cities of the county, are not officers.

That a school teacher is not a public officer is held in *Board of Education v. State ex rel. Reed*, 100 Wis. 455.

It appears to me under these authorities that the librarian of a public library whose duties, compensation and term of employment are determined by contract, is not a public officer.

That the term “public officer” as used in the paragraph referred to is not intended to include a librarian of a public

next lowest bidder, but instead of doing so, they were induced to send a representative to Madison and submit a new proposition; third, that the regents had no authority to accept an uncertified check; fourth, that the regents had no authority to let the contract to Keasbey & Mattison Company after that company's check was returned to it; fifth, that the proper proceeding would have been to re-advertise for bids.

The bid of Krez & Company and the acceptance thereof by the regents, constituted a binding contract. *Cheney v. Cook*, 7 Wis. 413; *Metzel v. State*, 16 Wis. 347; *Crawford v. Earl*, 38 Wis. 312; *Sherley v. Peehl*, 84 Wis. 46; *Lawrence v. M. L. S. & W. R. Co.*, 84 Wis. 427; *Peterson v. Chase*, 115 Wis. 239; *Abroahams v. Revillon*, 129 Wis. 235; Wait's Engineering & Architectural Jurisprudence, 122; Clark's Architect Owner & Builder Before the Law, 183, 189.

The proposal having been made by mail, the contract was complete when the acceptance was deposited in the post office. *Washburn v. Fletcher*, 42 Wis. 152; *L. J. Mueller Furnace Co. v. Micklejohn*, 121 Wis. 605.

The fact that a written instrument embodying all the agreements by both parties, was expected to be executed later, did not prevent the taking effect of the contract made by the bid and its acceptance. *Cohn v. Plummer*, 88 Wis. 622; *Lawrence v. M. L. S. & W. R. Co. Supra*.

The mistake of the contractor in making its figures prior to the submission of the bid, does not relieve it from the binding effect of the contract. *J. A. Coates & Son v. Buck*, 93 Wis. 128; *Straker v. Phenix Ins. Co.*, 101 Wis. 413; *Grant Marble Co. v. Abbott*, 142 Wis. 128.

The first reason assigned by Krez & Company for the return of the check is based upon a false assumption of fact. The regents did suffer a loss of the difference between the amount of the Krez bid and the amount of the bid of Keasbey & Mattison Company, amounting to nearly \$900.00. Furthermore, by the terms of the specifications which were agreed to when the bid was submitted, the check was to be forfeited if the successful bidder failed to execute a contract within the time limited.

“Where it is an express condition of the acceptance of a bid that the bidder shall make a deposit, which is to be forfeited on

his refusal to enter into the contract, the bidder, when he has abandoned such a contract without just cause, is not entitled to be relieved against the forfeiture." Wait's Engineering & Architectural Jurisprudence, 122.

The mistake made by the bidder in its figures does not constitute just cause for abandonment of the contract.

The regents are public officers. They constitute one branch of the state government and as such they have no authority to return this check after forfeiture.

"Public officers have no discretion in the matter; if the lowest bidder has refused or neglected to execute the contract, the check that he has deposited as security must be forfeited and retained by the city as liquidated damages and paid into the sinking fund, and any other disposition of the bid or the check is unlawful." Wait's Engineering & Architectural Jurisprudence, 168.

The second objection is also without merit. Krez & Company are in no position to object because they were given an opportunity to put in a second bid. No special inducement was held out to them to induce them to send a man to Madison, but as I understand it, they were merely asked over the telephone what difference in the bid they felt that their mistake would make. It was their own suggestion that instead of explaining the matter over the telephone, a member of the firm should come to Madison. Had the contract been awarded them upon such second bid perhaps other bidders would have been in position to object, but that question does not arise here. No rights of Krez & Company were in any manner jeopardized by the action taken.

What is said as to the second objection is equally applicable to the third. Krez & Company cannot complain because they were allowed to make a deposit of a different kind than required by the advertisement and specifications. Furthermore, "it seems that public officers may in their discretion excuse the failure to accompany the bid with 'such check'." Wait's Engineering & Architectural Jurisprudence, 167.

The fourth objection is disposed of by what is here said as to the third.

The fifth objection has no bearing upon the question at issue. Even had there been a readvertising for bids, it would have been the duty of the regents to retain this check.

It follows that the regents have no discretion in the matter and no authority to return the deposit.

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*Public Officers—Senate—Superintendent of Public Property—*  
It is not the duty of the Superintendent of Public Property to furnish pure spring water to the State Senate upon the adoption by the Senate of a resolution requiring him to do so.

March 4th, 1913.

HON. WM. L. ESSMANN,

*Superintendent of Public Property.*

In your letter of the 1st, you enclose a copy of a letter from F. M. Wylie, Chief Clerk of the Senate, in which he states that you are thereby notified that on February 27th, the Senate adopted Resolution No. 18, S., instructing you to furnish pure spring water in the water coolers provided for the use of the Senate and committee rooms, and you ask whether or not you are obliged under the law to recognize a resolution of this kind.

Under statutes providing that departments and officers are to be furnished with supplies, this department has ruled that the department or the officer is the judge as to what supplies are reasonably necessary to enable it or him to perform the duties imposed by law. See opinion of Honorable F. L. Gilbert given to Honorable Jos. D. Beck, Commissioner of Labor, under date of July 30th, 1910, and opinion of Honorable L. H. Bancroft given to you under date of March 12th, 1912.

I have been unable to find any similar law relating to supplies for either house of the legislature. Sec. 114 Wis. Stats. 1911 provides for stationery, but makes no mention of other supplies. Ch. 19 Wis. Stats. 1911, relating to the Superintendent of Public Property, does not appear to contain any provision that would require compliance with this resolution.

In the absence of any law authorizing the supplying of spring water (and a resolution adopted by only one branch of the legislature does not have the force of law) it is my opinion that you are not obliged to comply with the resolution in question.

*Public Officers—County Judge*—County Judge of Calumet county is entitled to five dollars a day as compensation for time spent in proceeding to adopt children.

March 5th, 1913.

JAMES KIRWAN,

*District Attorney,*

Chilton, Wisconsin.

Under date of March 3d you inquire whether the county judge of your county is authorized to charge ten dollars in a proceeding brought before him under ch. 173, for the adoption of two minor children. You state that these children were adopted in the same proceeding, on the same day.

You also inquire whether this is a legal charge against the county, or whether the party adopting the children, who in this case is a rich man, should not bear the expense of such adoption.

Under sec. 694 of the Stats. the county board fixes the salary of the county judge. In the absence of other specific provisions the salary so fixed would doubtless constitute his sole compensation for services required of him by law; but sec. 2454 of the Stats. provides:

“1. Every county judge is prohibited from taking or receiving, either directly or indirectly, any fees whatever for his official services in the administration of the estates of deceased persons, including proceeding to determine the descent of lands, and for certificates of title by descent, or in the appointment of guardians, or in the administration of the estates of wards, except in the counties in which it is otherwise expressly provided by law.

“2. The judge of any county court which is not vested with civil jurisdiction shall be entitled to receive five dollars per day, to be paid from the county treasury, for each day he shall be actually engaged in the examination of any person upon a criminal charge, or engaged upon any other matter, not appertaining to probate business, compensation for which is not otherwise provided.”

The County Court of Calumet county, so far as I am informed, is not endowed with civil jurisdiction by any statute of this state. The statute providing for the adoption of children in county court, being ch. 173 of our Stats., provides no

compensation for the services of the county judge and, as the judge of the County Court of Calumet county has no civil jurisdiction, he is entitled under this statute to a per diem compensation, unless it can be said that the proceeding for the adoption of children is probate business. The question arises, What did the Legislature mean by "probate business"? Did they intend to include simply the probating of the wills of deceased persons and the administration of their estates, or is the term used in a broader sense, including all matters of which probate courts have jurisdiction?

Our Supreme Court has not defined this term, but the Supreme Court of Minnesota, in the case of *Johnson v. Harrison*, 47 Minn. 575; 50 N. W. 923, used the following language:

"While the word 'probate' originally meant merely relating to proof and afterwards relating to proof of wills, yet, in the American law, it is now a general name or term used to include \* \* \* the matters of which probate courts have jurisdiction, which in this state are the estates of deceased persons and persons under guardianship."

The probate courts under the Massachusetts system, which was adopted by the states of Michigan, Wisconsin and Minnesota, have exclusive jurisdiction generally of the very large branch of former chancery jurisdictions relating to the persons and estates of minors and others subject to guardianship, and jurisdiction, exclusive or concurrent with other courts, of the conversion of real estate into money for the payment of debts and legacies and benefits of wards, and of the whole subject of accounting by executors, administrators and guardians appointed in them. See Gary's Probate Law, subd. 4, sec. 17.

The history of the legislation of probate courts in this state and the compensation provided for the judges of county courts seem to show that the term "probate business" as used in sec. 2454 includes all such matters as judges of probate have a right to pass upon. The history of this legislation is reviewed in an opinion by my predecessor the Honorable L. M. Sturdevant, which you will find in the biennial report and opinions of this department for the term ending June 30, 1906, page 527.

Our county court was established as an inferior court, upon which was conferred the powers and jurisdiction formerly possessed by the judges of probate. The jurisdiction of probate judges at the time of the admission of Wisconsin into the Union did not include the proceeding for the adoption of children. Ch. 173 was originally enacted as ch. 85, of the Laws of 1853. It was substantially a reënactment of the statute of Massachusetts of 1851, which, with the exception of the statutes in Louisiana and Texas, is the first law on the subject in the United States. See *Keegan v. Geraghty*, 101 Ill. 26, 33.

These statutes are in derogation of the common law, while the right of one person to adopt the child of another as his own comes from the civil law. See *Humphries v. Davis*, 100 Ind. 274.

It is thus very evident that probate courts did not have jurisdiction of the adoption of children when the constitution of this state was adopted, either in Wisconsin or in the state of Massachusetts.

Our court has held in the case of *Hoffman v. Lincoln County*, 137 Wis. 353, that the hearing of applications for permits allowing minors to labor is not a matter pertaining to probate business under said sec. 2454. Although I believe that the Legislature used the term "probate business" in a broad sense, still, I do not believe that it is broad enough to include the proceedings for the adoption of children. That being so, your county judge is entitled to five dollars per day for each day he is actually engaged in such matters; but you will notice that the statute fixes his compensation at five dollars a day and does not limit it to one child or one proceeding. The county judge cannot increase his per diem allowance by increasing the number of hours or in any other manner. See *Northern T. Co. v. Snyder*, 113 Wis. 516; *Hoffman v. Lincoln Co.*, 137 Wis. 353.

Under the express terms of the statute the county is to pay the county judge, and not the party who makes petition to the court for the adoption of a child.

*Public Officers—Salaries etc.—Legislature*—Member of legislature elected to fill a vacancy, may if he sits during a regular session be compensated even though his predecessor has drawn the full pay and mileage.

March 5, 1913.

HON. J. S. DONALD,  
*Secretary of State.*

In your favor of March 3rd, you state that:

“A member elected at the regular election of 1912 came to the legislature, took oath of office and drew full pay and mileage for the session of 1913. His death shortly after caused a vacancy. Notice of the vacancy and an order for a special primary and election to follow the same were regularly given and published by order of the governor. The vacancy was filled by an election held on Tuesday, February 25th, 1913.”

You request my opinion “as to the manner of procedure in the payment for services of the member elected to fill the vacancy.”

Sec. 21, art. IV, of the Const. provides in part:

“Each member of the legislature shall receive for his services, for and during a regular session, the sum of five hundred dollars, and ten cents for every mile he shall travel in going to and returning from the place of meeting of the legislature on the most usual route. In case of an extra session of the legislature, no additional compensation shall be allowed to any member thereof, either directly or indirectly, except for mileage, to be computed at the same rate as for a regular session.”

Sec. 110 of the Stats. provides in part:

“The presiding officers of the senate and assembly shall issue, immediately after the commencement of the biennial session of the legislature, in each year, to each member of the house over which they respectively preside, who is entitled to receive the same, a certificate, countersigned by the chief clerk, showing that such member has taken the prescribed official oath, and the number of miles traveled by him in going to and returning from the place of meeting of the legislature on the most usual route, and thereupon the amount of mileage and salary to which each member is entitled shall be audited and paid out of the state treasury.”

Both these provisions have remained without amendment or change since 1881. In the year 1885, a situation arose similar to the one now presented. William F. Vilas, elected mem-

ber of assembly from Dane county, drew the salary of \$500.00, the voucher being audited and allowed by the secretary of state on January 15th, 1885. On March 7th, 1885, Mr. Vilas resigned and at a special election, Mr. M. J. Cantwell was elected to fill the unexpired term. On April 15th, 1885, ch. 390, Laws of 1885 was published and went into effect, which law appropriated "the sum of five hundred dollars to Michael J. Cantwell of Madison, Wisconsin, as his salary as member of assembly for the year 1885 and 1886." On April 17th, 1885, a voucher for the payment of \$500.00 to Mr. Cantwell was audited and allowed by the secretary of state, pursuant to said ch. 390. Although it has no bearing on the question presented, it should perhaps be noted that on September 8th, 1885, Mr. Vilas refunded to the state the sum of \$500.00 that he had received.

In providing for the payment of the salary to Mr. Cantwell, it was evidently assumed that he was entitled to a salary under the quoted provision of the Constitution; that the payment thereof was not prohibited by sec. 26, art. IV of the Const. prohibiting the increase of the compensation of a public officer during his term of office; and that sec. 110 of the Stats. was not a sufficient appropriation to authorize the payment out of the state treasury.

I see no reason why this same practice should not be followed now. The newly elected member is within the exact letter of sec. 21 of article IV of the Const. in that he is a "member of the legislature" and renders "services for and during a regular session." It is obviously no objection that he is not present at every meeting during the session, for the same thing would be true of many of the members.

There may be a question whether sec. 110 of the Stats. is not a sufficient appropriation to warrant you in auditing and allowing the salary and mileage without any further legislative action, but I think it would be better if the procedure adopted by the legislature of 1885 were followed and a law passed making a specific appropriation.

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*Public Officers—Licenses—Pharmacists*—A pharmacist's license may be revoked upon his conviction for the third offense of selling habit-forming drugs contrary to sec. 1419,

Wis. Stats. 1911. If the judge fails to revoke the license as a part of the sentence, the State Board of Pharmacy may revoke it.

March 7, 1913.

HON. EDWARD WILLIAMS,

*Secretary State Board of Pharmacy.*

In your letter of the 6th, you ask my opinion as to the authority of the State Board of Pharmacy to revoke the license of a pharmacist who may be found guilty of the illegal sale of cocaine or other habit-forming drug as enumerated in sec. 1419 Wis. Stats. 1911.

Subsec. 5 of sec. 1409d. Wis. Stats. 1911, provides:

“The board of pharmacy may refuse to grant a certificate of registration to any person guilty of felony or gross immorality, or who is addicted to the use of alcoholic liquors or narcotic drugs to such extent as to render him unfit to practice pharmacy; and the board of pharmacy may, after due notice and hearing, revoke a certificate for like cause or any license or certificate which has been procured by fraud.”

Subsec. 1 of sec. 1419 Wis. Stats. 1911, provides in part:

“No person, copartnership or corporation shall sell, furnish or deliver to another person any opium, morphine, heroin, cocaine, alpha or beta eucaine, chloral hydrate,” etc.

except upon the order or prescription therein prescribed.

Par. 2 of subsec. 10 of the same section provides in part:

“Any person who shall violate any of the provisions of this section, shall be deemed guilty of a misdemeanor, and upon conviction \* \* \* for a third offense shall be fined not less than one hundred dollars nor more than two hundred dollars, and shall be imprisoned in the county jail for not more than six months, and if a licensed pharmacist, \* \* \* his license shall be revoked. It shall be the duty of the board of pharmacy to cause the prosecution of all persons violating the provisions of this section.”

The sale of cocaine or other habit-forming drug is thus made a misdemeanor and not a felony. Upon conviction for a third offense it is the duty of the judge, as a part of the sentence, to revoke the license. If he does not do so, in my opinion, the

Board of Pharmacy is authorized upon due notice and hearing to revoke the license. Anyone found guilty of committing the third offense, in my opinion, would be guilty of gross immorality. The board have no authority to revoke for this cause prior to conviction for a third offense.

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*Public Officers—Education—County Superintendent of Schools*

—A person whose main business or occupation has been teaching during a period of eight months is eligible under sec. 702a.

Where no proof is filed under subsec. 5 of sec. 38, the county clerk should not put the name of a candidate on the ballot. Where what is claimed to be proof is filed he should not assume to pass on the sufficiency thereof.

March 19, 1913.

HON. C. P. CARY,

*Superintendent of Public Instruction.*

Under date of the 14th inst., you asked my official opinion upon the question of whether employment at regular intervals throughout one school year as a substitute teacher in a system of schools in this state would constitute eight months of teaching within the meaning of the law relating to the qualifications of county superintendents. You state that:

“It must be understood that the substitute teacher receives pay only for the actual number of days taught in each month and does not receive a monthly salary, but a certain per diem. In other words, the substitute teacher works only for a school board as her services may be required and is paid for the time actually taught.”

Section 702a provides:

“No person shall be eligible to the office of county superintendent of schools who shall not, at the time of his election or appointment thereto, have taught in a public school in this state for a period of not less than eight months, and who shall not, at such time, hold a certificate entitling him to teach in any public school therein, or a county superintendent’s certificate, issued by the state superintendent after examination by and upon the recommendation of the board of examiners for state certificates as provided by law; provided, that the fore-

going provision shall not disqualify any person who held such office in this state on or before the first day of May, one thousand eight hundred and ninety-five."

Subd. 5 of sec. 38 of the Stats. provides:

"In no case shall a county clerk place the name of any person upon such ballot as a candidate for the office of county superintendent of schools unless such person shall have filed in such clerk's office at least ten days before the day of election at which such superintendent is to be elected, proof of having successfully taught in one or more of the public schools of this state, for a period of eight months, and a copy of a certificate entitling him to teach in any such school, or of a certificate known as a county superintendent's certificate, unless such person, before the first day of May, 1895, has held the office of county superintendent of schools in this state."

You call my attention to the fact that sec. 459 provides, among other things, that twenty days of teaching shall constitute a school month. I may also add that by quite universal custom six hours constitute a school day. The first question to be considered is whether a person who seeks to be a candidate for the office of county superintendent must have taught one hundred and sixty days of six hours each day in order to be eligible to the office. It will be conceded that such a construction is as harsh and rigorous as the language of sec. 702a or subd. 5 of sec. 38 will bear. If such should be the construction, a person teaching eight months but who lost a day or two by sickness would be ineligible for such office; neither would a principal of a high school, who, though acting in that capacity for a period of eight months, taught only a couple of hours each day, devoting the remainder of his time to supervision, be eligible. I feel that a court would not apply such a rigorous construction to the language of the statute. I am of the opinion that a *substantial* compliance with the terms of the statute is sufficient to qualify a person for the office, and that the main question is whether such person was engaged in teaching as his business or occupation during the period of eight months.

Under such a construction a substitute teacher might or might not comply with the requirements of this section, depending entirely upon circumstances and the portion of the

time actually devoted to teaching by such substitute teacher.

It seems to me that if he was employed generally for a period of eight months, losing only a day occasionally, but holding himself in readiness to respond to the call of the school board at any time, that a court would construe such service as a compliance with the requirements of the statute, while, if the circumstances were reversed and he only taught an occasional day or week so that during the year he only got in a small portion of the time in schoolroom service, it would not be held to be a compliance with the statute.

This brings us to the question of the duty of the county clerk in placing the name of a candidate for county superintendent on the ballot. He shall not place the name of a person upon the ballot as a candidate for county superintendent

“unless such person shall have filed in such clerk’s office at least ten days before the day of election at which such superintendent is to be elected, proof of having successfully taught in one or more of the public schools of this state for a period of eight months.”

It will be observed that the statute is not very specific as to what shall constitute “proof” of such act. It is quite likely, however, that “proof” to satisfy the requirements of this statute should rise to the dignity of an affidavit, at least, made by a party knowing the facts. It is clear that unless something in the nature of “proof” is filed with the clerk, he should not place the name upon the ballot. In case of a total failure to file anything of the kind, the clerk’s duty is plain. He shall not put the name on the ballot. But where a person who is a candidate for that office files a document which he *claims* to be “proof” that he is qualified, the clerk is confronted with quite another problem. The question then arises whether the clerk should exercise judicial or quasi judicial functions and pass upon the *sufficiency* of such “proof,” thus determining the right of anyone to become a candidate for that office. The county clerk is a ministerial and not a judicial officer. It would seem that if he is to pass upon the sufficiency of such a paper he exercises at least quasi judicial functions. At any rate, he sits in determination upon quite important rights for his erroneous decision might bar a person

actually qualified from becoming a candidate for this office. Such powers are not generally given to county clerks. In 15 Cyc. on page 347 the law is laid down that

“The county officer whose duty it is to prepare and print the official ballot acts in a purely ministerial capacity, and he must place upon the ballot all names regularly certified to him as having been put in nomination.”

In an opinion given to Victor Pierrelee, district attorney of Ashland county, under date of June 10, 1910, upon the question of whether the county clerk of Ashland county should put the name of Nellie M. Archibald, a woman, upon the ticket as a candidate for county treasurer, Attorney-General Gilbert said:

“Our supreme court has never passed upon the direct question as to whether a woman is eligible to the office of county treasurer. If the county clerk should take it upon himself to refuse to place Mrs. Archibald's name upon the ballot when nomination papers are filed in her behalf, it would deprive her of the right to have her name voted on at the September primary for there would not be sufficient time to get the matter before the supreme court and obtain a decision before the holding of the primary. The question as to the eligibility of Mrs. Archibald to the office of county treasurer should be determined by the courts and it is my opinion that under the above authorities it is the duty of the county clerk to place upon the official ballot the name of the person in question if proper nomination papers are filed.” Opinions of the Attorney-General for 1910, p. 342.

I think the rule laid down by Attorney-General Gilbert is a safe and eminently appropriate one for the guidance of county clerks. With reference to the office of county superintendent I should say that where no attempt is made to file “proof” of qualifications, he should refuse to place the name upon the ballot, but where what is claimed to be “proof” of such qualifications be filed in this office, he should not assume to pass upon the *sufficiency* of that “proof.” By following out such policy he will harm no one because if it should transpire that the candidate did not have the required qualifications there would still be an opportunity for the courts to pass thereon.

Referring to your question couched in the following language:

“In case the actual number of days taught and paid for by the school board was less than one hundred and sixty days during the school year, would such less number of days of teaching legally entitle the person to the statement that he had taught eight months in the state of Wisconsin?”

will say that it is my opinion that in furnishing these statements, certificates or affidavits, or whatever form they may take, by the school officers, they should confine themselves as nearly as possible to a statement of the facts as they really exist and leave it to the court to say whether or not upon such facts the candidate meets the qualifications of the statute.

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*Public Officers—Fees*—County Judge is entitled to five dollars for the hearing of an application to commit an insane person to the asylum.

March 20, 1913.

JAMES KIRWAN,  
*District Attorney,*  
 Chilton, Wisconsin.

In your letter of March 14th, you inquire to what fee the county judge is entitled for the hearing of an application to commit a husband and wife to the insane asylum. You state that you had a case of the examination of a husband and wife, both being examined on the same day, by the same physician, and also committed on the same day. You inquire whether the judge is entitled to ten dollars or to five dollars.

Sec. 585d of our Stats. provides:

“The county judge, except of Milwaukee county, shall receive a fee of five dollars for the hearing of an application to commit a person alleged to be insane, which fee shall include the making of necessary copies of the order to commit such person and the commitment papers, together with the certificate required by section 585c, when the insane person is committed to the county asylum.”

Under this provision of the law the judge is entitled to five dollars for the hearing of every application to commit a person alleged to be insane. Of course, if the same application contains the names of two persons, under the wording of this

statute he would still be entitled to only five dollars; but, as the applications are generally made for each person separately, the county judge would, under the express wording of this statute, be entitled to five dollars for the hearing of each application.

You have called my attention to sec. 2454 of the Stats., under which the county judge is entitled to five dollars per day

“for each day he shall be actually engaged in the examination of any person upon a criminal charge or engaged upon any other matter not appertaining to probate business compensation for which is not otherwise provided.”

As there is a special provision made for his pay, in case of the application to commit an insane person to an asylum, this latter section does not apply.

I am therefore of the opinion that the county judge is entitled to five dollars for each application to commit an insane person, although more than one application may be heard on the same day.

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*Public Officers—Municipal Corporations—Towns—Health—*  
Not all the members of a local board of health are required to be residents of the municipality in which they serve.

March 20, 1913.

DR. C. A. HARPER,

*Secretary State Board of Health.*

Under date of March 15th, you state that the health board of the town of Clarno, in Green county, consists of two members of the town board and Dr. Gnagi, the third member, and also the health officer of the board, who does not live in said town, but in the city of Monroe; that a case of violation of the quarantine law has occurred and that the question has arisen whether the board of health is properly organized in said town of Clarno. You also enclose the letter addressed to you by Dr. Gnagi under date of March 13th, in which he submits some of the facts concerning the matter in question.

Members of the board of health are not named in sec. 808 of the Stats., which specifies the town officers to be elected

at the annual town meeting. Said section contains the following provision:

“No person except an elector of the town shall hold any town office, and no person shall hold the offices of treasurer and assessor at the same time.”

Sec. 1411 of the Stats. provides as follows:

“The town board, village board and common council of every town, village and city shall, within thirty days after each annual election, organize as a board of health, or appoint wholly or partially from its own members, a suitable number of competent persons who shall organize as a board of health for such town, village or city.”

Said section also provides as follows:

“The officers of such board shall include a chairman, a clerk, and a health officer, who shall be ex officio a member of such board and its executive officer;” etc.

In the case of *Kempster v. City of Milwaukee*, 108 Wis. 422, our Supreme Court held that the commissioner of health of the city of Milwaukee was not a local officer. The court said:

“In carrying out the laws for the preservation of the public health, the city is performing a duty which it owes to the whole public as distinguished from a mere corporate duty. It is a duty which it is bound to see performed in pursuance of law as one of the governmental agencies, but not a duty from which it derives practical benefits in its corporate or private capacity. It is like the administration of the fire and police department.”

See also the case of *Hayes v. Oshkosh*, 33 Wis. 314.

Under the above provisions of our statute it is necessary that the board of health be partially appointed from the members of the town board. This has been done in the present case, two members of the board in question being members of the town board. The third member of the board is the health officer of the town, but not an elector of the town. There is no provision of our statutes, so far as I have been able to find, from which the conclusion may be drawn that all the members of the board of health must be electors or residents of the town. My predecessor in office, Honorable Frank

L. Gilbert, held in an opinion rendered to you June 5th, 1907, that it was not necessary that the health officer be an elector or resident of the town in which he serves. It seems to me that this is the correct conclusion to be drawn from the statutes. As the health officer is ex officio a member of the board of health the conclusion is inevitable that not all of the members of the board need necessarily be electors of the town.

I am therefore of the opinion that the board of health of the town of Clarno is legally organized and that its actions cannot be called into question if otherwise legal.

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*Public Officers—Powers and Duties—Justices of the Peace—Police Justices—State Veterinarian*—A police justice is not authorized to act under sec. 1492b with reference to the appraisal of condemned animals.

March 22, 1913.

HON. O. H. ELIASON,  
*State Veterinarian.*

In your favor of March 17th, you ask my opinion as to whether a police justice is empowered to act under sec. 1492b of the Stats., and the secretary of your board has orally informed me that the question arises as to the police justice of the village of Wilson, in St. Croix county, a village incorporated under general charter.

Sec. 1492b provides the procedure for the appraisal of condemned animals and sec. 1 thereof provides in part that:

“Whenever the owner shall not exercise the option mentioned in the preceding section \* \* \* written notice shall be given \* \* \* to a justice of the peace in the county in which the animals may be” etc.

Sec. 2 requires the justice to summon the owner, agent or possessor of the animals and

“three disinterested citizens of the county not residents of the immediate neighborhood in which such animals are owned or kept, to appraise the value thereof. Every person so appointed shall have had experience in the raising and care of live stock, and shall be familiar with the value of such live stock, and competent to appraise the same.”

Sec. 875 of the statutes provides for the election in each village of

“two justices of the peace and a police justice, if required to be elected in such year, unless such last named office shall have been discontinued,” etc.

Sec. 920 provides for the discontinuance of the office of police justice by vote of the electors of the village.

Sec. 886 provides for the jurisdiction of a justice of the peace in a village as follows:

“He shall have concurrent jurisdiction and powers throughout the county with other justices of the peace; and whenever there shall be no police justice in such village he shall have exclusive jurisdiction of all cases arising under the ordinances and by-laws of such village, and all the powers given herein to the police justice, and be taken as included within that designation herein.”

Subsec. 2 of sec. 887 provides as follows:

“He (the police justice) shall hold the police court, and, within the limits of the village, have the jurisdiction of a justice of the peace and exclusive jurisdiction of all cases whatever arising under the ordinances and by-laws of such village and concurrent jurisdiction of all criminal cases arising therein.”

Justices of the peace are constitutional officers. *State ex rel. Burke v. Henkel*, 144 Wis. 444, 7. Their jurisdiction is coextensive with the limits of the county. Sec. 3568 Stats. These particulars distinguish them from police justices, whose offices are created by the legislature and whose jurisdiction is confined to “the limits of the village.” The offices are so distinct that the same person cannot hold both. *State ex rel. Knox v. Hadley*, 7 Wis. 700, 707.

You will note that sec. 886 provides that the justices of the peace in a village where there is no police justice shall “have all the powers given herein to the police justice and be taken as included within that designation herein.”

I find no such provision as to police justices being included within the designation of justices of the peace and although sec. 887 gives to police justices “within the limits of the village \* \* \* the jurisdiction of a justice of the peace,” I think that in view of the limitation of their jurisdiction to the

village and the necessity of summoning as appraisers under sec. 1492b, "citizens of the county not residents of the immediate neighborhood in which such animals are owned or kept," and the requirements that such appraisers must "have had experience in the care and raising of live stock," experience not usually possessed by village residents, that the legislative intent was to confer the jurisdiction given by sec. 1492b on justices of the peace only and not on police justices.

The word "jurisdiction" may mean the power of a court "to hear and determine a cause" (*W. F. M. Co. v. Wis. M. R. Co.*, 81 Wis. 389, 395; *State ex rel. v. Whitford*, 54 Wis. 150, 7), or it may mean "the power and authority conferred by law upon the officer or tribunal" (*Schmidt v. Milwaukee*, 149 Wis. 367, 376). The word is evidently used in sec. 887 with its more limited meaning and seems intended to give to the police justice the jurisdiction of a justice of the peace *as a court*. Sec. 887 provides that the police justice "shall hold *the police court*" and the words immediately following are evidently intended to define his jurisdiction as such court, for later on in the section, he is given power to take acknowledgments of deeds, etc., powers possessed by justices of the peace and which the police justice would possess without enumeration if the grant of "jurisdiction" were intended to include all "powers" possessed by justices. The power given by sec. 1492b to justices of the peace is administrative rather than judicial. The only duties imposed are to enter the notice on the docket, summon the owner of the animals together with three appraisers, take the oath of the appraisers, receive their verified report and give his certificate entitling them to their fees. None of these duties are judicial, for it is plain that they might as well have been conferred on any purely administrative officer as well as on a justice of the peace. Consequently, they are not comprehended within the grant of "the jurisdiction of a justice of the peace" in the sense of such officer's judicial powers. Being of the opinion that police justices are given by sec. 887 only the jurisdiction of justices of the peace acting judicially and that the duty imposed by sec. 1492b is not a judicial function, I am forced to the conclusion that a police justice has no power to act under sec. 1492b.

*Public Officers—Education*—A person who has only taught 34 days in the schools of this state between February and May is not qualified for the office of county superintendent.

March 24, 1913.

EDWARD W. MILLER,  
*District Attorney,*  
Marinette, Wis.

Under date of the 24th inst., you ask for my official opinion as to whether a person

“is eligible as a candidate for the office of county superintendent of schools under section 702a of the statutes, where the records of the board of education now on file in the office of the county clerk in the county where such person claims to have taught and seeks election show that said person taught as a supply teacher in said schools for a period of thirty-four and a half days during the school year of 1910—1911 and no claim being made by said person that she ever taught in any other school of this state, the first part of said service having been performed during the month of February, 1911, and the last part of said service having been performed during the month of May, 1911, no contract or request of any kind for said service having been entered into or made with or by said board of education prior to the month of February, 1911, nor was any service as teacher rendered prior thereto.”

In an official opinion given to Hon. C. P. Cary, Superintendent of Public Instruction, under date of March 19th, 1913, in discussing the question of the qualifications of a candidate for the office of county superintendent as required by sec. 702a, I said:

“I am of the opinion that a substantial compliance with the terms of the statute is sufficient to qualify a person for the office and that the main question is, whether such person was engaged in teaching as his business or occupation during the period of eight months. Under such a construction a substitute teacher might or might not comply with the requirements of this section, depending entirely upon circumstances and the portion of the time actually devoted to teaching by such substitute teacher. It seems to me that, if he was employed generally for a period of eight months, losing only a day occasionally, but holding himself in readiness to respond to the call of the board at any time, a court would construe such service as a compliance with the requirements of the statute, while, if the circumstances were reversed and he only taught an occasional day or week, so that,

during the year, he only got in a small portion of the time in schoolroom service, it would not be held to be a compliance with the statute.”

Following this rule, it seems to me very apparent that a person who has taught but thirty-four and a half days, such service commencing in February, 1911, and ending in May, 1911, coupled with the further consideration that there were no contractual relations existing between such teacher and the school board covering the entire year, does not qualify under the provisions of sec. 702a of the Stats., and that such person would not be eligible to the office of county superintendent, in the absence of proof of any other service as a teacher in the public schools of this state.

Supplementing opinion of March 19th.

*Public Officers—Municipal Corporations*—A city officer ought not to solicit insurance business from the city for a company represented by him, even where the policy is not written by him, and he receives no commission on the premium paid for such insurance.

March 29, 1913.

HON. O. H. BRUEMMER,  
*District Attorney,*  
 Kewaunee, Wisconsin.

In your letter of the 26th you ask the following:

“Assuming an officer of a city represents insurance companies as their agent, and assuming that some of the city’s public property is insured in one of these companies, not through the officer but directly to that company, the agent solicits the business, but gets no commission upon the insurance premium. Is such a contract void or prohibited by section 925—255, 1911?”

The section you refer to provides in part:

“No city officer shall be interested, directly or indirectly, in any improvement or contract to which the city is a party, and whenever it shall appear that such is the case such contract shall be absolutely void and the city shall incur no liability whatever thereon.”

Certainly the action of the officer in soliciting such business was highly improper. If the contract is not such a one as is

prohibited by the statute it is dangerously close to it. The city ought not to enter into such a contract. Just what is required to give an officer an interest, direct or indirect, in such a contract is not easy of determination.

“It is impossible to lay down any general rule defining the nature of the interest of a municipal officer which comes within the operation of these principles. Any direct or indirect interest in the subject matter is sufficient to taint the contract with illegality, if the interest be such as to affect the judgment and conduct of the officer either in the making of the contract or in its performance. In general the disqualifying interest must be of a pecuniary or proprietary nature.” 2 Dillon on Municipal Corporations (5th ed.) sec. 773.

On the other hand, it is immaterial how slight the interest may be; thus one holding as collateral security one share of stock in a corporation is interested in any contract secured by such corporation regardless of the value of the stock. *State ex rel. Foster vs. City of Cape May*, 36 At. 1089; 60 N. J. Law 78.

And one who is a surety upon the bond of the contractor is interested in the contract. *O'Neill vs. Flannagan*, 98 Me. 426.

One who is a stockholder and manager of a lumber company which sells lumber to a contractor agreeing to receive improvement warrants in payment therefor, is interested in the contract. *Northport vs. Northport Town Site Company*, 27 Wash. 543; 68 Pac. 204.

In this last case the court said:

“However devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void.”

In New Jersey it has been held that a person who acts as manager for a business concern, solicits business for it, and signs contracts made by it, although he works on a salary and has no pecuniary interest in the concern, is indirectly interested in a contract secured by it. *Harrison vs. City of Elizabeth*, 57 At. 137; 70 New Jersey Law 591.

This case comes very close to the situation you present. In my opinion the court ought to hold that one who solicits a contract is, at least indirectly, interested in it. At the same time, it is not certain it would so hold. Of course, you have in mind also section 4549 and the opinion given you under date of December 12th last.

*Public Officers—Counties*—One who is a member of the county board of supervisors may not legally contract with the trustees of the county asylum to act as undertaker in burying the dead from such asylum.

March 31, 1913.

HON. ALEXANDER WILEY,

*District Attorney,*

Chippewa Falls, Wisconsin.

In your letter of the 27th you call my attention to sec. 692, Wis. Stats. 1911, which provides:

“No member of the county board or other county officer, whether elected or appointed, shall hereafter be a party to or in any way or manner interested, either directly or indirectly, in any contract or agreement whatever, verbal, written or otherwise, with the county for the purchase of any article whatever required by such county. All contracts or agreements made in violation of this section shall be void; and in case any supervisor shall offend against the provisions of this section he shall be deemed thereby to have vacated his office as such supervisor.”

And you ask if a supervisor of the county board who is an undertaker may legally bury the dead from a county asylum and be paid therefor by the asylum trustees, he having entered into a contract with the trustees to perform such services.

I assume that the supervisor in question in connection with such services furnishes the coffins and possibly other articles used in connection with such burials. Of course, the asylum trustees are mere agents of the county and any contract with them in their official capacity is a contract with the county; regardless of whether the supervisor has any agreement with the trustees or not, there is an assumption of some kind of a contract, either express or implied, or no payment would be made him. Very clearly any such contract is absolutely void under the section quoted and any money paid such supervisor thereunder may be recovered by the county.

“No member of a county board can be interested, directly or indirectly, in any such contract without being guilty of gross violation of public duty, and liable to respond therefor in damages to the corporation to the full extent of any pecuniary benefit re-

ceived by him in any event, and such further sum as the corporation may have lost by his unfaithful conduct." *Land, Log & Lumber Co. vs. McIntyre*, 100 Wis. 245.

Whether or not the performance of services in connection with such burials would be considered an article within the meaning of this section is far from certain. It is a penal statute and would be strictly construed. On the other hand, it is the duty of the court to carry out the spirit of the law and if that is done it might well be held that it was intended to cover contracts for services as well as contracts for tangible articles. It is not necessary, however, to rely on that section alone. Sec. 4549 provides in part:

"Any officer, agent or clerk \* \* \* of any county, \* \* \* or in the employment thereof, \* \* \* who shall have, reserve or acquire any pecuniary interest, directly or indirectly, present or prospective, absolute or conditional, in any way or manner, in any purchase or sale of any personal or real property or thing in action, or in any contract, proposal or bid in relation to the same, or in relation to any public service, \* \* \* shall be punished" etc.

This section is broad enough to cover any kind of a contract made by a county officer with the county. Under it our supreme court has held that a municipal judge authorized by the county to rent a suitable room for holding his court may not rent his own property; that such a contract would be not merely voidable, but absolutely void. *Quayle vs. Bayfield County*, 114 Wis. 108.

This department has made numerous rulings as to the acts prohibited by this section of which I may mention the following:—Purchase of goods by a county from a corporation of which a city officer is a stockholder, Biennial Report and Opinions of the Attorney-General for 1906, page 342; furnishing supplies to poor by mayor of city, *Ibid*, page 346; contract by normal school regents with corporation of which one of the regents is a stockholder, Report for 1908, page 702; contract for printing ballots for county with corporation of which district attorney is a stockholder, *Ibid*, page 779; contract with village clerk to construct power house and mains, Report for 1910, page 576; naming as county depository a bank in which a supervisor is a stockholder and officer, *Ibid*, page 588; also

opinion to district attorney of Calumet county, Report for 1912, p. 216; employment by street commissioner of mayor and alderman to work on streets, Report for 1910, page 608; purchase by superintendent of county asylum of groceries for that institution from a corporation of which he is a stockholder, page 485 of this report; writing insurance on county buildings by district attorney, page 488 of this report. In this latter opinion it was stated that this might be, and probably was, in violation of sec. 692. Publication for pay of village ordinances by village clerk, even where no other paper is published in the village and the statute requires publication in a paper published in the village if there be one, is prohibited. Opinion to district attorney of Calumet County, Report for 1912, p. 290.

Even in the absence of such a statute one who is a member of a public body such as a county board, school board, common council of city or board of trustees of a village cannot recover under a contract made with such body. Such a contract is contrary to public policy. *Rickett vs. School District*, 25 Wis. 551; *In re The Taylor Orphan Asylum*, 36 Wis. 534; *Haywood vs. Lincoln Lumber Co.*, 64 Wis. 639; *Pittsburgh Mining Co. v. Spooner*, 74 Wis. 307.

In my opinion the supervisor in question is guilty of violating this section and may be proceeded against accordingly and the county may recover whatever has been paid him under such contract.

## OPINIONS RELATING TO PUBLIC PRINTING.

*Printing—Public Officers*—Ch. 188 Laws 1903 does not authorize the printing of the report of the inspector of apiaries.

June 6, 1911.

HON. JAMES A. FREAR,  
*Secretary of State.*

Your favor of the 5th inst., enclosing an expense voucher executed under ch. 188 of the Laws of 1903, is received.

Concerning the same you ask for the opinion of this department as to whether or not ch. 188 authorizes the printing of the annual reports of the State Inspector of Apiaries and if so how many, and also whether or not any authority under the law exists for printing the report in the German language.

That portion of ch. 188 of the Laws of 1903 which bears upon the subject of your inquiry is as follows:

“The inspector shall make at the close of each calendar year a report to the governor stating the number of apiaries visited, the number of those diseased and treated, the number of colonies of bees destroyed and of the expenses incurred in the performance of his duties. Said inspector shall receive four dollars for each day actually and necessarily spent in the performance of his duties and be reimbursed the money expended by him in defraying his expenses, provided that the total expenditure for such purposes shall not exceed seven hundred dollars per year.”

It is difficult to perceive in this statute any authority for printing a report by the Inspector of Apiaries. The law expressly limits his expenses to four dollars for each day actually and necessarily spent in the performance of his duties and makes no provision or mention of the matter of printing his report in any language whatever. Evidently the legislative

purpose in providing that the inspector should make an annual report to the governor was for the purpose of determining from such report the necessity of maintaining the position of State Inspector of Apiaries. Certainly there is no authority either express or implied for the printing of this report either in English or in German by such inspector and it follows that the items of printing contained in the expense voucher submitted are without authority in law.

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*Public Printing—Public Officers*—The State Printing Board may authorize an increase in the number of pages of any report limited as to number of pages by sec. 20.25 Stats., if such report is required to be reprinted as a part of the collected state documents.

August 14th, 1912.

HON. J. A. FREAR,  
*Secretary of State.*

You have sent to this department a letter from Mr. F. E. Doty, Secretary and Chief Examiner of the State Civil Service Commission, bearing date of August 13th, and request my opinion upon the matters therein stated. Mr. Doty states:

“I understand that the law passed last winter relative to printing biennial reports confines the Civil Service Commission to 25 pages.

“Sec. 7, par. 5, of the civil service law, provides that the Civil Service Commission shall make a biennial report to the Governor on or before the first of December in each even-numbered year, showing its own actions, rules and regulations; the exceptions in force, the practical effects thereof; any suggestions that may be approved for more effective accomplishment of the purpose of this act, and shall give the names and separate compensation of persons employed by the commission; and it further provides that such report shall be immediately printed for public distribution and transmitted to the legislature when it convenes.

“The last printed biennial report contained in addition to matters required by law, the roster of the state service—49 pages; an index—16 pages; a decision of the Supreme Court—7 pages; opinions of the Attorney-General—36 pages. All other matters printed in the report were matters required by law to be printed.

"I am satisfied that the next biennial report should be indexed; that it should contain a roster of the service. We can omit all other matters not required by the civil service law to be printed. We could print the civil service law and rules separately, but this would not result in any material saving in printing.

"Our last biennial report contained 366 pages. The size can be somewhat reduced, but we cannot comply with the civil service law and reduce it to 25 pages.

"We would like instructions from you with reference to this matter. Are you given any discretion to depart from the strict letter of the law in cases of this kind?"

I assume that the law to which Mr. Doty refers is the one known as the State Printing Law, being ch. 657 of the Laws of 1911. Section 20.25 of that law provides in part:

"Within sixty days after receiving printer's copy therefor the state printer shall print and deliver two thousand copies of every general message addressed by the governor to any general or special session of the legislature and editions of the reports mentioned in section 20.24, limited as follows: \* \* \*"

The reports of the Civil Service Commission are limited, under this section, to 500 copies and 25 pages to the copy.

Section 20.38, being a part of the same chapter, provides in part:

"The printing board shall not order any printing not authorized by law nor any quantity in excess of the legal limitation thereof, except that the number of copies and the number of pages prescribed in this chapter for any official report, transactions, or proceedings which is required to reappear in the collected state documents may be enlarged upon the written request of its author by an order made by a majority of said board recorded before the printing order is made."

Section 20.29, being also a part of the same chapter, provides for the printing of the collected state documents of Wisconsin and provides what reports are to be included in such documents. Among other things to appear is the report of the State Civil Service Commission. From this it follows that the State Printing Board has authority, upon the written request of the author of the report of the State Civil Service Commission, to increase the number of pages that may be used in printing such report.

*Public Printing—State Board of Agriculture*—The printing of blank books for the office records of the Board of Agriculture and the educational and general premium list containing all rules and regulations of the board must be paid for out of the general fund of the state.

February 7th, 1913.

HON. J. C. MACKENZIE,

*Secretary Wisconsin State Board of Agriculture.*

Under date of January 28th you inquire whether the printing of blank books for the office records of your Board and the educational and general premium list containing all rules and regulations of the Board, is to be paid for out of the funds of the Board or out of the general funds of the State.

Section 20.33 of the printing law, being ch. 657 of the Laws of 1911, provides:

“Job printing includes all such labels, envelopes, letterheads, note heads, billheads, blanks of all kinds, blank books, folders, circulars, postal cards, announcements, instructions, bulletins, card catalogues, indexes, questions for bar, medical, civil service, teachers’ or other examinations, slips, pay rolls, statements, tables of receipts and disbursements, certificates, directories, election and other notices, sample ballots, lists of candidates, and such other printing not specified in this chapter as may be permitted or required by law and necessary for the use of the University of Wisconsin, all state normal schools, the state historical society, and each state officer, department, board, commission, or commissioner, including such binding as may be needed in connection with such printing; and the printing board shall order all such printing to be done by the state printer upon receiving printer’s copy and the necessary requisitions therefor from the respective institutions, boards, commissions and officers.”

Under sec. 1456 the department of Agriculture was continued as established, and the department was placed under the management of a board. Sec. 1458a of the Stats. provides that said Board of Agriculture shall have sole control of the affairs of the department of Agriculture and of all state fairs and state fair grounds and may make such by-laws, rules and regulations in relation to the management of the business of said department and said fairs and the offering of premiums thereat as they shall from time to time determine.

Said sec. 20.33 expressly mentions departments of state and boards. There can be no question that said section applies to the State Board of Agriculture. Not only is it a Board, but it has control of a department of state, expressly created by our statutes, so that it comes within the express terms of the statute. Blank books are expressly named in the enumeration of job printing, in said sec. 20.33.

Rule 5 of the rules and regulations governing the Wisconsin State Board of Agriculture provides as follows:

“The secretary shall, under the direction of the board, keep a true and complete record of all the proceedings of the board, take charge of all papers, documents and correspondence; keep a complete accounting system showing the financial transactions of the board, and render a statement showing the financial condition at each monthly meeting of the board.”

As the Board is authorized to make such rules and regulations in relation to the management of the business of the department of Agriculture, this rule is legally made, and the conclusion is inevitable that the printing of blank books is permitted by law and necessary for the use of this board in carrying out the purposes for which said Board was created.

I have not been informed whether your Board has any by-laws, rules and regulations authorizing the printing of premium lists; but, under the provisions of sec. 1458a, the offering of premiums at the fair is expressly referred to and in sec. 1463 published offers of premiums and purses are also referred to.

If, under the rules and regulations of your Board, it is necessary to print the educational and general premium lists containing all the rules and regulations of the Board, then it is very evident that such printing will come under the provisions of said sec. 20.33. The words “circulars,” “announcements,” “bulletins” and “instructions” are broad enough to include such premium lists.

Sec. 20.90 of the said printing law provides as follows:

“Every claim for compensation arising under this chapter shall be audited by the secretary of state and the amount allowed thereupon by him shall be paid out of the state treasury, but in certain cases such payment shall be charged as directed in section 20.91.”

Sec. 20.91 provides that the cost of all public printing furnished certain institutions and boards of the state shall be paid out of the funds set aside for such board, but the State Board of Agriculture is not among the list enumerated.

I am therefore of the opinion that the printing of the blank books and the educational and general premium lists containing all rules and regulations of your Board, should be paid for out of the general fund of the State. I believe that the statute in its present form expressly authorizes such payment.

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*State Printing—Public Officers*—The retiring Printing Board having placed the order for printing the Blue Book with the State Printer before Jan. 1st under the terms of the expiring printing contract, it is to be presumed that they were actuated by fidelity to the public interests, and any benefits accruing to the state therefrom should not be surrendered by the incoming Board unless it is plain that their act was without warrant of law.

February 14, 1913.

HON. JOHN S. DONALD,  
*Secretary of State.*

Under date of December 24, 1912, your predecessor submitted to my predecessor the question of whether the 1913 Blue Book should be printed and paid for under the old or new contract between the state and the Democrat Printing Company. The question was not answered before the change of administration, but I understand it is your desire that this department furnish you an answer to that question.

In reply thereto I beg to state that this department has given the subject quite thorough and serious consideration and I am obliged to say that in my opinion the law upon the question is so uncertain that it is impossible for me to give you an opinion thereon with any degree of assurance in advance of a decision of the Supreme Court upon that question. I may say, however, that while I do not feel that I would be warranted in stating the law on the question, I do feel that

there is little doubt as to the policy which should be pursued on the part of the Printing Board with reference to this contract. The old Printing Board, presumably actuated by considerations of fidelity to the interests of the state, placed the order for the 1913 Blue Book, together with a considerable portion of the copy for the same, prior to the first day of January, 1913. I assume they were prompted to do this by reason of the fact that the expense of printing the Blue Book would be considerably greater under the new contract than it would be if printed under the old contract. Inasmuch as the former Printing Board saw fit to take this action in the state's interest, it is very plain to me that the present Printing Board should not assume any different attitude thereon unless it is perfectly plain, as a matter of law, that the state cannot insist upon the printing of the Blue Book under the old contract. This, as I have above stated, is not plain and I think the present Printing Board would be subject to very just criticism if it were to voluntarily surrender any rights enjoyed by the state through the placing of the order for the printing of the Blue Book by the former Printing Board prior to January 1, 1913. The Supreme Court of this state has heretofore commended the secretary of state and the attorney-general for construing doubts in such cases favorably to the state, leaving it to that court to finally assume the responsibility of determination. *State ex rel. Bashford vs. Frear*, 138 Wis. 536.

I, therefore, consider and advise that the present Printing Board insist upon the printing of the Blue Book on the part of the Democrat Printing Company under the terms of the old contract. The Democrat Printing Company is under contract with the state to print this Blue Book under one or the other of the contracts. The company insists that it is entitled to compensation under the new contract. The company may protect itself by printing the Blue Book insisting that by so doing it is entitled to and will claim compensation under the new contract. The state may then compensate them to the amount provided for by the terms of the old contract and if the company feels that it is entitled to a further compensation under the terms of the new contract it may bring suit

against the state to recover the balance it may claim to be due.

I think the duty the Printing Board owes the state requires that it do no less than this. Under such a procedure the rights of the printing company will be preserved and if it is entitled to compensation under the terms of the new contract it will have ample opportunity to establish such claims in the courts.

## OPINIONS RELATING TO PUBLIC UTILITIES.

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*Public Utilities—Criminal Law—Telephones*—The putting in of extensions by a telephone company in territory covered by another telephone company with which its lines have physical connection is not in violation of an order of the Railroad Commission requiring such physical connection.

February 18th, 1913.

HON. L. E. GETTLE,

*Secretary of Railroad Commission of Wisconsin.*

In your letter of the 14th, you say that the Bergen Telephone Company is a public service corporation owning a number of rural lines in Rock county, Wisconsin; that the Clinton Telephone Company is also a public service corporation and operates an exchange in the village of Clinton, Rock county, Wisconsin; that on October 19th, 1912, after a hearing pursuant to sec. 1797m—4 Wis. Stats. 1911, the Commission ordered these two telephone companies to make physical connection of their systems and charge a fixed toll on all completed calls from one system to the other, the company on whose line the toll originates, collecting such toll charges, to be later divided between the two companies; that such physical connection was made but that now the Bergen Telephone Company is rendering service over independent lines in the village of Clinton to several residents and contemplates extending such individual service; that in this way it is able to divert from the Clinton exchange business which it was the intention should be transacted through the Clinton exchange by reason of physical connection, and you ask my opinion as to whether the Bergen Telephone Company is violating the statute by rendering service over independent lines within the

village of Clinton and for that reason subject to the penalty provided in the statute for violation of orders of the Commission.

I interpret your question to be: Has the Bergen Telephone Company, by giving such service over such independent lines, violated the order of the Commission requiring physical connection of the two systems?

I have carefully read the opinion and order of the Commission and have found nothing in there referring in any way to an extension of the lines or service of either company. Neither is there anything in the opinion or order that I have discovered referring to the right of either company to make physical connection with other lines. The order simply requires the two companies to make physical connection of the two lines and to accept calls from a subscriber on one line for the delivery of a message to a subscriber on the other line and fixes the charge to be made for such toll service and the proportionate share of such charge to be received by each.

I cannot say from the facts stated, that this order has been violated.

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*Public Utilities—Telephones—Criminal Law*—It is a violation of sec. 1797m—74 Wis. Stats. for a telephone company, without getting a certificate of necessity from the R. R. Commission, to run its wires from a central office outside to individual subscribers within the limits of a village.

February 27th, 1913.

HON. L. E. GETTLE,

*Secretary Railroad Commission of Wisconsin.*

In your letter of the 24th you call my attention to sec. 1797m—74 Wis. Stats. 1911, which provides in part as follows:

“No telephone exchange for furnishing local service to subscribers within any village or city shall be installed in such village or city by any public utility, other than those already furnishing such telephone service therein, where there is in operation in such village or city a public utility engaged in similar service, without first securing from the commission a declaration after a public hearing of all parties interested, that

public convenience and necessity require such second public utility. This subsection shall not prevent or impose any condition upon the extension of any telephone line from any town into or through any city or village for the purpose of connecting with any telephone exchange in such city or village or connecting with any other telephone line or system."

And you state that the Commission has made no declaration which would authorize the Bergen Telephone Company to operate within the village of Clinton. You ask if under the conditions stated in your letter of the 14th, the Bergen Telephone Company is violating this statute, and therefore, subject to the penalty provided in sec. 1797m—95. Those conditions in brief are: The village of Clinton is an incorporated village; the Clinton Telephone Company operates in the village, having a local exchange, while the Bergen Telephone Company is a rural company, operating in a part of the rural district in the vicinity of the village; the lines of the two companies have been connected by order of the Commission, but the Bergen Company is now running wires to individual subscribers within the village.

In construing a statute the mischief intended to be prevented may be considered. *Richer v. Carlson*, 136 Wis. 353; *Pettingill v. Goulet*, 137 Wis. 285; *State ex rel. McGrath v. Phelps*, 144 Wis. 1, 9.

"The actual judicially determined legislative intent must always govern if expressed at all so as to be discernible by the searchlights which the court possesses. They permit of looking at a written law as a whole, to the subject with which it deals, to the reason and spirit thereof, to give words a broad or narrow construction, going either way to the limits of their reasonable scope, to supply omitted words which are clearly in place by implication, to change one word for another in case of the wrong one being clearly used, and so read out of the enactment the real intent, even though it may be contrary to the letter thereof." *State ex rel. M. St. P. & S. S. M. R. Co. v. Rd. Comm.*, 137 Wis. 80, 85; *Neacy v. Supervisors of Milwaukee County*, 144 Wis. 210; *Jordan Land Co. v. Freeborn*, 149 Wis. 159.

"One of the most familiar and safe canons of construction may be stated thus: For the purpose of clearing up obscurities in a law it should be read with reference to the leading idea thereof,—such idea being regarded as such limitation upon particular words or clauses and expansion of others within the scope thereof, in connection with that of words clearly implied,—and

be thus, if reasonably practicable, brought into harmony with such idea." *State ex rel. M. St. P. & S. S. M. R. Co. v. Rd. Comm., Supra.*

"Having discovered the evident legislative intent, the letter should be sacrificed, within the uttermost boundaries of reason to effect it." *State ex rel. McGrael v. Phelps, Supra.*

Applying these rules of construction, what do we find to be the leading idea of the so-called public utilities act, of which the section referred to is a part; what was the mischief sought to be remedied; what was the legislative intent? Fortunately our supreme court has spoken upon these questions.

"That one of the principal mischiefs sought to be remedied by the new system was elimination of the conditions promotive of hostilities between municipalities and public utility companies, after making large investments by permission and invitation to serve the public directly as well as indirectly,—bitter controversies, sometimes for good reasons and sometimes not, but in any event at the expense of consumers of the product,—seems quite certain.

"It likewise seems certain that one of the major means for attaining the desired end was elimination of excessive investments, and excessive expenses caused by two or more public utilities, each with its separate property and fixed charges, where the need of the consumers only required one, and elimination of risk to investors by encroachments, or threatened encroachments, upon an occupied field of public service without any public necessity therefor. Doubtless an unvarying and invariable economic law was squarely faced and appreciated, that all such subjects for elimination represent waste, which if not avoided would, in the main, fall on the product, increasing the cost of service per unit and be paid by consumers. It was the interests of consumers which was the prime subject of legislative solicitude; such object to be conserved without injustice to others.

"\* \* \* The law must be given a reasonable,—sensible,—construction, at all points, to the end that the legislative intent shall not fail, instead of looking with favor upon technical assaults upon it." *Calumet Service Co. v. Chilton*, 148 Wis. 334, 365, 367.

Having arrived at the reason for the law, we may now examine the definitions of "telephone exchange" to determine which will have the greater tendency to promote the legislative idea.

“Telephone exchange. A central office in which the wires of telephones may be connected to permit conversation.” Webster’s International Dictionary. Century Dictionary. Ency. Americana.

In the article on telephones in the Encyclopaedia Americana, while their definition of the exchange is substantially that above given, in estimating the cost of the exchange, the cost of poles, wires and instruments for subscribers is included.

“A telephone exchange is an arrangement for putting up and maintaining wires, poles, and switch boards within a given area, with a central office, and the necessary operators to enable individual hirers of telephones within that area to converse with each other.” *Western Union Telegraph Co. v. American Bell Telephone Co.*, 105 Fed. 684, 686. 37 Cyc. 1608. 27 A. & E. Enc. of L. (2nd Ed.) 1095.

The same idea has been expressed in a little different form by Miller in his work on American Telephone Practice, 4th Edition, page 171, as follows:

“A telephone exchange is an organization of one or more telephone offices and the connecting lines and substation equipments necessary for supplying telephone service to a community.”

If the first definition given is adopted here, the law as applied to telephone systems is pretty thoroughly emasculated. All that is necessary for a new company to do is to establish its central office beyond the boundaries of the municipality, and it then is at liberty to run its individual wires to every telephone user in the municipality. Clearly the legislature did not intend anything of that kind.

Again, if that definition be adopted, the proviso that “this subsection shall not prevent or impose any condition upon the extension of any telephone line from any town into or through any city or village for the purpose of connecting with any telephone exchange in such city or village or connecting with any other telephone line or system,” is rendered meaningless and of no effect. Under that definition such extension would be no part of a telephone exchange and there would be no need of such proviso. It is the duty of the court and of this

department to so construe the statute as to give effect and meaning to all its parts, if that can reasonably be done. This can be done by adopting the definition quoted from 105 Fed. or that given by Miller.

It is, therefore, my opinion that these latter definitions are the ones that should be applied here; that a telephone exchange includes the wires running to the individual subscribers; that under the facts stated the Bergen Telephone Company has violated the provisions of the section referred to and is subject to the penalty provided by Sec. 1797m—95.

## OPINIONS RELATING TO REQUISITIONS.

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*Requisitions*—Authority of Governor to recall warrant in extradition matters.

June 2, 1911.

HON. FRANCIS E. MCGOVERN,  
Governor of Wisconsin.

*In re Stevens.*

I have examined the authorities cited by the attorneys for Mr. Stevens in the above entitled matter and I am of the opinion that these authorities amply sustain the position taken by the attorneys concerning the power of the Executive to revoke the warrant for arrest issued by the Executive in extradition matters.

“If a warrant has been issued in a case in which it should not have been issued the governor may revoke it whether it was issued by himself or his predecessor.” 19 Cyc. 95.

“It is a matter of common knowledge that the governors of states have been and are in the habit of recalling and revoking such warrants whenever they become satisfied that they were improvidently issued. \* \* \* it has become what may be not improperly called the common law of the country on the subject. \* \* \* the same officer who had the exclusive power to issue the warrant should have the power to remedy the wrong by revoking it.” *State v. Toole*, 69 Minn. 104; 72 N. W. 53; 65 Am. St. R. 553; 38 L. R. A. 224.

“If a warrant for the surrender of a fugitive from justice is obtained in a case in which it should not have been issued the governor may revoke it whether issued by himself or his predecessor.” *Syllabus, Work v. Corrington*, 32 Am. Repts. 345.

In the opinion of the court by Okey, Justice, on page 351 of the case last above cited, the court says:

“The provision was inserted in the articles of confederation, and subsequently in the constitution, to subserve public, and not private purposes. The object was to secure the punishment

of public offenders and not to enforce the payment of private claims whether well or ill founded. To employ this extraordinary process for public purposes tends to secure peace and good order; but to prostitute it to the advancement of private ends is to bring it into great disfavor. \* \* \* No satisfactory reason is perceived why a governor should issue or obey a requisition where he is satisfied that the sole object of the party complaining is to enforce the payment of a private claim for money. Such an abuse of process is equivalent to a fraudulent use of it."

The case above quoted from arose by virtue of a requisition from the governor of North Carolina upon which Governor Hayes, of Ohio, issued a warrant for the arrest of the defendant Corrington for the alleged crime of embezzlement. Afterwards Governor Young of Ohio, successor to Governor Hayes, becoming convinced that the warrant had been improvidently issued by his predecessor made an order to supersede the warrant so issued by Governor Hayes and the federal court held that the governor had authority to revoke such warrant issued by himself or his predecessor in office although at the time of the revocation of such order the fugitive was actually in the custody of the agent of the demanding state.

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*Requisitions*—Application for requisition not in conformity to rules of executive office not approved.

January 4, 1913.

HON. FRANCIS E. MCGOVERN,  
*Governor of Wisconsin.*

At your request I have examined the application of Stanley G. Dunwiddie, District Attorney of Rock county, for a requisition upon the Governor of the State of New Mexico for the return to this state of one R. W. Norton, alias George Williams, a fugitive from justice, charged with the crime of forgery.

This application fails to comply with the rules of the Executive office relating to applications for requisitions, to wit, Rules 6 and 15.

In addition, the copy of the complaint appears to be signed by H. A. Moehlenpah, Municipal Judge, and by John B.

Clark, Clerk of Municipal Court, and does not appear to have been sworn to before anyone. The copy of the complaint is verified as a true copy by Mary C. Whelen, who signs as Clerk of the Municipal Court, while John B. Clark, as Municipal Judge, certifies to her official character. The record is thus so confused that I am unable to approve the same.

In addition, I do not find that Rule 14 has been complied with, nor does the application name a proper person to whom the warrant may issue, etc., as required by Rule 3.

It seems, also, that Rule 9 has not been sufficiently complied with.

For the reasons stated I must refuse to approve of the application.

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*Requisitions*—A requisition will not be issued based upon a charge of bastardy.

Seduction is an offense for which a requisition may be issued.

Sec. 4587c Wis. Stats. 1911, defines an offense for which a requisition may be issued.

January 29, 1913.

HON. HARRY CURRAN WILBUR,

*Executive Clerk.*

In your letter of the 27th, you state that you are directed by Governor McGovern to submit to me the following statement in the matter of the proceedings of Lilly Rieck against Earl Van Ert and to request an opinion as to whether or not requisition proceedings will lie against Van Ert; that several days ago Lilly Rieck called at the Executive office and made complaint that Van Ert was the father of her illegitimate child; that he was then in Minnesota and that the district attorney of Wood county had declined to institute requisition proceedings to secure his return to Wisconsin.

You enclose a letter from Charles E. Briere, District Attorney, in response to a request for information, in which he states that on August 31st, 1910, before he became district attorney, Miss Rieck swore out a bastardy warrant against Van Ert, charging him with being the father of her child; that when he became district attorney, she appeared in his

office and that he told her then and on several occasions since that the rules do not allow extraditing in bastardy proceedings, basing his opinion on paragraph 18 of the executive rules relating to requisitions; that she then consulted some lawyer and returned with a request that the complaint be changed to charge seduction so that he could send after the party; that in response to his questions, she stated that what she was after was to get married and not the punishment of Van Ert; that under these facts he believes paragraph 7 of the executive rules is applicable and he would not certify the fact required under that paragraph.

You ask if the accused may be apprehended and returned to this state under requisition proceedings if charged with bastardy; may he be so returned on a charge of seduction in view of the admission of prosecutrix that what she desires is that the defendant be compelled to marry her; may he be so apprehended and returned on a charge of abandonment?

Rule 18 of the rules of the executive office, relating to applications for requisitions provides:

“As bastardy is not sufficiently well defined by the laws of this state as a crime within the meaning of chapter 7 of the Act of Congress of February 12th, 1793. no requisition will be granted for the surrender of a fugitive charged with this offense.”

This, of course, is because section 5278 Revised Statutes United States requires the apprehension and return only of persons charged

“with having committed treason, felony or other crime.”

That bastardy is not a crime is held in numerous decisions of our supreme court, among them the following: *State v. Mushied*, 12 Wis. 625; *State v. Jager*, 19 Wis. 235; *Rindskopf v. State*, 34 Wis. 217; *Baker v. State*, 56 Wis. 568; *Hodgson v. Nickell*, 69 Wis. 308; *Barry v. Niessen*, 114 Wis. 256; *Goyke v. State*, 136 Wis. 557; *Smith v. State*, 146 Wis. 111.

Clearly the district attorney was justified in refusing to make the application based on the bastardy charge. Seduction is a criminal offense under our statute (sec. 4581 Wis. Stats. 1911) and justifies application for a requisition.\* The

\* Prosecution for seduction cannot be brought after two years.

district attorney justifies his refusal to apply for the requisition based on this charge by saying that the complaining witness admits that her real object is to compel the accused to marry her and not to have him punished, and refers to rule 7 of the executive office relating to requisitions. That rule so far as material provides:

“It must appear satisfactorily that the object in seeking a requisition is not to collect a debt nor for any private end, but that the application is made in good faith, and with a view to enforce the charge of crime against the offender.”

It should be remembered that the district attorney makes the application for the requisition and not the complaining witness. It would appear to me that the object of this rule is to prevent the granting of requisitions on mere trumped-up charges; that if the district attorney is satisfied from the evidence presented that the crime charged has been committed and that he has sufficient evidence to convict the accused, he is warranted in applying for a requisition, even though the complaining witness really prefers something other or different than the punishment of the guilty party.

The complaining witness in a criminal proceeding is not a party to such proceeding and in theory at least, it is the state as representing all of the people that is interested in seeing that the laws are enforced. This is especially true where the offense charged is a serious one, as seduction certainly is.

Probably in a majority of the instances in which requisitions are applied for, the complaining witness really prefers a private settlement of some sort to the infliction of the prescribed penalty. I am, therefore, of the opinion that if the district attorney believes the evidence sufficient to convict the accused of seduction, he would be justified in applying for a requisition based on that charge.

Sec. 4587c Wis. Stats. 1911 provides in part:

“Any person who shall, without lawful excuse, desert or wilfully neglect or refuse to provide for the support and maintenance of his or her legitimate or illegitimate minor child or children under the age of sixteen years in destitute or necessitous circumstances, shall be guilty of a crime.”

Very clearly a requisition may properly issue for one charged with the crime defined by this section.

*Requisitions—Criminal Law—Extradition*—Under the treaty with Great Britain of July 12, 1899, a person charged with burglary may be extradited from Canada.

Rules regarding extradition.

March 19, 1913.

MR. A. J. O'MELIA,

*District Attorney,*

Rhineland, Wis.

In response to your communication over the telephone this morning, I beg leave to say that under the treaty of this country with England of July 12, 1899, found in Vol. 26 of the U. S. Statutes at Large, on page 1508, the following among others was added to the list of crimes for which extradition proceedings will lie between the two countries: "burglary, house-breaking and shop-breaking."

I have requested the executive department to forward to you a set of blanks for requisition proceedings. These may be used in applying for extradition. All papers should be made in triplicate and the application should be accompanied by an authenticated copy of the information and warrant and by an authenticated copy of the evidence upon which the warrant was issued, or by original depositions setting forth as fully as possible the circumstances of the crime. It must appear that one of the offenses enumerated in the extradition treaty has been committed within this state and such offense should be stated in the language of the treaty.

It should also be stated that the person charged is believed to have sought an asylum or has been found within the dominions of the particular foreign government from which extradition is asked. The name of the fugitive should be stated in full, if known, and his alias, if any, and the full name of the person proposed for designation by the president to receive and convey the prisoner here. You will find the rules quite fully set forth in 19 Cyc. 57 and 58, note.

The rules of the executive department of this state with reference to applications for requisition should also be complied with.

*Requisitions*—A requisition from the Governor of another state will not be honored where it appears upon the face of the papers submitted that the accused was in this state at the time of the alleged commission of the crime.

March 21, 1913.

HON. FRANCIS E. MCGOVERN,  
*Governor of Wisconsin.*

I have examined and return herewith the application of Honorable Woodbridge N. Ferris, governor of Michigan, for the apprehension and return to that state of one Howard King, who is charged with the crime of desertion. The complaint, a certified copy of which accompanies the application, alleges that the crime was committed at the city of Owosso, Shiawassee county, Michigan, on the first day of October, 1912. The affidavit of the complainant which accompanies the application, contains the following statement:

“Deponent further says that she is the wife of the accused and that since about March 1st, 1912, to April 1st, 1912, she and said accused were living together in the city of Owosso, State of Michigan, during which time the said accused was employed by the Ann Arbor Railroad Co., that about Sept. 1st, 1912, the accused determined to leave this deponent and desert her at the city of Owosso without cause, and this deponent traveled with him, paying her own fare to the city of Green Bay, Wisconsin, but the accused still refused to provide her a home, and deponent was compelled to return to her parents in the city of Owosso, Michigan, which she did within two weeks after they arrived at Green Bay. This deponent shows that the actual desertion of said accused occurred in the city of Owosso, Michigan.”

From this affidavit it appears that since about September 1st, the defendant has not been in the state of Michigan, but has been in the state of Wisconsin. Consequently he was not in Michigan on October 1st, the date the crime is alleged to have been committed.

In order that a requisition may issue, it must appear that the accused person was actually in the demanding state at the time the crime is alleged to have been committed. Constructive presence is not sufficient. Spear on the Law of Extradition.

tion, page 397 et seq. *Hyatt v. People ex rel. Cockran*, 188 U. S. 691 and cases cited.

Upon habeas corpus proceedings if it should appear that defendant was not in the demanding state at the time the crime was alleged to have been committed, he would be released. *Hyatt v. Cockran, supra*. For this reason, I cannot approve the application.

## OPINIONS RELATING TO RAILROADS.

*Railroads—Cities—Villages*—Section 1797—12k, Stats., subsection 2, repeals that part of sec. 1809 providing for the installation of safety devices at railroad crossings when directed by the public authorities of cities and villages.

August 14, 1912.

RAILROAD COMMISSION OF WISCONSIN.

In your letter of the 12th, you say:

“We desire your opinion upon the question whether sec. 1809 of the Stats., empowering villages to direct common carriers to install safety appliances, flagmen or gates at crossings, has been repealed by sec. 1797—12d. Perhaps more accurately speaking, does not subsec. j of sec. 1797—12e repeal sec. 1809?”

In a personal interview with your Mr. Roemer, I am informed that, in speaking of subsec. j of sec. 1797—12e, you meant subsec. 2 of sec. 1797—12k of the Stats., as created by ch. 540 of the Laws of 1909.

Subsec. 3 of sec. 1809 Stats., as am. by ch. 332, Laws of 1909, provides in part:

“Flagmen or gates shall be placed and maintained, or such mechanical safety appliances shall be installed upon such street crossings in incorporated villages and cities over which trains pass as the public authorities of any such city or village may direct.”

Section 1797—12d Stats., as created by ch. 13, Special Session Laws of 1905, provides in part that:

“Whenever a complaint is lodged with the railroad commission by the common council of any city, the village board of any village, a member of a town board, or an overseer of highways, or by five or more freeholders and taxpayers in any town,”

that a railroad crossing is unsafe, a hearing shall be had and, if it be determined that the crossing "is unsafe and dangerous to human life, said commission may order and direct the railway company to erect gates at said crossing" and such other suitable devices and precautions as may be deemed required, "and such railroad company shall comply with the terms of such order."

Subsec. 2, sec. 1797—12k Stats., as created by ch. 540, Laws of 1909, repeals all acts or parts of acts conflicting with the provisions of sec. 1792—12d or with the exclusive exercise of the jurisdiction conferred by sec. 1797—12d.

It appears very plain that where sec. 1792—12d is spoken of in this last sec. it is a clerical error, and that sec. 1797—12d is intended. It seems clear that by these several provisions the Legislature intended to confer upon the **Railroad Commission** exclusive jurisdiction over all matters pertaining to the operation of railroads; that it sought to establish one impartial tribunal before which the local authorities and the railroads might air their grievances and have a fair hearing under some sort of uniform rules and methods of procedure. As said by the court in *State ex rel. R. R. Co. v. R. R. Commission*, 137 Wis. 80:

"One of the most familiar and safe canons of construction may be stated thus: For the purpose of clearing up obscurities in a law it should be read with reference to the leading idea thereof,—such idea being regarded as such limitation upon particular words or clauses and expansion of others within the scope thereof, in connection with that of words clearly implied,—and be thus, if reasonably practical, brought into harmony with such idea."

Applying this rule of construction, it seems clear to me that that part of subsec. 3, sec. 1809 Stats., above referred to was repealed by subsec. 2, sec. 1797—12k.

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*Railroads—Express Companies*—Section 1797—8 permits a railroad to carry commodities free of charge only for its own employes.

November 19, 1912.

RAILROAD COMMISSION OF WISCONSIN.

In your favor of November 15th, you ask my opinion as to whether, under sec. 1797—8 of the Wisconsin Stats., it is a

violation of law for an express company to carry free for railroad employes commodities shipped by such employes for their own exclusive use.

Subd. (c) of sec. 1797—4 provides:

“It shall be unlawful for any railroad to charge, demand, collect or receive a greater or less compensation for the transportation of passengers or property or for any service in connection therewith than is specified” in the printed schedules of rates.

Other sections prohibit discriminations, preferences, etc. See sections 1797—22 and 1797—23, etc.

Section 1797—8 provides that:

“Nothing herein shall prevent the carriage, storage or handling of freight free or at reduced rates for the United States \* \* \* or household goods, the property of railway employes, or commodities shipped by employes for their own exclusive use or consumption.”

Section 1797—2 defines the term “railroad,” and subdivision (a) thereof provides:

“The term ‘railroad’ \* \* \* shall also mean and embrace express companies and telegraph companies” etc.

Sec. 1797—8, being a proviso or exception creating a privilege in favor of a class not shared by others is in derogation of common right and should receive a strict construction. “Those who set up any such exception must establish it as being within the words as well as within the reason thereof.” Black on Interpretation of Laws, pages 435, 476.

Whatever the construction given to the words “railway employes” in the clause relating to the free shipment of household goods, it is obvious that the word “employes” in the clause relating to commodities is used in a somewhat restricted sense. Plainly, it does not mean all employes as distinguished from employers. Such general terms “are often to be restrained by considerations drawn from the subject matter of the enactment and its general scope and design, the rule being to construe general provisions together in the light of the general objects and purposes of the enactment and so as

to give effect to the main intent." Black on Interpretation of Laws, page 197.

Keeping in view the legislative purpose to insure equal rates to all and the fact that sec. 1797—8 is to be strictly construed as an exception, it seems to me that it necessarily follows that the "employees" whose commodities may be shipped free are employees of the company affording the free service. It seems hardly reasonable to limit the word to railroad employees and not still further limit it to employees of the particular railroad performing the service. Especially as under the definition of the word "railroad" heretofore quoted employees of telegraph companies and express companies must also be included.

In subd. 2 of the same sec., relating to the free transportation of passengers, it is expressly provided that "the exchange of passes with officers, attorneys or employees of other railroads" is permitted, although it had already been provided that free transportation might be given to any "railroad officer, attorney, director or employe" etc.

The inference is thus that the providing for free transportation for railroad employees did not in legislative intent provide for the giving of free transportation to the employees of companies other than the one providing the transportation. I think that a similar construction should be given to subd. 1 of sec. 1797—8 and that it permits the free carriage of commodities only for the employees of the company affording the service.

## OPINIONS RELATING TO STATE LANDS.

*State Lands*—Wisconsin Valley Improvement Co. Right to acquire flowage rights under ch. 335, Laws of 1907.

July 25, 1911.

HON. E. M. GRIFFITH,  
*State Forester.*

You state that you have received from Mr. W. E. Brown, president of the Wisconsin Valley Improvement Company, information to the effect that the company wish to establish another reservoir upon the head waters of the Wisconsin river in accordance with the provisions of ch. 335 of the Laws of 1907, and that in establishing such reservoir it will be necessary for them to overflow certain state lands, and you ask for the opinion of this department as to whether or not state lands necessarily overflowed in the establishment of such reservoir can be sold directly to the Wisconsin Valley Improvement Company under the provisions of sec. 3 of ch. 335 of the Laws of 1907 or whether it will be necessary for the land commissioners to advertise and sell these lands under the provisions of sec. 207, Stats. 1898.

Ch. 335, Laws of 1907, is entitled

“An act to authorize Wisconsin Valley Improvement Company to construct, acquire and maintain a system of water reservoirs, located on the tributaries of the Wisconsin river” etc.

The act is a special one in that it does not authorize any other company than the Wisconsin Valley Improvement Company to construct, acquire and maintain a system of water reservoirs on the tributaries of the Wisconsin river. Sec. 3 of the Act provides in part as follows:

“In case any lands of the State of Wisconsin be required to be taken or overflowed for any of the purposes of this act the railroad commission of Wisconsin shall appraise and fix the

damage to be caused by such taking or overflow, and the amount thereof shall be paid into the state treasury by the Wisconsin Valley Improvement Company before the taking or overflow shall occur."

This act of the legislature being subsequent to sec. 207 of the Stats. of 1898 would, in my opinion, repeal the provisions of sec. 207 of the Stats. of 1898 by implication insofar as they relate to the taking or overflowing of state lands by the Wisconsin Valley Improvement Co. Sec. 207, Stats. of 1898, relates entirely to the sale of public lands by the land commissioners while ch. 335 relates to the taking or overflowing of state lands by this particular company and specifically authorizes the railroad commission to appraise and fix the damage to be caused by such taking or overflowing. The Wisconsin Valley Improvement Co. upon payment of the amount of such appraisal or damage into the state treasury would be, under the provisions of the act, entitled to the flowage rights upon such lands. Whether or not the title to such lands exclusive of such flowage rights would vest in the Wisconsin Improvement Company presents another question.

I am of the opinion that the Wisconsin Valley Improvement Company may possess itself of the flowage rights by complying with the conditions of sec. 3 of ch. 335, Laws of 1907, above quoted, and that it would not be necessary for the land commissioners to advertise and sell these lands under the provisions of sec. 207 of the Stats. of 1898 in order to give the Wisconsin Valley Improvement Company the right to overflow the lands. This will not establish any precedent for the future sale of state lands, as suggested in your inquiry, for the reason that ch. 335 makes no provision for the taking or overflowing of state lands in the manner therein provided by any individual or corporation other than the Wisconsin Valley Improvement Co. No other individual or corporation could obtain flowage rights upon state lands except by acquiring title thereto under the provisions of sec. 207, Stats. of 1898.

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*State Lands*—The provisions of sec. 210, Wis. Stats. must be complied with in the sale of all state lands classed as agricultural, and of all other state lands that do not lie north of town 33.

The provisions of that section do not apply to the sale of lands lying north of town 33 that are not classed as agricultural.

January 15th, 1913.

HON. W. H. BENNETT,  
*Chief Clerk Land Department.*

In your letter of the 9th you call attention to the following: That the Legislature of 1911 enacted ch. 452, relating to sales of state lands, with apparent intent to restrict sales of such lands to not more than 160 acres to one individual, company or corporation; that under ch. 264 of the laws of 1905 all state lands then unsold lying north of township 33 were granted to the State Board of Forestry and provision made that some of these lands may be sold on recommendation of said board; that later that board recommended the sale of a quantity of these lands, classifying as "valuable for agriculture" only such as have more value in land than in timber thereon, which may be sold on partial payments, as provided by sec. 1 of ch. 452, Laws of 1911; and you add:

"Other lands, not classed as 'valuable for agriculture' by the Forestry Board, can be sold for cash only, and some of them in unlimited quantity to any person or corporation. Conformably to this ruling, state lands for sale have been classified as shown in circular herewith."

Such circular shows a division into three classes. You state that an affidavit substantially in the form prescribed by sec. 210 Stats. has been required of purchasers of lands in two of the classes, but not of purchasers of other lands; that on December 18th, 1912, Mr. John Oelhafen, of Fond du Lac, purchased 200 acres of the state lands not classed as "valuable for agriculture;" that on January 7th, 1913, Mr. Oelhafen made application to purchase an additional 160 acres, one forty of which is designated as Class A, "valuable for agriculture;" that he cannot make an affidavit such as is required by sec. 210 Stats., because of his prior purchase; and you ask whether, if he had purchased the agricultural land first, filing the required affidavit, he could not have come in later and bought any quantity of the state lands not so classed.

Secs. 207 to 210, inclusive, of the Stats. relate to the sale of state lands. Sec. 210 provides in part:

“No more than one hundred and sixty acres shall be sold to any one person. Every person having bid in any such lands at a public sale, or making application for the purchase thereof at private sale shall, before such sale is made, make and file with the commissioners of public lands, or their agent making such sale, the following affidavit:”

Such required affidavit contains the following statement:

“That the public lands of this state, sold by it since the fifteenth day of October, A. D. 1903, now owned by the affiant, together with the lands hereinbefore described, do not exceed one hundred and sixty acres.”

These particular provisions were inserted in the sec. by sec. 16, ch. 450, Laws of 1903, which is the law establishing the system of state forests and the department of State Forestry. Sec. 6 of this ch. provides that the sale of all lands belonging to the State, except swamp lands, lands suitable for agriculture, woodlots convenient to farm homes, and isolated tracts not exceeding eighty acres each, shall cease after the going into effect of the act. Sec. 7 provides for the sale by the Land Commissioners, in such manner as the State Forest Commissioners shall prescribe, of such parcels of public land as the Superintendent of State Forests shall conclude it is for the best interests of the State not to reserve as a part of the state forests.

This same chapter also amended sections 207, 208 and 209 Stats.

Ch. 264, Laws of 1905, repealed ch. 450, Laws of 1903, thereby repealing secs. 207 to 210, inclusive, and made new provisions as to the state forest reserve, and created the State Board of Forestry. Section 3 of the Act provides in part:

“The sale of all lands belonging to the state north of town 33 shall cease upon the passage of this act, and such lands north of town 33 shall constitute the state forest reserve; provided, that those state lands within said forest reserve which after examination by the state forester are found by him to be more suitable for other purposes than for the purposes of the state forest reserve, because of their character, condition, extent or situation, may be sold by the commissioners of the public lands, upon the recommendation of the state forester and with the approval of the state board of forestry.”

The Legislature of 1907, by ch. 143, reenacted secs. 207 to 210, inclusive, of the Stats., and provided:

“Nothing in this act shall be construed as in any manner affecting the provisions of section 3 of chapter 264 of the laws of 1905.”

By ch. 452 of the Laws of 1911, sec. 209 Stats. was amended so as to provide for the sale of agricultural lands on time. Subsec. 4 provides:

“The provisions of this act and the provisions of section 210 of the statutes shall be interpreted to cover the sale of all state lands that may be classed as agricultural lands.”

It would seem to follow that the provisions of sec. 210 Stats. must be complied with in the sale of all public lands classed as agricultural lands wherever they may be situated and in the sale of all other public lands not lying north of town 33.

The conclusion seems also to follow that, as Mr. Oelhafen can not make the required affidavit, no agricultural lands can be sold him. Had he purchased the agricultural lands first, he could then have purchased any quantity of other public lands lying north of town 33, as, in making such purchase, no affidavit is required.

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*State Lands—Public Officers*—The Commissioners of Fisheries have no right to authorize the erection of the W. B. Cushing monument on the State Hatchery grounds at Delafield. Application should be made to the legislature.

January 24, 1913.

HON. JAMES NEVIN,

*Superintendent State Fish Hatcheries.*

I am in receipt of yours of January 23rd, in which you inquire whether the Commissioners of Fisheries have the power:

1. To grant to the town board of the town of Bayfield, Bayfield county, a right of way for a road across the State's hatchery grounds, along the north side of Pike's Creek, where said creek passes through the state lands.

2. To give permission to the Waukesha County Historical Society to erect the W. B. Cushing monument on the state hatchery grounds in Delafield, Waukesha county.

You also call my attention to ch. 561 of the Laws of 1911, authorizing the Governor, with the coöperation of the Waukesha County Historical Society, to erect a monument at the birthplace of W. B. Cushing, in the town of Delafield, Waukesha county, and appropriating five thousand dollars for the same.

The Commissioners of Fisheries have no powers except such as are conferred upon them by Statute, either by express language or by fair implication. The extent of the powers granted must be ascertained from all the provisions of the statute relating to the subject, and such provisions should be construed in the light of each other, in order to comprehend the intention of the Legislature.

I have carefully examined the powers and duties of these Commissioners, as found in the statutes. I find no statute authorizing them, either expressly or by implication, to dispose of any land or interest in the land owned by the State, upon which are located the state fish hatcheries, and which is under the control of said Commissioners. An easement for a right of way is a valuable interest in the land in question, which they are not authorized to alienate.

The answer to your first question must therefore be in the negative.

Neither do I find any authority in the statutes for the erection or granting of permission to be erected, by said Commissioners, of monuments of the character mentioned, on the state hatchery grounds. By ch. 527, subd. 7, of the Laws of 1911, the Legislature authorized the Commissioners of Fisheries to erect a cottage for the foreman of the state hatchery at Delafield. This act shows plainly that the Legislature did not consider the general powers granted to the Commissioners broad enough to include the erection of such cottage; hence, the special authorization.

It is my opinion that the Commissioners have no right to authorize the erection of the monument in question and that they can confer no rights whatever in the matter. If it be thought advisable to erect the W. B. Cushing monument on the grounds at Delafield, the proper course to pursue is to introduce a bill in the Legislature authorizing such erection and providing for the permanent protection of the same.

*State Lands—Appropriations and Expenditures*—The appraisers provided for by ch. 452, Laws 1911, to appraise the value of improvements placed on land purchased from the state, are to be paid, from the general fund, such compensation as may be fixed by the commissioners of public lands.

February 24th, 1913.

HON. W. H. BENNETT,

*Chief Clerk Land Office.*

In your letter of the 17th you enclose papers and correspondence which you state form the first application for allowance for improvements on land purchased from the state under ch. 452 Laws 1911 (sec. 209 Stats. 1911), and for appraisal of such improvements pursuant to subsec. 4 of said sec. 209. You ask how the appraisers are to be compensated, what the rate or amount of their compensation may be and from what fund such compensation should be paid.

It appears from the papers submitted that on the 22nd day of May, 1912, one W. J. Gibson purchased from the state forty acres of swamp land in Sawyer county, for \$216.00, of which amount he paid \$33.00. His heirs now desire to make final payment and receive the credit for improvements provided by the section referred to. Ch. 452 Laws 1911 added to sec. 209 Stats. provisions that purchasers of public lands at the time of making final payment shall be entitled to a credit of the value of the improvements made on such land not to exceed a certain percentage of the purchase price of said land, the value of such improvements to be ascertained by the appraisal thereof by three disinterested parties appointed by the land commissioner. No special provision is made for any payment for the services of such appraisers. Sec. 190 Wis. Stats. 1911 provides:

“All expenses incurred by the said commissioners in the \* \* \* care, protection and sale of the public lands, including advertising shall be fixed by the commissioners and paid out of the state treasury.”

This would appear to be broad enough to include the compensation of such appraisers. In my opinion the appraisers are to be appointed by the commissioners, and their compensation

is to be fixed by the commissioners. Such compensation should be reasonable and may be either on a per diem basis or otherwise, as the commissioners may determine, and is to be paid from the general fund.

My predecessor has given an opinion advising that no such credits be given until the constitutionality of this law has been passed upon by our supreme court. I concur in that view. There is room for very serious doubt as to the authority of the legislature to appropriate public property, that is the unpaid portion of the purchase price of such lands, to private use, as is done if the credit provided by this statute is made. Art. VIII, sec. 3 of the Const. provides:

“The credit of the state shall never be given or loaned in aid of any individual, association or corporation.”

Section 10 of the same article provides in part:

“The state shall never \* \* \* be a party in carrying on” works of internal improvement.

As to school and university lands, art. X sec. 8 provides for the form of security and the rate of interest upon the unpaid portion. Without holding that any of these constitutional provisions are violated by the law in question, I believe that there is room for a claim of that kind. I, therefore, renew the suggestion of my predecessor that no such credits be given and no expense be incurred in preparation for giving such credits until our supreme court has passed upon the validity of the law.

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*State Lands—Public Officers*—Under sec. 1494—43 Wis. Stats. 1911, it is not necessary that lands sold be appraised.

March 4th, 1913.

HON. E. M. GRIFFITH,  
*State Forester.*

In your letter of February 24th you ask my opinion as to whether the forest reserve lands to be sold under the provisions of sec. 1494—43 Wis. Stats. 1911, should be appraised by the Forestry Board or the Commissioners of the Public Lands.

That section provides in part:

“That those state lands within said forest reserve which after examination by the state forester are found by him to be more suitable for other purposes than for the purposes of the state forest reserve, because of their character, condition, extent, or situation, shall be sold by the Commissioners of the Public Lands, upon the recommendation of the State Forester and with the approval of the State Board of Forestry.”

I do not find any provision of the statutes requiring an appraisal of state lands prior to sale. Secs. 202 to 206 inclusive, Wis. Stats. 1911, relate to the price of public lands which are to be sold, but contain no provision requiring an appraisal of such lands. These sections would appear to be applicable to such lands in the forest reserve as may be offered for sale under the provisions of sec. 1494—43, and it is, therefore, my opinion that it is not necessary that such lands be appraised either by the Commissioners of Public Lands or the State Board of Forestry.

## OPINIONS RELATING TO TAXATION.

*Taxation*—Liability of state for payment of special assessments on lands escheated to the State.

June 6, 1911.

HON. A. H. DAHL,  
*State Treasurer.*

Your favor of the 6th inst. enclosing letter from Glicksman, Gold & Corrigan, attorneys, in which they explain that certain escheated property sold by the State of Wisconsin to their clients and located in the city of Milwaukee has been heretofore subjected to certain special assessments for street improvements by the city of Milwaukee, and making inquiry whether or not the state can reimburse the purchasers of these escheated estates for such special assessments, is received.

In reply thereto would say that in my opinion there is no authority conferred upon any state officer to reimburse purchasers of escheated lands for special assessments. The statute on the subject of escheats, ch. 18 of the Wisconsin Stats., makes no provision whatever for the payment of any special assessments or any other liability which may arise by virtue of the title acquired by the state, but on the contrary the language of the law seems to preclude any such payment. Sec. 284 provides in part that upon the sale of escheated lands by the land commissioners the commissioners shall execute and deliver to the purchaser a quit claim deed of conveyance under their hands which shall vest in the grantee all the right, title and interest of the state and every right of action which the state might have had but for such sale and conveyance, and provides further

“that no covenant for title or enjoyment shall be given in or implied from such deeds or any words therein; nor shall the state be liable to refund any consideration paid therefor or any costs or damages in any manner arising therefrom.”

The chapter taken as a whole seems to simply imply that the purchaser of escheated property takes whatever interest the state had therein subject to any and all liabilities or incumbrances and that the state does not assume any liability or in any manner obligate itself to reimburse the purchaser even for the purchase price. It may be that in equity the state ought to pay these special assessments which were incurred during the time of the ownership by the state but the State Treasurer nor any other state officer has any authority in law to reimburse the purchaser and for that reason I see no way in which he can protect himself except to pay the special assessments against the property which he now owns.

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*Taxation—Income Tax—Construction of Subdiv. i, section 1087m—4.*

October 4, 1911.

WISCONSIN TAX COMMISSION.

Your favor of October 4th is received. In it you call attention to subd. i of sec. 1087m—4 of the new Income Tax Act and make inquiry of this department as to the proper construction of this subdivision. You state that:

“The question troubling the commission is as to whether the paragraph quoted renders so much of the inheritance as is exempt under the inheritance tax act subject to the income tax. To illustrate,—a widow is entitled to an exemption of ten thousand dollars under the inheritance tax law. Suppose she received a legacy of eight thousand dollars. Is that subject to the income tax and if she received a legacy of fifteen thousand dollars and pays an inheritance tax on five thousand is she subject to an income tax on the remaining ten thousand?”

You add that you are satisfied that

“the intention of the framers of the act was to exempt all inheritances received within any given year which comply with the inheritance tax law of this state and to subject the legacies received from sources without the state not subject to our inheritance tax law, to the income tax.”

I do not of course know what the intention of the legislature may have been further than as such intention appears in the language of the act itself and it seems to me that, if the legislature intended any such construction as that suggested by you and such intention were given effect in construing the law,

it would render the act unconstitutional because of the discrimination which would thereby result. If, as suggested by you, a widow receives a legacy of eight thousand dollars and another person is possessed of eight thousand dollars either by gift or as a result of her own industry and the widow was exempt from taxation while the other individual was compelled to pay taxes upon a like amount, that would be an unjust and unconstitutional classification. The language of the act provides:

“Persons, other than corporations, joint stock companies, or associations, in reporting incomes for the purposes of taxation shall be allowed the following deductions . . . (i) All inheritances, devises and bequests received during the year upon which an inheritance tax shall have been paid to this state.”

Obviously the act exempts only such inheritances, devises and bequests as have paid the inheritance tax. Upon the exemptions no tax is paid, consequently they cannot be included in this language. For example, referring to the illustration suggested by you: Suppose a widow receives a legacy of eight thousand dollars. She is entitled to an exemption of ten thousand dollars and therefore pays no inheritance tax upon the eight thousand dollar legacy. Clearly then her eight thousand dollars is not included in the language of the law exempting devises and bequests upon which an inheritance tax has been paid.

I am of the opinion that subd. i of sec. 1087m—4 cannot be construed to exempt from the income tax the exemptions allowed by the inheritance tax but that the exemption in the income tax act only applies to such inheritances as have actually paid an inheritance tax.

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*Taxation—County Clerk—Tax Deeds*—County clerk should not issue tax deed on property in the hands of a receiver.

July 6, 1912.

MR. GEO. E. O'CONNOR,  
*District Attorney,*  
Eagle River, Wisconsin.

In your favor of June 24th you enclosed copy of order of the United States district court of the Western District of Wis-

consin in the case of *Harris et al. v. Northern Blue Grass Land Co.* The order is dated October 9, 1909, and appoints a receiver of the defendant and among other things provides:

“That all persons and corporations are enjoined from interfering in any manner with the possession of said receiver; also enjoined from selling or disposing of any of the property of said company which may be in their hands; are also enjoined from instituting any action at law against said defendant or its receiver; all creditors must present their claims to this court in this proceeding.”

You state that a large number of descriptions of lands owned by the company have been returned delinquent for nonpayment of taxes; that these lands have been sold for taxes and tax certificates issued; that the attorneys for the receiver have notified the county clerk of your county not to issue tax deeds on such lands, and you request my opinion as to the duty of the county clerk under the circumstances.

The rule seems undisputed that

“Property in the possession of a receiver appointed by a court is in *custodia legis* and that unauthorized interference with such possession is punishable as a contempt; and it cannot be contended that this salutary rule has any exceptions in favor of officers engaged in the collection of taxes.”

*Ledoux v. LaBee, County Treasurer*, 83 Fed. 761, 764;

*In re Tyler*, 149 U. S. 164;

*Va. etc. Co. v. B. L. Co.*, 88 Fed. 134, 137;

*Oakes v. Myers*, 68 Fed. 807, 808.

The reason for the rule is stated to be that the

“Court will require its receiver to pay all lawful taxes and there is no necessity for burdening the property with the expense of a sale under the state revenue law.”

*Burleigh v. Chehalis County*, 75 Fed. 873.

It is also held that

“A tax deed executed after the property has passed into the custody of a court by its appointment of a receiver . . . is void and ineffective to cut off the receiver's right of redemption.”

*Johnson v. S. B. & L. Assn.*, (Syllabus) 132 Fed. 540;  
*In re Eppstein*, 156 Fed. 42-3.

The facts in the case last cited are practically identical with those here presented and the headnote to that case is:

“While property in the course of administration under the bankruptcy act is not exempted from taxation or freed from tax liens or claims theretofore fastened upon it, it is, nevertheless, in *custodia legis*, and a pre-existing tax lien or claim cannot be converted into a full title by the procurement of a tax deed without the court’s sanction.”

*In re Eppstein*, 156 Fed. 42.

Not only would the tax deeds, if issued, be void under the authority of these cases, but the rule is that

“Any interference with the receiver’s possession after notice of the character in which such possession is held . . . without the sanction of the court appointing him, is a contempt of court which will subject the party to attachment and commitment. It makes no difference that the party charged with the contempt was not a party to the proceeding in which the receiver was appointed.”

34 Cyc. 208-210.

There are many other authorities to the same effect and few, if any, to the contrary.

I am therefore of the opinion that the county clerk should not issue tax deeds on any property in the hands of the receiver.

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*Taxation—Inheritance Tax*—No tax is due on transfer made prior to passage of law even though the right of possession does not accrue to the transferee until subsequent to the passage of the law.

July 24, 1912.

WISCONSIN TAX COMMISSION.

In your favor of May 29th you request my opinion as to whether a tax is due under the provisions of sec. 1087—1 (3) on the property conveyed by Peter Wells, of Monroe, Wisconsin, under the circumstances stated in *Wells v. Wells*, 132 Wis. 73. It appears that on January 27, 1902, Peter Wells executed deeds of certain property and placed them in the hands of a third person, Henry Ludlow, with instructions to deliver

them five days after the death of the grantor. The inheritance tax law became effective March 31, 1903, and Peter Wells died on September 26, 1904. The deeds being delivered according to instructions the supreme court held that having been placed "beyond the custody and control of the grantor" they were effective to pass title and that "upon such delivery to Henry Ludlow the deed became the present deed of Peter Wells" etc. (132 Wis. 73, 82).

By the terms of sec. 1087—1 (3) a tax is imposed upon the transfer of property when such transfer is made

"by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death."

Sec. 1087—1 (4) provides that:

"Property or estates which have vested in such persons or corporations before this act shall take effect, shall not be subject to a tax."

In New York it was held that a somewhat similar transfer was not within the terms of the inheritance tax law. *Matter of Seaman*, 147 N. Y. 69, 77. An amendment to the New York law, imposing a tax where the title had vested under a will prior to the amendment though the devisee did not come into possession and enjoyment until after such amendment, was held unconstitutional, the court saying that "The transfer tax is not imposed upon property but upon the right of succession", and that "Where there was a complete vesting of a residuary estate before the enactment of the transfer tax statute it cannot be reached by that form of taxation", the reason being that "To impose a tax based on the succession would be to diminish the value of these vested estates, to impair the obligation of a contract and to take private property for public use without compensation." *Matter of Pell*, 171 N. Y. 48, 55. And in a later case the New York court said: "Where there is no transfer there is no tax and a transfer made before the passage of the act . . . is not affected by it because, as we held in the Pell case, such act imposes no direct tax and is unconstitutional since it diminishes the value of vested estates" etc. *Matter of Lansing*, 182 N. Y. 238, 247.

Under the decision in *Wells v. Wells*, 132 Wis. 73, and the cases there cited, it seems impossible to distinguish a case where title is acquired by a deed placed in the hands of a third person "beyond the custody and control of the grantor" prior to the enactment of the taxing law from the case considered by the New York court where title was acquired under a will probated before such law was enacted; and the New York courts have, in fact, extended the principle to the case of a deed delivered prior to the enactment of the law, possession being postponed until the death of the grantor which occurred after the enactment of the law. *In re Craig's Estate*, 89 N. Y. Sup. 971. In the last cited case the court said:

"The appellants contend that at least as early as May 9, 1885, they had acquired their rights by irrevocable deed; that such rights, whether vested or contingent, then constituted present property interests in future estates which were vested in the sense that they were secured to them by deed subject only to contingencies as to time and survivorship; that incident to the ownership of such property was the absolute right to its acquisition in possession and enjoyment at the stipulated time; and that such ultimate right of possession and enjoyment being absolute and not merely privileged could not afterwards be taxed by the state because of well settled principles of constitutional law. I am inclined to the view that the contention is sound. . . . In considering the question the word 'vested' . . . is really to be construed as equivalent to the word 'accrued' and not as distinguished from merely contingent interests. In that sense a property right which has been fully acquired is protected by the contract and becomes in law a vested right, the enjoyment of which is not to be deemed as only a privilege and as such consequently subject to taxation upon the right of enjoyment. . . . No reservation being made (in the deed under consideration) of the power of revocation it (such deed) became operative and effective as a grant upon execution and delivery wholly irrespective of the time when possession was to be given of the estate conveyed to the same extent and in the same sense and degree as a devise of a remainder becomes operative and effective upon the death of a testator during the existence of an intermediate estate; and the logic which precludes legislative impairment in the one case is equally imperative in the other."

This decision was affirmed by the court of appeals without opinion *In re Craig's Estate*, 181 N. Y. 553.

In the light of these decisions and the quoted provision of sec. 1087—1 (4), I am of the opinion that no tax is due upon the transfer in question.

*Taxation—Villages—Fees of village treasurer*—1. In an action under sec. 1107a for taxes of 1909, judgment should include 5% collection fees.

2. The village, not its treasurer, is entitled to such fees when so collected.

3. The village treasurer is not entitled to fees on personal property taxes returned delinquent to the County Treasurer.

August 24, 1912.

WISCONSIN TAX COMMISSION.

In your favor of August 22nd you state that you have been called upon to act as arbitrator in matters of difference between the Southern Wisconsin Power Company and the village of Kilbourn and its treasurer. You state that taxes were levied upon the property of the company in 1909, 1910 and 1911, which were extended on the tax roll of the village; that the company refused to pay the 1909 taxes and the trustees of the village commenced an action at the request of the village treasurer under sec. 1107a against the Company to collect the taxes; that the case was tried before Judge Fowler and resulted in a judgment for the full amount of the tax and 5% collection fees; that the company failed to pay the 1910 and 1911 taxes and the same were returned delinquent to the county treasurer and are still held by him, but no proceedings have been taken to enforce collection; that the whole matter has been referred to you for adjustment including the right, if any, of the village treasurer to compensation for each year, and you request my opinion on the following questions:

1. Whether in an action under sec. 1107a to collect a personal property tax, a village is entitled to judgment for the 5% collection fees prescribed by sec. 840 of the Stats.

It seems to me that the 5% collection fees, which sec. 1079, stats. 1898, provides shall be carried out on the tax roll by the clerk before its transmission to the treasurer, become part of the taxes subject to their remission (sec. 1090) to the extent of 3% by payment on or prior to January 31st. While sec. 1107a merely provides for an action to collect "any tax assessed against any person upon personal property" I am clearly of the opinion that there is included a right to recover the incidents of such tax, i. e., the collection fees that have accrued and in effect

become a part of such tax. Other sections of the statutes treat the collection fees as part of the taxes, and show that their collection is to be enforced when payment of the taxes is made after the roll has left the hands of the village treasurer. See secs. 1112 and 1114, and *Spooner v. Washburn County*, 124 Wis. 24, 32. It would hardly be claimed that in a recovery had under sec. 1097, or sec. 1100, the word "taxes" did not include the 5% collection fees and I see no reason to give a different meaning to the word when used in sec. 1107a. I am, therefore, of the opinion that the 5% collection fees attach and become a part of the taxes by virtue of sec. 840 subject to be remitted by payment made pursuant to sec. 1090 and that such fees are to be included in a recovery had under sec. 1107a.

2. You further ask whether, if the judgment in an action under sec. 1107a should properly include the 5% collection fees, the village treasurer is entitled to such fees or do they belong to the village?

While sec. 840, as am. by ch. 335, Laws of 1899, clearly gives the 2% and 5% fees to the treasurer, it only gives him such fees "on taxes collected by him", the same "to be retained from the collections." I do not think that taxes collected by an action under sec. 1107a can be said to be collected by the village treasurer, even though the action was begun at his request. Secs. 1097 and 1100 provide methods by which the treasurer can collect delinquent personal property taxes while sec. 1107a provides a method by which the village can collect them, and I do not think that taxes so collected by the village are "taxes collected by" the treasurer within the meaning of those words in sec. 840, so as to entitle such treasurer to the fees.

3. You further ask whether the village treasurer is entitled to collection fees on personal property taxes returned delinquent to the county treasurer subsequent to January 31st, when no action has been brought for their collection.

If such taxes are paid to the county treasurer the village treasurer is clearly not entitled to the collection fees but pursuant to sec. 1114 such fees belong to the county. *Spooner v. Washburn County*, 124 Wis. 24, 32. In case the uncollected personal property taxes had been charged back by the county to

the village pursuant to section 1128, there might be some question as to whether on subsequent payment of the taxes the collection fees belong to the county or the village, but I do not see how the village treasurer can have any valid claim therefor whether the taxes are paid to the county treasurer or after having been charged back to the village are paid to it. As previously pointed out, the village treasurer is entitled to fees only on taxes collected by him, and these taxes, paid pursuant to an agreement of settlement between the village and the taxpayer, would not come within that description.

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*Taxation—State Lands*—Taxes become a specific lien on the land against which they are assessed, when the tax roll is finally made up.

No taxes can legally be assessed on lands purchased by the state at any time before the tax becomes a specific lien.

November 19th, 1912.

HON. E. M. GRIFFITH,  
*State Forester.*

In your letter of November 16th you ask for an opinion stating the exact date upon which taxes become a lien upon land.

I understand the question arises in this way: The State, on November 14th, received a deed on certain lands in Vilas county, upon the understanding that, if there are now any tax liens upon such lands, the grantor is to pay same.

Sec. 1088 Stats. provides in part:

“All taxes levied upon any tract or parcel of land and all costs, charges and interest thereon shall be a lien thereon until paid except as otherwise provided by law.”

Under this section it has been held that the lien accrues when the “aggregate amount of state, county and city taxes” are “determined and certified.” *Peters v. Meyers*, 22 Wis. 602.

“The tax is expressly made an encumbrance upon the property from the time it is assessed against the land.” *Milwaukee Iron Co. v. Town of Hubbard*, 29 Wis. 59.

The tax is a lien and a cloud upon the title as soon as levied. *Roe v. Lincoln Co.*, 56 Wis. 66.

“The assessment of a tax is the process prescribed by law to ascertain the sum of money which the owner of taxable property ought to pay, on account of such property, towards the support of the government for a given time.” *Flanders v. Town of Merrimack*, 48 Wis. 567.

It is the duty of the county board to fix the relative valuations of property in the towns, villages and cities at their November session. Sec. 1073 Stats.

And to determine the amount of the county tax and the amount of school tax to be raised by each such town, village and city at the same session. Sec. 1074 Stats.

The county clerk apportions the county tax and state tax, etc., and within ten days after the assessment of values by the county board certifies to the clerks of the towns, villages and cities the amount of taxes so apportioned and levied upon the same. Sec. 1076 Stats.

Upon receipt of the certificate from the county clerk it is the duty of the town, village or city clerk to calculate the total tax to be paid by each person on personal property and the total tax assessed against each tract or parcel of real estate, and to make up the tax roll. Sec. 1079 Stats.

Until this has been done the amount has not been ascertained and, under the definition given in *Flanders v. Town of Merrimack*, *supra*, the assessment is not complete. Upon the completion of the assessment, that is, upon its being ascertained definitely just how much the owner of taxable property ought to pay on account of such property towards the support of the government for a given time, the tax, in my opinion, becomes a lien upon the real estate. True, the court has said:

“The rule fixed by statute as to who shall pay the taxes for the current year, as between grantor and grantee, when no agreement is made in respect to the same, goes upon the theory that the taxes are not a specific lien upon real estate until the tax roll is completed and the taxes extended on such roll.” *Spear v. Door Co.*, 65 Wis. 298.

And, again;

“It is true that taxes are levied in gross upon the entire property of the town months before the warrant is delivered to the treasurer, but they do not become a specific lien or charge upon

any parcel of land until they have been extended upon the tax roll and the warrant of collection has been issued." *Sniveley v. Keystone Lumber Co.*, 129 Wis. 54.

This, however, was where the question arose between grantor and grantee as to whose duty it was to pay the tax.

Sec. 1153 Stats. determines that question. Formerly it provided that, as to land conveyed prior to the delivery of the warrant and tax roll to the treasurer for collection, it was the duty of the grantee to pay the taxes. If conveyed after that date it was the duty of the grantor to pay. By ch. 293, Laws of 1909, this section was amended by substituting the first day of January for the day of the delivery of the tax roll to the treasurer.

The question you present is: May any taxes, for 1912 be legally assessed against lands so purchased by the State and collection thereof be enforced against anyone, in view of the provisions of par. 1, sec. 1038 Stats., exempting property of the state from taxation?

In my opinion, when the lands are purchased by the State prior to the completion of the tax roll by the town clerk, no tax may legally be assessed against them. If purchased after that date the taxes so assessed are a lien on the land.

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*Taxation—Income Tax*—If the income tax assessed against any person is returned unpaid on the ground that it is illegal it may be compromised under sec. 1210g, Wis. Stats. 1911.

February 8th, 1913.

MR. DANIEL E. McDONALD,  
District Attorney,  
Oshkosh, Wis.

In your letter of the 5th you ask for my opinion as to whether an income tax under ch. 658 of the Laws of 1911, if illegal, can be compromised under sec. 1210g the same as other taxes can, supposing such income tax to be returned as delinquent to the county treasurer.

Sec. 1210g Wis. Stats. 1911, provides:

“If it shall appear from any tax roll or tax proceeding that any sum of money is due from any person or is charged against

any lands or other property, and such taxes have been returned as delinquent to the county treasurer of the proper county, and such person or the owner of the lands or property so charged with such taxes shall claim such taxes to be illegal for any cause the county treasurer, county clerk and district attorney of such county may, if they shall deem that there is reasonable cause to believe such taxes illegal, compromise with such person or owner and receive in lieu of the whole tax so appearing due or charged as aforesaid such part thereof as the said county treasurer, county clerk and district attorney, or a majority of them, shall determine to be equitable and for the best interest of such county."

Sec. 1087m—22 subsec. (4) provides:

"All laws not in conflict with the provisions of this act regulating the time, place and manner of payment of taxes on personal property, the collection thereof by action, distress or otherwise and the return of personal property taxes unpaid, shall apply to the income tax herein provided for."

It seems very clear that section 1210g is a law regulating the return of personal property taxes unpaid and the collection thereof and I am, therefore, of the opinion that it is applicable to an income tax.

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*Taxation—Municipal Corporations*—If a newly incorporated village elects its officers in time to make the assessment before the first meeting of the board of review, the village officers make the assessment and collect the taxes; otherwise the taxes are collected by the town officers and proper division made with the village as provided for the division of property by sec. 925e Wis. Stats. 1911.

February 11th, 1913.

HON. L. B. NAGLER,

*Assistant Secretary of State.*

In your letter of the 3rd, you enclose a letter from O. L. O'Boyle, attorney, of Milwaukee, in which he states that plans are now under way for the incorporation of the village of New Butler out of parts of the towns of Brookfield and Menomonee, Waukesha county; that if proceedings are immediately instituted, the incorporation would be completed, al-

lowing due time for the statutory notices of the various proceedings, some time during the first part of April, and he asks:

“Assuming that proceedings are immediately instituted and incorporation is secured some time during or before the month of April, would it be possible for the regular statutory assessment proceedings to be had, as provided, between the months of May and August, and taxes levied upon the property of such newly incorporated village, for the present year?”

You ask me to give you reply to this inquiry. Sec. 882 Wis. Stats. 1911, provides in substance that the village assessor shall begin the work of assessing the property on the first day of May or as soon thereafter as practicable. I find no provision in the statute which would prevent a newly incorporated village from going ahead with the assessment and the collection of taxes based upon such assessment provided their officers are elected so as to allow time for the assessment to be made before the meeting of the Board of Review.

Sec. 925i Wis. Stats. 1911, provides:

“Whenever a village has been or may hereafter be incorporated from territory within any town or towns, after the assessment of taxes in any year and before the collection of such taxes, the tax so assessed shall be collected by the town treasurer of the town or the town treasurers of the different towns of which such village formerly constituted a part, and all moneys collected from the tax levied for town purposes shall be divided between such village and such town or the towns, as the case may be, in the manner provided by section number 925e for the division of property owned jointly by towns and villages.”

Section 1151 Wis. Stats. 1911, provides in part:

“When any territory shall be detached from any county, town, city, village or school district it shall in no manner invalidate or interfere with the collection of taxes in such territory but they shall be collected and returns made as if the territory was not detached therefrom.”

In my opinion if a village is incorporated and has its officers elected in time to assess the property prior to the time fixed for the meeting of the Board of Review, it may so assess the property and collect the taxes the same as though it

had been incorporated a year or more prior to that time. If it is not incorporated in time to begin the assessment of taxes until after the assessment by the town or towns, parts of which comprise the territory included in such village, then the taxes should be collected by the officers of such town or towns and proper division thereof made with the village in the same manner as is provided for division of property by sec. 925e Wis. Stats. 1911.

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*Taxation—Income Tax*—A coöperative creamery is not exempt from the income tax law.

February 14th, 1913.

MR. GEO. W. MCKIBBIN,  
*District Attorney,*  
Viroqua, Wis.

In your favor of February 7th, you request my opinion as to whether a coöperative creamery company is exempt from the payment of an income tax, by reason of the fact that all earnings of such company are paid "to the patrons and in no-wise benefit any private individual."

Sec. 1087*m*—1 of the Income Tax Law imposes a tax upon incomes received "by such persons and from such sources as hereafter described."

Sec. 1087*m*—2 provides:

"The term 'person', as used in this act, shall mean and include any individual, firm, copartnership, and every corporation, joint stock company or association organized for profit, and having a capital stock represented by shares, unless otherwise expressly stated."

A coöperative creamery company answers all the calls of the above definition unless it be that it is not an "association organized for profit." Secs. 1786e—13 and 1786e—14 of ch. 368 Laws 1911, relating to coöperative associations, provided for the apportionment of earnings and the distribution of profits in the form of dividends. These sections show clearly to my mind that they are corporations organized for profit even though part of such profit is distributed to others than shareholders, i. e. to employees and customers.

The final sentence of sec. 1786e—16 that "No association organized under this act shall be required to do or perform anything not specifically required herein in order to become a corporation or to continue its business as such" cannot in my mind be construed to be an exemption from taxation. Subsec. 28 of sec. 1038 exempts from general taxation "the capital stock of mutual coöperative corporations organized under ch. 86". This, of course, cannot be construed to be an exemption from income taxation.

My conclusion, therefore, is that a coöperative creamery company is not exempt from the income tax law. This is the construction given to the law by the Tax Commission.

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*Taxation—Telephone Companies—Municipal Corporations—*

Where a village is incorporated from territory within a town after the assessment, the taxes to be paid by a telephone company operating an exchange in such territory should be collected and divided under the provisions of sec. 925i Wis. Stats. 1911.

March 18th, 1913.

HON. HENRY JOHNSON,  
*State Treasurer.*

In your letter of the 15th you ask my opinion upon the following question submitted to you by George W. Waller, Secretary of the Burlington, Rochester and Kansasville Telephone Company: About October 1, 1912, the village of Rochester was incorporated out of territory formerly a part of the town of Rochester. The above named telephone company has an exchange located in said village. What share of the taxes or license fees assessed against such exchange is the village entitled to receive and what share is the town entitled to receive? The village claims it is entitled to such proportion of the taxes for the entire year as is represented by the earnings after the date of incorporation, while the town claims the taxes or license fees for the entire year should be divided between the two municipalities in proportion to the assessed valuation of each.

The question is not specifically covered by statute, so far as I have discovered. Sec. 1222a Wis. Stats. 1911, provides for

an annual report by all telephone companies to be filed with the state treasurer on or before March 1st, and for a license fee to be paid based upon the gross receipts of such companies.

“The license fee upon eighty-five per cent of the gross receipts from the exchange service or business shall, on or before the first day of March, in each year, be paid to the treasurer of the town, city or village in which the exchange is located, for the use and benefit of said town, city or village.”

Sec. 925i Wis. Stats. 1911 provides:

“Whenever a village has been or may hereafter be incorporated from territory within any town \* \* \*, after the assessment of taxes in any year and before the collection of such taxes, the tax so assessed shall be collected by the town treasurer of the town \* \* \* of which such village formerly constituted a part, and all moneys collected from the tax levied for town purposes shall be divided between such village and such town \* \* \* in the same manner provided by section number 925e, for the division of property owned jointly by towns and villages.”

Sec. 925e, Wis. Stats. 1911, provides for the division of property owned jointly by a town and village

“in proportion to the equalized value of each as fixed by the county board at the first equalization subsequent to such separation.”

Is such license fee a tax within the meaning of sec. 925i, above quoted? That the word “tax” or “taxes” sometimes includes such license fees and sometimes does not, depending upon the wording of the particular statute in which it is used, is clear from the definitions given in volume 8, Words and Phrases, pages 6884 and 6885.

Our own court has held that a provision requiring the payment of a license fee on dogs is an exercise of the police and not of the taxing power of the state. *Carter v. Dow*, 16 Wis. 298; *Tenney v. Lenz*, 16 Wis. 566.

In *State v. Railway Companies*, 128 Wis. 449, however, in speaking of license fees of railways, the court says:

“The term ‘tax’ has come to be applied to all sorts of exactions which swell the public funds, stopping short only of fines imposed as punishment for criminal occurrences. Laws requir-

ing payment to the state of compensation for the enjoyment of a privilege, such as that of a foreign corporation to do business within the state, or requiring contribution to the public treasury as mere police regulation, such as license fees of hawkers or peddlers and saloon license fees, are commonly called taxes. In a broad sense most of them are referable to the taxing power though probably no one would regard them as taxes in a constitutional sense: that is as taxes on property falling under sec. 1, art. VIII.

“The payment by a railroad of a percentage of its gross earnings as compensation for the privilege of operating its road, or exemption of its property from the burdens of ordinary taxation, is generally spoken of as a tax, and properly so in the broad general sense, since the sum paid goes into the public funds to meet public expenses, and the method by which it is secured is an indirect way of reaching the railroad property for the purpose of obtaining public revenue therefrom.” (p. 484.)

In this connection it should be noted that the property of telephone companies is, by par. 27 of sec. 1038 Wis. Stats. 1911, exempted from ordinary taxation.

I am, therefore, of the opinion that sec. 925i is applicable to this situation. If, however, it is not, then in my opinion the license fee is property, it being in the nature of a debt, as is said in *State v. Railway Companies, supra*, and sec. 925e is applicable. Under that section the procedure would be the same.

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*Taxation—Municipal Corporations—Sec. 925—152a Wis. Stats. 1911, does not apply to the city of Milwaukee.*

March 22, 1913.

MR. LYMAN G. WHEELER,  
Special Assistant District Attorney,  
Milwaukee, Wisconsin.

In your letter of the 20th, you ask my opinion on the following: “Does sec. 925—152a apply to cities of the first class,—in other words, does it apply to the city of Milwaukee?”

The section in question was created by ch. 477, Laws 1911 and reads:

“Taxes not paid before February 1st shall be subject to a penalty of two per cent on the amount of the tax, which penalty shall be collected by the town, city or village treasurer, and paid into the treasury together with the taxes collected.”

While by the number given it, this section is placed in the statutes among the sections constituting the general charter law, it is very evident from the wording of the section that it applies to municipalities other than cities under such general charter law. By its terms, it applies to towns and villages as well as cities, and in my opinion, may well be considered a general law relating to the enforcing of the collection of taxes.

Sec. 38 ch. 18 of the Milwaukee city charter to which you call my attention, provides:

“The treasurer of the city, in giving bonds, collecting such city, county and school taxes and making his return to the county treasurer, and in all other things relating to such taxes, shall conform to and be governed by the general laws of the state,” etc.

This section has been in force since the passage of ch. 56, Laws 1852. During all that time it has formed a part of a chapter relating to taxation, other sections of which make special provisions for enforcing the payment of taxes. Sec. 21 of the same chapter provides a special proceeding differing from the general law for enforcing the payment of personal property taxes. Sec. 24 et seq. of the chapter makes special provisions differing from the general law for the sale of land for nonpayment of taxes. During all these years, these special provisions have been resorted to in the city of Milwaukee for the collection of delinquent taxes and so far as I have discovered, the question has never been raised that by reason of sec. 38, the methods prescribed by the general law should have been resorted to. It would seem, therefore, that that section was not intended to require that delinquent taxes be collected by the methods prescribed by the general law, but rather was intended to make plain the duty of the treasurer to collect the state, county and school taxes with the city taxes and to pay the same to the county treasurer within the time prescribed by law. To adopt the other construction would render most of the provisions of ch. 18 of the charter meaningless.

Certainly the sale of land for nonpayment of taxes is more intimately connected with the collection of such taxes than is the addition of the penalty prescribed by sec. 925—152a

and yet, as I am informed, in the city of Milwaukee, such sales are made under the charter provisions rather than under the general law. This penalty is neither a state, county or school tax and if I correctly understand the statute, neither the state, county nor any municipality other than the town, village or city in which it is collected, has any interest in it. By the terms of the statute, it is to be "paid into the treasury," that is if I correctly interpret it, into the town, village or city treasury. If that is true, then sec. 38 would have no application to it.

The question still remains whether independent of sec. 38 chap. 18 of the Milwaukee charter, sec. 925—152a applies to the city of Milwaukee. You have also called my attention to sec. 14 ch. 20 of the Milwaukee city charter, providing:

"No general law of this state, contravening the provisions of this act, shall be considered as repealing, amending, or modifying the same, except such purpose be expressly set forth in such law."

One legislature cannot limit succeeding legislatures to any certain form in exercising their legislative functions and if it can be said that it clearly appears from sec. 925—152a that it was the intention of the legislature to have it apply to the city of Milwaukee, the charter provision referred to will not prevent its having that effect. *Brightman v. Kirner*, 22 Wis. 54; *Kellogg v. Oshkosh*, 14 Wis. 623; *Raymond v. Sheboygan*, 76 Wis. 335; *State ex rel. Risch v. Trustees*, 121 Wis. 44.

Sec. 4986 Wis. Stats. 1911 provides:

"All the laws contained in these revised statutes shall apply to and be in force in each and every city and village in the state as far as the same are applicable and not inconsistent with the charter of any such city or village; but when the provisions of any such charters are at variance with the provisions of these revised statutes the provisions of such charters shall prevail unless a different intention be plainly manifested."

Sec. 4987 Wis. Stats. 1911 provides:

"None of the general provisions of these revised statutes shall be construed so as to affect or repeal the provisions of any special acts relating to particular counties, towns, cities or villages or the officers or offices thereof unless such acts are enumerated in the acts hereby repealed."

These sections it is true were enacted prior to the enactment of sec. 925—152a and refer only to "these revised statutes." Yet they do declare a general legislative policy.

"These express declarations on the part of the legislature show plainly that special legislative acts, such as municipal charters, are not intended to be repealed, directly or by implication, by the general revision of the subject in such statutes, where the specific subject is otherwise covered by such charters. The charter must be held to be in force as enacted by special act of the legislature."

*State ex rel. McCoale v. Kersten*, 118 Wis. 287.

Chap. 18 of the Milwaukee special charter covers the specific subject covered by sec. 925—152a. To have effect, the intention to repeal, amend or modify the charter provision must clearly appear from the language employed in the act claimed to so repeal, amend or modify. *Madden v. Kinney*, 116 Wis. 561; *Devine v. Fond du Lac*, 113 Wis. 61; *Janesville v. Markoe*, 18 Wis. 350.

While the question is not altogether free from doubt, it does not appear to me to be clear that the legislature in enacting sec. 925—152a intended to repeal, amend or modify the provisions found in the Milwaukee city charter, and it is, therefore, my opinion that that section does not apply to Milwaukee.

## OPINIONS RELATING TO THE UNIVERSITY.

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*University*—University Regents have the right to remove a sidewalk along Lorch street in the city of Madison.

October 18, 1912.

M. C. McCaffrey,

*Secretary, Regents of the University of Wisconsin.*

You have submitted for an official opinion the question whether the Board of Regents of the University of Wisconsin have the right to remove a sidewalk on Lorch street at the proposed site of the Wisconsin high school building. You also have enclosed a letter from Mr. Arthur Peabody, Supervising Architect, and a sketch of Lorch street, and the sidewalk in question. It appears from Mr. Peabody's letter that the proposed Wisconsin high school is to be located on the west side of Lorch street, at the intersection of University Avenue; that the description of the property shows that the east line abutting on Lorch street is on the curb line of the street, and that the sidewalk is wholly on the property of the University. It is proposed to build the new Wisconsin high school structure up to the curb, a distance of about forty feet along Lorch street, which will necessitate the removal of the sidewalk.

In answer to your inquiry I will say that as the ownership of this property is absolute in the University Regents and as the sidewalk along Lorch street, as I am informed, was built by the property owners not more than six or eight years ago, and as no reservations or agreements of any kind are found in any of the conveyances to the University, nor with any of the property holders along Lorch street, I can see no objection to the removal of this sidewalk from a legal standpoint. No one, outside of the University, has a vested right to have this side-

walk remain at the place where it is now located. I am, therefore, of the opinion that the Board of Regents have the power to remove it.

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*University—Appropriations and Expenditures*—A bond given by the president of the University for the purpose of removing alcohol from a bonded warehouse, without payment of the revenue tax is not an official bond within the meaning of sec. 1966—38 Stats., as amended.

Where the alcohol is used in the University laboratories, such a bond may be purchased by the regents from a surety company, and a claim for the premium therefor, if reasonable in amount, may properly be audited.

January 4, 1913.

HON. JAMES A. FREAR,  
*Secretary of State.*

In your letter of the 12th ult., you enclose certain correspondence with reference to the payment of premium on bond for the withdrawal of alcohol for the University of Wisconsin, and you ask for my opinion as to whether or not this bond is an official bond within the meaning of ch. 329, Laws of 1911, and if it is not, whether or not it would be proper for you to audit a claim for the premium upon the bond.

It appears from the correspondence inclosed that it is necessary that the University use considerable quantities of alcohol in its several laboratories; that under a provision of the internal revenue laws alcohol to be used for such purposes by an institution of this kind may be withdrawn from bonded warehouses without the payment of the internal revenue tax upon the giving of a bond by the president of such institution, and that the bond in question here is a bond of that kind.

Sec. 1966—38 of the Stats., as am. by ch. 329 of the Laws of 1911, provides in part:

“The state . . . may pay the cost of any official bond furnished by an officer thereof, pursuant to law or any rules or regulations requiring the same, if said officer shall furnish a bond with a surety company or companies authorized to do business in this state, said cost not to exceed one-fourth of one per cent per annum on the amount of said bond or obligation by said surety executed.”

In *Connor v. Corson*, 83 N. W. 588, 591; 13 S. D. 530, the court say, in speaking of the bond given by a sheriff as one of the necessary qualifications for assuming the office:

“An official bond is an obligation under which the sureties may, upon default of their principal, become liable to pay money to another.”

Mechem on Public Offices and Officers, section 263, in treating of official bonds, considers them as those by which public officers “are usually required to secure the faithful and proper discharge of their duties.”

In Anderson's Dictionary of Law an official bond is defined as:

“An obligation with sureties given by a public officer as security for the faithful discharge of the duties of his office.”

In my opinion the bond referred to in the correspondence sent is not an official bond and therefore does not come within the provisions of sec. 1966—38 as amended.

The question of whether or not a claim for premium on this bond may properly be audited is not so easy of solution. By sec. 379 of the Stats., as am. by ch. 260 of the Laws of 1903, the Regents of the University of Wisconsin are made a body corporate and given

“all the powers necessary or convenient to accomplish the objects and perform the duties prescribed by law, and shall have the custody of the books, records, buildings and all other property of said university.”

Under sec. 383a of the Stats., as am. by ch. 260 of the Laws of 1903, provision is made for the payment of certain claims against the University, following which appears the provision:

“Every other claim or account shall state the nature and particulars of the service rendered or material furnished, and be verified by the affidavit of the claimant or his agent and filed with the secretary of the regents, and a roll, showing the name of each such person, for what service or object, to what fund chargeable, and the amount allowed to and due him, shall be certified as aforesaid to the secretary of state; upon which he shall issue his warrant for the proper amount to the person entitled thereto.”

It appears that the purchases for the University are left very largely in the discretion of the Board of Regents. They are given very broad powers and may properly purchase whatever is necessary or convenient for carrying out the purposes for which the board was created. It would seem that there can be no question that under these powers it is proper for them to purchase alcohol for use in the laboratories. If they may purchase the alcohol and have the claim therefor audited, it would seem that there is no good reason why they may not also purchase such bond as is necessary to enable them to get the alcohol without the payment of the revenue tax. By so doing they save many times the amount of the premium on the bond. In my opinion a claim for such premium may properly be audited.

As to the amount of such premium, that is a question of fact not within the province of this department to decide. Of course, no claim for an exorbitant premium should be audited, but a claim may properly be audited for such amount as such premium is reasonably worth.

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*University—Public Officers*—Board of Regents of the university with the approval of the Governor have the power to settle with a contractor who has constructed a building not exactly as the original plan called for.

January 29, 1913.

DR. H. C. BUMPUS,

*Business Manager, University of Wisconsin.*

Under date of January 24th, you have submitted to me a copy of the report made by the special committee appointed by the Board of Regents of the University of Wisconsin in regard to certain matters that have arisen concerning the construction of the foundation for a kitchen located near the new dormitory of the University.

You state that, although the contractor and architect were found to be in error by this committee, the fact, nevertheless, remains that the contractor rendered services to the University, and you ask my advice in regard to the proper mode of procedure concerning his compensation therefor.

You have also submitted the exhibits mentioned in the report and a statement of the work actually performed by the contractor, together with a fair statement of the value thereof.

The value of the work performed is estimated at \$1930.30. The report of the committee, after stating that the contract for the construction of the foundation for the kitchen adjoining the woman's dormitory was duly entered into according to plans, drawings and specifications duly adopted, states:

“When the conditions of the contract with the Muskegon Construction and Engineering Company were being fulfilled the work of excavation having been partially completed—it was claimed by the contractor that an error had been made in the drafting of the plans, the adjustment of which would require the contractor to excavate material and construct foundations considerably in excess of the work involved under the terms of the contract as construed by himself, and he so reported to the supervising architect.

“The supervising architect, without authority, caused to be prepared a second plan and gave verbal instructions to the contractor, which plans and instructions were materially different from and at variance with the original plans, specifications and drawings.

“The substituted plans and instructions were not submitted to the Business Manager or to the Board.”

The report then states that the work was completed according to the substituted plans, and not according to the original plans, drawings and specifications. It further states that the contractor was in error in accepting directions from the supervising architect, in violation of his contract with the Board of Regents, and that the supervising architect was in error in making changes in the form of the original contract and making substitutions therefor, without authority from the Board of Regents.

The report of the special committee of the Board of Regents does not state that the contractor was in error when he claimed that an error had been made in the drafting of the plans. The criticism is simply directed to the error in accepting orders from one not having authority to give instructions and in making changes in the plans without the approval of the proper authorities. This criticism is, of course, well deserved. Subsec. 2 of section 4 of chapter 631, Laws of 1911,

making an appropriation for the building of a woman's dormitory, provides as follows:

"No plan or plans for any building shall be finally adopted, and no contract or contracts shall be entered into by the regents for the construction of any building, until such plans and contracts, with complete estimates of the total cost thereof, shall have been submitted to and in writing approved by the governor of the state, who shall withhold such approval until he shall satisfy himself by a personal examination or by such other means as he may in his discretion adopt, that such building is required for the purposes proposed, and it can and will be erected and fully completed according to such plans or contracts for the sum proposed for the same by the regents out of the appropriation herein made."

Any changes in the plan or specifications or drawings should have been submitted to the Regents and to the Governor of the state for approval, and no changes should have been made without such approval; but, from the conversation I have had with you, it appears to be a fact that an error was made in the specifications that were approved and that the contractor, in calling the attention of the supervising architect thereto, was simply doing what any other contractor probably would have done. Instead of having the changes to be made submitted to the proper authorities, the supervising architect assumed that they would be approved and proceeded to make them without proper authority.

If this be a fact and if the work as completed is satisfactory to the Regents and to the Governor, the matter can be easily adjusted by making a settlement with the contractor and paying him for the work actually performed by him. Such settlement, however, should not be made without the approval of the Governor as, under the above quoted section, such approval is required for the plans and specifications and no changes can legally be made therein without his approval. But there can be no question that the Board of Regents, with the approval of the Governor, have the right to make such settlement and adjustment of the matter as in their discretion may be just and equitable to all parties.

## OPINIONS RELATING TO WEIGHTS AND MEASURES.

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*Weights and Measures—Public Officers*—Bonds of manufacturers provided for in sec. 5 of ch. 566 Laws of 1911 to be provided by manufacturers themselves and sureties to be approved by Attorney-General.

October 7, 1911.

HON. J. Q. EMERY,

*Dairy and Food Commissioner.*

You call my attention to certain provisions of sec. 5 of ch. 566 of the Laws of 1911 relative to weights and measures and suggest that it is the duty of the attorney-general to prescribe the form of the bond required and perhaps to have these bonds mimeographed or printed. I do not quite agree with you in the interpretation of this act. The section referred to relates entirely to the duties of the superintendent of weights and measures and the particular part which relates to the attorney-general simply requires that the attorney-general shall approve the bond to be filed by the manufacturer. As I read this law the manufacturer is required to furnish his own bond and the attorney-general is required to approve the sureties thereon and perhaps by implication the form of the bond also. That particular portion of the law to which you refer and which applies to bottles or jars to be used for the sale of milk and requires that the initials or trademark of the manufacturer and the designating number shall be blown in the bottle for purposes of identification provides:

“The designating number shall be furnished by the state superintendent of weights and measures upon application by the manufacturer, and upon filing by the manufacturer of a bond in the sum of one thousand dollars with sureties to be approved by the attorney-general, conditioned upon their conformance with the requirements of this section.”

The law further provides that a record of the bonds furnished, the designating numbers and to whom furnished shall be kept in the office of the superintendent of weights and measures.

The only duty imposed upon the attorney-general is to approve the sureties and perhaps the form of the bond, and in my opinion the bond must be furnished by the manufacturer himself.

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*Weights and Measures—Public Officers—District Attorney—Criminal Law—Courts*—It is the duty of the District Attorney to prosecute for violations of the Weights and Measures Law.

Such prosecutions should be brought in the court having jurisdiction of criminal actions of a similar nature.

January 30, 1913.

MR. D. S. LAW,  
*District Attorney,*  
La Crosse, Wis.

In your letter of the 29th, you state that ch. 76 of the Stats., relating to weights and measures makes no provision as to the jurisdiction in which these offenses shall be tried and does not make it the specific duty of either the district attorney or the city attorney to handle these matters; that you have taken the position that it is the spirit and intent of these laws, providing for the appointment of a city sealer in each municipality of over 5,000 inhabitants, to place the supervision and control and enforcement of these laws, as well as the prosecution for violations, in the hands of such municipal authorities and that prosecutions for violations should be brought by the city attorney in municipal court, and you ask my opinion as to what court has jurisdiction and what public officials should prosecute.

Sec. 1659 par. 1, Wis. Stats. 1911, makes the dairy and food commissioner ex officio state superintendent of weights and measures. Par. 6 of the same section provides for supervision by him of the work of local sealers.

Section 1661 Wis. Stats. 1911 provides for the appointment of city sealers and par. 4 of that section provides, among other things,

“Whenever the city sealer finds a violation of the statutes relating to weights and measures, he shall cause the violator to be prosecuted.”

Paragraph 5 of the same section requires him to make an annual report to the mayor and also an annual report to the state superintendent of weights and measures.

Sec. 1664 Wis. Stats. 1911 gives the sealers of weights and measures police powers and several sections of ch. 76 prescribe various penalties for violations of the weights and measures law, defining the offenses in connection with that law. It is a law of general operation throughout the state and is in no sense a law of any particular city.

Sec. 752 of the Stats. prescribes the duties of the district attorney and par. 2 of that section reads,

“To prosecute all criminal actions, except for common assault and battery or for the use of language intended or naturally tending to provoke an assault or breach of the peace, before any magistrate in his county other than those exercising the police jurisdiction of incorporated cities and villages in cases arising under the charter or ordinances thereof, when requested by such magistrate; and upon like request to conduct all criminal examinations which may be had before such magistrate, and prosecute or defend all civil actions before such magistrates in which the county is interested or a party.”

As these several violations are made criminal offenses by the statute and do not arise under the charter or ordinances of the particular city, it would appear to be the duty of the district attorney to prosecute for violations. The duty of the city sealer of weights and measures is quite similar to the duties imposed upon constables in section 842 Wis. Stats. 1911. Par. 5 of that section requires a constable

“To cause to be prosecuted all violations of law of which he has knowledge or information.”

The language as to the duty of city sealers is quite similar, except that it is limited to violations of the weights and measures law. In my opinion, it is the duty of the district attorney to prosecute for this violation.

Any court having jurisdiction of criminal matters, the penalty for which is similar to that provided for the violation of

the weights and measure law, would have jurisdiction. In many places this would be in courts of justices of the peace. Many of the municipal courts are given jurisdiction of offenses of this nature, but I have not examined as to the jurisdiction of the municipal court of your county.

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*Weights and Measures—Criminal Law*—Where coal is sold to a resident of this state, and delivered to him by the wagon-load, by a Michigan dealer the sealer of weights and measures would not be justified in prosecuting under sec. 1666b, Wis. Statutes 1911, for failure to issue delivery tickets.

January 30, 1913.

HON. J. Q. EMERY,

*State Superintendent of Weights and Measures.*

In your letter of January 24th, you say:

“One of the city sealers of weights and measures living in a city bordering on the state of Michigan makes the following statement: ‘A certain coal company in the state of Michigan is delivering coal by teams on this (Wisconsin) side of the river. If I stop the teams and find the coal short in weight shall I prosecute the driver for the delivery of short weight coal, and if he refuses to weigh can I arrest him under the Wisconsin Law?’

“I am at a loss to know what answer to give this sealer in view of the interstate commerce features apparently involved in the transaction, and I request an official opinion from you as to the instruction I should give this sealer of weights and measures.”

From your statement of facts it is impossible to state whether the sale is made in Michigan or in this state. Of course, the laws of this state cannot and do not purport to regulate sales made in other states. Sec. 1666b Wis. Stats. 1911 provides in part:

“It shall be unlawful to sell or offer to sell in this state any coal, charcoal, or coke in any other manner than by weight. No person, firm or corporation shall deliver any coal, charcoal, or coke without each such delivery being accompanied by a delivering ticket and a duplicate thereof, on each of which shall be in ink, or other indelible substance, distinctly expressed in pounds, the gross weight of the load, the tare of the delivery vehicle,

and the quantity or quantities of coal, charcoal, or coke, contained in the cart, wagon, or other vehicle used in such deliveries, with the name of the purchaser thereof, and the name of the dealer from whom purchased. One of these tickets shall be surrendered to the sealer of weights and measures upon his demand, for his inspection, and this ticket or weight slip issued by the sealer when the sealer desires to retain the original shall be delivered to said purchaser of said coal, or his agent or representative, at the time of the delivery of the fuel; and the other ticket shall be retained by the seller of the fuel."

You will note that this prohibits the delivery of coal, without accompanying such delivery with a ticket. It does not punish the giving of short weight. No penalty is specified for violation of the statute. As it first makes it unlawful to sell in this state otherwise than by weight, I believe the court would hold that the further provision as to delivery relates only to deliveries made in the execution of sales in this state. If that is correct, it probably disposes of your inquiry. Whether it does or not, in so far as this section regulates the delivery, in my opinion it is intended to protect the purchaser against fraud and is a valid police measure even though it be construed as applicable to subjects of interstate commerce. See the opinion of my predecessor rendered to you under date of June 11, 1912. It would seem, however, to be intended merely as a regulation for the benefit of the purchaser, without making its violation a criminal offense. If it creates a criminal offense then the penalty is provided by sec. 4635 Wis. Stats. 1911, which reads as follows:

"Any person who shall be convicted of any offense the punishment of which is not prescribed by any statute of this state shall be punished only by imprisonment in the county jail not more than one year or by fine not exceeding two hundred and fifty dollars."

The court has stated that this section is probably applicable to common law offenses. *Smith v. State*, 63 Wis. 453.

It will be noted that by its terms the section is applicable to "any offense." Does sec. 1666b Wis. Stats. 1911 define "any offense?" An offense is defined as "the transgression of a law; a crime." *Anderson's Law Dictionary*.

"The doing that which a penal law forbids to be done, or omitting to do what it commands. In this sense, it is nearly synonymous with crime. In a more confined sense it may be

considered as having the same meaning with misdemeanor; but it differs from it in this, that it is not indictable but punishable summarily by the forfeiture of a penalty." *Bouvier's Law Dictionary*.

"The word 'offense' is used as synonymous with 'crime,' and means an offense for which a criminal punishment may by law be inflicted." *State v. Jager*, 19 Wis. 235.

"The term 'criminal offense' includes misdemeanors as well as felonies, but not violations of municipal ordinances." *Koch v. State*, 126 Wis. 470; *City of Oshkosh v. Schwartz*, 55 Wis. 483.

"A crime is any wrong which the government deems injurious to the public at large, and punishes through a judicial proceeding in its own name." I Bishop's *New Criminal Law Section 32*. *In re Bergin*, 31 Wis. 383; *Patterson v. Nat. Premium Life Ins. Co.*, 100 Wis. 118.

A criminal action is one

"prosecuted by the state as a party against a person charged with a public offense, for the punishment thereof." Section 2598 Wis. Stats. 1911; *State ex rel. Attorney-General v. Frost*, 113 Wis. 623.

Section 4635 provides a punishment for "any offense" for which punishment is not prescribed by any statute of this state. An offense is a crime and a crime is a public offense for which punishment may be inflicted at the suit of the state. This seems to be reasoning in a circle, although there is some distinction. In my opinion it is extremely doubtful if sec. 1666b defines "any offense" within the meaning of that phrase as used in sec. 4635, and in my opinion, the local sealer of weights and measures is not justified in prosecuting the driver under this section, under the circumstances stated in your letter.

Sec. 4432 Wis. Stats. 1911, provides that

"any person, who, by himself or by his servant or agent, or as the servant or agent of another, shall sell \* \* \* less than the quantity he represents, \* \* \* shall be punished \* \* \*"

If the sale in question was in this state, this statute would apply if the weight of the coal was less than represented.

Sec. 4430 Wis. Stats. 1911, provides a punishment for the crime of gross fraud or cheat at common law. This might be applicable in case of false weights being used, but would not apply to the mere giving of less than the quantity represented. 2 Bishop on Crim. Law. (7th ed.) Sec. 146; Clark's Crim. Law p. 276.

## INDEX.

	Page
Abandonment of children—Requisition will be granted for.....	567
Actions, prosecution of certain actions by district attorney. See District Attorney.	
Anti-Lobby law applies to persons employed for pecuniary consideration .....	187
<b>APPROPRIATIONS AND EXPENDITURES</b>	
Commissioner of Labor authorized to purchase appliances..	1
National Conference of Sealers of Weights and Measures—delegate to .....	1
Construction and furnishing of new capitol.....	2
Board of Control—Expenses of members.....	5
Conventions—Delegates appointed by Governor.....	5, 8
Wisconsin Naval Militia.....	6
Fire departments—Insurance fund.....	8
St. Croix Falls bridge—payment for construction.....	9
Memorial Arch Commission—dedication ceremonies.....	11
Bonds of public officers—payment of premiums.....	13, 608
Commissioner of Labor, Appropriation for—Employees.....	15
Industrial Commission, appropriation for—Employees.....	15, 17
Disbursements for salaries, etc.....	18, 20, 110
Appropriation, what constitutes.....	18
Highway improvements .....	20, 105
County officers cannot bind county by incurring expense beyond amount of appropriation for highways.....	20
Employment of investigator of training schools for nurses..	23
University contracts—Gymnasium annex.....	25
Subscription fund—note as asset.....	25
Perry's Victory Centennial Commission.....	29
Power of legislature to make appropriations under sec. 10, Art. VIII, Const., not limited.....	105
County board not authorized to make appropriation for relief of Black River Falls flood sufferers.....	147
Special asylum fund of county cannot be used for highway improvements .....	148
Legislature has no authority to reimburse citizens for losses by fire .....	433
Public Lands—Appraisers of improvements on public lands to be paid from the general fund.....	583.
Arson—Information in prosecution.....	170
Assault and Battery, duty of district attorney to prosecute cases in circuit court.....	472
Assemblmen. See Legislature.	
Attorney and client—Attorney may testify that answer of his client in a case was sworn to before him as a notary....	397
Attorney General—Rule of department not to render opinions upon questions involved in pending litigation.....	443, 455
Attorney General—Duty to advise Barbers Board.....	473.

	Page
Attorney General—To approve bonds of manufacturers of milk bottles .....	613
Auctioneer's bond; forfeiture collected by civil action.....	395
<b>AUTOMOBILES</b>	
Non-resident owners not required to register in Wisconsin..	31
Municipal ordinance inconsistent with state law invalid....	32
Bail—Bond in bastardy proceeding not lien on real property....	168
Bail—Sureties of bond cannot be held until bond is forfeited....	168
Bail—Forfeiture erroneously sent to state treasurer to be refunded to county.....	199
Ballots. See Elections; Voting Machines.	
Bank checks—Post-dated checks.....	195
<b>BANKS AND BANKING</b>	
State deposits may not exceed amount of paid-up capital of a bank .....	35
Joint ownership of stock.....	36
State banks cannot invest in real estate security except when located in this and adjoining states.....	37
Trust company banks have no power to issue debentures secured by pledging company's assets.....	38
Barbers Board—Barbers' and apprentices' permits.....	448
Barbers Board—Compensation and expenses of members.....	465
Barbers Board—No power to employ attorneys—Duty of Attorney General to advise.....	473
Bastardy. See Criminal Law; Requisitions.	
Bergen Telephone Co.—Operation in Rock County.....	559, 560
Black River Falls—County board not authorized to make appropriation for flood sufferers.....	147
Binder Twine—Sale by Board of Control.....	507
Blue Book contract.....	556
Board of Agriculture—Printing to be paid for out of general fund .....	554
Board of Control—Expenses of members.....	5
Board of Control—no power to enter into a contract for collection of excessive freight and express charges.....	467
Board of Control—power to sell binder twine.....	507
Board of Dental Examiners—Power to revoke license.....	428
Board of Dental Examiners—Examination of candidate who is not a graduate of dental college prior to Dec. 31, 1911..	457
Board of Forestry—law providing for payment of salaries and expenses constitutional .....	110
Board of Forestry—not required to pass upon problems of engineering or construction of dams or reservoirs under ch. 335, L. 1907.....	450
Board of Forestry—not authorized to execute contracts of guaranty .....	462
Board of Health—Members of local board not all required to be residents of municipality.....	540
Board of Pharmacy may revoke pharmacist's license upon third offense of selling habit-forming drugs.....	533
Bond accompanying state building contract must secure payment of claims for labor and materials.....	113
Bond for bail in bastardy proceeding not lien on real property..	168
Bond for bail—Sureties of bond cannot be held until bond is forfeited .....	168
Bond for bail—forfeiture erroneously sent to state treasurer to be refunded to county.....	190

	Page
Bond of president or regents of University for removal of alcohol from warehouse .....	608
Bonds of public officers—payment of premiums.....	13, 608
Bonds—State banks cannot invest in real estate security except when located in this and adjoining states.....	37
Bonds—determination of claims for payment for labor and materials under state building contracts.....	115
Bonds of county depository—time of filing.....	150
Bonds of manufacturers of milk bottles to be provided by manufacturers and approved by attorney general.....	613
Boxing match distinguished from prize fight—duty of sheriff....	157

## BRIDGES AND HIGHWAYS

Appropriation for highway improvements.....	20, 105
Bridges already constructed can be repaired—construction of ch. 642, L. 1911.....	41
Highway taxes, payment of in money—construction of sec. 1260, .....	43, 519
Town may build bridge over stream, although dam has been authorized .....	45
When erection of a dam destroys public highway, owners of dam must pay for restoration.....	45
Power of county and town boards to alter or discontinue part of county road system—ch. 337, L. 1911.....	48
Municipal corporations not entitled to county aid in constructing bridges and highways within their limits....	49, 50
Right of appeal to Highway Commission.....	52
Highway Commission has supervision of construction of all state highways .....	53
Town in which highway adopted by village is located is not required to maintain or repair the same.....	55
Payments by a town to make up deficit for construction of bridge or highway may be used as basis for obtaining state and county aid.....	56
Duty of county and town boards to levy tax for highway improvement may be enforced by mandamus.....	59, 69
County liable for maintenance of highways adopted by county board as state highways.....	60
Amount of aid to be granted under sec. 1319, stats.....	62, 64
Tax levy of town of Reserve for 1912.....	65
Money for highway construction must be paid out of county treasury .....	65
Liquor license money may not be used as basis for state aid	67
Vote to raise money for improvement of prospective state highways need not be by ballot.....	70
Where town becomes part of a city before highway improvement is begun for which money is voted, work should be carried on as though no change had taken place .....	73
Special asylum fund of county cannot be used for improvement of highways .....	148
Villages authorized to appropriate money for permanent highway improvement .....	400
Member of county board may not be employed on road construction under county highway commissioner.....	518

## BUILDING AND LOAN ASSOCIATIONS

Articles of incorporation—amendments that conflict with statutes not approved.....	82
Articles of incorporation—amendments must be adopted by vote of two-thirds of outstanding stock.....	87

	Page
By-laws required to state rate of interest.....	76
By-laws—no authority to provide for retiring of stock when- ever board of directors deem it expedient.....	76
By-laws—amendment should be shown by affidavit to be adopted in the manner prescribed by law and the by- laws .....	81
By-laws in conflict with articles of incorporation not ap- proved .....	83, 87
By-laws—copy of amendment sent to Banking Commissioner should be verified.....	84
By-laws—amendment by association organized prior to enact- ment of ch. 368, L. 1897.....	84, 86
Provision that no share-holder in arrears allowed to vote is void .....	77
Candidates for office. See Elections.	
Capitol, construction and furnishing of.....	2
Cedarburg Mutual Fire Ins. Co.—amendment of articles of asso- ciation .....	329
Children. See Abandonment; Indigent, Insane, etc.	
Cities. See Municipal Corporations.	
Citizens—not necessary, before Dec. 1, 1912, that person of for- eign birth should have taken second papers to be quali- fied to sign request for special school meeting.....	390
Commissioner of Labor authorized to purchase appliances.....	1
Commissioner of Labor, appropriation for—employees.....	15
Commissioners of Fisheries have no power to authorize erection of Cushing monument on state hatchery grounds.....	581
Constitutional amendment limiting appropriations for develop- ment of water power, etc., not validly adopted.....	105
Constitutional amendments, form of ballot for voting.....	223
<b>CONSTITUTIONAL LAW</b>	
State lands—which are subject to sale.....	89
School lands—parts of ch. 452, L. 1911, invalid.....	89
Industrial education law constitutional.....	93
Elections—cities of the fourth class permitted to vote at one polling place .....	97
Veterinary license law constitutional.....	101
Power of Veterinary Board to revoke license.....	101
State fair grounds—bill creating commission to select site constitutional .....	104
Power of legislature to make appropriations for public high- ways under Sec. 10, Art. VIII, Const., not limited.....	105
Amendment to Constitution limiting appropriations for de- velopment of water power, etc., not validly adopted....	105
Forestry Department—Expenses may be paid, although constitutionality of appropriation for purchase of forest reserve lands questioned.....	110
Act requiring thermometers in railroad passenger cars in this state not unconstitutional as an interference with interstate commerce .....	111
<b>CONTRACTS</b>	
Examination of Dunphy-Fridstein Co. contract for erection of grand stand at state fair grounds.....	113
State building contracts must contain eight-hour clause....	113
State building contracts must secure payment of claims for labor and materials .....	113
Determination of claims for payment for labor and materials under state building contracts.....	115

	Page
<b>CONTRACTS—Continued</b>	
Contract guaranteeing land values as part of contract of sale is not an insurance contract.....	320
State or any state officer not authorized to execute contracts of guaranty .....	462
Railroad company not obliged to execute contract authorizing forest ranger to use a railway velocipede upon its tracks .....	462
Board of Control has no power to enter into a contract for collection of excessive freight and express charges.....	467
Contracts of public officers—what are illegal.....	485, 488, 489, 518, 546, 548.
Public officers must enforce forfeiture where bids upon public work require deposit to be made.....	524
Blue book contract.....	556
Regents of University may settle with contractor for construction of building not exactly as plan called for.....	610
Conventions—delegates appointed by Governor.....	5, 8.
Coöperative Associations. See Corporations.	
<b>CORPORATIONS</b>	
Articles of incorporation, filing by secretary of state.....	119
Right of stockholders to govern voting power of preferred stock .....	119
Articles of incorporation, amendment of—filing fee.....	121
Articles of incorporation, amendment to change from non-stock to stock corporation.....	121
Proxies—Irrevocable proxy not against public policy.....	122
Foreign corporations—when not to be licensed to do business in this state.....	124
Foreign corporations—what constitutes doing business within the state in order to require license.....	126
Insurance corporation—general insurance agency not an insurance corporation .....	127
Incorporation without capital stock.....	128
Insurance corporation—capital stock may be diminished as provided in sec. 1774.....	128
Charter, rescission of forfeiture—affidavit required.....	129, 142
Electric railway—power to purchase and operate gas plants	131
Purposes of corporation, what may be included in articles of association .....	133
Coöperative associations, requirements for organization to benefit under sec. 1786e-16.....	138
Coöperative associations, organization of Freedom Mutual Tele. Co. ....	138
Coöperative associations—prohibition as to transaction of business by corporations until 50% of stock has been subscribed and 20% paid in applicable to coöperative associations .....	140
Charter, facts authorizing revocation of.....	143
Coöperative associations may be organized by non-residents under sec. 1786e-1.....	144
Insurance corporation, amendment of articles.....	145
Oil inspection—criminal action against corporation for violation of law.....	193
Articles of incorporation—amendment providing for guaranty of land values is void.....	317
Articles of incorporation—guaranty of land values.....	320
Coöperative creamery, not exempt from income tax law.....	600
Corrupt Practices Act. See Elections.	

	Page
<b>COUNTIES</b>	
Counties cannot be bound by officers incurring expense beyond amount of appropriation for highways.....	20
County not compelled to aid municipal corporations in constructing bridges and highways within their limits....	49, 50
County liable for maintenance of highways adopted by county board as state highways.....	60
County has no power to make appropriation for relief of Black River Falls flood sufferers.....	147
Special asylum fund cannot be used for improvement of highways.....	148
County may return to method of insuring in private companies after adopting state insurance.....	149
County chargeable with fees of justice of the peace in bastardy proceedings.....	150
County depository, time of filing of bond.....	150
Vilas County has no power to change salary of municipal judge.....	152
County depository may be designated by county board at special meeting.....	153
County should receive refund of bail bond forfeited and erroneously sent to state treasurer.....	190
County buildings—state insurance fund—effective date....	315
County buildings—district attorney may not write insurance for.....	488
Tract indices to be prepared by register of deeds.....	493
Any county may adopt tract indices and chain of title system	493
County Board—power to alter or discontinue part of county road system.....	48
County Board—duty to levy tax for highway improvement may be enforced by mandamus.....	59
County Board has no power to make appropriation for relief of Black River Falls flood sufferers.....	147
County Board has no power to change salary of municipal judge	152
County Board may designate county depository at special meeting.....	153
County Board—where board adjourns subject to call of chairman, the meeting called is a special meeting and must be called as such.....	378
County Board—implied power of adjournment. Adjournment must be to a day certain or it is an adjournment <i>sine die</i>	385
County Board—resolution not void because carried by vote of <i>de facto</i> officer.....	491
County Board—member who resigns may be elected trustee of poor farm.....	497
County Board—members, compensation and mileage.....	497, 502
County Board—member may not be employed on road construction under county highway commissioner.....	518
County Board—city and village supervisors are entitled to vote on a resolution providing that town highway taxes shall be paid in money.....	519
County Board—member may not contract with asylum trustees to act as undertaker in burying the dead from asylum..	548
County Clerk cannot charge more than fee of \$1 for hunting license.....	287, 289
County Clerk not entitled to additional compensation for acting as member of county board of election canvassers.....	501
County Clerk may not pass on sufficiency of proof of candidate's right to have his name on ballot.....	216, 535
County Judge—proceedings to adopt children—compensation...	529

	Page
County Judge, compensation for commitment of insane person..	539
County officers—duties in counties having more than one super- intendent district .....	437
County Superintendent of Schools, compensation and expenses..	198
County Superintendent of Schools, when electors in cities may not vote for.....	401
County Superintendent of Schools may be removed for wilful neglect to make reports.....	503
County Superintendent of Schools—who is eligible, proof....	535, 545

**CRIMINAL LAW**

Bank checks with no funds—intent to defraud.....	155
Oil Inspection—inspector cannot settle violations of law....	156
Boxing match distinguished from prize fight—duty of sheriff	157
Hotels distinguished from boarding houses.....	158
Failure to pay board bill.....	158
Lotteries—drawing of automobile at county fair prohibited	159
Offender on Wisconsin side of Mississippi river may be ar- rested on Iowa side while still on the river.....	160
Bailee guilty of conversion of property may be prosecuted for either larceny or embezzlement.....	161
County in which conversion of property took place proper place to prosecute.....	161, 179
Railroads—train crew—"Car," sec. 1809r, includes baggage and express cars.....	164
Embezzlement—partner may be prosecuted for embezzlement of partnership property.....	166
Polygamy, place of prosecution.....	168
Bastardy proceedings—bail bond given not lien on real prop- erty .....	168
Bastardy proceedings—judgment may be taken in absence of defendant .....	168
Bastardy proceedings—judgment may be enforced in another state .....	168
Arson—information in prosecution.....	170
Burglary—possession of burglar's tools.....	171, 173, 174
Adultery—wife may not testify for or against husband.....	173
Escaped prisoner may be retaken after period when term would have expired.....	177
Embezzlement—allegations as to ownership of embezzled property. Procedure .....	179
Probationer may be convicted of another crime.....	180
Cemetery association not guilty of offense in cutting down trees .....	181
Oleomargarine—sale of from wagons.....	182, 184
Milk—sale of unsanitary milk.....	184
Requisitions will not be granted for bastardy charge.....	184
Requisitions may be granted for charge of fornication.....	184
Embezzlement—warrant may be sworn out by any one know- ing the facts.....	186
Anti-lobby law applies to persons employed for a pecuniary consideration .....	187
Refund of forfeited bail bond erroneously sent to state treasurer to be made to county, not city.....	190
Security for costs may be required in criminal actions by justice of the peace.....	191
Requisition will not be issued if accused was not in this state when offense was committed.....	191
Gambling machines .....	192

CRIMINAL LAW—Continued	Page
Oil inspection—corporation may be proceeded against by criminal information .....	193
Oil inspection—clerk or agent making illegal sale may be prosecuted .....	193
Bank checks—post-dated checks.....	195
Elections—wrongful suppression of nomination papers.....	197
Elections—prosecution of election officers for wrongful certification of poll lists.....	213
Health laws—district attorney to prosecute violations.....	469
Weights and measures law—district attorney to prosecute violations .....	614
Weights and measures law—courts in which prosecutions are to be brought.....	614
Weights and measures law—prosecution for failure to issue delivery tickets—interstate sales.....	616
Cushing monument—Commissioners of Fisheries not to authorize erection on state grounds.....	581
Dams—Town may build bridge over stream with reference to natural condition of stream, although dam has been authorized .....	45
Dams—when erection causes destruction of public highway, owners must pay for restoration of highway.....	45
Dams—Board of Forestry not required to pass upon problems of engineering or construction of dams or reservoirs under ch. 335, laws 1907.....	450
District Attorney—Duty to prosecute under corrupt practices act	232
District Attorney—Discretion in prosecuting for liquor sales made under illegal license.....	346
District Attorney—Duty to represent game warden when state is interested in action.....	447
District Attorney—Duty to prosecute violations of health laws	469
District Attorney—Duty to prosecute assault and battery cases in circuit court.....	472
District Attorney may not write insurance on county buildings	488
District Attorney may not argue case on behalf of common carrier .....	489
District Attorney to direct coroner to hold inquests.....	516
District Attorney—Duty to prosecute violations of weights and measures law .....	614
Drinking cups—Use in department stores and public buildings..	429
<b>EDUCATION</b>	
Industrial education law constitutional.....	93
Transportation of pupils—distance to school.....	199
Transportation of pupils—contract does not prevent carrying other passengers unless expressly prohibited.....	200
Transportation of pupils—school district entitled to aid....	200
Union free high school, dissolution of district.....	203
School meeting—school district prohibited to act on same subject at more than one special meeting in same school year .....	370
County Superintendent of Schools. See County Superintendent of Schools; Public Officers.	
<b>ELECTIONS</b>	
Cities of the fourth class permitted to vote at one polling place .....	97
Nomination papers, wrongful suppression by candidate.....	197
Corrupt practices act—County clerks not entitled to fees for preparing copies of poll lists.....	207

ELECTIONS—Continued	Page
Election Officers—penalty for looking at voters' ballot applies to elections at town meetings.....	209
Corrupt practices act—statement of expenses, filing prior to time fixed .....	209
Voting machines must permit voter to express first and second choice .....	211
Corrupt practices act—statement of expenses, time of filing Election officers—Poll lists—prosecution for wrongful certification .....	213
Candidates—resignation of nominee for presidential elector filed with secretary of state.....	214, 225
Nominations for presidential elector of a party not before participating in elections in this state must be made by nomination papers .....	215
Candidates—duty of county clerk to place name on ballot in case of doubt of eligibility.....	216, 535
Corrupt practices act—statement of expenses—amounts to be included.....	219, 245
Primary pamphlet—secretary of state to arrange order in which candidates are to appear.....	221
Corrupt practices act—acts and disbursements which constitute violations .....	222, 240
Voting machines—adoption by cities in all precincts prohibits return to old ballot system.....	222
Constitutional amendments—form of ballots.....	223
Corrupt practices act—failure to file expense accounts prohibits name of candidate appearing on ballot.....	225
Corrupt practices act—failure to file expense accounts, notification by secretary of state.....	225
Nominations need not be accepted by nominee—name to be omitted from primary ballot.....	227
Primary election—Town of Stockbridge, Calumet County...	228
Primary election—saloons must be closed on election day...	228
Corrupt practices act—pass to state fair given by candidate	229
Election officers—number of clerks—poll lists.....	231
Candidates—name may appear as candidate for more than one office .....	231
Presidential elector—member of Congress prohibited.....	231
Corrupt practices act—violation for candidate to pay for circulation of nomination papers.....	232
Corrupt practices act—prosecution for offenses should be by district attorney .....	232
Primary election for sheriff resulting in tie must be settled by lot .....	233
Presidential electors—nomination—number of signers.....	234
Presidential electors—nomination—form of papers.....	235
Platform convention—record of proceedings.....	236
Polls—petition for changing hours for opening and closing must be filed 20 days prior to primary.....	237
Candidates—independent candidate, when entitled to be...	238
Corrupt practices act—limitation on disbursements is for both primary and general elections.....	240
Where Democratic nominee received highest number of votes at Republican primary, person receiving next highest number on Republican ticket is not Republican nominee	241
State Central Committee can make its own rules. Proxies	242
Candidate who did not file nomination papers is not entitled to have his name placed in party column, but may have it placed in individual column.....	243

ELECTIONS—Continued	Page
Corrupt practices act—candidates who have made no disbursements need file no statements—name to appear on ballot .....	244
Vacancies—no method of filling after primary when there was no candidate at the primary.....	246
Ballots—voting machine—what ballots machine may be used for .....	247
Corrupt practices act applies to campaign for presidential electors .....	252
Corrupt practices act—statement of expenditures must be filed by party and personal committees.....	252
Corrupt practices act—secretary of state is proper filing officer of candidate for state office.....	252
Political advertising .....	252
Corrupt practices act—statement of expenses—candidate for county office must include contribution made to state central committee .....	254
Corrupt practices act—candidate for state office may make contribution to party county committee.....	255
Corrupt practices act—candidate defeated at primary and not candidate at general election must file statement of expenses .....	256
Nomination papers should be circulated by precincts rather than by wards in counties containing more than 100,000 population .....	257
Contested elections—legislative investigations.....	259
Nomination papers—no time limit for circulation of non-partisan nomination papers for county judge.....	262
Primaries—special primary must be held prior to special election to fill vacancy in legislature.....	263
Non-partisan candidates—repeal of sec. 31 by ch. 613, laws 1911 .....	264
Nomination papers for independent candidates must be filed at least fifteen days prior to special election.....	265
Corrupt practices act applies to activities in recall election prior to calling of election.....	266
Registration—unregistered voters may vote at primary by making affidavit .....	269
Election officers—inspectors may administer oaths to unregistered voters .....	269
Boards of registry—duties at meetings held prior to spring election of 1913.....	270, 274
Primary—not held where not more than two candidates have filed for judicial office.....	272
Nomination papers—signers' post office addresses, etc., must be added to be counted.....	275
Nomination papers—when defective, candidate may not have name put on ballot.....	275
Ballots—candidate's name may not appear when nomination papers are defective.....	275
Ballots—arrangement of names of persons nominated by nomination papers .....	278
Notice of election, publication.....	279
Ballots—in town election on license question only official ballots may be cast.....	280
Local option issue must be decided first Tuesday in April..	334
County superintendent of schools—when electors in cities may not vote for.....	401
Electric railway company may be organized with power to operate gas plants.....	131

	Page
Embezzlement. See Criminal Law.	
Equitable Fraternal Union—articles of association, amendment	318
Escaped prisoner may be retaken after period when term would have expired .....	177
Escaped prisoner—sheriff's salary may not be withheld on account of escape.....	514
Evidence—possession of burglar's tools in burglary prosecution .....	171, 173, 174
Farmers Mutual F. & L. C. & T. Town Ins. Co.—articles of organization .....	331
Fees of justice of the peace, in bastardy proceedings, proper charge against county.....	150
Fees. See County Clerk; County Judge; County Treasurer; Public Officers.	

## FISH AND GAME

Muskrat and mink fur—title to—subject to seizure for violation of laws.....	283
Drawing off water in mill pond for lawful purpose not violation of fish and game laws because fish are killed....	284
Catfish in Lake Pepin or Lake St. Croix—taking and sale	285, 294
Brook trout caught without the state of Wisconsin, liability for .....	286
County clerks cannot charge more than fee of \$1 for hunting license .....	287, 289
Fish used as bait—crab traps.....	290
Hunting license cannot be granted to persons under fifteen years of age.....	290
Beaver hides—unlawful to purchase or possess green hides shipped from Michigan into Wisconsin.....	291
Deer heads—persons shipping green deer heads without proper coupons attached should be prosecuted by game warden .....	293
Fish and game laws applicable to allotted Indians.....	296
Search warrant may be issued to search for game killed by tribal Indians .....	296
Duty of district attorney to represent game warden when state is interested in the action.....	447
Game wardens may collect the fees of constables when performing the same duties.....	482
Food—Oleomargarine, sale of from wagons.....	182, 184
Food—Milk—sale of unsanitary milk.....	185
Forestry—Constitutional amendment limiting appropriations not validly adopted .....	105
Fraud—intent—utterance of bank checks without funds.....	155
Gambling machines .....	192
Highway Commission has supervision of construction of all state highways .....	53
Highways. See Bridges and Highways.	
Hotel—distinguished from boarding house.....	158
Husband and wife—joint ownership of bank stock.....	36
Husband and wife—wife may not testify for or against husband in adultery prosecution.....	173
Indians—amenable to state fish and game laws.....	296
Indians—search warrant may be issued to search for game killed by tribal Indians.....	296

INDIGENT, INSANE, ETC.	Page
Expenses of transferring inmates from house of correction to state reformatory.....	300
Children—report of removal from infants' home—construction of ch. 161, laws 1903, as applied to St. Vincent's Asylum, Milwaukee .....	301
Expense of maintenance of insane person may be recovered from estate—proceedings necessary to establish liability .....	302
State reformatory—maintenance of inmates includes medical care, etc.....	306
Soldiers' relief fund—relief within discretion of Soldiers Relief Commission of each county.....	308
State reformatory—inmates transferred from Industrial School for Boys are not entitled to diminution of term for good conduct.....	311
County judge, compensation for commitment of insane person .....	539
Industrial Commission, appropriation for—employees.....	15, 17
<b>INSURANCE</b>	
Insurance fund for fire departments.....	8
General insurance agency not an insurance corporation....	127
Capital stock of insurance corporation may be diminished as provided in sec. 1774.....	128
Amendment of articles of insurance corporation.....	145
County may return to method of insuring in private companies after adopting state insurance.....	149
Fire insurance policies must conform with form on file in office of insurance commissioner.....	314
State insurance fund—county buildings—effective date.....	315
Corporations—amendment to articles providing for guaranty of land values is void.....	317
Fraternal benefit society, amendment of articles of association .....	318
Contract guaranteeing land values as part of contract of sale is not an insurance contract.....	320
Rider to policy may require that property be kept insured for 90% of value.....	321
Limitations on recovery in case of loss in violation of sec. 1943a .....	323
Policy may include more than one kind of insurance.....	325
Articles of organization of Patrons Mutual Town Ins. Co. of Rhinelander .....	327, 328
Articles of organization of Cedarburg Mutual Fire Ins. Co.—amendment .....	329
Articles of organization of Farmers Mutual F. & L., C. & T. Town Ins. Co. of Eau Claire.....	331
Articles of organization of town mutual insurance companies should not contain more than statute authorizes.....	331
District Attorney may not write insurance on county buildings .....	488
Securities of insurance companies to be returned by state treasurer when company dissolves.....	504
City officers not to solicit insurance from city.....	546
Interstate commerce—Act requiring thermometers in railroad passenger cars in this state not unconstitutional.....	111

INTOXICATING LIQUORS	Page
License money may not be used as basis for state aid for highways .....	67
Saloons must be closed on primary election day.....	228
In town elections on question of license only official ballots may be cast.....	280
Right of parents or guardians to withdraw names from petition .....	332
Local option issue must be decided first Tuesday in April..	334
Dry territory attached to wet territory remains dry until new election is held.....	334
Village incorporated from dry territory cannot grant licenses until after election making it wet territory... 334,	353
300-foot law—distance from school house to be measured along streets, not alleys.....	336
Sunday closing law—druggists are not prohibited to sell liquors as medicine on Sunday.....	338
Licenses—number which town may issue after incorporation of village in its territory.....	340
Licenses—number which village may issue..... 340, 355,	359
License cannot be granted to new location while old location available .....	341, 349
Licenses—population limiting number of licenses must be determined from official census.....	341
License—valid license cannot be granted by town board to non-resident .....	343
License, void because of non-residence of grantee not legalized by change of residence.....	343
Liquor—sale in quantities greater than one gallon.....	347
Licenses—transfer to new location; what places may be licensed .....	348
Posted persons—Liability of persons furnishing liquor to... 352	352
Licenses—No preference to locations where village is created in town which did not give preference.....	353
Fermented malt liquor cannot be sold without license.....	357
Licenses cannot be granted in a no-license village, after election in favor of license, until July 1st following election .....	360
Justice of the Peace—fees proper charge against county in bastardy proceedings .....	150
Justice of the Peace may require security for costs in criminal actions .....	191
Justice of the Peace—power to act in appraisal of condemned animals .....	542
Lake Pepin and Lake St. Croix, taking of catfish in..... 285,	294
Larceny. See Criminal Law.	
Legislature—Power to make appropriations under sec. 10, Article VIII, Const., not limited.....	105
Legislature—investigation of contested elections.....	259
Legislature—member cannot hold office created during his term .....	365, 453
Legislature—member may be appointed on Live Stock Sanitary Board .....	367
Legislature—member may also be town chairman.....	485
Legislature—salary of member may not be withheld on account of judgment in favor of the state.....	499
Legislature—member elected to fill vacancy may be compensated .....	532
Libraries—Public Librarians not public officers.....	521

	Page
<b>LIVE STOCK AND LIVE STOCK SANITARY BOARD</b>	
Associate professor in bacteriology in University is not member of Live Stock Sanitary Board.....	363
Officers of board should be elected from members.....	365
Member of legislature may be appointed on Live Stock Sanitary Board .....	367
Board may refuse to allow claim for animal slaughtered, when .....	368
Board and state veterinarian not to be furnished books and periodicals by superintendent of public property.....	458
Police justice not authorized to act in appraisal of condemned animals .....	542
<b>LOANS FROM TRUST FUNDS</b>	
School district prohibited to act on same subject at more than one special meeting in same school year.....	370
Loan may be increased or its time of payment changed....	370
Special school meeting, time of service of notice.....	371
Indebtedness is not incurred by school district until contract is made.....	373
Two or more loans may be authorized at same school meeting	374
Form of resolution of loan.....	374
Limitation on time of payment of loan.....	374
Authority of electors cannot be delegated to school board...	374
Where county board adjourns subject to call of chairman, the meeting called is a special meeting and must be called as such.....	378
City may not borrow from trust funds when charter contains the provision that city cannot borrow money that cannot be paid from revenues for current year.....	380
School district must make provision for collection of annual tax after authorizing issue of bonds.....	384
County board has implied power to adjourn.....	385
Adjournment of county board must be to a day certain or it is an adjournment <i>sine die</i> .....	385
Tax must be levied at school meeting called to authorize loan—second meeting cannot be held in same school year .....	389
Notice of special school meeting cannot be served on Sunday .....	390
School meeting—not necessary before Dec. 1, 1912, that person of foreign birth should have taken second citizenship papers to be qualified to sign request.....	390
Limitation of amount school district may pay for building school house in any year—interest and principal.....	391
Certificate of town board must be secured before larger tax is levied or amount voted for building school house than that authorized by statute.....	391
Member of Congress cannot be presidential elector.....	231
Memorial Arch Commission—payment of expenses of dedication ceremonies .....	11
Milk—sale of unsanitary milk.....	184
Minors—hunting licenses cannot be granted to persons under fifteen years of age.....	290
<b>MISCELLANEOUS</b>	
Newspapers—only weekly newspapers permitted to circulate "copy laws" and receive compensation therefor..	393, 394
Auctioneer's bond; forfeiture collected by civil action....	395
Attorney and client—attorney may testify that answer of his client in a case was sworn to before him as a notary	397

	Page
Mortgages—registers of deeds must note satisfaction of mortgage opposite description of each lot in tract index.....	520
<b>MUNICIPAL CORPORATIONS</b>	
Ordinances—automobiles .....	32
County not compelled to aid municipal corporations in constructing bridges and highways within their limits....	49, 50
Town not required to maintain highway adopted by village	55
City which has adopted voting machines in all precincts cannot return to old ballot system.....	222
City cannot borrow from trust funds when charter contains the provision that city cannot borrow money that cannot be paid from revenues for current year.....	380
Power of water commission in cities owning water works..	399
Villages authorized to appropriate money for permanent highway improvement .....	400
County superintendent of schools—when electors in cities may not vote.....	401
Assessor appointed to fill vacancy holds for unexpired term under general city charter law.....	403
City officer not to solicit insurance from city.....	546
Villages entitled to 5% collection fee in actions to recover taxes on personal property.....	593
Tax assessment in newly incorporated village.....	598
Delinquent tax collection under sec. 925—152a not applicable to city of Milwaukee.....	603
City Dealer of Weights and Measures. See Public Officers.	
Municipal judge—Vilas County—salary fixed by statute.....	152
Newspapers—publication of election notice.....	279
Newspapers—only weekly newspapers permitted to circulate "copy laws" and receive compensation.....	393, 394
Nominations. See Elections.	
<b>OIL AND OIL INSPECTION</b>	
Inspector cannot settle violations of law.....	156
Criminal proceeding for violation of law.....	193
Placard not necessary on tank wagon selling oil or kerosene	406
Deputy oil inspectors—Bonds of surety company, approved by Governor, need not be approved by county judge....	406
Public records in office of oil inspectors may be copied.....	407
"Power distillate," for illuminating or heating purposes, should be inspected.....	408
Oil inspector not authorized to enter premises of a manufacturer of iron and steel products to ascertain whether petroleum products are used for heating purposes without inspection .....	409
"Gas oil" is subject to inspection.....	410
Kerosene prohibited to be carried by express companies in express cars .....	415
Deputy oil inspector not rendered ineligible to office by brother's acceptance of agency for illuminating oil....	460
Superintendent of public property not required to furnish periodicals to oil inspector's department.....	484
Oleomargarine—sale of from wagons.....	182, 184
Partnership—person running cheese factory for patrons not a partner of patrons .....	166
Partnership—partner may be prosecuted for embezzlement of partnership property .....	166
Patrons Mutual Town Ins. Co. of Rhinelander—articles of organization .....	327, 328

	Page
<b>PEDDLERS</b>	
Transient merchant—what constitutes.....	417
Person peddling Bibles without license violates peddlers law	418
Person may be a peddler when selling goods belonging to another man on commission.....	419
Baker need not have license to sell his goods from wagon...	420
Perry's Victory Centennial Commission, appropriation for.....	29
"Pevo" cannot be sold without liquor license.....	357
Pharmacist's license may be revoked upon third offense of selling habit-forming drugs .....	533
Physicians, etc. See Public Health.	
Platform convention—record of proceedings.....	236
Primary elections. See Elections.	
<b>PUBLIC HEALTH</b>	
Oleomargarine—sale of from wagons.....	182, 184
Milk—sale of unsanitary milk.....	184
State Tuberculosis Sanatorium—requisites of residence for admission .....	422
Registered nurses—what constitutes residence to entitle nurse to become registered.....	423, 425
Chiropody may be included in practice of medicine, although manicing is not.....	424
Board of Dental Examiners—power to revoke license.....	428
Drinking cups—use in department stores and public buildings .....	429
Physicians required to apply remedy to prevent blindness in infants .....	431
District attorney to prosecute violations of health laws....	469
<b>PUBLIC OFFICERS</b>	
Bonds, payment of premiums.....	13, 608
Board of Forestry—payment of salaries.....	110
Fees of justices of the peace in bastardy proceedings proper charge against county .....	150
Municipal judge of Vilas County—salary fixed by statute...	152
County superintendent of schools—compensation and expenses .....	198
District attorney to prosecute violations of the corrupt practices act .....	232
District attorney—discretion in prosecuting for liquor sales made under illegal license.....	346
Officers of newly incorporated village hold office until successors are elected at the next spring election.....	354
Member of legislature cannot hold office created during his term .....	365, 453
Member of legislature may be appointed a member of Live Stock Sanitary Board .....	367
City assessor appointed to fill vacancy holds for the unexpired term under the general charter law.....	403
Deputy oil inspectors—bonds of surety company, approved by Governor, need not be approved by county judge....	406
Commissioner of Banking—compensation cannot be increased during term of office.....	433
State school inspector, expenses of.....	435, 483
State officers—expenses while at place of office headquarters .....	435, 440, 483, 508, 519
County officers—duties in counties having more than one superintendent district .....	437

PUBLIC OFFICERS—Continued	Page
State Forester—power, when acting as fire warden.....	438
Deputy commissioner of banking—expenses, while in Madison .....	440
Fire wardens—compensation, how paid.....	442
Attorney General's department—rule not to render opinions upon questions involved in pending litigation.....	443, 455
County judge and county treasurer—fees in inheritance tax proceedings .....	444
District attorney—duty to represent game warden when state is interested in action.....	447
Barbers Board—Barbers' and apprentices' permits.....	448
Board of Forestry not required to pass upon problems of engineering or construction of dams or reservoirs under ch. 335, L. 1907.....	450
Board of Dental Examiners—examination of candidate who is not a graduate of dental college prior to Dec. 31, 1911 .....	457
State veterinarian and live stock sanitary board not to be furnished books and periodicals by superintendent of public property .....	458
Superintendent of public property not required to furnish magazines, periodicals, etc.....	458, 484
Deputy oil inspector not rendered ineligible to office by brother's acceptance of agency for illuminating oil.....	460
Teachers' retirement fund—county treasurer not entitled to 2% fees .....	461
State officers not authorized to execute contracts of guaranty .....	462
Barbers Board, compensation and expenses of members.....	465
Board of Control has no power to enter into a contract for collection of excessive freight and express charges.....	467
Public officers employed by railroads may not use a railroad pass except in performance of railroad duties.....	468, 470
District attorney—duty to prosecute violations of public health laws .....	469
District attorney—duty to prosecute assault and battery cases in circuit court.....	472
Barbers Board has no power to employ attorneys—duty of Attorney General to advise.....	473
City sealer of weights and measures holds office until expiration of his term.....	474
State treasury agent, salary, expenses and deputies' fees....	476
Assessor of income may be appointed to make reassessment of property—compensation .....	477
Register of deeds, fees for recording articles of incorporation .....	481
Game wardens may collect fees of constables when performing the same duties.....	482
Oil inspector—superintendent of public property not required to furnish periodicals to.....	484
Member of legislature may also be town chairman.....	485
Superintendent of county asylum cannot purchase groceries for institution from a corporation in which he holds stock .....	485
Contracts of public officers, what are illegal.....	485, 488, 489, 518, 546, 548
City sealer of weights and measures appointed under civil service law not authorized to appoint deputy.....	486
Register of deeds—if on salary, county board cannot provide for payment of a salary to his deputy.....	487

PUBLIC OFFICERS—Continued	Page
District attorney may not write insurance on county buildings .....	488
District attorney may not argue case on behalf of common carrier .....	489
Town clerk designated to attend meeting of county board is a de facto officer; resolution not void because carried by his vote.....	491
Register of deeds—duty to prepare tract indices, compensation .....	493
Member of county board who resigns may be elected trustee of poor farm.....	497
Members of county board—mileage.....	497, 502
Member of legislature—salary may not be withheld on account of judgment in favor of the state.....	499
County clerk not entitled to additional compensation for acting on county board of election canvassers.....	501
County superintendent of schools may be removed for wilful neglect to make reports.....	503
State treasurer authorized to return securities of insurance company when company dissolves.....	504
Board of Control—power to sell binder twine.....	507
Secretary of state—duty in the appointment of public officers	509
Sheriff—salary cannot be withheld because of escape of prisoner .....	514
Law providing that committee authorized thereby shall report on or before a certain date is directory, not mandatory .....	515
Coroners to hold inquests at direction of district attorney...	516
Coroners' juries—selection of in counties having jury commissions .....	516
Member of county board may not be employed on county road construction .....	518
City and village supervisors in county board entitled to vote on resolution providing for payment of highway taxes in money .....	519
Registers of deeds must note satisfaction of mortgage opposite description of each lot in tract index.....	520
Librarians of public libraries not public officers.....	521
Public officers must enforce forfeiture where bids upon public work require deposit to be made.....	524
State Senate cannot require superintendent of public property to furnish spring water.....	528
County judge proceedings to adopt children—Compensation	529
Member of legislature elected to fill vacancy may be compensated .....	532
Board of Pharmacy may revoke pharmacist's license upon third offense of selling habit-forming drugs.....	533
County superintendent of schools—who is eligible, proof..	535, 545
County judge, compensation for commitment of insane person	539
Boards of health—not all members required to be residents of municipality in which they serve.....	540
Police justice not authorized to act in appraisal of condemned animals .....	542
Inspector of Apiaries—report not authorized to be printed..	551
Village treasurer not entitled to fees on personal property taxes returned delinquent to county treasurer.....	593

## PUBLIC PRINTING

	Page
Inspector of Apiaries—report not authorized to be printed..	551
Reports of state officers and boards—State Printing Board may authorize increase in number of pages.....	552
Board of Agriculture—blank books, premium lists, etc., to be paid for out of general fund.....	554
Blue Book contract—order by Printing Board under expiring printing contract .....	556

## PUBLIC UTILITIES

Electric railway may be organized with power to operate gas plant .....	131
Freedom Mutual Tele. Co.—organization.....	138.
Water works—construction of sections relating to municipally owned plants .....	399.
Telephone company—extensions by one company in territory of another with which it has physical connection not in violation of order of Railroad Commission requiring physical connection .....	559.
Telephone company—certificate of necessity from Railroad Commission necessary to authorize company to run wires from exchange outside to subscribers within village .....	560.

## RAILROADS

Act requiring thermometers in railroad cars in this state not interference with interstate commerce.....	111.
Electric railway company may be organized with power to operate gas plants.....	131
Train crew—number; "Car," sec. 1809r, includes baggage and express cars.....	164.
Railroad company not obliged to execute contract authorizing forest ranger to use railway velocipede.....	462.
Railroad company—duty to patrol its right of way after each train to prevent forest fires.....	463.
Railroad pass cannot be used by public officer employed by railroad except in performance of railroad duties.....	468, 470.
Safety devices—section requiring installation upon direction of city or village repealed.....	573.
Railroads may carry commodities free only for its employees	574.
Register of Deeds. See Public Officers.	

## REQUISITIONS

Will not be granted for bastardy charge.....	184, 567
May be granted for charge of fornication.....	184
Will not be issued if accused was not in this state when offense was committed.....	191
Authority of Governor to recall warrant.....	566
Application for requisition not approved if not in conformity to rules .....	566.
May be granted for abandonment of children.....	567
May be granted for charge of seduction.....	567
Person charged with burglary may be extradited from Canada—rules .....	570.
If papers show that accused was in this state when offense was committed, requisition from another state will not be honored .....	571
Rice storage reservoir—establishment by Wisconsin Valley Improvement Company .....	450.



INDEX.

641

	Page		Page		Page
Laws 1889		Laws 1905		Laws 1909	
Ch. 245 .....	474	Ch. 106 .....	158	Ch. 59 .....	431
251 .....	158	259 .....	477	78 .....	6
390 .....	177	264 .....	89	86 .....	7
			90	125 .....	125
Laws 1891			579	189 .....	23
Ch. 276 .....	475	305 .....	31	207 .....	517
		314 .....	517	208 .....	305
Laws 1893		376 .....	304		162
Ch. 288 .....	209	387 .....	326		185
298 .....	55	486 .....	468	215 .....	185
	56	489 .....	285	240 .....	498
Laws 1895		490 .....	419		502
Ch. 228 .....	152	507 .....	477	258 .....	428
	153	518 .....	481	277 .....	163
			198		167
			199	282 .....	485
Laws 1897		Laws 1905			488
Ch. 368 .....	84			293 .....	597
	85	Special Session		297 .....	1
	86	Ch. 13 .....	573		2
	87			298 .....	101
Laws 1899		Laws 1907			102
Ch. 12 .....	287	Ch. 54 .....	448	316 .....	4
284 .....	50	122 .....	96	332 .....	573
292 .....	114	143 .....	580	355 .....	124
312 .....	283	193 .....	285	397 .....	50
335 .....	594	335 .....	450		63
			577		64
Laws 1901			180	433 .....	198
Ch. 63 .....	305	358 .....	425		199
75 .....	178	363 .....	495	442 .....	437
286 .....	435	368 .....	492	460 .....	422
336 .....	96	398 .....	164	493 .....	320
439 .....	436	402 .....	165	502 .....	327
440 .....	363	484 .....	343	506 .....	96
445 .....	477		350	514 .....	279
459 .....	247	524 .....	15	523 .....	105
	248		17		6
		525 .....	327		8
Laws 1903		537 .....	3	525 .....	465
Ch. 67 .....	185		4		283
161 .....	301	542 .....	490		284
188 .....	552	562 .....	139		285
233 .....	35		141		482
234 .....	434	574 .....	507	531 .....	296
260 .....	609	576 .....	79	540 .....	573
450 .....	89		120		
	90		123	Bills, 1909	
	580	624 .....	303	No. 553 S. ....	107
451 .....	262	634 .....	476	Laws 1911	
	263	648 .....	150	Ch. 3 .....	482
		664 .....	281	4 .....	257
					258



INDEX.

643

	Page		Page		Page
Ch. 10 .....	212	Sec. 11-12 .....	242	Sec. 40a .....	281
	226		269	41 .....	281
	244		270	44-1 to	
	245	11-13 .....	234	44-18 ...	223
20 .....	241		246	47 .....	231
22 .....	235	11-14 .....	269		269
			270		270
			271	49 .....	237
Laws 1913		11-18 .....	239		238
Ch. 8 .....	270		242	50 .....	281
	271		264	56 .....	281
	274	11-22 .....	236	62 .....	207
			237	65 .....	281
Bills, 1913		11-24 .....	197	66 .....	231
No. 205 A. ....	104	11-25m ...	229	69 .....	345
409 A. ....	111	11-29 .....	215	84 .....	233
			235	94n .....	266
			236	94y .....	235
Resolutions, 1913			253		236
No. 18 S. ....	528	15 .....	229	94-1 .....	226
		20.25 ....	552-3		230
		20.29 .....	524		253
Stats. 1858			553		254
Ch. 73, sec. 2... 137		20.33 .....	554		267
		20.38 .....	553		268
		20.70 .....	393	94-3 .....	254
Stats. 1911			395	94-5 .....	219
Ch. 18 .....	586	20.83 .....	524		220
19 .....	528	20.84 .....	521		241
68 .....	396	20.89 .....	524		255
76 .....	614	20.90 .....	555	94-6 .....	226
86 .....	129	20.91 .....	556		230
	132	26 .....	270		240
	133	27 .....	270		255
	140	29 .....	263		556
	141		264	94-7 .....	230
	145		266		240
	319	30 .....	215	94-8 .....	226
142 .....	396		216	94-9 .....	210
173 .....	529		234		212
201 .....	312		235		226
201a .....	312		236		227
203 .....	312		262		244
			266		245
			275		253
			277		254
Wis. Stats.			278		255
Sec. 11-1 .....	269	31 .....	264		257
11-2 .....	262		265	94-10 .....	210
	263	34 .....	215		212
11-5 .....	237		225		225
	258		234		226
	262	36 .....	279		245
	278	38 .....	235	94-11 .....	245
11-6 .....	269		248		246
11-7 .....	232		249	94-12 .....	253
11-9 .....	232		279	94-13 .....	226
11-10 .....	279		535-6	94-14 .....	226
					253

	Page		Page		Page
Sec. 94—15	226	Sec. 459	536	Sec. 703	402
94—16	226	460—9	462		403
94—17	226	475	375	704	198
94—18	226		376	709	22
94—21	221		377		287
94—28	219		384	715	22
	220		385	719	461
	236	490a	203	725	514
	240		204	752	470
	241		205		472
	245	495—1	to		615
	246	495—19	...	758	495
94—35	226		204	762	495-6
94—38	230	495—19	204		520
	232	496f	435	762m	495
	233		436	764	481
104	259		437		494
	261	496q	200		521
110	532		201	772a	477
114	528		203	772c	478
122	261	561j	306	776	66
141	510	561jj	300		71
145	6	573w	305	783	228
	8	585d	539	799	281
160d	35	600	303	801	209
	36	604a	497	807	281
169b	20	604e	303	808	540
172	18		304	840	593
	19		305	842	615
	20	604g	148	867 to 869...	357
190	583	604q	303	874	281
202 to 206...	585	650	496	875	357
207	577	652	22		543
	580	663	491-2	878	357
208	580	664	379	882	599
209	90		386	886	543
	580		502	887	543
	583	665	44	893	401
210	89	668	502	894a	50
	90	669	147	905	401
	579		149	920	543
258	380		154	925e	598
	382	670	147		602
261	373	692	488	925i	599
	374		518		601
284	586		548	925m—301 to	
379	609	693	150	925m—319	381
383a	609		151	925m—303 ..	381
427	370		153	925—26a	404
	371	694	152	925—28	404
	372		153	925—31	404
	389		529	925—31b	404
	391	694a	514		405
430	391	695	497-9	925—33	404
435o	199		502		405
	200	697t	514	925—90	400
437	96	698	198	925—93	400
439cc	503	702a	535	925—95	399
439ce	503		545		400

INDEX.

645

	Page		Page		Page
Sec. 925—96 .....	399	Sec. 1151 .....	599	Sec. 1409a—5 ...	426
925—98 .....	400	1153 .....	597	1409a—6 ..	24
925—120 to	400	1210g .....	65	4109a—7 ..	24
925—129 ..	400		66		25
925—152a ...	603		67	1409a—8 ...	24
925—255 ....	546	1222a .....	601	1409a—11 ..	24
926—11 .....	378	1222—2 ....	132		25
926—115 ....	402	1260 .....	43	1409d .....	534
	403		44	1410g .....	428
926—132 ....	98		519	1410i .....	428
	101	1265 .....	53	1411 .....	541
926—133 ....	98	1276 .....	53	1419 .....	534
	101	1300 .....	49	1421c to	
975 .....	503	1304a .....	51	1421p ...	408
1021b .....	17	1308 .....	62	1421d .....	406
1021b—4 .....	17	1317m—2 ..	54	1421e .....	193
1021b—12 ....	17	1317m—3 ..	21		406
	18		61		408
1021c .....	15	1317m—4 ..	20		412
	17		21	1421f .....	415
1021d .....	15		56	1421h .....	409
	16		57		410
1021e .....	15		68	1421k .....	460
1021t .....	15		69	1421m .....	413
	16		70	1421—7 ....	422
	17		71	1435f .....	425
	18		74	1453 .....	182
1038 .....	597	1317m—5 ..	51	1456 .....	554
	601		57	1458a .....	554
	603		58	1463 .....	555
1073 .....	596		59	1492aa ....	363
1074 .....	596		68		365
1076 .....	596		73		367
1079 .....	593		74		368
	596	1317m—6 ..	22	1492ab ....	368
1087m—1 ....	600		54		369
1087m—2 ....	600	1317m—7 ..	48	1492b .....	369
1087m—4 ....	587		58		542
1087m—8 ....	477		61	1492d .....	369
1087m—9 ....	478		62	1492e .....	458-9
1087m—22 ...	598		67	1492e—8a ..	102
1087m—25 ...	478		72		103
1087m—1 ....	590		518	1494—41 ...	110
1087—12 ....	444	1317m—9 ..	49	1494—42 ...	110
	445		52	1494—43 ...	13
	446		53		584
1087—45 .....	477	1317m—12 .	58	1494—47 ...	110
1087—52 .....	478		148	1494—48 ...	442
1087—53 .....	478	1317m—13 .	58	1494—48a ...	443
1087—55 .....	478	1317m—15 .	67	1494—57 ...	464
1088 .....	595	1319 .....	50	1494—62 ...	14
1090 .....	593		62		15
1097 .....	594		63		110
1100 .....	594		64	1498a—1 ...	291
1107a .....	593	1409a—2 ...	431	1498c .....	482
1112 .....	594	1409a—4 ...	432	1498k—1 ...	297
1114 .....	594	1409a—5 ...	24	1498q .....	294
1128 .....	595		423		

Sec.	Page	Sec.	Page	Sec.	Page
1498s	287	1661	474	1792-12d	574
	288		487	1797-2	575
	294		614	1797-4	575
1498s-1	291	1664	615	1797-8	574
1502	305	1666b	616	1797-12d	573
1502a et seq.	305	1729m	114	1797-12e	573
	306	1751	78	1797-12k	573
1529b	309	1755	129	1797-22	575
1529c	309	1759a	120	1797-23	575
1529d	309		123	1797m-74	560
1529e	309	1760	79	1797m-95	561
1533m	150		123	1809	573
1534	169	1763	144	1809r	164
1548	332	1771	128	1809s	165
	334		132	1862	131
	336		133	1862a	132
	337		135	1895m	127
	343		136	1896	129
	351		137		320
	353		145	1897	326
1554	353	1772	83	1897a	326
1556	353		121		327
1556a	353		124	1897f	127
1564	338		139		128
	340		144	1897g	129
1565	358		481	1897i	129
1565a	280	1773	140	1906	129
	281		141	1906a	129
	334	1774	86	1926	9
1565b	334		87	1927	327
	360		121		328
1565c	357		128		329
	361		129		330
1565d	341		144		331
	343		145	1928	331
	349		146	1931	328
	350		318		329
	354		319	1932	329
	355		320	1934	328
	356	1774a	130	1937	329
1565l	345		142	1941-42 to	
1580	477		125	1941-65	314
1583	476	1775	139	1941-47	326
1586	396	1786e	141		327
1587	395-6		141	1941-64	314
1636l	194	1786e-1 to	138		315
1636-21	466	1786e-17	140		326
1636-24	448		141	1943a	322
	449		145		323
	450	1786e-1	144	1946k	443
1636-25	448	1786e-13	600	1955b-5	319
	450	1786e-14	600	1956	319
1636-39	1	1786e-16	138		320
1636-43	1		140	1958	319
1636-47	32		141		320
1636-49	33		601		504
1636-53	31	1786g	136	1966a-5	145
	32	1788	145	1966-32	125
1636-55	33	1789	144	1966-38	608
1659	614				

INDEX.

647

Sec.	Page	Sec.	Page	Sec.	Page
1978 .....	318	4411a .....	171	4560a-16 ..	293
1978f-5 ...	316		172	4560a-17 ..	293
2010 .....	81		174	4560a-48 ..	290
	83		175	4560a-50 ..	295
	84	4415 .....	162		296
	85		167	4560d .....	284
	86		185	4565c-5 ...	283
	87	4418 .....	163		292
2012 .....	76		164	4577 .....	168
	77		167	4580 .....	184
2014-5 ....	83		185		186
2014-8 ....	77	4430 .....	619	4581 .....	568
	78	4432 .....	618	4587c .....	192
	80	4438a .....	155		569
	82		195	4607b-5 ...	184
	83		196		185
2014-11 ...	76		197	4607d .....	182
	77	4438b .....	158		183
	80	4482a to		4608 .....	184
	82	4482j ....	188	4635 .....	469
	83	4482a .....	188	4679 .....	617
	86	4482b .....	188	4703 .....	168
2024-10 ...	35	4482c .....	188	4725a .....	180
2024-32 ...	35	4482d .....	188	472a .....	178
2024-35 ...	37	4482h .....	187	4733 .....	181
	38		188	4734 .....	178
2024-36 ...	39	4486 .....	515	4734a to	194
	40	4520 .....	157	4734m ...	181
2024-44 ...	36	4523 .....	159	4771 .....	191
2024-45 ...	36	4529 .....	159	4794 .....	169
2024-68 ...	37		192	4795 .....	169
2024-771 ..	38	4531 .....	192	4865 .....	517
	40	4537 .....	159	4866 .....	517
2024-77k ..	38		160	4878 .....	517
	39	4543c .....	256	4918-2 ....	507
	40		257	4918-3 to	
2374 .....	397	4543c-1 ...	257	4918-9 ..	507
2394-45 ..	509-510	4544 .....	213	4918-15 ...	507
2394-52 ...	16		214	4928 .....	311
2394-54 ...	15	4544b .....	213		312
2394-71 ...	15		214		313
	16	4544e .....	209	4944a .....	307
	18	4545 .....	213	4944c .....	180
2454 .....	445		214		308
	529	4549 .....	485	4944d .....	308
	540		488	4944f .....	311
2598 .....	618		503	4944i .....	311
2876 .....	397		518	4944j .....	313
2959 .....	482		547	4967 .....	313
3039 .....	397		549	4971 .....	183
3295 .....	396	4549g .....	482		256
3302 .....	395	4550 .....	503		502
	396	4552a .....	468	4978 .....	56
3327a .....	114	4552m ...	489-490		85
	115	4560 .....	283		158
3568 .....	543	4560a-4 ...	285	4980 .....	56
4052d .....	23	4560a-5 ...	295	4986 .....	382
4076 .....	398	4560a-10 ..	285		605
4401 .....	170		294	4987 .....	383
	171		295		605
4402 .....	171		296		

	Page
Stockbridge, Calumet Co.—Primary election, place of.....	228
<b>TAXATION</b>	
Highway taxes, payment in money. Construction of sec. 1260, stats. ....	43, 519
Tax levy of town of Reserve for 1912.....	65
School district must make provision for collection of annual tax after authorizing issue of bonds.....	384
Tax must be levied at school meeting called to authorize loan—second meeting cannot be held in same year.....	389
Inheritance tax—fees of county officers in proceedings.....	444
Liability of state for payment of special assessments on escheated lands .....	586
Income tax law exempts only inheritances that have paid inheritance tax .....	587
Tax deed—county clerk should not issue on property in hands of receiver .....	588
Inheritance tax—no tax due on transfer made prior to passage of law .....	590
Action to recover personal property taxes—judgment to include 5% collection fees for village.....	593
Taxes become specific lien on land when tax roll is made up	595
Taxes cannot be assessed on lands purchased by the state before the tax becomes a specific lien.....	595
Income tax—illegal tax, returned unpaid, may be compromised .....	597
Assessment in newly incorporated village—how and by whom made .....	598
Income tax—coöperative creamery is not exempt.....	600
Incorporation of village after assessment—collection of telephone company's taxes.....	601
Delinquent taxes—collection under sec. 925—152a—not applicable to city of Milwaukee.....	603
Teachers' Retirement Fund—county treasurer not entitled to 2% fees .....	461
Town Board—power to alter or discontinue highways. Ch. 337, laws 1911 .....	48
Town Board—duty to levy tax for highway construction may be enforced by mandamus .....	69
Towns, See Municipal Corporations; Bridges and Highways.	
Tract indices and chain of title system for counties—register of deeds to prepare.....	493
Transient Merchants. See Peddlers.	
Treasury Agent—salary, expenses, fees of deputies.....	476
<b>UNIVERSITY</b>	
Contracts—Gymnasium annex .....	25
Contracts—forfeiture of deposit accompanying bids.....	524
Regents may remove sidewalk on Lorch street, city of Madison .....	607
Bond of President of University authorities for removal of alcohol from warehouse.....	608
Regents may settle with contractor for construction of building not exactly as plan called for.....	610
Veterinary Board—power to revoke license.....	101
Veterinary license law constitutional.....	101
Village officer employed by railroad may not use pass except in performance of railroad duties.....	468
Village treasurer not entitled to fees on personal property taxes returned delinquent to county treasurer.....	593

	Page
Villages—County not compelled to aid village in constructing bridge .....	49
Villages—Highway adopted by village remains village highway after repeal of ch. 298, L. 1893.....	55
Villages—dry territory incorporated into village remains dry until after election .....	334, 353
Villages—number of liquor licenses villages may issue..	340, 355, 359
Villages authorized to appropriate money for permanent highway improvement within village limits.....	400
Villages entitled to 5% collection fee in actions to recover personal property taxes.....	593
Villages—tax assessment in newly incorporated village.....	598
Villages. See Municipal Corporations; Public officers.	
Voting machines must permit voter to express first and second choice .....	211
Voting machines—adoption by city in all precincts prohibits return to old ballot system.....	222
Voting machines—What ballots may be used for.....	247

## WEIGHTS AND MEASURES

City sealer holds office until expiration of his term.....	474
City sealer appointed under civil service law not authorized to appoint deputy .....	486
Bonds of manufacturers of milk bottles to be provided by manufacturers and approved by Attorney General.....	613
Duty of district attorney to prosecute violations of law.....	614
Courts in which prosecutions are to be brought.....	614
Prosecution for failure to issue delivery tickets—interstate sales .....	616
Wisconsin Levee Commission—provision that committee report on or before a certain day is directory, not mandatory	515
Wisconsin Naval Militia—Appropriation.....	6
Wisconsin Valley Imp. Co.—establishment of Rice storage reservoir .....	450
Wisconsin Valley Imp. Co.—right to acquire flowage rights.....	577
Woodland Farms Co.—amendment to articles of incorporation 317,	320



